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Illegal Contracts and Agreements: A New Standard for Prostitution and Marijuana Agreements

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Abstract

Agreements exchanging sex for money and those involving marijuana may encounter illegality defenses in court. Granting a legal remedy for breach of an agreement that exchanges seriously illegal consideration would lower the court's public standing and endanger its legitimacy. On the other hand, the spectacle of a buyer claiming its own illegality to escape paying its seller troubles courts.

Lord Mansfield stated the illegality defense in Holman v. Johnson*: "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." Yet he rejected the illegality defense in that case on the ground that the plaintiff's contract to sell tea that the buyer planned to smuggle into England was complete before the crime occurred.*

Difficult illegality decisions arise when the illegality is not serious, as in this Article's sex and marijuana topics. This Article rejects fixed rules for illegality disputes and favors judicial discretion guided through standards. The standards include the seriousness of the illegality and preventing unjust enrichment

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leading to restitution. Applying the standards to the Article's first example leads to potential recovery for an unpaid sex worker. The Article also approves recovery of contractual damages for many marijuana transactions that are illegal under federal law but legal under state law.

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"Discretion," wrote Lord Mansfield, "when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful, but legal and regular."[1]

1. Rex. v. Wilkes (1770) 98 Eng. Rep. 327, 334; 4 Burr. 2527, 2539 (KB).

THE NECKLACE OF THE BRISINGS

The Norse myth, The Necklace of the Brislings, sets the stage for this Article on illegal transactions:

> The goddess sidled through the dismal cave. The sound of the tapping, insistent yet fitful, grew stronger and stronger. Freyja stopped, listened again, moved on; at last, she stopped, eased her way down a narrow groin, and stepped into the sweltering smithy of the four dwarfs, Alfrigg and Dvalin, Berling and Grerr.
>
> For a moment Freyja was dazzled by the brilliance of the furnace. She rubbed her eyes, and then she gasped as she saw the breathtaking work of the dwarfs—a necklace, a choker of gold incised with wondrous patterns, a marvel of fluid metal twisting and weaving and writhing. She had never seen anything so beautiful nor so desired anything before.
>
> The four dwarfs, meanwhile, stared at the goddess—she shimmered in the warm light of the forge. Where her cloak had fallen apart, the gold brooches and jewels on her dress gleamed and winked. They had never seen anyone so beautiful nor so desired anyone before.
>
> Freyja smiled at Alfrigg and Dvalin and Berling and Grerr. 'I will buy that necklace from you,' she said.
>
> The four dwarfs looked at each other. Three shook their heads and the fourth said, 'It's not for sale.'
>
> 'I want it,' said Freyja.
>
> The dwarfs grimaced.
>
> 'I want it. I'll pay you with silver and gold—a fair price and more than a fair price,' said Freyja, her voice rising. She moved closer to the bench where the necklace was lying. 'I'll bring you other rewards.'
>
> 'We have enough silver,' said one dwarf.
>
> 'And we have enough gold,' said another.
>
> Freyja gazed at the necklace. She felt a great longing for it, a painful hunger.
>
> Alfrigg and Dvalin and Berling and Grerr huddled in one corner of the forge. They whispered and murmured and nodded.
>
> 'What is your price?,' asked the goddess.
>
> 'It belongs to us all,' said one dwarf.
>
> 'So what each has must be had by the others,' said the second, leering.
>
> 'There's only one price,' said the third, 'that will satisfy us.'

> The fourth dwarf looked at Freyja. 'You,' he said.
>
> The goddess flushed, and her breasts began to rise and fall.
>
> 'Only if you lie one night with each of us will this necklace ever lie round your throat,' said the dwarfs.
>
> Freyja's distaste for the dwarfs—their ugly faces, their pale noses, their misshapen bodies and their small greedy eyes—was great, but her desire for the necklace was greater. Four nights were but four nights; the glorious necklace would adorn her for all time. The walls of the forge were red and flickering; the dwarfs' eyes were motionless.
>
> 'As you wish,' murmured Freyja shamelessly. 'As you wish. I am in your hands.'
>
> Four days passed; four nights passed. Freyja kept her part of the bargain. Then the dwarfs, too, kept their word. They presented the necklace to Freyja and jostled her and fastened it round her throat. The goddess hurried out of the cavern and across the bright plains of Midgard, and her shadow followed her. She crossed over Bifrost and returned in the darkness to Sessrumnir. And under her cloak, she wore the necklace of the Brisings.[2]

INTRODUCTION

Contract law's responses to transactions for illegal consideration are one of the most nettlesome areas in contract and restitution.[3] The private law of contract governs our relationships with each other in important spheres of our lives, personal relations, the market, and the workplace.[4] The criminal law plays a role when the consideration in an agreement violates the criminal law.[5] The criminal law is juxtaposed against the court's usual approach to a private contract that emphasizes the primary role of the private parties

2. KEVIN CROSSLEY-HOLLAND, THE NORSE MYTHS 65–67 (1980).

3. *Cf.* Omri Ben-Shahar et al., *Nonparty Interests in Contract Law*, 171 U. PA. L. REV. 1095, 1110–11 (2023) ("Even in the absence of explicit legislative prohibitions, contract law has a blanket rule that allows courts to refuse enforcement of agreements that violate public interests.").

4. *See id.* at 1096 ("Courts generally enforce the agreements parties choose to enter and the promises they wish to make, providing them the power to form relationships and 'effect changes' in their affairs.").

5. *See id.* at 1097–98 (discussing how criminal law influences contract law).

in forming their agreement.[6] Intrinsic tension lurks between, on the one hand, the private law of contract and restitution that enforces promises supported by consideration and reverses unjust enrichment, and, on the other hand, the public criminal law that labels an activity as illegal and protects the safety of potential victims of crime and the social order.[7]

Lord Mansfield shaped the common law of illegality in *Holman v. Johnson*[8] in 1775. In a lawsuit, a seller sued his buyer for the price of tea he knew the buyer would smuggle into England.[9] Lord Mansfield wrote,

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for, his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. . . . No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. . . . It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.[10]

Lord Mansfield appears to have thought that the claim of illegality "sounds at all times very ill in the mouth of the defendant" because, if the judge voided the contract, the defendant would get something for nothing at the plaintiff's expense.[11] The judge prevented the plaintiff's forfeiture and the defendant's enrichment. Lord Mansfield rejected the defendant's illegality argument on the ground that the contract was completed before the defendant exported the goods:

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6. *See id.* at 1110 ("Criminal law protects social order and the safety of potential victims of crime. Thus, criminal conspiracies are punishable and, obviously, unenforceable.").

7. *See id.* at 1110–11 (observing the challenge of balancing private contract law and public criminal law); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (AM. L. INST. 2011) ("A person who is unjustly enriched at the expense of another is subject to liability in restitution.").

8. (1775) 98 Eng. Rep. 1120; 1 Cowp. 341 (KB).

9. *Id.* at 1121.

10. *Id.*

11. *See id.*

> This is an action brought merely for goods sold and delivered at Dunkirk. Where then, or in what respect is the plaintiff guilty of any crime[?] Is there any law of England transgressed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them? The contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself. It is not a bargain to be paid in case the vendee should succeed in landing the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods at Dunkirk.[12]

The spectacle of a credit buyer claiming his own illegality to avoid paying his seller and the enrichment, and forfeiture, that results if he succeeds have attracted important professional support for the idea of preventing forfeiture by reversing his unjust enrichment.[13] In the rest of this Article, Lord Mansfield will receive recognition for it.

Exchanges allocate resources to their most valuable use based on free exchange and willingness to pay.[14] Usually, resources go to the person willing to pay the highest price.[15] The illegality rules forbid unlawful exchanges that may either make both sides better off or one side better off, and the other no less well off.[16] The illegality doctrines also condemn an unlawful agreement that both parties consent to freely.[17] In contrast,

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12. *Id.*

13. *See, e.g.*, RESTATEMENT OF THE LAW OF CONTRACTS § 600 (AM. L. INST. 1932) ("If neither the consideration for a promise nor the performance of the promise in an illegal bargain involves serious moral turpitude, and the bargain is not prohibited by statute, it is enforceable unless the plaintiff's case requires proof of facts showing the illegality . . . ."); RESTATEMENT (SECOND) OF CONTRACTS § 197 (AM. L. INST. 1981) ("[A] party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture."); John W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261, 301, 301 n.241 (1947) (citing an example of a court applying § 600 of the Restatement of the Law of Contracts to give restitutionary relief).

14. *See* Murray N. Rothbard, *Free Market*, ECONLIB, https://perma.cc/2RFA-RER4 (last visited Feb. 19, 2024).

15. *See id.*

16. *Cf.* G.H. TREITEL, THE LAW OF CONTRACT 392–94 (10th ed. 1999).

17. *See id.*; *see also* Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 116 n.4 (1988).

other contract defenses such as incapacity, fraud, duress, and undue influence qualify or negate one party's knowing consent.[18] Why should a civil court treat an agreement for illegal consideration differently? In short: paternalism, prevention of externalities, and distributional reasons.

Paternalism is the idea that sometimes the government, here the civil judge, knows better than other people what is best.[19] Because of the criminal law, the judge does not allow the parties to the civil agreement to choose what they think is best for them.[20] People in society may be better off if they are prohibited from bargaining and agreeing.[21] Paternalism focuses on the individuals in the transaction and ignores larger social policies.[22] Also, an agreement between two parties may create costs to third parties—externalities.[23] These costs may be too important to society and create too large a moral cost for the civil judge to accept. Finally, there are distributional goals. Forbidding enforceable agreements may affect the distribution of resources: one group may gain, another may lose. "Whether an entitlement may be sold or not often affects directly who is richer and who is poorer."[24]

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18. *See* Lawrence Kalevitch, *Gaps in Contracts: A Critique of Consent Theory*, 54 MONT. L. REV. 169, 193 (1993) ("[L]imits to freedom of contract . . . [are] doctrines such as duress and unconscionability that are said typically to 'police' the bargain.").

19. *See* Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1113 (1972).

20. *See id.* at 1113–14 (establishing that true paternalism is based on the notion that in certain situations, the State knows what is best for the individual better than the individual does).

21. *See id.* at 1111 (hypothesizing that, in some situations, such as a sale of land to a polluter that will injure various individuals, it is more efficient for a court to prohibit the sale than allow the parties to bargain for a sale price that accommodates the future damages).

22. *See id.* at 1114–15 (discussing the role of paternalism in decision-making, emphasizing its focus on individual well-being and overlooking broader social policies).

23. *See* F.H. Buckley, *Perfectionism*, 13 SUP. CT. ECON. REV. 133, 139 (2005) (explaining that deeming a contract illegal means "leav[ing] the immediate parties to the contract and consider[ing] its effects upon third parties").

24. Calabresi & Melamed, *supra* note 19, at 1114.

I. THE LAW OF ILLEGALITY IN THE UNITED STATES

The United States law of illegality is a legal muddle. The law started in England in 1775 before the Revolution with a simple rule that denied litigants all judicial remedies for illegal agreements.[25] In 1775, in *Holman v. Johnson*, Lord Mansfield wrote: "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."[26]

When the law speaks in legal Latin that signals it is confused. The law of illegality has three major statements in legal Latin.[27] First, *ex turpi causa non oritur actio*, no action arises from a disgraceful cause.[28] Second, *in pari delicto potior est conditio defendent*, where both parties are equally in the wrong, the position of the defendant is the stronger.[29] Third, a defense, *locus poenitentiae*, voluntary withdrawal from the illegal scheme.[30]

This Article proposes a new approach, which, like any good common law article, uses traditional legal reasoning techniques to build the new approach on the existing and past doctrine. This new approach starts with judicial discretion.[31] Next, it subjects judicial discretion to standards which are set out below.[32]

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25. *See* Lincoln Caylor & Martin S. Kenney, *In Pari Delicto and Ex Turpi Causa: The Defence of Illegality—Approaches Taken in England and Wales, Canada and the US*, 18 BUS. L. INT'L 259, 260–61 (2017) (discussing the early beginnings of illegality in contract law).

26. (1775) 98 Eng. Rep. 1120, 1121; 1 Cowp. 341, 343 (KB). We will return to *Holman v. Johnson* below.

27. *See* Lord Burrows, Just., Sup. Ct. U.K., Jill Poole Memorial Lecture at Aston University: The Illegality Defense After *Patel v. Mirza* (Oct. 24, 2022), https://perma.cc/3U98-8TG2 (PDF)

> [M]uch of the [law of illegality] stemmed from the ideas that *ex turpi causa non oritur actio* ('no action arises from a disgraceful cause') and *in pari delicto potior est conditio defendentis* ('where both parties are equally in the wrong the position of the defendant is the stronger') and that there is a *locus poenitentiae* ('time for repentance').

28. *Id.*

29. *Id.*; *see also* Goldberg v. Sanglier, 639 P.2d 1347, 1353 (Wash. 1982) ("The maxim 'in pari delicto potior est conditio defendentis' declares that the defendant will prevail when the parties are of equal guilt.").

30. *Cf.* Burrows, *supra* note 27.

31. *See infra* notes 63–76 and accompanying text.

32. *See infra* notes 77–87 and accompanying text.

The most difficult illegality decisions stem from illegal agreements in grey areas with robust debate about whether the conduct or activity should be illegal at all. This Article will examine two of them: prostitution[33] and marijuana[34].

In the larger picture, our topics, agreements about sex for money, criminal prostitution, and marijuana, are part of society's effort to suppress, control, or regulate vice. Other activities that many consider to be vices include alcohol and gambling, which this Article will next turn to briefly for context in their developments.[35]

Political majorities thought that alcohol and gambling offended moral codes and ought to be forbidden.[36] Others argued that the activities were victimless conduct that involved consenting adults.[37] Modern debate has challenged both assumptions; it called into question both whether, in light of widespread alcohol abuse and addiction, and gambling addiction, the activities are truly either immoral or victimless.[38]

A movement that seeks to compel Americans to live according to a stringent moral code may be vulnerable when it succeeds. The United States tried to forbid alcohol with a constitutional amendment.[39] Prohibition failed; less than fifteen

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33. *See infra* Part II.

34. *See infra* Part III.

35. *See* Chris Matthews, *The 5 Biggest Vice Industries in the World*, FORTUNE (Mar. 24, 2016), https://perma.cc/6H5L-6A79 (discussing world-wide vices, including alcohol, tobacco, military-grade weaponry and services, illicit drugs, and gambling).

36. *See, e.g.*, Jim Concannon, *We've Been Here Before: The Impact of Marijuana Legalization on DUI*, LEXIPOL (Dec. 13, 2017), https://perma.cc/8TAA-JC2P (discussing the United States' history of criminalizing moral offenses such as "drinking alcohol, gambling, cheating on your spouse").

37. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 151 (1968) (establishing that because crimes such as fornication, gambling, or narcotics generally involve consenting adults, these victimless crimes "present[] a greater problem to the criminal process than does the crime with an ascertainable victim").

38. *See infra* notes 42–43, 49 and accompanying text.

39. *See* U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI; *see also* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 13 (1999) (describing the Prohibition as a "novel social experiment" of the 1920s).

years later, the constitutional amendment was repealed.[40] Today the manufacture and sale of alcoholic beverages is regulated and taxed.[41]

Alcohol use is expensive in both lives and money. By the count of the Centers for Disease Control, about 140,000 deaths per year in the United States result from injuries or disease caused by alcohol.[42] The Centers for Disease Control and Prevention found that in 2010, the year of the most recent data, alcohol abuse cost the nation $249 billion.[43]

Before 2018, gambling on sports events and other contests was illegal in all states but one, Nevada.[44] In 2018, in *Murphy v. National Collegiate Athletic Association*,[45] the Supreme Court struck down the federal statute that forbade states from legalizing sports betting.[46] Following the *Murphy* decision, state statutes allowing sports betting with taxation and regulation swept the country.[47] Thirty-eight states and the District of Columbia now allow sports betting.[48]

Caution about legalized gambling may also be propitious. Australia, where slot machines and gambling addiction are

40. *See* U.S. CONST. amend. XXI; *see also* KENNEDY, *supra* note 39, at 138 ("The lame-duck Congress had passed a bill repealing the Eighteenth Amendment on February 20, 1933.").

41. *See Alcohol Regulation 101*, NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, https://perma.cc/2BVG-TEDN (last visited Mar. 19, 2024).

42. *Deaths from Excessive Alcohol Use in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/8VYB-A6YJ (last updated July 6, 2022).

43. *Id.*

44. *See* Adam Liptak & Kevin Draper, *Supreme Court Ruling Favors Sports Betting*, N.Y. TIMES (May 14, 2018), https://perma.cc/NAW7-GZ6Y (discussing the Supreme Court's decision to overturn the Professional and Amateur Sports Prohibition Act of 1992, Pub. L. No. 102-559, 106 Stat. 4227, *invalidated by* Murphy v. Nat'l Collegiate Athletic Ass'n., 584 U.S. 453 (2018), which prohibited states, except for Nevada, from authorizing sports gambling).

45. 584 U.S. 453 (2018).

46. *See id.* at 486 (holding that a federal statute making it unlawful for a state to authorize sports gambling violated the constitution's anticommandeering doctrine).

47. *See* Brian Pempus, *States Where Sports Betting Is Legal*, FORBES (Feb. 6, 2024), https://perma.cc/5UDP-XQ26 ("Since [the Supreme Court ruling], 38 states and the District of Columbia have allowed some form of sports betting.").

