PUBLIC POLICY IN THE ENGLISH COMMON LAW *

THIS essay on public policy originated in a much wider question. Is there any ideal standard of judicial legislation recognized by English judges? If so, what is it? Suppose that an entirely new point comes before an English judge, on what principles does he settle it? In his brilliant lectures delivered a few years ago, Judge Cardozo has answered this question so far as the American bench is concerned, and much of what he has said applies to English judges. They will refer to legal analogy, to legal history, to custom, to the force of justice, morals, and social welfare.[1]

But, quite apart from the fact that English and American judicial traditions are not exactly alike, this does not tell us whether English judges have before them any ideal such as that to which I have referred. Thus there opened before me a wide tract still to be explored. The most obvious approach to it seemed to be by way of public policy. The investigation might yield something; and even if it yielded nothing, there is still a certain value in negative results. On our own side of the Atlantic, the literature on public policy is rather scanty. Mr. W. S. M. Knight has written a valuable article on the topic; [2] Sir Frederick Pollock's lucid account of it in connection with the law of contract is very helpful; [3] and on the historical side, Professor Holdsworth is here, as in every other branch of the law, an infallible guide to the avenues of further research.[4] Indeed, we must make a historical sketch the starting point in order to understand the present law, for the doctrine has existed from early times, though it has had several different names, and has on occasion even taken the veil of anonymity.[5]

* Founded on a lecture delivered in the University of London.

[1] CARDOZO, GROWTH OF THE LAW (1924) 62.

[2] Knight, *Public Policy in English Law* (1922) 38 L. Q. REV. 207–19.

[3] POLLOCK, PRINCIPLES OF CONTRACT (9th ed. 1921) 379–441.

[4] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 377; 5 *ibid.* 213–14; 8 *ibid.* 54 *et seq.*, 250, 252–53, 383–84, 478 *et seq.*, and other references in this essay.

[5] I have ventured also in the course of this paper to make some references to the literature and decisions in the United States, and I am greatly indebted to Dr. Frank I. Schecter for his kindness in giving me many of these references.

In tracing the history of public policy, two things must be clearly distinguished. One is the unconscious or half-conscious use of it which probably pervaded the whole legal system when law had to be made in some way or other, and when there was not much statute law and practically no case law at all to summon to the judges' assistance. The other is the conscious application of public policy to the solution of legal problems, whether it bore the name by which it is now known or was partly concealed under some other designation which, however, really expressed the same thing.

As to the first, in the dawn of our law there is plenty of evidence that its rules could be modified where they were harsh, and extended where they were defective, by "equity." Long before equity was a separate system, these ideas which lie at the root of it were put in practice by the king's courts.[6] We know from Bracton that writs could be adapted to meet new cases. Here we have the paradox that public policy pervades our law and that nobody is aware of its existence. No one talked about "public policy" then, yet when a new writ was approved or a new rule laid down, what else was it in most cases that the judges had in view but the benefit of the public? It was so much a matter of course that no one took any more special notice of it than he did of the air that he breathed. Then came the time when the common law courts, as we now call them, became so rigid in their administration that they lost the habit of qualifying it by equity. In the fourteenth century they were beginning to get a body of rules on which they could concentrate attention so closely, that they were apt to neglect the pith of the tree for the bark. Thus were suitors driven to the chancellor and so began the equity which we now know.[7]

In the fifteenth and sixteenth centuries, the chancellors were illustrating quite as vividly as their common law predecessors the paradox which I have stated, but their conceptions of what we might call public policy were slightly more conscious. Through John Gerson they had drunk deep of scholastic philosophy, and that very remarkable book *Doctor and Student* told them, I think, nothing new, but expressed what most of them felt and practised.[8] Its earliest edition was perhaps 1523, and the opening chapters of

[6] 2 HOLDSWORTH, *op. cit. supra* note 4, 245–46, 344.

[7] *Ibid.* 344–46.

[8] 4 *ibid.* 275–76.

it are essential to any study of the principles of abstract justice which ran in men's heads at that period. It cuts beneath the hard, dull surface of the law and shows us the vital spirit imprisoned in it. One ingredient of that vital spirit is stated by both the divine and the lawyer to be the law of reason. Both identify it with the law of nature, though the student warns the doctor that lawyers do not use the latter phrase.[9] Neither statute nor custom can prevail against the law of reason.[10] It is written in the heart of every man and tells him what to do and what to avoid.[11] So large is its scope that according to some all the law of the realm is the law of reason,[12] but it is not really so extensive as that.[13]

Moreover equity considers all the particular circumstances of each case, and is tempered by mercy, and is said by the Doctor to be applicable to every law of men, and to this the Student adds examples from English law. Equity mitigates the rigor of the law, where the words of the law are against justice and the commonwealth.[14] There is a certain amount of looseness, and perhaps even confusion, about some of the theories in the dialogue, but they all leave upon the reader an extraordinary impression of the

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[9] ST. GERMAIN, DOCTOR AND STUDENT (1523) bk. I, cc. II, V. For the importance of these passages, see POLLOCK, ESSAYS IN THE LAW (1922) 57–59.

[10] *Cf.* Lord Holt, in City of London v. Wood, 12 Mod. 669, 687–88 (1708): "When an act of Parliament is against common right and reason . . . the common law will control it and adjudge such act to be void."

[11] ST. GERMAIN, DOCTOR AND STUDENT c. II.

[12] *Ibid.* c. V.

[13] It is very tempting here to say a great deal more about the law of nature than space permits. Fortunately, we have already an excellent historical account of it by Sir Frederick Pollock, which I have often wished could have been published separately from his ESSAYS IN THE LAW, and with this and one or two later references I must leave the matter. See POLLOCK, ESSAYS IN THE LAW (1922) 31–79.

In Y. B. Mich. 8 Edw. IV, f. 12b (1467), Yelverton says, "We will now do in this case as the canonists and civilians do when a new case arises uncovered by previous law. Then they resort to the law of nature which is the foundation of all laws, and therefore what commends itself to them as most beneficial for the common weal." Sir Frederick Pollock regards this as no more than the envious sigh of a common law lawyer for the dialectic resources of the civilians and canonists. POLLOCK, *op. cit. supra*, at 56. The learned author also considers the plentiful use of the law of nature in the arguments in Sharington v. Strotton, 1 Plowd. 298 (1564), and Calvin's Case, 7 Co. 1, 12 (1608), to be merely an incident in highly peculiar circumstances. POLLOCK, *op. cit. supra*, at 57. It is noticeable, however, that the very fact that the circumstances were novel was exactly the cause which drove counsel to the line of argument which they adopted.

[14] DOCTOR AND STUDENT c. XVI.

fluidity of legal principles at that time. It is not without significance that St. German gives us a picture of two scholarly men, a canonist and a common lawyer, giving each other courteous explanations, and not of a couple of antagonists snarling at the faults in each other's system. Judges had a laboratory full of reagents for testing rules and changing their shape and substance. But there were wholesome checks on rash experiments. Our law, long before the Doctor and Student exchanged views, had secured a toughness of procedural fiber that would always bring a practitioner from airy speculation to hard earth. It was almost in the same decade that St. Germain's work was published that there also appeared the *New Natura Brevium* of Sir Anthony Fitzherbert,[15] a work so highly technical that, compared with *Doctor and Student,* we seem to be gazing on the skeleton of the law instead of feeling its spirit. And this work was only one specimen of other books of the sixteenth century which can be read from cover to cover without gaining one single philosophical thought from them.[16] Yet we may assume that the best type of lawyer knew his *Doctor and Student* as well as his *Natura Brevium,* for one of the most profound masters of the common law recommended both these books to the student.[17] Of equity, as a separate system, it is worth noticing how religious concepts colored the principles of ecclesiastical chancellors. " I know well," said Archbishop Morton, the chancellor of Henry VII, " that every law is, or of right ought to be, in accordance with the law of God. And the law of God is that an executor who is evilly disposed shall not spend all the [deceased's] goods. And I know well . . . that if he will not make restitution where it is in his power to do so, he shall be damned in Hell." [18]

Let us now turn to the more self-conscious side of public policy. We shall find that in its origin it shades off into the public policy that scarcely knew of its own existence. In discussing it we must

[15] Published in 1534. See WINFIELD, CHIEF SOURCES OF ENGLISH LEGAL HISTORY (1925) 302.

[16] Equity, when it became centered in the chancellor's court, was still formed on the principles set out in DOCTOR AND STUDENT. 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 218 *et seq.,* 235.

[17] Sir Matthew Hale in his preface to ROLLE, ABRIDGMENT DES CASES ET RESOLUTIONS DEL COMMON LEY (1668).

[18] Y. B. Hil. 4 Hen. VII, f. 5a (1489).

begin by making a deliberately false step, because the later history of the topic has forced this upon us. We start with Bracton, not because we are right in doing so, but because we have later judicial authority that we are right in doing so. Bracton, centuries after his death, was credited with a much broader conception of public policy than he ever expressly stated. In a highly Romanesque passage of *De Legibus Angliae*, he speaks of stipulations for impossible things and gives as an example a promise of something which neither is, nor can be, *in rerum natura,* or of a thing sacred or public which is not the subject of private ownership.[19] This passed by the channel of Coke's commentaries upon Littleton [20] and later writers into the nineteenth century law reports,[21] gathering a good deal of moss or gloss without which it would not have been of much value.

Littleton is of more assistance than Bracton. In several paragraphs of his *Tenures* he gives as the ground of the particular rule which he is stating that adoption of any contrary principle would be "inconvenient" or "against reason." He does recognize vaguely something which is not so much public policy, as we know it, as a canon of judicial lawmaking. In the last resort, a rule cannot be deduced if either: (a) it is inconsistent with some other established legal rule; or (b) it is illogical even to a layman. Thus, it is an established rule of law that a woman is the woman of no one except her husband. Therefore, in doing homage to her lord, a married woman uses no expression that she is the lord's woman, for that would not be "convenient." Again, it is an established rule of law that a lord shall get some service from its tenant. Therefore he gets at least fealty from a secular alienee of frankalmoign lands; otherwise it would be "inconvenient" [22] and this applies to the tenant in frank-marriage.[23] So too it is "inconvenient and against reason" that partition should affect the devolution of lands given in frank-marriage.[24] We need not multiply in detail other examples.[25] In one of them, Littleton explains incon-

[19] BRACTON, DE LEGIBUS ANGLIAE (Woodbine's ed. 1922) f. 100.
[20] Co. LITT. 206b.
[21] See Egerton v. Brownlow, 4 H. L. Cas. 1, 140 (1853).
[22] Co. LITT. § 139.
[23] *Ibid.* § 138.
[24] *Ibid.* § 269.
[25] See *ibid.* §§ 231, 440, 478, 722, 730.

venience by saying that " the law will sooner suffer a mischief than an inconvenience," [26] and that phrase attracted some attention at a later date. Illogicality patent to anybody is illustrated by a section in which he remarks that it would be inconvenient if a man were to sue himself.[27] Elsewhere, Littleton says that it is " against reason " that a man should be his own judge.[28] I suppose no one but a lawyer would ever have doubted this, but in Littleton's youth a judge had thought it not unreasonable that a man should adjudicate his own case,[29] and counsel had backed this view with a curious fable about a pope who had committed a great offense. The cardinals came to him and said, " Thou has sinned." He replied, " Judge me." They retorted, " We cannot, because thou art head of the Church; judge thyself." And the pope said, " I adjudge myself to be burned." So he was burned and afterwards became a saint.[30]

Now Littleton was very much the child of his age, and these phrases, " inconvenient " and " against reason " are of common occurrence in the Year Books. The whole of that era was one of rapid building in our law, and it had to be developed more by analogies, by logic, and by a broad perception of what was wanted than by precedents of which there were few compared to the mass that exists in more modern law.[31] I doubt whether Littleton identified " inconvenience " and " against reason " with what we now call public policy. The circumstances of his time made it unnecessary, perhaps impossible, to think as exactly as that. But very likely Coke in his writings and reports turned what he bor-

[26] *Ibid.* § 231.

[27] *Ibid.* § 665.

[28] *Ibid.* § 212.