48. *Id.*

ubiquitous, averages $1,000 in gambling losses per adult per year.[49]

Criminal statutes against some forms of vice have yielded to legalization with regulation and taxation.[50] In contrast, the criminal sex-for-money trade continues in the shadow of law enforcement, and the "War on Drugs" has sent millions of people to jail or prison.[51] Questions about criminal regulation of vice circle back to public policy and private agreements for the illegal matters. Should the criminal law be limited for consenting adults' voluntary conduct? How do criminal statutes against vice affect the way police investigate crime? How does a criminal statute against vice affect the public at large? What political and moral forces lead to a criminal statute that forbids vice or to legalization with regulation and taxation?

It is not completely accurate to say the law prevents someone from selling something. This assumes legal doctrine that is automatically carried into practice. People may, and do, transact for illegal consideration if they exchange consideration simultaneously and decline to ask a court later who owes or owns something.[52]

What a court does when someone sues for breach of a contract for illegal consideration, is refuse to grant contract

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49. *See* Michael E. Miller, *In Australia, Slot Machines Are Everywhere. So Is Gambling Addiction*, WASH. POST (Apr. 26, 2022), https://perma.cc/LX6F-9QHP (discussing how "Australia is home to less than half a percent of the world's population but has 20 percent of its pokies" and leads the planet with an average $1,000 in gambling losses per adult per year).

50. *See* Bryan Walsh, *The End of Vice*, AXIOS (Oct. 2, 2021), https://perma.cc/48C2-AGRS (exploring how vice conduct is becoming legal as society pursues regulation and taxation instead).

51. *See The Impact of the War on Drugs on U.S. Incarceration*, HUM. RTS. WATCH, https://perma.cc/W8GM-W4YR (last visited Feb. 21, 2024) ("Policies adopted to battle the use and sale of drugs have led to marked increases in arrest rates, in the likelihood of going to prison, and in the length of sentences for drug offenders. Between 1980 and 1997, the number of annual drug arrests tripled to a high of 1,584,000.").

52. *Cf.* PACKER, *supra* note 37, at 151 (exploring how, historically, individuals have consented to illegal transactions such as gambling and avoided interactions with the courts).

remedies, specific performance, and expectancy damages.[53] The court may say that it will aid neither side of an illegal contract.[54]

"Our cases warn against the sentimental fallacy of piling on sanctions unthinkingly once an illegality is found," observed Justice Kaplan for the Massachusetts Supreme Judicial Court.[55] Judges balked at denying all remedies for breach of an illegal contract because they perceived injustice in the way the simple rule operated. If, for example, the buyer's illegality defense in *Holman v. Johnson* had been accepted, the smuggler-buyer would have had the seller's tea without paying anything for it.[56] Denying any remedy may leave one party unjustly enriched unless the court orders restitution. The court may stray from its word about refusing all relief; it may grant one side restitution to prevent the other side's unjust enrichment.[57]

Until recently, no new consensus on either the way to approach the problem of illegal agreements or the way to state the rules had emerged to supplant the early doctrine. Two recent developments may aid a modern United States court in deciding a dispute about a transaction with an illegal component.

A. *The* Restatement (Third) of Restitution and Unjust Enrichment *Approach*

The first is of the American Law Institute's 2011 *Restatement (Third) of Restitution and Unjust Enrichment* sections 32, Illegality, and 63, Equitable Disqualification. Restatement, section 32: "Restitution will . . . be allowed, as necessary to prevent unjust enrichment, if the allowance of restitution will not defeat or frustrate the policy of the

53. *See* Kostritsky, *supra* note 17, at 120–21.

54. *See id.* at 118–20 ("Courts have claimed they effectuate . . . concerns by characterizing illegal contracts as 'void' and denying them all legal effect. . . . Despite their broad declarations of the 'no-effect' rules, the courts vary their treatment of parties to illegal contracts.").

55. Town Plan. & Eng'g Assocs., Inc. v. Amesbury Specialty Co., 342 N.E.2d 706, 711 (Mass. 1976).

56. *See* (1775) 98 Eng. Rep. 1120, 1121; 1 Cowp. 341, 344 (KB) (rejecting the defendant's argument that the contract shouldn't be enforced because it furthered an illegal act by reasoning that the contract was complete before the illegal act occurred).

57. *See supra* note 53 and accompanying text.

underlying prohibition."[58] Section 32 is qualified by the doctrine of inequitable conduct (unclean hands) that "[r]estitution will be denied, notwithstanding the enrichment of the defendant . . . , if a claim . . . is foreclosed by the claimant's inequitable conduct."[59] To the charge that "inequitable conduct"[60] is too vague and will lead to excessive discretion and ad hoc decisions, the comment to section 63, which summarizes the unclean hands doctrine, opines, "Ideally, of course, the rule of this section will not be invoked . . . when the claimant's offense is to personal, possibly idiosyncratic, values of a particular judge."[61]

The more characteristic and difficult cases within section 32 are those described in subsection 2. "Here the basic question may be simply stated: would restitution to the claimant be incompatible with [the purpose of] the underlying prohibition?"[62] Section 32 proposes a more realistic analysis in which the effect of a grant or denial of restitution is judged in light of the policy of the underlying illegality and the potential for unjust enrichment in a particular case.[63]

B. *The* Patel v. Mirza *Approach*

The second development is the United Kingdom Supreme Court's decision in 2016 in *Patel v. Mirza*[64] granting restitution after an illegal insider-trading agreement.[65] Patel paid £620,000 to Mirza under an agreement that Mirza would bet on the price of some shares in the Royal Bank of Scotland illegally using insider information that he learned from his contacts at the bank.[66] The scheme failed to reach fruition because the expected

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58. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 32(2) (AM. L. INST. 2011).

59. *Id.* § 32(3); *see also id.* § 63 ("Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability.").

60. *Id.* § 32(3).

61. *Id.* § 63 cmt. a.

62. *Id.* § 32 cmt. c.

63. *See id.* ("The statute or regulation by which the parties' underlying transaction is prohibited may expressly decide the issue . . . .").

64. [2016] UKSC 42 (appeal taken from Eng.).

65. *Id.* at [11], [121].

66. *Id.* at [11].

insider information was mistaken.[67] Mirza did not return the funds to Patel as promised.[68] Patel sued Mirza in contract and unjust enrichment seeking the return of £620,000.[69] Mirza argued that the obligation could not be enforced because the agreement was illegal and Patel's claim would be precluded by the principle of illegality.[70] The United Kingdom Supreme Court held unanimously that Patel could recover the money in restitution.[71]

Patel v. Mirza is important both because of its result, granting restitution to reverse unjust enrichment from an illegal agreement, but also for its analysis of rules versus discretion. The majority favored judicial discretion: "The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."[72] By contrast, the concurring opinion argued for rules: "The proper response of this court is not to leave the problem to case by case evaluation by the lower courts by reference to a potentially unlimited range of factors, but to address the problem by supplying a framework of principle which accommodates legitimate concerns about the present law."[73]

Concluding that the subject is too varied and complex to be guided by rules and doctrine, this Article maintains that the majority in *Patel v. Mirza* guides courts to better solutions. The Article endorses the *Patel v. Mirza* majority opinion's approach that favors judicial discretion under guidelines, including the Restatement's emphasis on purpose.[74] Under the discretionary

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at [9].

71. *See id.* at [210] (Lord Clarke, concurring in judgment) ("[T]here is no disagreement between members of the court as to the correct disposal of this appeal. It is that the appeal must be dismissed because Mr Patel is entitled to restitution of the £620,000 that he paid to Mr Mirza . . . .").

72. *Id.* at [120] (majority opinion).

73. *Id.* at [265] (Lord Sumption, concurring in judgment). A valuable collection of essays followed. *See generally* ILLEGALITY AFTER *PATEL V. MIRZA* (Sarah Green & Alan Bogg eds., 2018).

74. *See supra* notes 62–63 and accompanying text.

approach, a court should not be in thrall to doctrine. The court should examine factual context and public policy and apply sound judgment and common sense.

C. *Advice to the Courts*

Courts that take this Article's suggestions for adjudicating agreements with an illegal component will grant more contract remedies and order restitution in more disputes. But these same courts will also temper their discretion with guidance from standards. An example of an approach that creates too much discretion is a New Zealand statute. It says the court may grant to any party to an illegal contract "such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just."[75]

An agreement where the consideration violates a criminal statute usually cannot escape the label of an illegal contract.[76] The court should not grant a contract remedy, specific performance or expectancy damages, for an illegal contract. The next step is whether the court should consider granting restitution. Many of the inquiries for granting or denying a contract remedy are the same for granting or denying restitution.[77]

The judge should consider all the facts and circumstances and apply discretion guided by several standards, stated as questions in the next paragraph, that focus the judge's professional judgment and experience on the critical issues in the dispute.

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75. Illegal Contracts Act 1970, s 7(1) (N.Z.).

76. *See, e.g.*, Green v. Mt. Diablo Hosp. Dist., 254 Cal. Rptr. 689, 695 (Ct. App. 1989) ("Contracts that are contrary to express statutes . . . are illegal contracts." (citation omitted)); Hiltpold v. T-Shirts Plus, Inc., 298 N.W.2d 217, 220 (Wis. Ct. App. 1980) ("A contract is illegal where its formation or performance is expressly forbidden by a civil or criminal statute . . . ." (citation omitted)).

77. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 32 cmt. a (AM. L. INST. 2011); *see also* RESTATEMENT (SECOND) OF CONTRACTS §§ 197–199 (AM. L. INST. 1981) (explaining when restitution is available).

What was the subject matter of the parties' agreement?[78] How extensive was the parties' illegal behavior?[79] Did the principal part of the parties' agreement violate an important criminal statute?[80] How culpable was the party seeking restitution?[81] Was illegality an important or an incidental part of the parties' agreement?[82] How strong is the policy that supports the illegality?[83] Would approving relief defeat the purpose of the criminal statute's ban?[84] If one person is denied relief, will the second person receive a benefit and the first person suffer a forfeiture?[85] Does the claimant deserve to suffer that large a forfeiture?[86] If the claimant is denied relief, will the other party be unjustly enriched?[87] Will either granting or

78. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 32 cmt. a (AM. L. INST. 2011).

79. *Cf. id.* § 32 cmt. b (establishing that a court may deny restitution based on a "claimant's inequitable conduct").

80. *See id.* § 32 cmt. a ("[T]he fact that a particular contract is described by a statute or regulation as 'illegal' . . . is merely the beginning, not the conclusion of the inquiry under [the illegality section of the Restatement].").

81. *See id.* § 32 cmt. c (providing that the "extent of the claimant's culpability" is a relevant factor to consider when deciding whether to grant or deny restitution); *id.* § 32 cmt. b (establishing that "the claimant's role in the underlying transaction" may serve as grounds to deny restitution); *id.* § 32 cmt. d (explaining that equitable disqualification, an affirmative defense to restitution, establishes "that a party guilty of inequitable conduct in the underlying transaction may on that account be denied a claim based on unjust enrichment").

82. *See id.* § 32 cmt. c (providing that when a judge evaluates "the effect on underlying policy of a decision either to allow restitution or to require a forfeiture," a relevant factor to consider is "whether illegal conduct was central or merely tangential to the performance in question").

83. *See id.* § 32(1) ("Restitution will be allowed, whether or not necessary to prevent unjust enrichment, if restitution is required by the policy of the underlying prohibition.").

84. *See id.* § 32 cmt. c ("The statute or regulation by which the parties' underlying transaction is prohibited may expressly decide the issue . . . .").

85. *Cf. id.* § 32 cmt. b ("[R]estitution is available on ordinary terms—as necessary to prevent unjust enrichment—to the extent that the consideration of the claim does not defeat the policy of the underlying prohibition.").

86. *See supra* note 81.

87. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 32 cmt. b (AM. L. INST. 2011).

denying restitution deter the parties' or others' misconduct in the future?[88]

The questions are general and overlapping. They may repeat essentially the same issue in a different language. Often, a single inquiry will decide the issues.[89] An example is the mythical unpaid hitman suing for his fee.[90] He loses without more because the agreement's core violates the law against murder.[91]

The subject is diffuse and pluralistic. The body of public criminal law defines criminal offenses and governs public officials' decisions to charge and try suspected persons.[92] It also sets penalties for convicted offenders.[93] A person's violation of a criminal statute is an offense against the public as distinct from the civil law of private breach or injury.[94] The purposes of criminal law are to protect the public by preventing or deterring

88. *Cf. id.* § 32 cmt. c ("Significant negative consequences for deterrence will justify the court in denying relief, even in the face of substantial unjust enrichment."); *see also* 2 GEORGE PALMER, THE LAW OF RESTITUTION § 8.1 (1978) ("The central problem is whether the policy against permitting retention of an unjust enrichment is overbalanced by the policies lying behind the condemnation of a transaction as illegal.").

89. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 32 cmt. c (AM. L. INST. 2011) ("The statute or regulation by which the parties' underlying transaction is prohibited may expressly decide the issue . . . .").

90. *See* Patel v. Mirza [2016] UKSC 42, [116] (appeal taken from Eng.) (citing an imagined unpaid hitman scenario as "sufficient . . . to identify the framework within which such an issue[,]" of whether a claimant is barred from recovering payments made as consideration for an illegal contract, "may be decided"); *see also* Jonathan Edwards, *He Applied to Be an Assassin at RentAHitman.com, Then Got Arrested, FBI Says*, WASH. POST (Apr. 14, 2023), https://perma.cc/D2ZR-PL9T (reporting on the story of an individual who was arrested after applying for a job as a hitman to undercover FBI agents).

91. *See* Patel v. Mirza [2016] UKSC 42, [116] (appeal taken from Eng.) ("[T]here might be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it: as where one man has paid money by way of hire to another to murder a third person." (internal quotations omitted)).

92. *See* Andrew Cornford, *The Aims and Functions of Criminal Law*, 87 MOD. L. REV. 398, 399 (2024) ("[C]riminal law prohibits conduct or declares it to be wrongful. . . . [I]t provides for a fitting response to that wrongful conduct: most importantly, its condemnation and punishment, but also a distinctive process through which guilt is adjudicated.").

93. *See id.*

94. *See id.* at 405 (noting that criminal law enforcement is a "public matter").

crimes, to punish and rehabilitate offenders, and to express and strengthen social norms.[95] Misconduct covers a spectrum. No one would dispute that a hired killer should not recover for his services. The criminal law covers vast areas of human conduct, from universally recognized, core misconduct like murder, assault, and theft to the trivial and silly, like handing a bottle of water to someone in a voting line.[96] At its worst, a criminal statute may be a mean-spirited expression of social prejudice, for example imposing a long prison sentence on a librarian or teacher who hands an "obscene" book to a minor.[97]

On the civil policy side, one might oppose granting a claimant a remedy on an illegal agreement on the grounds that the court personnel have plenty of business without dealing with law breakers. Questions of morality might trouble the judge and a possible jury.[98] Granting a remedy might encourage, or not discourage, future illegal agreements and undermine the substantive law.[99] Finally, awarding civil damages to a law breaker might bring public disapproval down upon the court. It is not clear, however, that these concerns justify denying all claimants all relief under all illegal agreements.[100]

The Supreme Court stated the United States' beginning rule in *Kaiser Steel Corp. v. Mullins*:[101] "[O]ur cases leave no doubt that illegal promises will not be enforced in cases

95. *See id.* at 399–400.

96. *See, e.g.*, GA. CODE ANN. § 21-2-414 (2023).

97. Hannah Natanson, *School Librarians Face a New Penalty in the Banned-Book Wars: Prison*, WASH. POST (May 18, 2023), https://perma.cc/3HK5-CURJ; *see id.* ("One example is an Arkansas measure that says school and public librarians, as well as teachers, can be imprisoned for up to six years or fined $10,000 if they distribute obscene or harmful texts."). A federal judge temporarily blocked the Arkansas state law that would have made it a crime for librarians and booksellers to give minors materials deemed "harmful" to them. *See* Fayetteville Pub. Libr. v. Crawford County, Arkansas, No. 23-cv-05086, 2023 WL 4845636, at *21 (W.D. Ark. July 29, 2023).

98. *See supra* note 36–37 and accompanying text.

99. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 32 cmt. c ("Significant negative consequences for deterrence will justify the court in denying relief, even in the face of substantial unjust enrichment.").

100. *See* STEPHEN A. SMITH, RIGHTS, WRONGS, AND INJUSTICES: THE STRUCTURE OF REMEDIAL LAW 292 (2019) ("It is not clear that the existing law balances these considerations appropriately.").

101. 455 U.S. 72 (1982).

controlled by the federal law."[102] Lower courts have been less categorical and more flexible.[103] To begin , the contract policies of certainty, stability, and protecting parties' reasonable expectations remain part of the court's analysis.[104] Lower court decisions accept Lord Mansfield's dislike of forfeitures and windfalls and anticipate the Restatement's analysis.[105] "[M]any cases continue to treat the defense of illegality to the enforcement of a contract as presumptive rather than absolute, forgiving minor violations and not allowing the defense to be used to confer windfalls," a court wrote citing earlier decisions.[106] An obsolete or anachronistic statute may not support a successful illegality defense.[107] Lord Mansfield's concern endures in statements like, "[T]he courts are to be guided by the overriding general policy . . . of preventing people from getting other people's property for nothing when they are purporting to be buying it."[108] Courts should "tak[e] into account such considerations as the avoidance of windfalls or forfeitures,

102. *Id.* at 77.