[29] Strangeways, J., in Y. B. Hil. 8 Hen. VI, f. 20a, f. 21a (1430). But his brethren were against him. The leading authority, Dimes v. Grand Junction Canal, 3 H. L. Cas. 759 (1852), confirms their view.

[30] Rolfe, *arguendo,* Y. B. Hil. 8 Hen. VI, f. 21a (1430).

[31] *Cf.* WINFIELD, *op. cit. supra* note 15, at 155. See also Finchden, *arguendo*, in 40 Lib. Ass. pl. 27 (1679 ed.), " When a man shows that a thing is inconvenient, it seems that the law cannot suffer this;" and Y. B. Trin. 4 Edw. II (1311), printed in 42 SELDEN SOCIETY (1926) 120, 123. The context in these cases shows that " inconvenient " means " inconsistent with legal principle," or perhaps merely " illogical." Arguments based on " common right " also appear in the Year Books; *e.g.,* Y. B. Trin. 4 Edw. II (1311), printed in 42 SELDEN SOCIETY 109, 110, 118, 119, 121, 122, 130–31. They are an appeal to the common stock of legal ideas without which no civilized community can exist.

rowed from Littleton into something a little more technical and certainly more far-reaching — something which formed the substance of public policy for later generations to shape. Evidences of such transformation appear in his comments upon Littleton. Of course they are not all in one place and it is doubtful whether they are all quite consistent with one another. "Reason," he says, "is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason." [32] This may possibly have meant that "reason" signifies "legal logic," but the context, which is too long to quote here, perhaps justifies the wider meaning of "legal wisdom." After all, Coke knew his *Doctor and Student*.

As to "inconvenience," Coke states and emphasizes the maxim, *nihil quod est inconveniens est licitum*. He regards it as a forcible argument. If one can extract any meaning from him, it seems to be that the law prefers the public good to private good, and that if it has to choose between prejudice to the many and mischief peculiar to individuals, the individual must suffer.[33] But it is perhaps rash to pin him down to this,[34] for elsewhere he regards new inventions of the judges as full of "inconvenience." [35] To press for any more exact analysis is to forget the limits of Coke's abilities. They did not include the capacity for close or consistent classification. We are at least safe in saying that he carried "inconvenience" further than Littleton left it, and that the maxim, *nihil quod est inconveniens est licitum*, was perhaps rightly taken by later authorities to lay down the doctrine of public policy,[36] or at least to contain the seeds of formal ideas about it. Elsewhere, Coke would imply that public policy is not concerned with *mala in se*, but with *mala quia prohibita* which are either "repugnant to the state," or "against some maxim or rule in law"; [37] and in his *Reports*, he

[32] Co. Litt. § 138.

[33] *Ibid.* §§ 138, 231.

[34] *Cf. ibid.* §§ 87, 269, 440, 478, 665. Coke throughout vouchsafes no explanation.

[35] *Ibid.* § 722.

[36] *E.g.*, Pollock, L. C. B., in Egerton v. Brownlow, *supra* note 21, at 145.

[37] Co. Litt. 206b. Referred to by Lord Truro in Egerton v. Brownlow, *supra* note 21, at 195.

states a resolution of the court that the law will never make an interpretation to advance private interests and to destroy public good.[38] But these dicta would not be worth citing, except for the use made of them by Coke's successors. They merely confirm the impression that their author had no very clear conceptions about the matter.

Sir Henry Finch, a contemporary of Coke's, in his Νομοτεχνία, presents us with a sharper outline of what he calls the " common weal." He distinguishes[39] the law of nature from the law of reason. He puts the law of reason on quite as high a level as St. Germain had done, and says that some of its rules are taken from " foreign learnings," while the rest are proper to the law itself. Under foreign learnings he includes, " Divinity, Grammar, Logic, Natural Philosophy, Politicall Oeconomics, Morall, though in our reports and Year Books they come not under the same terms, yet the things which there you find are the same; for the sparks of all sciences in the world are raked up in the ashes of the law." [40] And under the detailed headings of foreign learnings is a section devoted to " Things for the common weal." Nearly all of them are defenses to trespass.[41] Sheppard's *Touchstone,* published in 1641, has a passage on conditions in deeds or limitations in which he says that such conditions as are against the liberty of law or against public good are void.[42] This is another quotation that later acquired some prominence in the law reports. Sheppard himself affords us no help towards the meaning of his own phrases, but Lord Chief Baron Pollock in *Egerton v. Brownlow* [43] equated the phrase, " against the public good," to Coke's phrase, " repugnant to the state." [44]

I think that one may safely say that in the seventeenth and eighteenth centuries the courts were advancing by somewhat un-

[38] Magdalen College Case, 2 Co. 66b (1614–15). *Cf.* SHEPPARD, TOUCHSTONE (1641) 132.

[39] " Confuses," according to POLLOCK, ESSAYS IN THE LAW (1922) 58.

[40] FINCH, Νομοτεχνία (1627) cc. I–III.

[41] For the change in ideas about the law of nature, see POUND, LAW AND MORALS (1924) 1 *et seq.*, 92 *et seq.*; POLLOCK, ESSAYS IN THE LAW (1922) 53–63.

[42] SHEPPARD, TOUCHSTONE (1641) 132.

[43] 4 H. L. Cas. 1, 140 (1853). Swinfen Eady, J., in *In re* Beard, [1908] 1 Ch. 383, 386, regarded Sheppard's " against the public good " as equivalent to " against public policy."

[44] Co. LITT. 206b.

certain steps to a narrower application of public policy, though not to a more definite conception of it.[45] Instead of sprawling in vaporous fashion across the legal atmosphere like a genie of the *Arabian Nights,* it is shrinking to certain departments of the law; but no one had yet thought of imprisoning it in a jar, and indeed no one has ever been able to do that. There were several agents at work in this shrinking process. Case law and statutes between them were rapidly reducing to certainty what had been under the vague control of reason, convenience, and policy. Every new decision that was printed had a twofold effect. It covered some ground which had been unfenced till then, and it formed an outpost for further exploration. The fuller the reports became, the less need was there for appeal to the law of nature, the law of reason, or the law of God.[46] Then, too, the statute book was swelling in bulk, and after the Revolution of 1688, Parliament's position was more fully assured. A monograph might well be written on the history of public policy in relation to constitutional law during the sixteenth and seventeenth centuries, and the text of the discourse might be that famous passage in Chief Baron Fleming's judgment in *Bates's Case*[47] which begins, "The King's power is double, ordinary and absolute." The ordinary power is represented by the common law. The absolute power "is properly named Policy and Government; and as the constitution of this body varieth with the time, so varieth this absolute law, according to the wisdom of the king for the common good."[48] Bacon's literary exposition of the same view is too well known to need quotation.[49] We cannot here follow the legal and physical battles fought upon this ground. It is enough to note that even after 1688, the Court of Chancery at one time looked as though it was becoming the *âme damnée* of

[45] *Cf.* Knight, *Public Policy in English Law* (1922) 38 L. Q. REV. 208–10.

[46] "In England at the end of the eighteenth century juristic creative energy was spent. Lord Mansfield was succeeded by Lord Kenyon. Lord Eldon came presently to "crystallize" equity. . . . Much of the disrepute of natural law at present comes from thinking of it in terms of the identification of an ideal form of familiar legal institutions with the postulated eternal immutable law of nature, which obtained at the end of the eighteenth century, rather than in terms of the classical creative natural law of the seventeenth century." POUND, LAW AND MORALS 36.

[47] 2 How. St. Tr. 371, 390 (1606).

[48] *Ibid.* 390.

[49] BACON, ESSAYS (1597) *"Of Judicature."*

the executive in what were called "cases of State." In the *Bankers' Case,* there was an appeal to it on the "equity of public necessity." Lord Keeper Bridgeman flinched from this and even Shaftesbury, who was thrust in his place as chancellor, found his complaisance balked by the difficulties of the task. Lord Nottingham's exalted notions of his own powers made him more successful here, but his successor, Lord Keeper Guildford, bluntly refused to stop the sale of English bibles printed beyond the seas, on this ground.[50] An echo of the idea of "case of State" was heard when an English court had to make up its mind whether it should stop the Hungarian patriot, Louis Kossuth, from printing bank notes in usurpation of the Emperor of Austria's prerogative; but it was no more than an echo.[51]

Several illustrations may be given of parts of the law which public policy was beginning to penetrate. One hears of it in contracts in restraint of trade certainly as early as Elizabeth, and though in many of the cases it is not mentioned, or is referred to only as one of the grounds of the decision, one can safely say it was clearly recognized by the time of *Mitchel v. Reynolds*,[52] which was decided in 1711 and for a long time was a landmark in this branch of the law. Then it bulks largely in that great decision on the rule against perpetuities, the *Duke of Norfolk's Case*.[53] Lord Nottingham hit off the fluid nature of public policy when to the question, "Where will you stop, if you do not stop here?" he retorted, "I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear." [54]

Other examples are sales of offices,[55] marriage contracts,[56] and

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[50] MOORE, ACT OF STATE IN ENGLISH LAW (1906) 9, 21, and c. I generally.

[51] Emperor of Austria v. Day and Kossuth, 3 De G. F. & J. 217 (1861).

[52] "Against the policy of the common law," 1 P. Wms. 181, 183 (1711); "against the policy of the law," *ibid.* at 187. *Cf.* "encounter le necessity del cõmonwealth" (against the necessity of the commonwealth), Anon., Moore K. B. 242 (1586); Claygate v. Batchelor, Owen 143 (1600); "contrary to the common good," Julliet v. Broad, Noy 98 (1619).

[53] "Polity of the kingdom," 3 Ch. Cas. 1, 20 (1681); "inconvenience," *ibid.* at 49, 51.

[54] *Ibid.* at 49.

[55] Lord Hardwicke in Chesterfield v. Janssen, 1 Atk. 339, 352 (1750) ("for the sake of the public"; "public utility").

[56] *Ibid.* at 352.

wagers.[57] Public policy, like misery, made some very incongruous bedfellows. The man who bet on Napoleon's life,[58] the worker who fettered his own freedom of trade, the parent who wished to tie up his estate indefinitely or to get his daughter too well married, the parish officers who compounded for a lump sum with the father of a bastard child,[59] the person who made a simoniacal contract,[60] the testator who made a gift dependent on the acquisition of a dukedom [61] — are all here cheek by jowl. Perhaps matters were edging on the absurd when it was held that a colliery fire engine must be reckoned as personal property on the ground of "public benefit and convenience." [62]

In the earlier part of the nineteenth century, uneasy doubts began to be expressed about the soundness of public policy. In the old days the idea was so transparent, that, though it was all pervasive, it obscured no one's vision. But when it had condensed to something much less nebulous and much more visible, the judges began to wonder where it was going to lead them. Lawyers talked much less about natural law,[63] they had ceased to contend that reason and the law of God must override an act of Parliament, and they had begun to realize that some limits must be placed on the application of public policy unless it was to thrust them into a position which Parliament alone could occupy, or to infect with a *virus* of uncertainty principles which had long been settled by case law.

Lord Mansfield had already indicated that public policy ought to be confined to new cases, and had implied that it was an important basis, if not the only one, of judicial legislation.[64] But we

[57] Jones v. Randall, 1 Cowp. 37, 39 (1774).

[58] Gilbert v. Sykes, 16 East 150 (1812).

[59] Cole v. Gower, 6 East 109, 110 (1805).

[60] Kircudbright v. Kircudbright, 8 Ves. 51 (1802).

[61] Kingston v. Pierepont, 1 Vern. 5 (1681).

[62] Lawton v. Lawton, 3 Atk. 12, 13, 15, 16 (1743).

[63] Blackstone says that human laws have no validity if contrary to the law of nature. BL. COMM. 1, 41. It may be doubted whether he does more than lip-service to the law of nature, in view of what he says later. *Ibid.* at 57–58. J. T. Coleridge's notes to these passages, in the 1825 edition, reduced the law of nature to something much less than Blackstone's statement — a man's private conscience. *Cf.* POLLOCK, ESSAYS IN THE LAW 60. One can still hear of the law of nature even in the twentieth century. See Lord Buckmaster in Bowman v. Secular Society, Ltd., [1917] A. C. 406, 469.