103. *See, e.g.*, Paul Arpin Van Lines, Inc. v. Universal Transp. Servs., Inc., 988 F.2d 288, 290 (1st Cir. 1993) ("The general rule is that an otherwise valid contract that results in the violation of a public-protection statute or regulation is unenforceable. This general rule, however, is almost as much honored in the breach as in the observance." (citations omitted)).

104. *See* N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co., 799 F.2d 265, 273–74 (7th Cir. 1986) [hereinafter *NIPSCO*] ("The balance in this case favors enforcement. This makes it irrelevant whether . . . the contract itself could be viewed as illegal under any interpretation of the statute."); *see also* Energy Labs, Inc. v. Edwards Eng'g, Inc., No. 14 C 7444, 2015 WL 3504974, at *3 (N.D. Ill. June 2, 2015) ("[T]he illegality of contract defense involves a balancing of the 'pros and cons of enforcement,' taking into account the benefits of enforcement 'that lie in creating stability in contract relations and preserving reasonable expectations' and the 'costs in forgoing the additional deterrence of behavior forbidden by the statute.'" (quoting *NIPSCO*, 799 F.2d at 273)); RESTATEMENT (SECOND) OF CONTRACTS § 178(2)(a) (AM. L. INST. 1978) ("In weighing the interest in the enforcement of a term, account is taken of the parties' justified expectations.").

105. *See supra* notes 8–13, 60–63 and accompanying text.

106. Nagel v. ADM Inv'r Servs., Inc., 217 F.3d 436, 440 (7th Cir. 2000).

107. *See NIPSCO*, 799 F.2d at 274 ("Section 2(c) is an anachronism—a regulatory statute on which the sun set long ago.").

108. Dervin Corp. v. Banco Bilbao Vizcaya Argentaria, S.A., No. 03-CV-9141, 2004 WL 1933621, at *3 (S.D.N.Y. Aug. 30, 2004) (citing *Kaiser Steel Corp.*, 455 U.S. at 80).

deterrence of illegal conduct, and relative moral culpability."[109] Decisions adjure balancing, "a comparison of the pros and cons of enforcement."[110]

In the Federal Rules of Civil Procedure, illegality is listed as an affirmative defense.[111] But it does not behave like typical affirmative defenses do. If a defendant does not raise most affirmative defenses in its answer, they are waived.[112] However, the judge may raise illegality sua sponte even though neither party mentions it.[113] Illegality can enter a lawsuit through many passages, including as part of the plaintiff's prima facie case.[114] Even though the factual issues in legal restitution will be tried

109. Bassidji v. Goe, 413 F.3d 928, 937–38 (9th Cir. 2005).

110. *NIPSCO*, 799 F.2d at 273; *see also* Resol. Tr. Corp. v. Home Sav. of Am., 946 F.2d 93, 96–97 (8th Cir. 1991) ("Some federal courts have . . . refused to enforce illegal contracts only if the statute or regulation explicitly provides that contracts in violation are void or if the interest in enforcement clearly outweighs the public policy against enforcement." (citations omitted)); *Energy Labs, Inc.*, 2015 WL 3504974, at *3 ("[T]he illegality of contract defense involves a balancing of the 'pros and cons of enforcement,' taking into account the benefits of enforcement 'that lie in creating stability in contract relations and preserving reasonable expectations' and the 'costs in forgoing the additional deterrence of behavior forbidden by the statute.'" (quoting *NIPSCO*, 799 F.2d at 273)).

111. *See* FED. R. CIV. P. 8(c).

112. *See id.*

113. *See* Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83 (1982) ("It is also well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it."); J. Lilly, LLC v. Clearspan Fabric Structures Int'l, Inc., No. 18-cv-01104, 2020 WL 1855190, at *11 (D. Or. Apr. 13, 2020) ("The Court raised sua sponte the question of whether a federal court sitting in diversity can award a party lost profits generated from the sale of marijuana and ordered the parties to brief the issue."); Bovard v. Am. Horse Enters., Inc., 247 Cal. Rptr. 340, 343 (Ct. App. 1988) ("Whenever a court becomes aware that a contract is illegal, it has a duty to refrain from entertaining an action to enforce the contract.").

114. *See* John D. McCamus, The New Illegality Defence in English Restitutionary Law: A Critical Appraisal 19 (July 17, 2023) (unpublished manuscript) (on file with author) ("[I]llegality becomes relevant to the 'failure of consideration' claim only as a defence. In such cases, the plaintiff has a prima facie right to recovery, subject, however, to the illegality defence.").

to a jury if demanded,[115] the illegality issue is a question of law for the judge.[116]

1. The Midgard Illustration

This Article will next return to Midgard to summarize the possible contract and restitution approaches—specific performance, expectancy damages, restitution, quantum meruit, rescission-restitution, and constructive trust—if either Freyja or the Brislings had breached their agreement.

The myth introduces an agreement to exchange sexual services for valuable consideration.[117] Freyja agreed with the Brislings to exchange her sexual services for their consideration—a necklace.[118]

Amazingly, Midgard's civil law of contract remedies resembles the law of a typical modern state in the United States. To develop the smorgasbord of remedies, we first suppose that the parties' agreement does not violate Midgard's criminal law and that Freyja or the Brislings repudiates the agreement.

Suppose Freyja changes her mind before the first night. The Brislings sue her in Midgard's court for her breach. What remedies might the court consider?

First, the Brislings' demand for her specific performance would probably fail because it would force Freyja to perform intimate personal services.[119]

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115. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. a (AM. L. INST. 2011) ("Because the Seventh Amendment of the U.S. Constitution confers a right to jury trial in suits 'at common law,' American courts are sometimes required to decide whether the case before them is one that would have been brought at law or in equity in 1791.").

116. *See id.*

117. CROSSLEY-HOLLAND, *supra* note 2, at 66.

118. *Id.*

119. *See* DAN DOBBS & CAPRICE ROBERTS, THE LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 12.8(2) (3d ed. 2018) (noting that courts generally do not grant specific performance for personal service contracts); Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 WASH. U. L. REV. 1807, 1863 (2022) ("[A] contract clause promising sex—like any agreement for personal services—would never invoke specific performance in an enforcement action . . . .").

Denial of specific performance would probably also follow if the Brislings had given Freyja the necklace but she hadn't performed.[120]

Second, the Brislings' demand for expectancy damages[121]—their profit potential from Freyja's breach—would consider the value of her services minus the value of the necklace.[122] Both values would be difficult to impossible to compute even from expert testimony.[123] This difficulty of measuring value will continue through the Article.

Sex has value that fact finders set when awarding damages for the tort of loss of consortium.[124] This part of personal injury damages allows one spouse to recover damages from a tortfeasor whose intentional or negligent conduct injured the other spouse and impaired the marital relationship, including its sexual aspects.[125] The sources on consortium, however, do not do a very helpful job of telling us how to set the value of the sexual element of a plaintiff's damages.

Litigants can prove value with expert testimony.[126] In the artificial world of legal scholarship, a hypothetical plaintiff's

120. *See* DOBBS & ROBERTS, *supra* note 119, § 12.8(3) ("Courts will not compel an employee to work.").

121. *See id.* § 12.2(1) (noting that expectation damages generally "give [the] plaintiff what she expected to receive had the contract been fulfilled").

122. See *id.* ("[E]xpectation damages for a complete breach of contract attempt to give plaintiff the difference between the price she was to pay and the value she was to get from performance.").

123. *See id.* § 3.5 ("In many instances, no appropriate market can be found for the property or entitlement in question.").

124. *See* Antognini & Appleton, *supra* note 119, at 1807 ("While courts reject private agreements between spouses regarding sex, they nonetheless deem sex 'essential' to the existence of marriage, and they quantify just how much sex matters when considering loss of consortium claims.").

125. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 25(a) (AM. L. INST., Approved Tentative Draft No. 2, 2023) (establishing that a plaintiff may seek damages for loss of consortium for the loss of sexual relations as a result of a tort); RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A (AM. L. INST., Tentative Draft No. 1, 2022) ("The spouse of a person who suffers physical or emotional harm, factually caused by an actor's tortious conduct and within the actor's scope of liability, may recover for the loss of society resulting from the other spouse's harm."). Thanks to Albertina Antognini and Susan Frelich Appleton who brought this use of consortium to my attention in their article. *See generally* Antognini & Appleton, *supra* note 119.

126. *See* DOBBS & ROBERTS, *supra* note 119, § 3.5 ("A common form of proving market value . . . relies on expert opinion.").

lawyer might prove the value of Freyja's services with expert testimony from high-end sex workers.[127] More realistic would be jeweler-experts to prove the necklace's value.[128]

But if the Brislings claim for either specific performance or expectancy damages fails, could the Brislings rescind the contract and recover restitution of the necklace from Freyja? If Freyja breaches after she gets the necklace, the court might grant the Brislings rescission-restitution and order her to return the necklace.[129]

If Freyja has received the necklace and changes her mind, the Brislings may seek equitable restitution—a constructive trust.[130] The court may find her unjustly enriched and hold that she is a constructive trustee who must return the necklace to the Brislings.[131]

Now changing the breaching party, suppose the Brislings change their minds before Freyja performs. Turning to her remedies, her demand for specific performance would force her intimate performance on defendants unwilling to receive her personal services.[132] I don't think it would succeed.

More likely is her second remedy, expectancy damages, which the court would calculate by the value of the necklace minus the value of her services.[133] Her incentive to undervalue her performance makes this remedy more imprecise and

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127. *See id.*

128. *See id.* (noting that an expert opinion often comes "not only from professional appraisers, but also from those who otherwise know the standards of value for the kind of property in question").

129. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 54 cmt. a (AM. L. INST. 2011) (noting that recission and restitution is "a composite remedy . . . that combines the avoidance of a transaction and the mutual restoration of performance thereunder").

130. *See id.* § 55(1) ("If a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant . . . the defendant may be declared a constructive trustee, for the benefit of the claimant, of the property in question . . . .").

131. *See id.* § 55(2) ("The obligation of a constructive trustee is to surrender the constructive trust property to the claimant, on such conditions as the court may direct.").

132. *Cf.* DOBBS & ROBERTS, *supra* note 119, § 12.8(3) (noting that, while a court "could compel an employer to accept work from an employee who has contract rights to a job," "many concerns counsel caution in enforcement of personal service contracts").

133. *See id.* § 12.2(1).

unpredictable than the Brislings' expectancy damages if she breaches.

Third, rescission-restitution would fail because no unjust enrichment exists.[134]

Now suppose the Brislings breach after Freyja spends one night with each of the four dwarves. First, Freyja's preferred remedy is specific performance, the necklace. Specific performance of her fully executed contract for the defendants to deliver "unique" consideration—the necklace—is a plausible solution.[135]

Second, her suit for the "price," or expectancy damages, is possible.[136] But it is tricky because of the difficulty of measuring the value of her services.

Freyja's third remedy, restitution, is quantum meruit to recover the "reasonable" value of her performance.[137] It is subject to the same measurement difficulty as her suit for expectancy damages.

If Freyja has performed and the Brislings repudiate the agreement, finding that the Brislings are constructive trustees who must turn the necklace over to Freyja is somewhat difficult because she never possessed the necklace.[138] The palpable unfairness of allowing the Brislings to accept Freyja's performance and escape their performace may overcome the Brislings' objection that their enrichment did not come from the plaintiff.[139] After all, her constructive trust solution is the

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134. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 54 cmt. a (AM. L. INST. 2011) ("The object of rescission in the law of restitution is the reversal of a transfer of property.").

135. *See* DOBBS & ROBERTS, *supra* note 119, § 12.8(2); U.C.C. § 2-716(1) (AM. L. INST. & UNIF. L. COMM'N 2022) ("Specific performance may be decreed where the goods are unique or in other proper circumstances.").

136. *See* DOBBS & ROBERTS, *supra* note 119, § 12.2(1) ("Damages estimates are almost always imprecise and are conditioned by practical limitations of proof and understanding.").

137. *See id.* § 4.2(2) ("A recovery on quantum meruit usually appears to mean a recovery for the value of the services.").

138. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 cmt. a (AM. L. INST. 2011) (explaining that a "[c]onstructive trust is the principal device for vindicating equitable ownership against conflicting legal title[s]").

139. *See id.* § 62 cmt. a ("If a well-pleaded complaint alleges unjust enrichment, it must be a proper answer . . . to plead 'no unjust enrichment.'").

equivalent of specific performance: the defendants perform their side of the agreement.

Finally, if either Freyja or the Brislings breach while the agreement is fully executory, there is no enrichment to reverse. Rescission of the agreement is probably in order.[140]

This Article now turns to one of its major subjects: Remedies for a breached sex-for-money agreement.

II. PROSTITUTION[141]

Freyja's contract—to receive the necklace, in return for her sexual services—was, as far as we know, a one off for her. She was not, in modern parlance, a sex worker. We now turn to examining commercial sex-for-money activity.

Suppose prostitution is a crime under Midgard's criminal law statutes. Exchanging sexual services for valuable consideration is a working definition of the crime of prostitution.[142]

Under New York state law, for example, prostitution is punishable by up to three months in jail and a fine of up to

140. *See id.* § 54(4) ("Rescission is appropriate when the interest of justice are served by allowing the claimant to reverse the challenged transaction instead of enforcing it.").

141. Vocabulary note: The terms "prostitution" and "prostitute" are stigmatizing and pejorative. *See* Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 525 (2000). This Article uses other language—sex worker—except for criminal prostitution statutes. The book *Whore of New York: A Confession* by Liara Roux uses the word "whore" in the title, but in the text, "sex worker" describes the activity. *See generally* LIARA ROUX, WHORE OF NEW YORK: A CONFESSION (2021). Sex work and sex worker are broad terms, including exotic dancers, models, actors, and others. This Article follows a narrower definition of sex worker: seller of explicit sexual services.

142. *See* Allen v. Commonwealth, 997 S.W.2d 483, 486 (Ky. Ct. App. 1999) (explaining that promoting prostitution requires an exchange of sexual activity for money, thereby defining prostitution as a profit motivated offense); *see also* Patten v. Raddatz, 895 P.2d 633, 637 (Mont. 1995) (noting that an agreement to perform sexual favors in exchange for financial support constitutes prostitution under Montana law).

$500.[143] Pimps would get one year, minimum.[144] "Buying sex is illegal, too: Patronizing an adult sex worker can put a person in jail for up to one year."[145] The federal Mann Act,[146] the so-called "white slavery law," made it a crime to transport a woman across state lines for "prostitution" or "any other immoral purpose."[147]

What about our subject: civil recovery for breach of an agreement that involves consideration that violates a criminal statute? *Ex turpi causa non oritur actio* is the legal latin phrase for the traditional common law rule that a plaintiff cannot pursue legal relief and recover damages that arise from an illegal act.[148] What does that approach mean for Freyja? If the Brislings refuse to pay her after she has performed, no remedy at all for Freyja: no specific performance, no expectancy damages, no restitution.[149] Refusing to grant her any remedy is not a response that deters or discourages people from forming illegal contracts.

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143. *See* N.Y. PENAL LAW § 230 (McKinney 2023) (stating that prostitution is a class B misdemeanor); *id.* § 70.15(2) (establishing that a sentence for a class B misdemeanor "shall not exceed three months"); *id.* § 80.05(2) (providing that a fine for a class B misdemeanor shall "not exceed[] five hundred dollars").

144. *See id.* § 230.20.

145. Margot Boyer-Dry, *What's the Best Way to Protect Sex Workers? Depends on Whom You Ask.*, N.Y. TIMES (July 23, 2021), https://perma.cc/58ZG-Y86D; *see* N.Y. PENAL LAW § 230.04 ("Patronizing a person for prostitution in the third degree is a class A misdemeanor."); *id.* § 70.15(1) (limiting the prison time to one year).

146. White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424).

147. *Id.* § 2 (code with some differences in language at 18 U.S.C. § 2421(a)).

148. *See* Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine Be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 55 (1995).

149. *See* RESTATEMENT OF THE LAW OF CONTRACTS § 589 (AM. L. INST. 1932) (stating that bargains for or in consideration of illicit sexual intercourse are illegal; providing illustrations where contracts involving sexual intercourse are deemed illegal based on the context).

A. *Sex-for-Money Agreements*

Earlier, agreements with future illegal cohabitation as consideration were void.[150] Unmarried persons' contracts with sexual relations as consideration violated public policy.[151]

An important development in contracts involving sex was the California Supreme Court's 1976 decision in *Marvin v. Marvin*.[152] Before *Marvin*, if unmarried persons agreed to live together and share sexual relations, the agreement violated public policy and a court would refuse to grant any remedies for breach of it.[153]

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150. *See id.* (establishing that contracts involving immoral or illegal considerations, specifically future illegal cohabitation, are void under general American legal principles).

151. *See, e.g.*, GA. CODE ANN. § 13-8-1 (2023) ("A contract to do an immoral or illegal thing is void."); *see also* Rehak v. Mathis, 238 S.E.2d 81, 82 (Ga. 1977) ("[N]either a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration."); Liles v. Still, 335 S.E.2d 168, 169 (Ga. Ct. App. 1985) ("A contract founded upon a promise to live in the future in a meretricious state is void."); 15 TIMOTHY MURRAY ET AL., CORBIN ON CONTRACTS § 81.4 (1962) (exploring the history of courts refusing to recognize contracts where sexual relations were part of the consideration); RESTATEMENT OF THE LAW OF CONTRACTS § 589 cmt. a (AM. L. INST. 1932) (stating that bargains "in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof [are] illegal," which directly addresses contracts with sexual considerations among unmarried persons). The First Restatement's focus on "immoral sex relations" and the Second Restatement's extension to general public policy bans clearly reflect the illegality of such contracts under common law. RESTATEMENT OF THE LAW OF CONTRACTS § 589 (AM. L. INST. 1932); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 197 (AM. L. INST. 1981) ("[A] party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture.").