[64] Jones v. Randall, 1 Cowp. 37, 38 (1774).

should do a great injustice to natural law as well as considerable violence to the irregularity which has marked the growth of our legal system if we gave the impression that the law of nature had ceased to function in Lord Mansfield's time. The history of the law merchant and the recognition of what was really quasi-contractual liability are aptly noticed by Sir Frederick Pollock as examples of the influence of the law of nature. And the notions of the "reasonable man" and a "reasonable price" are later instances of the doctrine under another name.[65] Here and elsewhere, the law of nature was neither dead nor sleeping. But what certainly had happened was that public policy was splitting away from it, and that lawyers were beginning to see it plainly enough to realize that it ought to have some sort of technical shape.

In the first quarter of the eighteenth century, ideas were fermenting about public policy, and it is not surprising to find contradictory opinions expressed as to its value by different judges, or even by the same judge on different occasions. Some of the judges took the doctrine for granted and applied it without comment.[66] Others, where they did examine it, disagreed in their conclusions, and in 1824 the Courts of Common Pleas and of King's Bench emitted dicta which, if not inconsistent with each other, are not easy to reconcile. In the King's Bench case Chief Justice Abbott, who was an excellent lawyer and severe against any practice savoring of fraud, not only took public policy as he found it, but carried it a step further than it had gone before on the facts before him.[67] In the Common Pleas case Chief Justice Best, whose reputation was not as high as Abbott's, thought that the courts had gone much further than they were warranted on questions of policy, and that where such questions were doubtful they ought to be left to the legislature.[68] It was in the same case that Mr. Justice Burrough took a similar view in turning loose upon the legal profession the historic "unruly horse" which he is said to have borrowed

[65] POLLOCK, ESSAYS IN THE LAW 68–74. Note also the learned author's remarks about the Conflict of Laws.

[66] See Plumer, V. C., and Eldon, L. C., in Vauxhall Bridge Co. v. Spencer, 2 Madd. 356, 365 (1817), Jacob 64, 67 (1821); Abbott, C. J., in Card v. Hope, 2 B. & C. 661, 670 (1824).

[67] Card v. Hope, *supra* note 66. While public policy is not mentioned in the judgment, it underlies the decision.

[68] Richardson v. Mellish, 2 Bing. 229, 242–43 (1824).

from Chief Justice Hobart.[69] But Chief Justice Best himself did not blench at using public policy on a new point [70] twice within the next four years, and on one of these occasions he was voicing the opinion of other judges in response to a request of the House of Lords. Both he and Mr. Justice Dampier agreed that public policy was applicable only where the law was doubtful.[71] That they arrived at opposite conclusions in applying it, is merely characteristic of the doctrine ever since judges began to express any opinion about it at all. Up to this point, public policy had suffered nothing more than some wavering attacks on its character, but in 1853 it had to fight for its life. Sixteen judges fought a pitched battle about it in *Egerton v. Brownlow*,[72] a case which occupies two hundred and fifty-six pages in the law reports. Lord Alford had been given an enormous property under a will, with a proviso that if he died without having acquired the title of Duke or Marquis of Bridgewater, the gift should be void. It was held that the proviso was a condition subsequent and void as against public policy. The House of Lords summoned the judges to give their opinions. Eleven attended. Nine held the condition valid, two dismissed it as invalid. Of the lords themselves, four held it to be valid, and one invalid. The variety of opinions expressed reminds one of *Jarndyce v. Jarndyce* in *Bleak House*, of which Dickens says that no two lawyers could discuss it for five minutes without flatly contradicting each other. In *Egerton v. Brownlow*, one extreme view would have reduced public policy to a mere guide for ascertaining the object of any particular law, and would have regarded it in any wider sense as a historical husk that had done all that could be expected of it.[73] Another extreme view would have exalted it into an abstract standard of judicial legislation, independent of time or circumstances.[74] Other judges made statements that verged towards one or other of these extremes. Mr. Justice Crompton pointed out the danger of public policy owing to the fact that

[69] *Ibid.* at 252.

[70] Fletcher v. Sondes, 3 Bing. 501 (1826); Gifford v. Yarborough, 5 Bing. 163 (1828).

[71] Fletcher v. Sondes, 3 Bing. 501 (1826).

[72] 4 H. L. Cas. 1 (1853).

[73] Wightman and Erle, J.J., in 4 H. L. Cas. at 100; Alderson, B., *ibid.* at 106–07; Parke, B., *ibid.* at 122–24.

[74] Platt, B., *ibid.* at 99.

varying notions of public expediency would make it impossible to see its extent and would set up great uncertainty in ascertaining legal rights.[75] Two of the judges, though they were decidedly opposed to public policy, used language which expressly or impliedly recognized its existence. Thus, Mr. Justice Cresswell identified it with the spirit of the law,[76] and a thoroughgoing adherent of the doctrine could scarcely have asked for stronger support. Baron Parke admitted that it had got a foothold in our law in covenants in restraint of trade or of marriage.[77] If any general line of thought is traceable in the dissentient judgments, it is that public policy is a tool of the legislature and not of the judicature. The lawyers — some of them great lawyers — who felt this certainly had some grounds for their attitude. Case law had become so abundant and Parliamentary legislation so plentiful and so much more likely to reflect public opinion since the Reform Act of 1832, that there seemed to be few gaps that required filling up in our law, and even so Parliament seemed much better fitted to stop them than was the bench. Not that this was an abnegation of all power of judicial legislation; for the judges could still apply established rules even if they could not create new ones. We have no wish to make the dissentient judges in *Egerton v. Brownlow* ventriloquial puppets for our own arguments in their favor, but we can perhaps read this much between the lines.

Perhaps also, like all English judges, they were practical men, not at all welcoming any statement of the theory of judicial legislation. When this theory peeped out from behind the veil of public policy and confronted eleven of them in a body, most of them were so alarmed at its appearance that they promptly hustled it back again, and seemed disposed to deny the existence not only of the theory but also of the veil which covered it. They might have pardoned an angel for having entertained it unawares, but they could not forgive it for appearing to them in nothing but its wings.

The fairest statement of the view which proved acceptable to the House of Lords seems to be that of Lord Chief Baron Pollock. He said that if he were to discard public welfare from consideration, he would be abdicating the functions of his office, and that

[75] *Ibid.* at 70–71; see also Talfourd, J., *ibid.* at 96.