152. 557 P.2d 106 (Cal. 1976); *see id.* at 122 (holding that courts should enforce express contracts between nonmarital partners except when explicitly founded on meretricious sexual services and recognizing the validity of implied contracts or agreements demonstrated by the conduct of the parties); *see also* HOMER H. CLARK JR. & SANFORD N. KATZ, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 1.2 (3d ed. 2021) (discussing the shift from traditional unenforceability of contracts involving meretricious relationships to the recognition of valid claims in such relationships).

153. *See Restitution at Home: Unjust Compensation for Unmarried Cohabitants' Domestic Labor*, 133 HARV. L. REV. 2124, 2146–47 (2020) (explaining that, prior to *Marvin v. Marvin*, contracts between unmarried cohabitants were generally unenforceable due to public policy considerations,

In *Marvin*, the California court decided that the woman plaintiff could receive a remedy for her services even if some of them were sexual: "The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses."[154] Her remedy may be for breach of a contract implied in fact or for restitution to prevent unjust enrichment of the other party to the agreement.[155]

Restitution between unmarried people who have lived together in a relationship similar to marriage has evolved into standard United States common law; it was accepted in 2011 by the *Third Restatement of Restitution and Unjust Enrichment*,[156] although not without dissent.[157]

The *Marvin* court continued, however, speaking in dicta about explicit sex-for-money agreements: contracts that "rest upon a consideration of meretricious sexual services" will "fail."[158] A couple cannot contract for sex because "such a contract is, in essence, an agreement for prostitution and unlawful for that reason."[159] The court distinguished agreements between unmarried couples from prostitution because "equat[ing] the nonmarital relationship of today to such

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but *Marvin* introduced the concept of enforcing such agreements, particularly when they included provisions beyond sexual relations).

154. *See Marvin*, 557 P.2d at 113.

155. *See id.* at 121–23 (recognizing that, while express contracts between nonmarital partners are enforceable, courts also have the discretion to apply equitable principles and remedies, such as implied contracts or restitution to prevent unjust enrichment, especially in scenarios where domestic labor is involved and contributes to the acquisition or improvement of shared property).

156. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 (AM. L. INST. 2011) (noting that restitution claims can be made by unmarried cohabitants who have made substantial, uncompensated contributions to specific assets owned by the other, reflecting a shift in legal perspective from viewing these relationships as meretricious to recognizing potential equitable claims).

157. *See* Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 712–13 (2006) (opposing the cohabitants' recovery).

158. *Marvin*, 557 P.2d at 113.

159. *Id.* at 116.

a subject matter is to do violence to an accepted and wholly different practice."[160]

In *Lawrence v. Texas*,[161] in 1993, the Supreme Court held that a Texas criminal statute forbidding sodomy violated due process.[162] Dicta in both *Lawrence v. Texas* and *Marvin v. Marvin* disapprove of sex-for-money agreements: the Supreme Court in *Lawrence* by approving criminal prostitution statutes[163] and the California court in *Marvin* by rejecting restitution growing out of such an agreement.[164]

Professors Antognini and Appleton maintain that a court should approve either a pre-marital or a post-marital contract that involves sex as consideration.[165] Although their reasoning supports recovery for a sex-for-money agreement unrelated to marriage, their article disclaims that conclusion.[166]

The U.S. Court of Appeals for the Ninth Circuit, declining to extend *Lawrence* to invalidate the criminal prohibition of prostitution, ruled that California's anti-prostitution statutes are constitutional.[167] Although in *Lawrence v. Texas* five of the

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160. *Id.* at 122.

161. 539 U.S. 558 (2003).

162. *See id.* at 576–79 (recognizing the right of homosexual adults to engage in consensual conduct and emphasizing that moral disapproval does not justify intruding into the private lives of individuals).

163. *See Lawrence*, 539 U.S. at 578 (clarifying that the case does not involve public conduct or prostitution, thereby implicitly disapproving of sex-for-money agreements while affirming the right to private consensual conduct).

164. *See* Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976) (distinguishing between lawful contracts regarding property rights among cohabitants and unlawful agreements for sexual services).

165. *See* Antognini & Appleton, *supra* note 119, at 1810–11 (arguing that the prevailing legal view, which refuses to recognize agreements involving sex as contracts, overlooks the complexity of such agreements and challenging this stance by advocating for the application of ordinary contract rules to agreements that include a sexual component).

166. *See id.* at 1812–13 (critiquing the conventional legal stance that refuses to recognize contracts involving sex outside of marriage, and arguing for a more nuanced approach that distinguishes between agreements that explicitly trade sex for property and those where sex is a part of a broader relational contract).

167. *See* Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 880 F.3d 450, 460–61 (9th Cir. 2018) (upholding California's criminalization of prostitution, ruling that such regulation does not violate the First Amendment

six justices in the majority had ruled that the Texas anti-sodomy statute violated the liberty and privacy protections in the Fourteenth Amendment's Due Process Clause,[168] the Court of Appeals rejected the plaintiff's liberty-privacy argument against the California prostitution statute.[169]

In the United States, plaintiffs' judicial efforts to void criminal prostitution statutes have been unsuccessful.[170] Any change in the legal status of sex work will, it seems to me, have to come from state legislatures.[171] In June 2023, the Maine legislature voted to decriminalize selling sex in the state, although buying sex will remain illegal.[172] This followed the Nordic or partial decriminalization approach, which has been enacted in Canada and several European countries; it "is based

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and stating that prostitution, being non-protected commercial speech, falls outside the ambit of constitutional safeguards).

168. U.S. CONST. amend. XIV, § 1; *see Lawrence*, 539 U.S. at 578–79 (highlighting the case's focus on two consenting adults engaged in private sexual conduct, affirming the right to liberty under the Due Process Clause).

169. *See Erotic Serv. Provider*, 880 F.3d at 460–61 (analyzing and ultimately rejecting the plaintiff's argument that *Lawrence* extends to create a liberty interest invalidating laws criminalizing prostitution).

170. *See Annual Review of Gender and Sexuality Law: Sex Work*, 23 GEO. J. GENDER & L. 325, 350–52 (2022) (discussing how courts have upheld sex-work statutes under First Amendment, due process, and equal protection challenges, emphasizing that such statutes are not unconstitutionally vague or overbroad). *But see* James J. Bernstein, *Property Prohibitions: Why Criminalizing Prostitution Violates Constitutional Guarantees*, 56 U.S.F. L. REV. 109, 110 (2021) (arguing that anti-prostitution statutes unconstitutionally interfere with property rights).

171. *See, e.g.*, *Annual Review of Gender and Sexuality Law: Sex Work*, *supra* note 170, at 339–41 (analyzing the legal framework for sex work in Nevada and Rhode Island, highlighting the distinct models of regulation and decriminalization adopted by these states, and discussing the significant role of state legislatures in determining the legal status of sex work).

172. *See* An Act to Reduce Commercial Sexual Exploitation, L.D. 1435, 131st Leg., 1st Reg. Sess. (Me. 2023) (eliminating the crime of engaging in prostitution while renaming and intensifying the penalization for the crime of patronizing prostitution, particularly focusing on minors and individuals with mental disabilities, and establishing defenses related to conspiracy and solicitation in the context of commercial sexual exploitation); *see also* Alexandra Heal, *Maine Becomes First State to Decriminalize Selling Sex*, WASH. POST (June 30, 2023), https://perma.cc/Y6YF-5ENC (commenting that Maine's approach mirrors those of Canada and European countries and is supported by feminists "who see it as the best way to stamp out demand for paid sex while protecting those who sell it because of economic need or because they are victims of trafficking").

on the notion that the exchange of sex for money is almost always exploitative and therefore should be eliminated."[173]

Whether to continue the crime of prostitution or legalize sex work and regulate it is debated. Except for Maine and another small exception, the sale of sexual services is a crime in the United States.[174]

The other exception is that sex work is legal in a few rural counties in Nevada.[175] Several counties in Nevada have

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173. Heal, *supra* note 172.

174. Maine stands as the only state to have repealed the statute criminalizing the sale of sexual services. *See* ME. STAT. tit. 17, § 853-A (repealed 2023); *see also* Jeffrey Miron, *Maine Legalizes the Sale of Prostitution Services*, CATO INST. (July 3, 2023), https://perma.cc/B9PG-N8GD (discussing Maine's legalization of the sale but not the purchase of prostitution services, and arguing that partial legalization perpetuates underground market problems, including increased violence and corruption, while suggesting that full legalization involving consenting adults is the more effective approach). The rest of the United States still criminalizes prostitution. *See* ALA. CODE § 13a-12-121 (2024); ALASKA STAT. § 11.66.100 (2023); ARIZ. REV. STAT. ANN. § 13-3214 (2024); ARK. CODE ANN. § 5-70-102 (2023); CAL. PENAL CODE § 647(b)(1) (West 2024); COLO. REV. STAT. § 18-7-201 (2024); CONN. GEN. STAT. ANN. § 53a-82 (West 2023); DEL. CODE ANN. tit. 11, § 1342 (2024); D.C. CODE § 22-2701 (2024); FLA. STAT. ANN. § 796.07 (2024); GA. CODE ANN. § 16-6-9 (2023); HAW. REV. STAT. ANN. § 712-1200 (2023); IDAHO CODE § 18-5613 (2024); 720 ILL. COMP. STAT. 5/11-14 (2022); IND. CODE § 35-45-4-2 (2023); IOWA CODE § 725.1 (2024); KAN. STAT. ANN. § 21-6419 (2024); KY. REV. STAT. ANN. § 529.020 (West 2023); LA. STAT. ANN. § 14:82 (2024); MD. CODE ANN., CRIM. LAW § 11-306 (LexisNexis 2023); MASS. GEN. LAWS ANN. ch. 272, § 53A (West 2023); MICH. COMP. LAWS. § 750.449a (2024); MINN. STAT. § 609.321 (2023); MISS. CODE ANN. § 97-29-49 (2024); MO. ANN. STAT. § 567.020 (West 2023); MONT. CODE ANN. § 45-5-601 (2023); NEB. REV. STAT. § 28-801 (2023); N.H. REV. STAT. ANN. § 645:2 (2024); N.J. STAT. ANN. § 2C:34-1 (West 2023); N.M. STAT. ANN. § 30-9-2 (2024); N.Y. PENAL LAW § 230.00 (McKinney 2024); N.C. GEN. STAT. § 14-204 (2023); N.D. CENT. CODE § 12.1-29-03 (2023); OHIO REV. CODE ANN. § 2907.25 (LexisNexis 2024); OKLA. STAT. tit. 21, § 1029 (2024); OR. REV. STAT. ANN. § 167.007 (2024); 18 PA. STAT. ANN. § 5902 (2023); 11 R.I. GEN. LAWS. § 34.1-2 (2024); S.C. CODE ANN. § 16-15-90 (2024); S.D. CODIFIED LAWS § 22-23-1 (2024); TENN. CODE ANN. § 39-13-513 (2024); TEX. PENAL CODE ANN. § 43.02 (West 2023); UTAH CODE ANN. § 76-10-1302 (LexisNexis 2023); VT. STAT. ANN. tit. 13, § 2632 (2023); VA. CODE ANN. § 18.2-346 (2023); WASH. REV. CODE § 9A.88.030 (2024); W. VA. CODE § 61-8-5(b) (2024); WIS. STAT. § 944.30 (2024); WYO. STAT. ANN. § 6-4-101 (2023).

175. *See, e.g.*, NYE COUNTY, NEV., CODE § 9.20.010 (2024) ("[P]rostitution conducted in accordance with the provisions of this chapter does not constitute a public offense, or nuisance, and is designed to promote public trust through strict regulation which will protect the public health, safety, morals and welfare of the residence of the County."); *see also Nevada Prostitution Laws*, DECRIMINALIZE SEX WORK, https://perma.cc/3NN5-4784 (last visited Feb. 27,

legalized sex work in licensed and regulated brothels.[176] Despite efforts to control and regulate prostitution, the illegal sex-for-money trade continues in Nevada, particularly in large cities like Las Vegas.[177]

In addition, progressive prosecution authorities in Manhattan, Baltimore, and Philadelphia don't prosecute sex-for-money activity.[178]

Statutory prohibitions on sex work reflect legislative concerns based on health, safety, economics, crime prevention, spreading venereal diseases, and community morality.[179] The external human costs are exploitation of children and human sex trafficking.[180]

2024) (listing various counties in Nevada that allow sex work through regulation of brothels). *But see* NEV. REV. STAT. §§ 201.354, 244.345 (2023) (establishing that prostitution and the operation of brothels is illegal in the state of Nevada in counties with more than 700,000 people).

176. *See Annual Review of Gender and Sexuality Law: Sex Work*, *supra* note 170, at 339–41 (detailing Nevada's decriminalization of prostitution in 1971 with regulated allowance in licensed brothels, specifying that prostitution is legal in certain counties with populations under 700,000, and highlighting the county's discretion in legalizing or prohibiting prostitution); *see also Prostitution and Sex Work*, 16 GEO. J. GENDER & L. 229, 232–33 (2015) (noting that, as of 2009, Nevada was the only state not entirely outlawing the exchange of sexual activity for compensation, with specific provisions for legalized prostitution in certain counties where it is highly regulated and permitted in licensed brothels).

177. *See* Brian Bahouth, *Nevada's Illegal Sex Industry Is the Nation's Largest and a Hub for Sex Trafficking*, SIERRA NEV. ALLY (Jan. 21, 2021), https://perma.cc/H8SA-7Y9T (describing the situation in Nevada where, despite the existence of nineteen legal brothels, the state harbors the nation's largest illegal sex industry).

178. *See* Heal, *supra* note 172; Jonah E. Bromwich, *Manhattan to Stop Prosecuting Prostitution, Part of Nationwide Shift*, N.Y. TIMES (Apr. 21, 2021), https://perma.cc/7S4T-43S5 (last updated July 23, 2021) (reporting that the Manhattan District Attorney's Office announced it would no longer prosecute prostitution and unlicensed massage, reflecting a nationwide trend in changing approaches to sex work criminalization); *see also* Tom Jackson, *After Crime Plummeted in 2020, Baltimore Will Stop Drug, Sex Prosecutions*, WASH. POST (Mar. 26, 2021), https://perma.cc/2RKX-TGL8 (reporting that Baltimore will decline to prosecute nonviolent offenses such as prostitution).

179. *See Annual Review of Gender and Sexuality Law: Sex Work*, *supra* note 170, at 354.

180. *See* MAGGY KRELL, TAKING DOWN BACKPAGE: FIGHTING THE WORLD'S LARGEST SEX TRAFFICKER 25–37 (2022) (detailing the author's efforts as a deputy attorney general in prosecuting the owners of Backpage.com for sex trafficking, and describing the establishment of a statewide human trafficking

The argument in favor of repealing the prostitution statutes is based on equality and autonomy with libertarian and feminist themes.[181] George Bernard Shaw spelled out the poverty and discrimination explanation for sex work in the preface to his play, *Mrs. Warren's Profession*: "[T]he truth that prostitution is caused, not by female depravity and male licentiousness, but simply by underpaying, undervaluing, and overworking women so shamelessly that the poorest of them are forced to resort to prostitution to keep body and soul together."[182]

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unit that addressed exploitation of women and underage girls on the website); *see also* Nicholas Kristof, *When Children Are Bought and Sold*, N.Y. TIMES (July 19, 2023) [hereinafter Kristof, *When Children Are Bought and Sold*], https://perma.cc/3W2G-UXUV (relating the personal experience of Melanie Thompson, a victim of sex trafficking, who recounts being kidnapped and sold for sex at age thirteen, her challenges in foster care and high school, and her advocacy against decriminalizing the sex trade due to concerns about increased exploitation and trafficking); G.G. v. Salesforce.com, Inc., 76 F.4th 544, 548 (7th Cir. 2023) (explaining that a plaintiff asserting a claim under Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595, can state a claim that defendant "knowingly benefits" from a sex trafficking venture by alleging that the defendant was aware it was benefitting from its participation in the venture).

The law firm of Brown Rudnick filed a federal lawsuit against MindGeek, Pornhub, Feras Antoon, Berg Bergmair, Visa, and other defendants in the Central District of California for alleged sex trafficking and distribution of child pornography. *See* Fleites v. Mindgeek S.A.R.L., 617 F. Supp. 3d 1146, 1152–54 (C.D. Cal. 2022). The 179-page complaint was filed on behalf of Serena Fleites, featured in a December 2020 *New York Times* opinion piece on Pornhub, and thirty-three anonymous plaintiffs. *See id.* at 1150; Nicholas Kristof, Opinion, *The Children of Pronhub*, N.Y. TIMES (Dec. 4, 2020), https://perma.cc/M8Q5-GSV7. The plaintiffs contended that they were victimized and exploited by the defendants as children. *See Fleites*, 617 F. Supp. 3d at 1151.