[76] *Ibid.* at 85–87.

[77] *Ibid.* at 122–24.

he ought not to shrink from applying its principles to "any new and extraordinary case that may arise." [78] "All matters relating to the public welfare — all acts of the legislature or the executive — must be decided and determined upon their own merits only." [79] "It may be that judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it. Is it, or is it not, a part of our common law, that in a new and unprecedented case, where the mere caprice of the testator is to be weighed against the public good, the public good should prevail? In my judgment it is." [80] Lord Truro's speech in effect covers much the same ground.[81]

I have read nothing in the reported decisions from *Egerton v. Brownlow* to 1928 which departs seriously from the extracts that I have cited from the Lord Chief Baron's judgment. I respectfully think that it represents what English law always has been and still is.[82] Baron Alderson's repudiation of public policy in the sense in which it is now understood came too late in 1853. He would have limited it to Parliamentary legislation. Three years later, Lord Campbell expressed a regret that the courts had ever interfered with contracts through the medium of public policy, and seemed to think that it had done nothing but obscure the boundary between judge made law and statutory law.[83] But what the learned judge was regretting was the history of English law. The passage really bemoans the tacit allotment to the judicature of a legislative power which has in fact been the basis of our common law. The judges had this power because our legal genius could cast the law in no other mold, and the common law would have

[78] *Ibid.* at 149.

[79] *Ibid.* at 149–50.

[80] *Ibid.* at 51.

[81] *Ibid.* at 196–201.

[82] Knight, *Public Policy in English Law* (1922) 38 L. Q. REV. 207, 212–14, thinks that Egerton v. Brownlow was followed by a period of scepticism and hesitation in relation to public policy. Certainly there are some dicta which might raise this inference, but we think that, as Mr. Knight himself says, they express "no more than a merely conservative influence." It may be doubted whether the opinions in Evanturel v. Evanturel, L. R. 6 P. C. 1, 29 (1874), are as sceptical as Mr. Knight suggests that they are.

[83] Hilton v. Eckersley, 6 E. & B. 47, 64 (1856).

been a stunted and flaccid affair if it had not been nourished by such power. Still, there is no doubt that but for the House of Lords, public policy would have pretty nearly perished in *Egerton v. Brownlow.*

We have now reached the point where we can try to assess the current meaning of public policy, the attitude of the judges towards it, and the limits to which it is subject. Here one who is not immersed in the practice of the law must gather his material from the law reports, and he may very well make mistakes, for what the reports do not give us is the silent traditions which influence the judges in administering the law; these can only be inferred from decided cases, if indeed they can be inferred at all. This makes it peculiarly difficult to attribute general views to the judges on a vague subject like public policy. But, with this preliminary warning, I will do my best to state in a series of propositions what I believe to be the law.

(1) The attitude of the bench in general towards public policy is one of cautious acceptance of it. They have often repeated Mr. Justice Burrough's metaphor about public policy being an unruly horse. That animal has proved to be a rather obtrusive, not to say blundering, steed in the law reports. It would have been more effective if we had not heard quite so much of it. It has gone reverberating down the history of our law like the oath of Hull, the judge in Henry V's reign, when he said of the dyer who agreed to restrain his own trade, " and, by God, if the plaintiff were here, he should go to prison." And at times the horse has looked like even less accommodating animals. Some judges appear to have thought it more like a tiger, and have refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it like Balaam's ass which would carry its rider nowhere.[84] But none, at any rate at the present day,[85] has looked upon it as a Pegasus that might soar beyond the momentary needs of the community.[86] The doctrine then has had some reluctant

[84] *E.g.,* Halsbury, L. C., in Janson v. Driefontein Mines, Ltd., [1902] A. C. 484, 491. *Cf.* Parke, B., in Egerton v. Brownlow, *supra* note 72, at 123.

[85] Platt, B., took this wider view in Egerton v. Brownlow, *supra* note 72, at 99.

[86] See Swinfen Eady, J., in *In re* Beard, [1908] 1 Ch. 383, 386–87; Warrington, L. J., in *In re* Wallace, [1920] 2 Ch. 274, 288; *In re* Bowman, [1915] 2 Ch. 447, 471.

adherents, but upon the whole it is accepted,[87] though it may be " a very unstable and dangerous foundation on which to build until made safe by judicial decision." [88]

(2) What does public policy mean? If we abandoned any attempt to define it, we should have the excuse that some judges have thought it to be indefinable,[89] that others have given descriptions not easily reconcilable, and that others again have made inconsistent statements in the self-same decision.[90] There is nothing remarkable in this because the topic itself is so elusive. I hope that I do not merely add to a controversy if I describe public policy as " a principle of judicial legislation or interpretation founded on the current needs of the community." [91] Now this signifies that the interests of the whole public must be taken into account; but it leads in practice to the paradox that in many cases what seems to be in contemplation is the interest of one section only of the public, and a small section at that. Many questions of public policy are profoundly uninteresting to the whole community. What does it matter to the ordinary citizen whether matrimonial agencies flourish or not, whether parish officers compound with the putative father of an illegitimate child, whether family bargains are made about church livings, whether a profiteer is a little too unblushing in his methods of procuring a title, or whether one who is a total stranger to others covenants with his father not to drink to excess? [92] The explanation of the paradox is that the courts must certainly weigh the interests of the whole community as well as the

[87] It is recognized without comment in such cases as Neville v. Dominion of Canada News Co., Ltd., [1915] 3 K. B. 556; Horwood v. Millar's, etc. Co., [1917] 1 K. B. 305; *In re* Meyrick's Settlement, [1921] 1 Ch. 311; Russell v. Russell, [1924] A. C. 687. Mr. Knight notes a tendency since 1914 to revert to the vaguer phrases of a century ago, " the tendency being strengthened, as doubtless it was a hundred years before, by the war conditions of the period." Knight, *supra* note 82, at 215.

[88] Lord Lindley in Janson v. Driefontein Mines, Ltd., [1902] A. C. 484, 507. See also Lord Davey, *ibid.* at 500.