181. *See, e.g.*, Scott A. Anderson, *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, 112 U. CHI. ETHICS J. 748, 749–50 (2002) (discussing the debate between liberals advocating for the normalization of prostitution as a service industry and radical feminists arguing against it, emphasizing the need to protect sexual autonomy and address the inherent problems in sexual relations within a patriarchal society, and arguing that prostitution's normalization could obscure and entrench these issues rather than resolve them).

182. George Bernard Shaw, *Preface to Mrs. Warren's Profession*, *in* 3 COMPLETE PLAYS WITH PREFACES 3 (1962).

Practical arguments for repeal begin by emphasizing the sex worker's hazards from law enforcement.[183] Police officers overreach and exploit sex workers.[184] Officers don't protect sex workers against crimes.[185] Illegal drug activity is related to forbidden commercial sex activity.[186] Sex workers and their families are mistreated and subject to discrimination, for example by banks.[187] When sex work is illegal, many sex workers are forced to rely on pimps for protection, an arrangement that can be controlling and abusive.[188]

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183. *See* Law, *supra* note 141, at 524–33 (calling for criminal sanctions against sex workers to be repealed and for enhancing legal remedies and programs to protect sex workers from danger, including violence from police).

184. *See id.* at 533 (noting that some police officers rape and beat sex workers and are rarely prosecuted for their wrongdoing).

185. *See id.* ("Police systematically ignore commercial sex workers' complaints about violence and fail to investigate even murder.")

186. *See, e.g.*, Peter W. Poulos, Comment, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CALIF. L. REV. 379, 379 (1995) (discussing how loitering laws specifically aimed at drug activity, prostitution, and criminal gangs often reached innocent constitutionally protected activity due to arbitrary or discriminatory enforcement by police).

187. *See* Zahra Stardust et al., *High Risk Hustling: Payment Processors, Sexual Proxies, and Discrimination by Design*, 26 CUNY L. REV. 57, 61 (2023) (examining the policies of banking and digital payment providers who refuse to provide service to sex workers); Tara Siegel Bernard, *Sex Workers Have Been Shunned by Banks, Even When Their Work Is Legal*, N.Y. TIMES (Nov. 18, 2023), https://perma.cc/H2BR-S2GX (last updated Nov. 27, 2023) (discussing how, even though prostitution is legal in certain Nevada counties, no bank in the state will lend money to a brothel and it is difficult for sex workers to maintain a basic bank account or other financial relationships that most people take for granted due to discrimination).

188. *See* Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195, 1217 n.79 (2015) (analyzing the experiences of sex professionals working in legal jurisdictions in Nevada that make clear that individual pimps controlling a number of prostitutes are replaced by a small number of legal brothel owners); Mary Joe Frug, Commentary, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1054 (1992) ("The legal terrorization of prostitutes forces many sex workers to rely on pimps for protection and security, an arrangement which in most cases is also terrorizing. Pimps control when sex workers work, what kind of sex they do for money, and how much they make for doing it."); Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1921–25 (1987) (advocating for the decriminalization of selling sex services in order to protect poor women from the degradation and danger of the black market and the prohibition of efforts to create an organized sexual service market); David A.J. Richards,

Proponents of legalization usually stake out a position on what form legalization should take, either complete repeal or the Nordic model of partial decriminalization.[189]

Because exchanging money for sex violates a criminal statute in almost all states, it is easy to conclude that the parties' agreement is an illegal contract. Some sources say that a sex-for-money or prostitution contract is illegal, but do not cite any decisions.[190] We have not found any lawsuits in the United States where sex workers sued breaching patrons for the agreed price or the value of their services. There seem to be several reasons for this. Sex workers usually secure payment in advance.[191] The sex may be anonymous on both sides.[192] And, perhaps, the sums involved may be too small to sue for.[193]

Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution, 127 U. PA. L. REV. 1195, 1216 (1979) (noting that the American prohibition of brothels has forced prostitutes to seek alternative arrangements for self-protection including arrangements with pimps).

189. *See* Kristof, *When Children Are Bought and Sold*, *supra* note 180 (favoring a Nordic model over complete decriminalization: "I fear that if this well-meaning push for full decriminalization proceeds, the winners will be pimps and the losers will be some of America's most vulnerable young people"); *see id.* ("Melanie, now 27, warns that the result of full decriminalization, including allowing pimps and brothels, would be more trafficking of victims who are overwhelmingly Black and brown, or coming out of foster care, or L.G.B.T.Q. youth or others who are marginalized.").

190. *See* SMITH, *supra* note 100, at 286 ("In certain circumstances, courts will refuse to issue a remedy on the ground that the claimant's lawsuit is connected to an unlawful activity or to an activity that is against public policy (e.g. prostitution).").

191. *See* Lorena Molnar & Marcelo F. Aebi, *Alone Against the Danger: A Study of the Routine Precautions Taken by Voluntary Sex Workers to Avoid Victimization*, CRIME SCI., June 2022, at 1, 1 (finding that sex workers attempt to avoid victimization by prescreening their customers and asking for payment in advances for their services).

192. *See* Chelsea Breakstone, Note, *"I Don't Really Sleep": Street-Based Sex Work, Public Housing Rights, and Harm Reduction*, 18 CUNY L. REV. 337, 369 (2015) (noting that, although distributing lists of violent clients to sex workers that live in group homes can help workers vet potential clients, a concern is that this model would reduce anonymity that clientele want and is afforded under the traditional anonymous nature of street-based sex work).

193. *See* Marjorie Hernandez, *Inside LA's Brazen Sex Market, Where Women Sell Themselves in Broad Daylight—Emboldened by California's New Laws*, N.Y. POST (Oct. 23, 2023), https://perma.cc/WYG6-XKCY (reporting that, according to the Los Angeles Police Department, prostitutes in the area

Unveiling the deadbeat in public or to a spouse is an informal collection technique. Finally, an unpaid sex worker may just "lump it."

B. *Judicial-Discretion-with-Standards Approach*

This Article suggests a judicial-discretion-with-standards approach to granting remedies for breach of an agreement with consideration that violates a criminal statute. We return to an examination of the restitution issue in a stranger agreement for sexual services under a discretionary approach with standards.

Suppose a promise is given in the United States of $20,000 for a week-long tryst at a resort. On the morning of the seventh day, the male promisor leaves without paying the sex worker. She files her lawsuit on the following Monday; she alleges breach of contract and unjust enrichment and demands either expectancy damages of $20,000 or $20,000 in restitution.

The modern approach to illegal agreements, and the approach this Article suggests, is that, after finding the contract illegal and declining specific performance and expectancy damages—the contract remedies—the court should then ask whether one party is unjustly enriched and whether to grant restitution to the other.[194]

The agreement exchanging sex for money requires sexual activity that violates a criminal statute.[195] Breach of the illegal contract should not lead to the contract remedies of specific performance or expectation damages.

Is one party enriched or benefitted so unjustly that a court should grant restitution to the other? Denial of restitution would let the man avoid payment for six days of sexual services that he had agreed to pay for, a result that would not discourage or deter him and others from agreeing in the future to pay for sexual services on credit.[196]

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will perform sex acts for as little as $40 and many are selling their bodies for $160 or less at a time).

194. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 32 (AM. L. INST. 2011) ("A person who renders performance under an agreement that is illegal or otherwise unenforceable for reasons of public policy may obtain restitution from the recipient . . . .").

195. *See, e.g.*, VA. CODE ANN. § 18.2-346 (2023) (making it a crime for any person to commit a sexual act in exchange for money or its equivalent).

196. *See supra* note 88 and accompanying text.

Would restitution frustrate or negate the policy of the criminal statute that forbids the sale of sexual services? A strong argument against her recovery is that the plaintiff's sale of her sexual services is the exact conduct the criminal statute forbids.[197] Her violation of the criminal statute is central to her restitution claim. Sale of sexual services in breach of the criminal statute may also be conduct the court may consider a reason for her equitable disqualification, "unclean hands," if you will.[198]

The argument for her recovery is also strong. The defendant's benefit is the one he bargained for and agreed to pay for.[199] Considering her risks, the sex worker's payment is almost always inherently unequal and unfair.[200] Sex for money is usually a minor crime.[201] There are cogent arguments for repeal of the criminal statutes—so far, however, they have been unsuccessful in the United States, except for Maine.[202] Sex work is legal in many other countries.[203] Criminal statutes and

197. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 32 cmt. c, illus. 5 (AM. L. INST. 2011) (illustrating that restitution will be denied if a landowner hires an engineer to drain a marsh in violation of a statute protecting wetlands and then refuses to pay because restitution would award compensation for precisely the act that the legislature is attempting to suppress).

198. *See id.* § 32(3) cmt. b ("A court may deny restitution . . . if the court concludes that the claimant's inequitable conduct in the matter under consideration precludes the assertion of a claim based on unjust enrichment."); *id.* § 63 ("Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability.").

199. *See* Jassmine Girgis, *Can the Failure to Pay for Sexual Services Form the Basis of a Contractual Claim?*, ABLAWG (Aug. 29, 2023), https://perma.cc/J88C-V5N9 (arguing that finding an illegal contract unenforceable on the grounds of illegality would permit the defendant-buyer who unjustly enriched himself and gained a benefit to use the law to protect his own illegal conduct).

200. *See id.* (stating that sex workers do not typically occupy strong bargaining positions and that many of them are forced into the trade due to the effects of social determinants, structural violence, or as a means of survival).

201. *See, e.g.*, VA CODE ANN. § 18.2–346.01 (2023) (engaging in prostitution is a class one misdemeanor).

202. *See supra* notes 171–174 and accompanying text.

203. *See List of Countries Where Prostitution Is Legal 2023*, INT'L UNION SEX WORKERS (Oct. 2, 2023), https://perma.cc/9W6P-E4JM (listing countries

criminal enforcement have been unsuccessful in suppressing the sex trade, a fact expressed by the phrase naming sex work as the "world's oldest profession."[204] A 2021 book by a high-end call girl examines her experience in the sex-work trade but seems indifferent to criminal statutes and law enforcement.[205]

With cogent and persuasive arguments on both sides, judicial discretion might favor either side. Considering the unjust benefit on the one side and the arguments against and for restitution on the other, a court might decide the close call on the side of granting restitution.

In a Nordic model jurisdiction where selling sexual services is legal, but buying them is illegal, suppose a buyer, when sued, interposes his illegal conduct as a defense to the seller's claim. This returns to the unjust enrichment that Lord Mansfield feared in *Holman v. Johnson*: a credit "buyer" argues his own illegal conduct to avoid paying.[206] A court following a modern Nordic approach would be likely to grant the plaintiff's demand for restitution, which was the result in a Canadian decision in Nova Scotia.[207]

Restitution for a plaintiff's services is called quantum meruit.[208] A plaintiff's complaint that seeks to recover for

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where prostitution is legal as of 2023, including Germany, Mexico, India, and New Zealand).

204. May-Len Skilbrei & Charlotta Holmström, *Is There a Nordic Prostitution Regime?*, 40 CRIME & JUST. 479, 490 (2011); *see* Scott W. Stern, *Moral Nuisance Abatement Statutes*, 117 NW. U. L. REV. 613, 651 (2022) (explaining that red-light abatement statutes close brothels and move prostitution's action to the streets and hotels); Dan Rosenzweig-Ziff, *'High-End Brothel' Serving Politicians and Executives Busted, Feds Say*, WASH. POST (Nov. 8, 2023), https://perma.cc/79DT-C4KA (reporting that three people were arrested in connection with operating high-end brothels in Virginia and the Boston area that served elite clientele, such as elected officials, military officers, government contractors, and others).

205. *See generally* ROUX, *supra* note 141.

206. *See* (1775) 98 Eng. Rep. 1120, 1121; 1 Cowp. 341, 344 (KB); *see also supra* notes 9–13 and accompanying text.

207. *See* Sheehan v. Samuelson, [2023] NSSM 27, para. 57 (Can. N.S.) (deciding a case where a Canadian sex worker in Nova Scotia, a Nordic jurisdiction, sued and recovered in both contract and restitution for her unpaid fee).

208. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31 cmt. e (AM. L. INST. 2011) ("A plaintiff who seeks a recovery 'in quantum meruit' usually asserts that the defendant is obligated to pay a reasonable price for specified services rendered."); DOBBS & ROBERTS, *supra* note 119,

quantum meruit alleges that the defendant must pay a "reasonable price" for services she rendered to him at his request.[209] One difficulty for this plaintiff, which runs throughout this Article, is how to measure the "reasonable value" of her sexual services.

In the United States, quantum meruit is legal restitution with a jury trial if demanded.[210] The Restatement's measurement rule for quantum meruit is "a reasonable price, usually the lesser of (i) market value and (ii) a price the defendant has expressed a willingness to pay."[211] It suggests that the plaintiff "can point to a prevailing standard of compensation for the services in question. That standard might consist of an hourly wage, a percentage commission, or a 'going rate' that takes some other form."[212] In personal injury and wrongful death actions, courts measure the victim's spouse's consortium, which comprises services, society, and sex.[213] The plaintiff might also adduce opinion evidence from an expert witness.[214] It may be unwise, it seems to me, for the court to award the plaintiff the price in the agreement because that rate

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§ 4.2(2) ("A recovery on quantum meruit usually appears to mean a recovery for the value of the services, measuring value in the labor market where the services itself was sought by defendant.").

209. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31 cmt. e (AM. L. INST. 2011).

210. *See* Campbell v. Tenn. Valley Auth., 421 F.2d 293, 295 (5th Cir. 1969) (determining whether the jury instruction was correct when it said that a person is entitled to recover, under a quantum meruit theory, the fair market value of the goods or services they provided); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. c (AM. L. INST. 2011) (highlighting that the false premise that a claim in restitution or unjust enrichment is by its nature equitable rather than legal can lead courts to mischaracterize the law of restitution and unjust enrichment, and wrongfully conclude that there is automatically no right to a jury trial).

211. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31 cmt. e (AM. L. INST. 2011).

212. *Id.*

213. *See supra* notes 124–125 and accompanying text.

214. *See, e.g.*, Hynansky v. 1492 Hosp. Grp., Inc., No. 06C-03-200, 2007 WL 2319191, at *1 (Del. Super. Ct. Aug. 25, 2007) ("Quantum meruit is to be established by way of opinion testimony by expert witnesses in the same field of endeavor as Plaintiff, in response to hypothetical questions based on the facts of the case, as to the worth of the services rendered to Defendants [by the Plaintiff].").

could validate an agreement that the law condemns as an illegal contract.

Our next topic is agreements for marijuana.

III. MARIJUANA

Marijuana, also cannabis, is a psychoactive drug used for recreational and medicinal purposes. Mental and physical effects vary.[215] Under federal law, the Controlled Substances Act[216] ("CSA"), possession or use of marijuana, a Schedule I controlled substance, is a criminal offence.[217] Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits.[218]

Possession, cultivation, and use of marijuana was a crime in all states for most of the twentieth century, but the unmistakable trend favors its legalization. At the time of this writing, the Spring of 2024, in conflict with the federal criminal statutes that ban it, twenty-four states recognize that

215. *See Cannabis (Marijuana) DrugFacts*, NAT'L INST. ON DRUG ABUSE (Dec. 24, 2019), https://perma.cc/P9QT-8X5Z (stating that effects of using marijuana can include nausea, increased heart rate, breathing problems, changes in mood, impaired memory, hallucinations, psychosis, and more).

216. 21 U.S.C. §§ 801–971.

217. *See id.* § 812(c), sched. I(c)(10) (listing marijuana as a Schedule I controlled substance). When preparation of this Article was in final stages, the DEA began the process to reschedule cannabis from Schedule I to Schedule III. *See* Stanley Jutkowitz & Susan Ryan, *Breaking News: DEA to Reschedule Cannabis*, SEYFARTH: THE BLUNT TRUTH (Apr. 30, 2024), https://perma.cc/5MFV-PVWJ. This move would not legalize cannabis. *See id.* Final rescheduling will follow review by the Office of Management and Budget and a public-comment period. *See id.*

> Re-scheduling, although much closer than it was yesterday, is still a ways off. A rule would be published and go into effect. Given the controversy surrounding both the rescheduling and legalization of marijuana, we would not be surprised if there is litigation that seeks to stop the rescheduling from going into effect.

218. U.S. CONST. art. VI, cl. 2.

recreational marijuana is legal[219] and thirty-eight states recognize that medicinal marijuana is legal.[220]

The law differs horizontally between states that allow and states that ban marijuana. We do not have anything on choice of law between two states for a marijuana-related contract.[221] Our principal subject is the law that differs vertically between states that allow marijuana and the federal government that bans it. It is in this environment of mixed legality-illegality that this Part examines the way illegality doctrines affect private agreements or contracts that affect marijuana. In addition to the public law-private law interplay, the marijuana-related contracts test federalism principles between the state and federal systems. The differences between criminal prostitution and marijuana lead to differing conclusions and developments—in particular, because marijuana is legal in some states, contract remedies and restitution are more likely in those states.

A. *Contract and Restitution Remedies for Marijuana Businesses*

Marijuana businesses' contracts in states where marijuana is legal have generated most of the decisions. Some idea of the

219. Ohio became the twenty-fourth state to legalize cannabis for adult use by referendum on November 7, 2023. *See* Mona Zhang, *Ohio Becomes 24th State to Embrace Weed Legalization*, POLITICO (Nov. 7, 2023), https://perma.cc/5264-SNWS.