[89] *E.g.*, Jessel, M. R., in Besant v. Wood, 12 Ch. D. 605, 620 (1879).

[90] *E.g.* Vaughan Williams, L. J., in Driefontein Mines, Ltd. v. Janson, [1901] 2 K. B. 419, 431, 434.

[91] Mr. Knight distinguishes " policy of the law " from " public policy." Knight, *supra* note 82, at 215–17. We should be glad to think that the learned author's distinction — undoubtedly an important one — is as clearly marked in the law reports as he contends.

[92] See Denny v. Denny, [1919] 1 K. B. 583.

interests of a considerable section of it, such as traders; and this is so even where those interests stand passively in the background, and where the actual decision is with respect to some well marked body in the community. If the decision is in their favor, it means no more than that there is nothing in their conduct which is prejudicial to the nation as a whole. Nor is the benefit of the whole community always a mere tacit consideration. The courts may have to strike a balance in express terms between community interests and sectional interests. They have done so, for example, where the general freedom of contract which everyone possesses has been pitted against the principle that this freedom shall not be used in restraint of trade. Here public policy which embraces the interests of all may be in direct conflict with public policy that covers the interests of traders in the community.[93] Another notable instance of this was the *Mogul Steamship Co., Ltd. v. McGregor, Gow and Co.*[94] An agreement made among the defendants for "cutting" freights in the China tea carrying trade was thought by some of the judges to be void as between the defendants because it was in restraint of trade and therefore against public policy; but that did not convert it into a tort as against the plaintiff whom this undercutting had driven out of the trade, for the competition which might well have ruined him individually, might also benefit the public at large by giving them cheaper tea. In other words, precisely the same act may in one aspect be against public policy and void, and in another aspect it may be in conformity with public policy and not illegal. Hence there is nothing surprising in the frequency with which judges have with equal plausibility arrived at diametrically opposite conclusions in problems of public policy where the scales are nearly even in this process of balancing conflicting interests.[95]

(3) Public policy is necessarily variable. It may be variable not only from one century to another, not only from one generation to another, but even in the same generation. Further, it may vary

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[93] See Vaughan Williams, L. J., in Marlborough v. Marlborough, [1901] 1 Ch. 165, 172; Jessel, M. R., in Printing, etc. Co. v. Sampson, L. R. 19 Eq. 462, 465 (1875); Farwell, J., in Wilson v. Carnley, [1908] 1 K. B. 729, 739–40.

[94] [1892] A. C. 25.

[95] *Cf.* Fletcher v. Sondes, 3 Bing. 501 (1826); Hilton v. Eckersley, 6 E. & B. 47 (1856).

not merely with respect to the particular topics which may be included in it, but also with respect to the rules relating to any one particular topic. As to the first point, there are certainly dicta which expressly or impliedly deny it.[96] But there are opinions of equal authority,[97] and even decided cases, in its favor.[98] And it is doubtful whether there is any real conflict on the point, for even the adverse views would regard such new cases as mere applications of a general principle, and if that general principle be the vast one of the good of the community, they concede to us all we want.

As to the variability of public policy with regard to the same branch of the law, the illustrations are legion.[99] The stock example is restraint of trade. In this field many decisions barely fifty years old are now museums of fossil economic theories.[100] One hundred and thirty years ago current views on religion led to the condemnation of Paine's *Age of Reason* as a blasphemous libel, because any attack on Christianity was to be regarded as illegal.[101] Sixty years ago the frustration of a ball and tea party in memory of the author was compensated by one farthing damages.[102] Ten years ago, the House of Lords held that a denial

[96] Halsbury, L. C., in Janson v. Driefontein Mines, Ltd., [1902] A. C. 484, 491, said: "I deny that any court can invent a new head of public policy." Finlay, L. C., in Bowman v. Secular Soc., Ltd., *supra* note 63, at 427–28, denied that public policy could be applied to justify a change in legal principle by judicial decision. But what is the line between a legal principle and its application?

[97] Lord Sumner in Bowman v. Secular Soc., Ltd., *supra* note 63, at 467; Lord Haldane, in Rodriguez v. Speyer Bros., [1919] A. C. 59, 77–81; McCardie, J., in Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft, [1918] 1 K. B. 331, 342; Kennedy, L. J., in Wilson v. Carnley, [1908] 1 K. B. 729, 743.

[98] See examples given by McCardie, J., in Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft, *supra* note 97, at 342.

[99] For a general statement of principle, see Evanturel v. Evanturel, L. R. 6 P. C. 1, 29 (1874). This statement was approved by Bowen, L. J., in Maxim-Nordenfelt Guns, etc. Co. v. Nordenfelt, [1893] 1 Ch. 630, 665, and by Vaughan Williams, L. J., in Wilson v. Carnley, [1908] 1 K. B. 729, 737–38. *Cf.* Swinfen, Eady, J., in *In re* Beard, [1908] 1 Ch. 383, 386; Lord Sumner in Bowman v. Secular Soc., Ltd., *supra* note 63, at 467, and in Russell v. Russell, [1924] A. C. 687, 743; McCardie, J., in Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft, *supra* note 97, at 342.

[100] If any special illustration be needed, see Lord Macnaghten's speech in Nordenfelt v. Maxim-Nordenfelt Guns, etc. Co., [1894] A. C. 559, 574.

[101] Rex v. Williams, 26 How. St. Tr. 653 (1797). *Cf.* 2 STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND (1883) 471–73.