220. *State Medical Cannabis Laws*, NAT'L CONF. STATE LEGISLATURES, https://perma.cc/T2T5-DZB9 (last updated June 22, 2023); *see* Athena Chapekis & Sono Shah, *Most Americans Now Live in a Legal Marijuana State—and Most Have at Least One Dispensary in Their County*, PEW RSCH. CTR. (Feb. 29, 2024), https://perma.cc/X6DW-JRQM ("Since Colorado and Washington became the first states to pass legislation in 2012, there are now 24 states (plus the District of Columbia) that have legalized the recreational use of marijuana as of February 2024. Another 14 states allow the drug for medical use only.").

221. *See generally* John F. Coyle et al., *Choice of Law in the American Courts in 2022: Thirty-Sixth Annual Survey*, 71 AM. J. COMPAR. L. 251 (2023). An important decision on illegality between two jurisdictions is *Wong v. Tenneco*, 702 P.2d 570 (Cal. 1985). The court dealt with a lawsuit based on land ownership that was illegal under Mexican law, but legal under California law. *Id.* at 575. The court applied the doctrine of comity to accept the Mexican illegality and held that a California court should reject a contract that violated Mexican law. *Id.* at 575–78.

legal marijuana businesses' legal problems from federal illegality will set the stage for their agreements or contracts.

Federal bankruptcy is not available.[222] In *In re Arenas*,[223] the bankruptcy court dismissed the case for cause.[224] The debtors produced and distributed marijuana lawfully under Colorado state law.[225] However, the court held that the bankruptcy trustee could not take control of the debtors' property or liquidate the inventory of marijuana plants without himself violating the federal Controlled Substances Act.[226] The court and the trustee could not be involved in the debtors' criminal violation.[227] The impossibility of lawfully administering the debtors' bankruptcy estate constituted cause for its dismissal.[228] The Bankruptcy Appellate Panel agreed: "Can a debtor in the marijuana business obtain relief in the federal bankruptcy court? No."[229]

In *In re Rent-Rite Super Kegs West Ltd.*,[230] the debtor-in-possession was a landlord who received approximately 25 percent of its revenue from a marijuana operation.[231] The bankruptcy court found that its renting to the marijuana operation exposed the debtor to risks of criminal liability and forfeiture of the real property.[232] Because of these risks, the bankruptcy court held that the debtor's lease constituted "gross mismanagement of the estate" and was cause to dismiss under 11 U.S.C. § 1112(b)(4)(B).[233]

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222. *But see In re* The Hacienda Co., 647 B.R. 748, 756 (Bankr. C.D. Cal. 2023) (denying a motion to dismiss arguing that a violation of criminal law requires dismissal and asserting that the bankruptcy court has discretion to determine whether a debtor's collection of cannabis profits and any past or future investment in cannabis enterprises warrants dismissal).

223. 514 B.R. 887 (Bankr. D. Colo. 2014).

224. *Id.* at 895.

225. *See id.* at 889.

226. *See id.*

227. *Id.* at 891.

228. *Id.* at 892.

229. *In re* Arenas, 535 B.R. 845, 847 (B.A.P. 10th Cir. 2015).

230. 484 B.R. 799 (Bankr. D. Colo. 2012).

231. *Id.* at 802.

232. *Id.* at 805–06.

233. *Id.* at 809.

In *In re Great Lakes Cultivation, LCC*[234] a medical marijuana facility that grew and sold medical marijuana filed for bankruptcy after all its marijuana plants died.[235] On appeal from the bankruptcy court's dismissal, the district court wrote: "Numerous courts recognize that 'cause' to dismiss exists when a failure to dismiss would require the trustee to administer assets that are used for, or generated by, a business prohibited under the CSA."[236] It affirmed the bankruptcy court's dismissal.[237]

The insolvent marijuana business's options are an assignment for the benefit of creditors, state court receivership, or liquidation without court supervision.[238]

Causes of action under the federal Racketeer Influenced and Corrupt Organizations Act[239] ("RICO") is not available to a marijuana business.[240]

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234. No. 21-12775, 2022 WL 3569586 (E.D. Mich. Aug. 18, 2022).

235. *Id.* at *3.

236. *Id.* at *5 (citation omitted).

237. *Id.* at *8; *see also In re* Burton, 610 B.R. 633, 637–38 (B.A.P. 9th Cir. 2020) (noting that, although "the mere presence of marijuana near a bankruptcy case does not automatically prohibit a debtor from bankruptcy relief[,] . . . [s]everal courts have held that a case must be dismissed if its continuation would require the court, trustee, or debtor . . . to administer assets that are illegal under the CSA").

238. *See* Ryan C. Griffith, *Cannabis Receiverships: The Alternative for State Legal Cannabis Businesses Seeking Financial Rehabilitation Locked Out of Bankruptcy Court by the Controlled Substances Act*, 45 SEATTLE U. L. REV. 1107, 1111 (2022) (discussing how cannabis businesses suffer from being unable to utilize federal bankruptcy and exploring state law receiverships as an alternative remedy to help cannabis businesses survive financial crisis); Edward S. Adams, *When Cannabis Businesses Fail: Assignment for the Benefit of Creditors as an Alternative to Bankruptcy*, 22 UTAH L. REV. 967, 969 (2022) (sharing how a lesser-known, state-level substitute for federal bankruptcy called an "assignment for the benefit of creditors" can serve as a reasonable alternative).

239. 18 U.S.C. §§ 1961–1968.

240. *See* Shulman v. Kaplan, 58 F.4th 404, 407 (9th Cir. 2023) (holding that a business that is actively engaged in the cultivation of and commerce in cannabis does not have statutory standing to bring claims arising pursuant to RICO); Sensoria, LLC v. Kaweske, 548 F. Supp. 3d 1011, 1030 (D. Colo. 2021) ("RICO provides no redress for injury to a property interest that is contrary to public policy or the law. The businesses or property interests Sensoria seeks to vindicate are in a business that would grow, process, and sell marijuana. . . . [Which is,] an illegal business." (citation omitted)).

Possessing a gun as a marijuana user, either for medical or recreational purposes, is a federal crime.[241] The proprietor of a legal marijuana business, who relies on cash because she cannot use a bank, and is a marijuana user, is forbidden from keeping a firearm to protect her business from a robber.

A marijuana business's ability to utilize federal intellectual property is uneven. Federal trademark registration is not available to a cannabis company: only goods sold lawfully in commerce may become registered trademarks.[242] The Patent and Trademark Office will, however, grant patent protection for a product or process even if it is directed to illegal goods or services.[243] If, finally, copyright protection was not available for

241. 18 U.S.C. §§ 922(g), (h)(1). Courts have found that the statute violates the Second Amendment. *See* United States v. Daniels, 77 F.4th 337, 355 (5th Cir. 2023) (ruling a § 922(g)(3) conviction was inconsistent with our "history and tradition" of gun regulation and violated the Second Amendment because the government did not show that Daniel's marijuana use made him more likely to engage in armed conflict or that he had a history of drug-related violence); United States v. Forbis, No. 23-CR-133, 2023 WL 5971142, at *3 (N.D. Okla. Aug. 17, 2023) (finding that the Second Amendment "presumptively protect[ed] Mr. Forbis's conduct" and shifted the burden to the government to justify the § 922(g)(1) conviction for possessing methamphetamine by demonstrating that it was consistent with the United States' history and tradition of firearm regulation, which it failed to do); United States v. Connelly, No. 22-CR-229(2), 2023 WL 2806324, at *12 (W.D. Tex. Apr. 6, 2023) (concluding that § 922(g)(3) is not consistent with the United States' historical tradition of firearm regulations because it lumps all marijuana users together and labels them as "dangerous lunatics" even though they might not be dangerous); *see also* Serge F. Kovaleski, *Federal Law Requires a Choice: Marijuana or a Gun?*, N.Y. TIMES (Nov. 29, 2023), https://perma.cc/UN64-YZP7 ("But even as a growing number of states have legalized marijuana, either for recreational or medical use, participating in a state's medical marijuana system remains a barrier to gun ownership.").

242. *See* Viva R. Moffat et al., *Cannabis, Consumers and the Trademark Laundering Trap*, 63 WM. & MARY L. REV. 1939, 1943 (2022) ("The 'lawful use' doctrine prohibits the registration of marks in connection with illegal goods, and the doctrine has been deployed by the United States Patent and Trademark Office (PTO) to preclude registration of trademarks for marijuana products, notwithstanding the legality of the applicant's business under state law."); *In re* Nat'l Concessions Grp., Inc., 2023 WL 3244416, at *21 (T.T.A.B. 2023) (denying federal registration of the applicant's marks because they constitute drug paraphernalia under the CSA).

243. *See* Gene Pool Techs., Inc., v. Coastal Harvest, LLC, No. 21-CV-01328, 2023 WL 5944139, at *1 (C.D. Cal. Feb. 7, 2022) (granting a stipulated protective order in litigation concerning patent infringement of marijuana and hemp products).

illegal subjects, a flourishing murder-mystery industry would disappear.[244]

B. *Legalization of Marijuana*

The "War on Drugs," which criminal statutes that prohibit marijuana were a principal part of, fell more heavily on Black and other minority people.[245] Opponents of the criminal statutes emphasize the racial basis of the Lost War and the harm that it caused; they argue for legalizing marijuana, expunging marijuana convictions, and treatment instead of punishment.[246]

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244. In a recently filed California case, an ingenious plaintiff has attempted to overcome these drawbacks by combining a state trademark registration with a federal copyright registration. *See* Complaint at 6–16, Holding Co. v. Pac. W. Distribs., No. 24-cv-00986 (C.D. Cal. Feb. 5, 2024); *see also* Brian Michaelis, *Whoa! Cannabis Company Lawsuit Lights Up the Benefits of Creative IP Protection*, SEYFARTH: THE BLUNT TRUTH (Mar. 6, 2024), https://perma.cc/UH4W-5SC3 ("[A] combination of federal copyright registration and state trademark registration for [cannabis related] goods and services may provide an opportunity for cannabis companies to protect the substantial investments made in their brands and offerings.").

245. *See* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks*", 6 J. GENDER RACE & JUST. 381, 381–82 (2002) (arguing that the War of Drugs had a disproportionate impact on African Americans and resulted in more African American men being incarcerated at a rate that is almost eight times higher than that for White males).

246. *See* JESSE PLAKSA, DRUG ENF'T & POL'Y CTR., GETTING RID OF THE "SCARLET-M": THE HARMS OF THE WAR ON MARIJUANA AND WHY SOCIAL EQUITY SHOULD BE INCORPORATED INTO MARIJUANA REFORM 2 (2022), https://perma.cc/EQ4L-QF39 (PDF) ("For Marijuana legalization and reform to even begin undoing the harms of the war on marijuana, social equity components, such as community reinvestment for those harmed and automatic expungements, must also be enacted."); andré douglas pond cummings & Steven A. Ramirez, *Roadmap for Anti-Racism: First Unwind the War on Drugs Now*, 96 TUL. L. REV. 469, 474–75 (2022) (calling for the federal government to completely end drug policing and to focus its efforts on repairing the harm its War on Drug policies have had on communities of color across the nation); Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 653–57 (2021) (offering ways in which our criminal legal system must change in order to move away from the racist War on Drugs policies and rebuild our legal system with an antiracist legal structure); Simeon Spencer, *Redressing America's Racist Cannabis Laws: Voters and Policymakers are Key to Enacting Change*, LEGAL DEF. FUND (Aug. 4, 2022), https://perma.cc/6UBE-YVHV (arguing that record expungement is critical to reforming the criminal justice system's treatment of drug crimes); India I. Thusi, *The Racialized History of Vice Policing: Toward an Abolitionist Future*, 69 UCLA L. REV. 1576, 1683–95

Beginning with California in 1996, states legalized medical marijuana.[247] Legalization of recreational use began in Colorado and Washington state in 2012.[248] Thirty-eight states have legalized medical marijuana, twenty-four states have legalized recreational marijuana by either citizen referendum or legislation.[249] Virginia, my home state, usually waits fifty or more years to let others try out any novel innovations; however, in 2021, it became the eighteenth state to legalize recreational marijuana.[250] Marijuana legalization is successful because of its popular support: about 68 percent of adults support legalization according to a Gallup survey in 2021.[251]

Federal legislation to legalize marijuana is, however, stuck.[252] Generally, Democrats favor, but Republicans oppose, legalization.[253] With divided government and one chamber of Congress controlled by each party, Democrats introduce legalizing bills in their chamber with great ballyhoo knowing

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(2023) (evaluating the policing of vice crimes, such as drug consumption, through an abolitionist framework).

247. Adams, *supra* note 238, at 970.

248. *Id.* at 971.

249. Ohio became the twenty-fourth state to legalize cannabis for adult use by referendum on November 10, 2023. *Id.*; *State-by-State Recreational Marijuana Laws*, PROCON, https://perma.cc/L2UB-76B6 (last updated Nov. 8, 2023).

250. *See* Adams, *supra* note 238, at 972. Virginia has a divided government with a Republican governor and Democratic majorities in the General Assembly. *See* Michael Pope, *Could State Lawmakers Finally Implement a Marijuana Marketplace?*, WVTF (Dec. 1, 2023), https://perma.cc/6M2X-9A69. Virginia's legalized marijuana has no legal retail markets. *See id.* Virginia Governor Glenn Youngkin (R) vetoed legislation in 2024 that would have set up a retail market in the state. *See* Tony Lange, *Virginia Governor Vetoes Adult-Use Cannabis Sales Bill*, CANNABIS BUS. TIMES (Apr. 1, 2024), https://perma.cc/SQL6-PCRJ.

251. *Support for Legal Marijuana Holds at Record High of 68%*, GALLUP (Nov. 4, 2021), https://perma.cc/WS9T-H8LZ.

252. *See* Jonathan Weisman, *House Votes to Decriminalize Cannabis*, N.Y. TIMES (Apr. 1, 2022), https://perma.cc/Y3WZ-MQZS (noting that historical attempts to enact federal legislation have failed and the most recent attempt is unlikely to succeed).

253. *See id.* (explaining the Democratic party sponsored the federal marijuana legalization bill based on economic growth and racial justice, while Republicans opposed the bill noting concerns of exposure to children and mental health issues).

that the legislation will be dead on arrival in the Republican-controlled chamber.[254]

Justice Thomas wrote that the federal government's "half-in half-out regime" of forbidding marijuana interferes with the states' core police powers under basic federalism principles that allow states to develop and administer their own criminal laws.[255] "A prohibition on intrastate use or cultivation of marijuana may no longer be necessary or proper to support the Federal Government's piecemeal approach," he wrote.[256]

Reasoned opposition and skepticism about legalizing recreational marijuana continues.[257] Public health professor and columnist Dr. Leana Wen articulated an unfavorable but nuanced position in *The Washington Post*: "[A]s science uncovers more and more about the harms of cannabis, we need a sustained education campaign about its dangers," she began.[258] "Our societal perception must shift from the extremes of condemning or championing marijuana to treating it like tobacco and alcohol—legal substances that should be carefully regulated, including with clear warnings about their potential for serious and lasting harm."[259]

The rapidly growing and lucrative new marijuana business opportunities have attracted entrepreneurs. Legal sales of

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254. *See id.*

255. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2237 (2021).

256. *Id.* at 2238.

257. *See* Ross Douthat, *Legalizing Marijuana Is a Big Mistake*, N.Y. TIMES (May 17, 2023), https://perma.cc/RZ8U-U89D (identifying several broad downside risks of legalized recreational use); *see also* Anthony Faiola & Catarina Fernandes Martins, *Once Hailed for Decriminalizing Drugs, Portugal Is Now Having Doubts*, WASH. POST (July 7, 2023), https://perma.cc/CD9R-7YEQ ("Portugal decriminalized all drug use, including marijuana, cocaine and heroin, in an experiment that inspired similar efforts elsewhere, but now police are blaming a spike in the number of people who use drugs for a rise in crime.").

258. Leana S. Wen, *We Should Not Be Celebrating Marijuana Use*, WASH. POST (Apr. 25, 2023), https://perma.cc/6V8Z-GK4V.

259. *Id.*; *see also* NAT'L INST. ON DRUG ABUSE, CANNABIS (MARIJUANA) RESEARCH REPORT: WHAT ARE MARIJUANA'S LONG-TERM EFFECTS ON THE BRAIN? (2020), https://perma.cc/7LCM-DBAU (identifying long term cognitive effects that users may develop); Julie Wernau, *More Teens Who Use Marijuana Are Suffering from Psychosis*, WALL ST. J. (Jan. 10, 2024), https://perma.cc/DV6Q-AYD6 ("More frequent use of marijuana that is many times as potent as strains common three decades ago is leading to more psychotic episodes . . . .").

marijuana exceed $30 billion.[260] New marijuana enterprises in untried regulatory systems are located in states in the shadow of federal illegality and may be next door to another state or states that retain criminal statutes that forbid marijuana.[261]

Inconsistent regimes confuse and frustrate marijuana businesses. Businesses that deal legally in marijuana under state law may subtract only the cost of goods sold from their federal taxable income; they may not deduct other ordinary and necessary business expenses.[262] Banks refuse to accept deposits of money from legal sales of marijuana; legal marijuana businesses must operate entirely with cash.[263]

Employees of cannabis businesses were permitted to bring claims under the federal Fair Labor Standards Act.[264] The courts are divided on whether an injured worker who is receiving workers' compensation may be reimbursed for medical marijuana to treat her work-related injuries.[265] In one instance, a privately insured plaintiff sued his insurance company for future medical expenses for medical marijuana; the court

260. Adams, *supra* note 238, at 968.

261. *See* Alex Malyshev & Sarah Ganley, *Federal-State Divide on Cannabis Still Makes for Risky Business*, REUTERS (June 16, 2021), https://perma.cc/KFJ4-EVSD (noting marijuana companies must navigate unique handicaps against the backdrop of federal illegality and "each state must be siloed" to prevent any marijuana from entering into a state where it is illegal under state law).

262. *See* 26 U.S.C. § 280E (prohibiting any federal "deduction or credit" if the business "consists of trafficking in controlled substances" as defined by federal law, which marijuana, as a Schedule I drug, is).

263. *See Standing Akimbo, LLC*, 141 S. Ct. at 2238 (describing how federal law prohibits banks from accepting deposits that are tied to federally illegal activities).

264. 29 U.S.C. §§ 201–219; s*ee id.* § 218c(b); Kenney v. Helix TCS, Inc., 939 F.3d 1106, 1112 (10th Cir. 2019) ("[J]ust because an employer is violating one federal law, does not give it license to violate another." (quoting Greenwood v. Green Leaf Lab LLC, No. 17-cv-00415, 2017 WL 3391671, at *3 (D. Or. July 13, 2017))).

265. *Compare* Musta v. Mendota Heights Dental Servs., 965 N.W.2d 312, 327 (Minn. 2020) (holding "no," that workers receiving workers' compensation may not be reimbursed by their worker's compensation insurance for medical marijuana), *with* Fegley v. Firestone Tire & Rubber, 291 A.3d 940, 954 (Pa. Commw. Ct. 2023) (holding "yes," that workers receiving workers' compensation may be reimbursed by their worker's compensation insurance for medical marijuana).

declined his request because it said that requiring payment would violate federal law.[266]

However, since 2015, following the passage of the Rohrabacher amendment, the Department of Justice is prohibited from spending funds to prevent states "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[267] In 2021, President Biden's nominee for United States Attorney General, Merrick Garland, responded to questions by Senator Cory Booker that, under his leadership, the Department of Justice would not pursue cases against Americans "complying with the laws in states that have legalized and are effectively regulating marijuana."[268]

In 2022, President Biden pardoned about 6,500 people who had been convicted on federal charges of simple possession of marijuana.[269] He further ordered a review of whether marijuana should continue to be a Schedule 1 drug.[270] Scholars have noted a remarkable decline in the number of federal marijuana sentences imposed over the last decade.[271]

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266. *See* Hemphill v. Liberty Mut. Ins. Co., No. Civ. 10-861, 2013 WL 12123984, at *2 (D.N.M. Mar. 28, 2013) (explaining that the court cannot compel payment of medical marijuana expenses due to federal illegality).

267. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138; *see* United States v. Bilodeau, 24 F.4th 705, 714 (1st Cir. 2022), *cert. denied*, 142 S. Ct. 2875 (2022) (explaining that, although the Department of Justice may not prevent states from adopting medical marijuana laws, medical marijuana patients with valid documents receive no protection for "blatantly illegitimate activity"); *see also* United States v. McIntosh, 833 F.3d 1163, 1168, 1175–77 (9th Cir. 2016) (reasoning that a person "who engaged in conduct permitted by the State Medical Marijuana Laws and fully complied with such laws" cannot be prosecuted by the Department of Justice).

268. *Confirmation Hearing on the Nomination of Hon. Merrick Brian Garland to Be Attorney General of the United States: Hearing Before the Subcomm. on the Judiciary*, 107th Cong. 400 (2021).

269. Michael D. Shear & Zolan Kanno-Youngs, *Biden Pardons Thousands Convicted of Marijuana Possession Under Federal Law*, N.Y. TIMES (Oct. 6, 2022), https://perma.cc/4KQT-5VJ7.

270. *See id.* Newly disclosed documents show that scientists recommended that "the Drug Enforcement Administration make marijuana a Schedule III drug, alongside the likes of ketamine and testosterone, which are available by prescription." Christina Jewett & Noah Weiland, *Federal Scientists Recommend Easing Restrictions on Marijuana*, N.Y. TIMES (Jan. 12, 2024), https://perma.cc/U94B-PS29.

271. *See, e.g.*, Douglas A. Berman & Alex Fraga, *How State Reforms Have Mellowed Federal Enforcement of Marijuana Prohibition*, 49 FORDHAM URB.

Advice about legal matters is imperative in this conflicting and rapidly evolving legal environment. However, in June 2021, the Supreme Court of Georgia rejected an amendment to the Georgia Rules of Professional Conduct proposed by the State Bar of Georgia; the court said that Georgia lawyers were forbidden "from counseling and assisting clients" in Georgia's newly-legal medical marijuana-cannabis industry because marijuana was illegal under federal law.[272]

Georgia's position appears to be a minority.[273] The New York State Bar Association's ethics opinion says that lawyers may provide legal services to clients in compliance with the state's new recreational marijuana law.[274]

In this unstable legal environment, legalized marijuana is a growth area for lawyers.[275] The Practicing Law Institute has published a legal guide to the marijuana business.[276] The law firm of Seyfarth Shaw publishes a weekly client newsletter

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L.J. 675, 685 (2022) (identifying a "considerable and steady drop in the number of sentenced federal marijuana defendants and marijuana cases").

272. SUP. CT. GA., IN RE: MOTION TO AMEND 2021-3, at 1–2 (2021), https://perma.cc/776K-8MF9 (PDF); *see also* OFF. GEN. COUNS., STATE BAR GA., 2021 REPORT OF THE OFFICE OF THE GENERAL COUNSEL 13 (2021), https://perma.cc/SRX2-2EXY (PDF) (reviewing the Supreme Court of Georgia's refusal to amend the rules of professional conduct and allow lawyers to "invest[] or accept[] ownership interest" in a company that manufactures, distributes, or sells cannabis plants because it constitutes a federal, although not a state, crime).

273. *See* Richard De Palma et al., *Lawyers Beware: NY and GA Issue Conflicting Ethics Decisions on Representing Cannabis Clients*, L. FOR LAWS. TODAY (July 29, 2021), https://perma.cc/2MS8-ZGL6 ("While Georgia's position appears to be in the minority, [New York's] opposing opinion[] demonstrate[s] the cannabis balancing act that state ethics authorities have tried to perform.").

274. *See* N.Y. STATE BAR ASS'N COMM. ON PRO. ETHICS, OPINION 1225 ¶ 14 (2021), https://perma.cc/9ZVC-F5HL (PDF); *see also* Amanda Robert, *Ethics Opinion Gives NY Attorneys Green Light to Advise on, Partake in Cannabis*, AM. BAR ASS'N J. (July 12, 2021), https://perma.cc/8RXL-CZJG.

275. *See* Zack Nauth, *Lawyers Are Lighting Up the Budding Cannabis Industry*, AM. BAR ASS'N J. (Dec 1, 2022), https://perma.cc/AGV7-EMDB (identifying the demand for cannabis industry legal services is "strong and still growing, especially in states where cannabis is newly legalized").

276. *See generally* JAMES T. O'REILLY & EDGAR J. ASEBEY, LEGAL GUIDE TO THE BUSINESS OF MARIJUANA: CANNABIS, HEMP AND CBD REGULATION (2023).

online: *The Week in Weed*.[277] At McGeorge School of Law, students may earn a Cannabis Law Certificate.[278]

With the foregoing inconsistency and ambiguity in place and in mind, this Article will turn to courts' responses to businesses' lawsuits with a marijuana component and a defense of illegality. It examines federal "illegality" lawsuits: loans, a sale, insurance claims, and a construction contract.

C. *Businesses' Lawsuits Concerning Marijuana*

The "law" is not very conclusive. Most of the decisions are federal district judges' and magistrates' interlocutory rulings on pretrial motions, not final decisions that one party wins and the other loses. Some of the arguments are farfetched; but the judges are careful and patient, so common sense prevails. Also, while most of the decisions are not reported in the Federal Supplement, they can be found through Westlaw.

The decisions contained two surprises. First, the judges found that the federal government's interest in its criminal marijuana statute has declined because it has been diluted by developments in its administration.[279] Second, this Article examines why courts should eschew a surprising but erroneous and misleading statement of the illegality rule.[280]

This Article poses questions that could structure the judge's discretion around the important issues in contract and restitution lawsuits with a marijuana component and an illegality defense. It claims simplified decisionmaking and better results for its technique, and it examines how its standards, phrased as questions posed above and restated again just below, affect the judges' decisions.[281]

What was the subject matter of the parties' agreement? How extensive was the parties' illegal behavior? Did the principal part of the parties' agreement violate an important

277. *See, e.g.*, Susan Ryan, *The Week in Weed: January 5, 2024*, SEYFARTH: THE BLUNT TRUTH (Jan. 5, 2024), https://perma.cc/62DH-KD4C.

278. *See Certificate in Cannabis Law Offered by McGeorge School of Law*, FASTCASE, https://perma.cc/KHN9-9GJD (last visited Jan. 29, 2024).

279. *See infra* Part III.C.1–2.

280. *See infra* Part III.C.2.

281. See sources cited *supra* notes 78–88, which form the background for the stated questions.

criminal statute? How culpable was the party seeking restitution? Was illegality an important or an incidental part of the parties' agreement? How strong is the policy that supports the illegality? Would approving relief defeat the purpose of the criminal statute's ban? If one person is denied relief, will the second person receive a benefit and the first person suffer a forfeiture? Does the claimant deserve to suffer that large a forfeiture? If the claimant is denied relief, will the other party be unjustly enriched? Will either granting or denying restitution deter the parties' or others' future illegal behavior?

1. Loans

A creditor's lawsuit to collect on a debtor's defaulted note is usually straightforward. Not, however, if marijuana is involved.

In *Mann v. Gullickson*,[282] Mann sold Gullickson two medical-marijuana-related businesses that were legal under California state law, and Mann received a promissory note in return.[283] After Gullickson allegedly defaulted, Mann sued her in state court for the balance due; Gullickson removed the lawsuit to federal court.[284]

Gullickson's motion for summary judgment contended that "the parties' agreement is void *ab initio* because it relates to medical marijuana, which is still a prohibited substance under the federal Controlled Substances Act, even if legal in the states where the Companies operate and the parties' contracts were formed."[285] She argued that she would use income from the marijuana-related businesses to repay Mann and the "relief requested by Mann cannot be granted because it would 'mandate illegal conduct.'"[286]

Magistrate Judge James was required to "navigate the conflict created by the prohibition of medical marijuana under federal law and the legalization [of] medical marijuana under

282. No. 15-cv-03630, 2016 WL 6473215 (N.D. Cal. Nov. 2, 2016).

283. *See id.* at *1 (outlining the business transaction, which included Gullickson's forgiveness of a $10,000 loan held by Mann and a promissory note assuring Gullickson's $400,000 payment to Mann in three installments).

284. *Id.* at *2.

285. *Id.*

286. *Id.* (citation omitted).

California law."[287] She began by discussing the "erosion" of the federal public policy.[288] She cited the Rohrabacher amendments that forbade the federal government from spending any appropriated funds to prosecute someone who was dealing with medical marijuana that was legal under state law.[289]

Judge James quoted the Ninth Circuit Court of Appeals: a court "will not order a party to a contract to perform an act that is in direct violation of a positive law directive, even if that party has agreed, for consideration, to perform that act."[290] There are exceptions. An illegal contract, said the California Supreme Court, "will be enforced in order to 'avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff.'"[291] "The Court," Judge James wrote, "cannot ignore the potential likelihood of a windfall for Gullickson if she is able to dodge the contract at this point."[292] "While the nature of the businesses may indirectly involve medical marijuana," she wrote, "other potentially illicit conduct would be deterred if the agreement was enforced, i.e., nonpayment for services rendered pursuant to a contract."[293]

Judge James denied defendant Gullickson's motion for summary judgment, signaling probable success for plaintiff Mann's claim to collect: "Given the federal government's wavering policy on medical marijuana in states that regulate this substance, and California's expressed policy interest in allowing qualified patients to obtain medical marijuana, the

287. *Id.* at *1.

288. *See id.* at *4 ("[F]ederal policy regarding enforcement of the CSA has been less than clear since 2009.").

289. *Id.* at *5. Today, one would add Attorney General Merrick Garland's disclaimer of federal interest, *see supra* note 268 and accompanying text, and Justice Thomas's statement that the "half-in half-out" federal prohibition of marijuana should become an all-out federal withdrawal from the marijuana regulation field. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2237 (2021); *see also supra* notes 255–256 and accompanying text.

290. *Mann*, 2016 WL 6473215, at *5 (quoting Bassidji v. Goe, 413 F.3d 928, 936 (9th Cir. 2005)).

291. *Id.* at *6 (citation omitted).

292. Mann v. Gullickson, No. 15-cv-03630, 2016 WL 6473215, at *8 (N.D. Cal. Nov. 2, 2016).

293. *Id.* at *9.

purported illegality here is not one the Court finds to mandate non-enforcement of the parties' contract."[294]

Mann v. Gullickson exhibits Lord Mansfield's concern that a nonpaying buyer could claim illegality and receive something for nothing.[295] Like Lord Mansfield, Judge James found that the seller could recover on the contract.[296] Judge James found her way around the apparent rule that forbids a judge from ordering a party "to perform an act that is in direct violation of a positive law directive."[297] This Article returns to that below.

Mann v. Gullickson was decided through two of this Article's inquiries: the illegality was not serious and, if it succeeded, the illegality claim would result in plaintiff's forfeiture and defendant's windfall.[298] Judge James adroitly undermined the federal interest in its criminal marijuana statute,[299] cited the policy of avoiding unjust enrichment,[300] and appeared to foreshadow a judgment for plaintiff on its contract and note.[301]

This Article's second loan decision, *Bart Street III v. ACC Enterprises, LLC*,[302] also illustrates Lord Mansfield's concern about a debtor who claims its own illegality to avoid paying its

294. *Id.*

295. *See id.* (weighing that enforcement based on illegality would permit parties to avoid complete payment); *supra* notes 10–12 and accompanying text.

296. *See Mann*, 2016 WL 6473215, at *9 (ruling that Gullickson is not excused from payments owed in the contract).

297. *Id.* at *5.

298. *See id.* at *7 (investigating "[n]uanced approaches to the illegal contract defense taking into account such considerations as the avoidance of *windfalls* or forfeitures, deterrence of illegal conduct, and *relative moral culpability*" (emphasis added) (citation omitted)).

299. *See id.* at *4 (observing that "federal policy regarding enforcement" of the Controlled Substances Act has been "less than clear since 2009").

300. *See id.* at *6 ("In compelling cases, illegal contracts will be enforced in order to 'avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff.'" (citation omitted)).

301. *See id.* at *7 (observing the case law demonstrates that "even where contracts concern illegal objects, where it is possible for a court to enforce a contract in a way that does not require illegal conduct, the court is not barred from according such relief").

302. No. 17-CV-00083, 2018 WL 4682318 (D. Nev. Sept. 27, 2018).

debts.[303] Bart sued ACC on two promissory notes.[304] ACC argued illegality, rooted in its involvement in a cannabis cultivation business, and moved to dismiss Bart's complaint for failure to state a claim.[305]

Judge Navarro stated the rules against illegal agreements and an exception: "Nevada law allows courts to sever the illegal portions from those that are legal, and then enforce the legal portions."[306] Two provisions of the promissory notes were found to be unenforceable: one, a right of first refusal and, the other, a requirement that the loan must be used in the marijuana business.[307] But the loan and debt provisions were apparently enforceable.[308] The judge cited the *Mann* case discussed above: "Here, just as in *Mann v. Gullickson*, the potential remedy in this case . . . would not mandate illegal activity. Accordingly, the Court declines to dismiss Plaintiff's claims relating to breach of contract on illegality grounds at this stage."[309] "[I]nsofar as the Court finds that some aspects of the contract are enforceable, Plaintiff has stated a cognizable claim for relief, thereby avoiding dismissal."[310]

Bart Street III v. ACC Enterprises, LLC doesn't move this Article's analytic agenda ahead. The judge doesn't discuss the forfeiture and windfall if the defendant prevailed. Nor is there a signal that the plaintiff wins. Ruling on a defendant's motion to dismiss for failure to state a claim, the judge, hampered by an

303. *See id.* at *4 (observing the defendant's theory of the case is that their alleged breach of not using funds from promissory notes is unenforceable because it was involved with the sale of a cannabis business).

304. *Id.* at *1–2.

305. *Id.* at *3–4.

306. *Id.* at *4.

307. *See id.* at *5 ("[F]rom the face of the Complaint it stands to reason that Plaintiff executed the Promissory Notes with knowledge of Defendants actions in a federally unlawful cannabis business. This means that the Court cannot order any remedy that permits Defendants to directly use Plaintiff's funds for cannabis . . . .").

308. *See id.* ("The First Promissory Note . . . requires Defendants to use certain funds to pay off Defendants' prior lenders . . . . Similarly, the Second Promissory Note requires Defendants to use all the funds to purchase two parcels of land in Pahrump, Nevada.").

309. *Id.* at *6.

310. *Id.* at *5.

inadequate rule structure, only decided what was necessary.[311] The plaintiff creditor's demand for recovery survives for later litigation.[312]

2. Sales

The transition from loans to a sale is smooth because loans often finance sales. *Indian Hills Holdings, LLC v. Frye*[313] deals directly with the illegality rule stated above, that the judge cannot order illegal conduct.[314]

Indian Hills paid Frye, and a company he owned, for some modular cubes, which are used to cultivate, grow, and/or produce marijuana.[315] Frye's company was to buy these cubes from another seller, who ended up rescinding its contract with Frye's company.[316] As a result, Frye's company was unable to deliver the cubes to Indian Hills but refused to refund its payment.[317] Indian Hills sued Frye and his company for fraud, breach of contract, and unjust enrichment.[318] Frye's company defaulted, and the clerk entered a money judgment against it.[319]

Frye, a layman who represented himself, filed a muddled document that Judge Benitez treated as a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim.[320] Frye's argument that the court lacked subject matter jurisdiction seems to be that "because federal district courts will not enforce a contract that violates federal law, Plaintiff lacks an actionable injury, and therefore, lacks standing, divesting

311. *See id.* (declining to dismiss the complaint in its entirety because portions of the promissory notes were found to be unenforceable but deciding whether severance of the unenforceable parts of the promissory notes should be allowed can only be decided at later stages of litigation).

312. *See id.* at *8 (granting defendant's summary judgment in part and denying in part).

313. No. 20-cv-00461, 2021 WL 5994036 (S.D. Cal. Dec. 15, 2021).

314. *See id.* at *7 (stating that Frye argued "that the Court cannot enforce [the agreement] because it is an illegal contract").

315. *Id.* at *1 n.1.

316. *Id.*

317. *Id.*

318. *Id.* at *11, *13.

319. *Id.* at *1.

320. *Id.* at *2.

the Court of its subject matter jurisdiction."[321] A federal district court, however, has subject matter jurisdiction to decide a plaintiff's unsuccessful substantive claim, just as a plaintiff has standing to bring an unsuccessful substantive claim.[322]

Judge Benitez began with a statement of the illegality rule that "courts will not order a party to a contract to perform an act that is in direct violation of a positive law directive."[323] The judge worked through two CSA provisions that qualify federal illegality: 21 U.S.C. § 863(f), which provides that the CSA does not apply to "any person authorized by State . . . law to manufacture, possess, or distribute such items,"[324] and 21 U.S.C. § 841(a), which prohibits the "knowing manufacturing, distribution, possession, or cultivation" of marijuana,[325] but that "the United States Department of Justice 'has declined to enforce . . . when a person or company buys or sells marijuana in accordance with state law.'"[326] Indeed, the Department is forbidden from spending money on such a prosecution.[327] "Thus, these Congressional mandates suggest that enforcing the instant contract would not violate public policy even if they may result in a *prima facie* violation of federal law."[328]

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321. *Id.* at *7.

322. *See id.* at *5 (finding the court did have subject matter jurisdiction).

323. *Id.* (quoting Bassidji v. Goe, 413 F.3d 928, 936 (9th Cir. 2005)). The commanding-illegal-conduct "rule" appears to have originated from language in *Kaiser Steel v. Mullins*, 455 U.S. 72 (1982). *See Kaiser Steel*, 455 U.S. at 79 (evaluating whether the contract in question "could be enforced without commanding unlawful conduct"); *see also* Mann v. Gullickson, No. 15-cv-03630, 2016 WL 6473215, at *7 n.3 (N.D. Cal. Nov. 2, 2016) ("*Kaiser Steel* considered 'the difference between cases in which the courts are asked to order an illegal act and cases in which the relief sought does not seek directly to order illegal activity." (quoting Bassidji v. Goe, 413 F.3d 928, 936 (9th Cir. 2005))).

324. *See* Indian Hills Holdings, LLC v. Frye, No. 20-cv-00461, 2021 WL 5994036, at *8 (S.D. Cal. Dec. 15, 2021).

325. *See also* 21 U.S.C. §§ 802(6), 812(b)–(d) (establishing that a controlled substance includes marijuana).

326. *Indian Hills Holdings, LLC*, 2021 WL 5994036, at *8.

327. *See id.* ("In fact, in 2015, Congress reinforced this arrangement by defunding the Department of Justice's prosecution of the exchange of medical marijuana where it is legal under state law." (internal quotations omitted)).

328. *Id.*

The judge returned to the statement of the illegality rule that forbids a judge from ordering a party to a contract to perform an act that violates the law:

> [B]y providing Plaintiff with the remedy of damages over specific performance, the Court can avoid violating any laws. For example, if the Court awards Plaintiff relief on its unjust enrichment claim, all that occurs is a return of funds paid to Defendants for goods never received. Specific performance, on the other hand, which would require Defendants to provide Plaintiff with the Cubes for which it paid, and which it intended to use for growing marijuana, is not being sought. As a result, a finding that Plaintiff prevails on the unjust enrichment claim would not result in Plaintiff receiving the Cubes and growing marijuana. Rather, the result would be a return of funds paid for goods that were never received.[329]

On a vocabulary note, "a return of funds paid" may not state the money judgment the plaintiff seeks accurately. Similarly, in the statement in *Mann v. Gullickson*—"Mandating that payment does not require Gullickson to possess, cultivate, or distribute marijuana, or to in any other way require her to violate the CSA"—"mandating" defendant's payment is too strong.[330] The money judgments that both plaintiffs seek do not order defendant to pay, but allow the plaintiff to collect.[331]

The ancient adage is: equity acts in personam, the law acts in rem.[332]

> The plaintiff collects a "legal" judgment for money damages impersonally. The judgment winner's usual collection techniques are the writ of execution, garnishment, and the judgment lien. The sheriff satisfies the plaintiff's unpaid money judgment by seizing and selling the defendant's property without, however, involving the defendant

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329. *Id.* at *10.

330. *Mann*, 2016 WL 6473215, at *7.

331. *See, e.g.*, *Indian Hills Holding, LLC*, 2021 WL 5994036, at *10 (observing the court can grant "re-payment of the amounts tendered" without violating the law). A money judgment in the United Kingdom does order the judgment debtor to pay the judgment creditor. *See* SMITH, *supra* note 100, at 51, 61.

332. *See* Wilhelm v. Consol. Oil Corp., 84 F.2d 739, 746 (10th Cir. 1936) ("Equity acts in personam." (citing Hart v. Sansom, 110 U.S. 151, 154 (1884))); DOUG RENDLEMAN & CAPRICE ROBERTS, REMEDIES: CASES AND MATERIALS 299 (9th ed. 2018) (observing the law "acts in rem").

> personally. The law, in traditional vernacular, "acts in rem."[333]

In contrast, the specific performance decree, that the judge mentions, is equitable. The judge orders the defendant "in personam" to perform the contract and, if necessary, the judge enforces the order with contempt.[334] The overstatement of the effect of a money judgment does not, however, appear to affect the result of either case.

Judge Benitez denied defendant Frey's motion to dismiss Indian Hills's contract and unjust enrichment claims, but Frey's fraud claim was dismissed.[335] It is hoped that other courts follow Judge Benitez's reasoning that, while a judgment for money damages will be available because it doesn't order illegal conduct, specific performance of the contract that may order illegal conduct is unlikely to be available.[336]

3. Insurance Claims

The courts' marijuana-insurance-claim decisions conflict. In 2012, the District Court of Hawai'i declined to hold a home insurer liable to pay for its insured's claim for theft of medical marijuana plants which were legal under Hawai'i law:[337] "Plaintiff's possession and cultivation of marijuana, even for State-authorized medical use, clearly violates federal law."[338] The court granted the insurance company's motion for summary judgment.[339]

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333. RENDLEMAN & CAPRICE, *supra* note 332, at 299.

334. *Cf.* DOBBS & ROBERTS, *supra* note 119, § 12.8(1) ("A specific performance decree is a court order compelling defendant to perform the contract.").

335. *See* Indian Hills Holdings, LLC v. Frye, No. 20-cv-00461, 2021 WL 5994036, at *15 (S.D. Cal. Dec. 15, 2021).

336. *See id.* at *10.

337. *See* Tracy v. USAA Cas. Ins. Co., No. 11-00487, 2012 WL 928186, at *13 (D. Haw. Mar. 16, 2012) ("To require Defendant to pay insurance proceeds for the replacement of medical marijuana plants would be contrary to federal law . . . . The Court therefore CONCLUDES that, as a matter of law, Defendant's refusal to pay for Plaintiff's claim for the loss of her medical marijuana plants did not constitute a breach . . . .").

338. *Id.*

339. *Id.*

The result differed in a later lawsuit brought in Colorado. In response to a medical marijuana firm's insurance claim for ruined marijuana plants and equipment, a business legal under state law, the insurance company interposed the defense of illegality, even though it was aware that the insured was in the medical marijuana business when it issued the policy.[340]

In *Green Earth Wellness Center, LLC v. Atain Specialty Insurance Company*,[341] the Colorado District Court, in 2016, declined to follow the Hawai'i case, discussed above, "particularly in light of several additional years evidencing a continued erosion of any clear and consistent federal public policy in this area."[342] The court rejected the insurance company's motion for summary judgment; Green Earth's claims for damages and bad faith were subject to trial.[343] "[T]he Court," the judge wrote, "merely interprets and applies the terms of the Policy."[344] "Any judgment issued by this Court will be recompense to Green Earth based on Atain's failure to honor its contractual promises, not an instruction to Atain to pay for damages to marijuana plants and products."[345] The court declined to void the insurance contract on public policy grounds: "Atain, having entered into the Policy of its own will, knowingly and intelligently, is obligated to comply with its terms or pay damages for having breached it."[346]

Should the insurance company accept premiums from a legal medical marijuana firm and then refuse to pay for marijuana plants and equipment destroyed in a fire? The court's transition from the illegality policy to the insurance contract's terms was based on the "difference between the federal government's de jure and de facto public policies regarding state-regulated medical marijuana."[347] This "de facto public policy" reduced the strength and force of the federal illegality

340. *See* Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co., 163 F. Supp. 3d 821, 834 (D. Colo. 2016).

341. 163 F. Supp. 3d 821 (D. Colo. 2016).

342. *Id.* at 835.

343. *Id.* at 837.

344. *Id.* at 834.

345. *Id.* (internal quotations omitted).

346. *Id*. at 835.

347. *Id*. at 833.

policy and increased the importance of protecting bargained expectations.[348]

4. Construction Contracts

In this Article's construction contract decision, J. Lilly, a licensed marijuana grower, leased a greenhouse, which Clearspan agreed to install.[349] Clearspan's subcontractor failed to correct construction defects that J. Lilly claimed hindered its ability to cultivate cannabis.[350] J. Lilly sued, demanding $5.4 million in lost profits.[351] The court dismissed J. Lilly's complaint after finding that the construction contract included a waiver of consequential damages and lost profits, and that there was insufficient evidence to determine the amount of J. Lilly's lost profits.[352]

The judge, *sua sponte*, ordered the parties to brief and argue another possible reason to dismiss: May a federal court sitting in diversity award lost-profit damages from the cultivation and sale of cannabis?[353]

"In determining whether to enforce a contract," the judge wrote, "courts should consider whether a remedy exists 'that would not require a court to order a legal violation.'"[354] As an alternative holding, the court found that ordering defendants to pay J. Lilly's lost profits would require Clearspan to violate the federal Controlled Substances Act.[355]

As discussed above, paying the money judgment that J. Lilly sought would not have required the defendants to violate the CSA. Judge Hernandez would have been wiser to have followed Judge Benitez's reasoning in *Indian Hills Holdings v. Frye*.

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348. *See id*. at 835 (holding that the difference in federal law and federal enforcement of prohibiting marijuana was grounds for not following *Tracy*).

349. J. Lilly, LLC v. Clearspan Fabric Structures Int'l, Inc., No. 18-CV-01104, 2020 WL 1855190, at *1 (D. Or. Apr. 13, 2020).

350. *Id*. at *2.

351. *Id*.

352. *Id*. at *13.

353. *See id*. at *2.

354. *Id*. at *11 (quoting Mann v. Gullickson, No. 15-CV-03630, 2016 WL 6473215, at *7 (N.D. Cal. Nov. 2, 2016)).

355. *See id*. at *12–13.

CONCLUSION

The criminal law leads us on a twisted road. In Nevada, some brothels are legal, marijuana is legal, but a homeowner can't water her lawn.[356] Serious discussion of repeal of anti-prostitution criminal statutes proceeds apace with repeal's foot in the door in Maine.[357] In one lifetime, the United States has moved from the movie *Reefer Madness*—released in the 1930s and rediscovered the 1970s—to the War on Drugs and the "Just Say No" campaign[358] of the 1980s—with serious racial disparities—to today's Lost War on Drugs and states' legalization of recreational and medicinal marijuana.[359]

This Article's modest effort has tried to restate and adopt the ancient illegality doctrines. It has argued for a unified approach based in informed judicial discretion guided by standards stated as questions. It has tested its approach in the grey areas created by criminal statutes against sex-for-money and marijuana agreements.

One peculiarity of private illegality litigation is the government's absence. A private defendant argues the defense of illegality against a private plaintiff's private law claim.[360] The government is out of sight while the plaintiff and the court may whittle away at the government's interest in enforcing its criminal statute. I have not seen any indication of the

356. *See* Henry Fountain, *Where Lawns are Outlawed (and Dug Up, and Carted Away)*, N.Y. TIMES (May 3, 2022), https://perma.cc/MQ7L-7FM8 (observing how the "Water Patrol" has the power to "issue warnings" which can "escalate to violations with increasing fines" for people improperly watering their yard).

357. *See* Heal, *supra* note 172 ("The state of Maine is embarking on a controversial experiment by partially decriminalizing prostitution in an attempt to eliminate exploitation of sex workers—adopting a model advocates say is a first in the country.").

358. *See Just Say No*, HISTORY (May 31, 2017), https://perma.cc/2EVK-AB3H (last updated Aug. 21, 2018) ("The 'Just Say No' movement was one part of the U.S. government's effort to revisit and expand the War on Drugs. . . . Nancy Reagan, launched the 'Just Say No' campaign, which encouraged children to reject experimenting with or using drugs by simply saying the word 'no.'").

359. *See* Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 423–45 (2011).

360. *See, e.g.*, J. Lilly, LLC v. Clearspan Fabric Structures Int'l, Inc., No. 18-CV-01104, 2020 WL 1855190, at *3 (D. Or. Apr. 13, 2020).

government expressing its interest by intervention or amicus participation in private litigation of the illegality defense. The private law process rolls on leaving the private defendant to argue the public law interest in the absence of the government.

In the material examined for the marijuana decisions in this Article, that public-law interest has not been well defended. Its proponents have raised the flag of illegality as if that stain alone sufficed.[361] The criminal statute's purposes and the criminal law policies of deterrence and punishment seem to be abandoned, also leaving purpose—the Restatement's principal inquiry[362]— unaddressed.

In this Article's marijuana material, the opponents of illegality have often prevailed. The principal example of their successful advocacy is their reduction of the strength and importance of the federal government's interest in its criminal marijuana statute. The limits on expenditures to prosecute marijuana crimes, the Justice Department's policy of not prosecuting anyone for marijuana-related activity that is legal under state law, and Attorney General Garland's similar pledge have lowered the importance of the federal criminal statutes.

The major innovation in this Article is Judge Benitez's rejection of the restated illegality rule that illegality occurs if the judge's order requires illegal conduct. A money judgment against a judgment debtor doesn't require any conduct from the debtor in personam. Dispensing with this dead-end "rule" will encourage the parties and judges to focus on the real issues that comprise discretion and the standards. I hope that this trial judge's cogent view will conquer the "rule" and lead to its universal adoption.

The argument for a remedy for a breached sex-for-money agreement is that the criminal prostitution statute is not a very important one (in light of cogent arguments favoring legalization), one state's partial legalization, changing

361. *See, e.g.*, Indian Hills Holdings, LLC v. Frye, No. 20 cv 00461, 2021 WL 5994036, at *7 (S.D. Cal. Dec. 15, 2021) (noting the defendant only cited a single article from a website rather than any of the other federal district courts' decisions from different jurisdictions).

362. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 32(2), cmt. c. (AM. L. INST. 2011) ("*The primacy of statutory purpose*. The statute or regulation by which the parties' underlying transaction is prohibited may expressly decide the issue addressed by § 32.").

prosecution policies, and differing law in other nations. At this writing, its success cannot be predicted.

What steps can parties take to avoid the cry of illegality? If possible, if there is a hint of illegality, the parties should exchange consideration simultaneously, leaving nothing executory. No credit should be extended. This will prevent the nonpaying buyer from interposing its own illegal conduct as a defense to its creditor's suit to collect. An alert judge will spot the plaintiff's forfeiture and the defendant's unjust enrichment if the buyer doesn't pay its bills. But earlier cash on the barrelhead will obviate the need to sue.

The parties in a marijuana transaction should avoid federal court. That means a plaintiff ought to sue in state court. Several contractual techniques are available to a plaintiff in state court to reduce the likelihood of a defendant's successful illegality claim: an arbitration clause, a clause that forbids the defendant's removal to federal court, a state statute—like Colorado's—that legalizes marijuana contracts, and a choice-of-law clause that selects a state's law.

This Article's final observation is to commend its approach of judicial discretion with standards for analysis and application in any lawsuit where illegality is argued. In this Article, contract principles, the importance of the illegality, and unjust enrichment have been the standards in play. Illegality covers a lot of diverse territory. In other lawsuits, other standards may be more important and varying results may be predicted.