[102] Cowan v. Milbourn, L. R. 2 Ex. 230 (1867). Described by Lord Sumner in

of Christianity was not blasphemous, apart from scurrility or profanity.[103] Here public policy had broadened legal views in religious toleration. Now take an example where it has narrowed them in political morality. In James I's reign, a baronetcy might be purchased for £1095, subject to safeguards which may or may not have been observed.[104] Nowadays, an agreement with the secretary of a charity by which he undertakes to procure a knighthood for the donor of a large sum of money is so objectionable that the donor is not allowed to recover his gift, even though he is not knighted and is defrauded from the very first.[105] Another notable example is the sale of commissions in the army. Within living memory such a transaction was perfectly lawful and a matter of common practice. It was an exception (expressly preserved by statute) to the rule forbidding sales of public offices, and that rule not only existed at common law,[106] but was fortified by statute.[107] Public opinion gradually hardened against the retention of this exception, but there was still enough aristocratic support of it to make a bill for the abolition of the purchase of commissions futile in 1871; for while it passed the Commons, the House of Lords rejected it. The Cabinet, however, discovered that they could do what they wanted by Royal Warrant, and by that method purchase was abolished in the same year. That the Cabinet correctly interpreted public opinion there can be no doubt, for an indirect result of their action was not merely to forbid such traffic but to make it a criminal offense,[108] for which a definite punishment was fixed ten years later.[109]

This variability of public policy is a stone in the edifice of the doctrine, and not a missile to be flung at it. Public policy would be almost useless without it. The march of civilization and the difficulty of ascertaining public opinion at any given time make it

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Bowman v. Secular Soc., Ltd., [1917] A. C. 406, 462, as a "dismal, but no doubt harmless, festivity."

[103] Bowman v. Secular Soc., Ltd., [1917] A. C. 406.

[104] *Cf. In re* Wallace, [1920] 2 Ch. 301.

[105] Parkinson v. College of Ambulance, Ltd., [1925] 2 K. B. 1.

[106] Hanington v. Du-Chatel, 1 Bro. C. C. 124 (1781); Garforth v. Fearon, 1 H. Bl. 327 (1790); Co. Litt. 234a.

[107] 49 Geo. III, c. 126 (1809).

[108] 34 & 35 Vict. c. 86, § 2 (1872).

[109] 44 & 45 Vict. c. 58, § 155 (1881).

essential. There is a careful analysis of this characteristic by Lord Haldane in *Rodriguez v. Speyer Bros.*[110] His conclusions may be thus summarized. The influence of public policy on our law has taken three shapes: (a) rules which, though originally based on public policy have become so crystallized that only a statute can alter them, for example, the rule against perpetuities; (b) cases in which public policy has never crystallized, in which public policy depends on no real legal principle, in which it is accepted as a matter of fact, and in which its application depends on the circumstances of each particular case, for example, cases concerning the legality of wagers; (c) cases in which public policy has partially precipitated itself into legal rules which, however, have remained subject to its molding influence in the sense of current national policy, as illustrated by covenants in restraint of trade. In this last field may be previous decisions in plenty, but they cannot be taken to stereotype national policy. Underlying all of them is the legal principle that trade must not be fettered. But what was a fetter one hundred and fifty years ago may have ceased to be so now.[111] Under this head, Lord Haldane included also the general principle that an alien enemy cannot sue in this country.[112] In the realm of contract, some judges have expressed a decided disinclination to extend public policy any further in the direction of invalidating agreements.[113]

(4) How is public policy evidenced? If it is so variable, if it depends on the welfare of the community at any given time, how

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[110] [1919] A. C. 59, 77–81.

[111] The principle as to covenants in restraint of trade has so clearly precipitated itself that occasionally judges do not think it worth while to state that its foundation is public policy. In Neville v. Dominion of Canada News Co., Ltd., [1915] 3 K. B. 556, this rule was one reason for the decision, public policy of another kind being the other.

[112] Rodriguez v. Speyer Bros., *supra* note 110, at 77. There is nothing in the speeches of Finlay, L. C., and Lord Parmoor that is inconsistent with this analysis. *Ibid.* at 64, 133. Lord Atkinson seemingly regarded public policy as having a fixed principle both in this case, *ibid.* at 87, and in Nordenfelt v. Maxim-Nordenfelt Guns, etc. Co., [1894] A. C. 535, *sed quaere.* Lord Sumner apparently did not deny Lord Haldane's classification, though he certainly did not agree with the placing of the particular examples in it. [1919] A. C. at 125–26.

[113] See Cave, J., *In re* Mirams, [1891] 1 Q. B. 594, 595, cited with approval by Lord Bramwell in Mogul Steamship Co. v. McGregor Gow & Co., [1892] A. C. 25, 45, and by Warrington and Younger, J.J., in *In re* Wallace, *supra* note 86, at 289, 303.

are the courts to ascertain it? Some judges have thought this difficulty so great, that they have urged that it would be solved much better by the legislature and have considered it to be the main reason why the courts should leave public policy alone.[114] Others, while accepting the doctrine, have uttered a warning that the judges are more to be trusted as interpreters of the law than as expounders of public policy.[115] This admonition is a wise one and judges are not likely to forget it. But the better view seems to be that the difficulty of discovering what public policy is at any given moment certainly does not absolve the bench from the duty of doing so.[116] The judges are bound to take notice of it and of the changes which it undergoes, and it is immaterial that the question may be one of ethics [117] rather than of law. The basis for their decision is " the opinions of men of the world, as distinguished from opinions based on legal learning." [118] Of course it is not to be expected that men of the world are to be subpœnaed as expert witnesses in the trial of every action raising a question of public policy. It is the judges themselves, assisted by the bar, who here represent the highest common factor of public sentiment and intelligence. One guide that they are certain to employ whenever it is available is statutory legislation *in pari materia,* if it is not too antiquated to be useful.[119] In exercising this branch of judicial discretion, they must consider the tendency of the transaction

[114] See the judgment of Alderson, B. (in which Wightman and Erle, J.J., concurred) in Egerton v. Brownlow, *supra* note 72, at 106–07. See also Parke, B., *ibid.* at 122–24.

[115] See notes 111 and 112, *supra,* and Sankey, J., in Denny v. Denny, [1919] 1 K. B. 583, 587.

[116] Younger, L. J., in *In re* Wallace, *supra* note 86, at 302.

[117] Kennedy, L. J., in Wilson v. Carnley, [1908] 1 K. B. 729, 743, thought that no change of public policy can be admitted in matters of elementary morality, such as the moral obligations involved by marriage. Dean Pound, whose judicial experience makes his opinion all the more valuable, says of American law, " There are many situations where the course of judicial action is left to be determined wholly by the judge's individual sense of what is right and just." POUND, LAW AND MORALS 62.

[118] Lord Haldane in Rodriguez v. Speyer Bros., *supra* note 110, at 79. It is only where a contract is *ex facie* illegal that judicial notice must be taken of its illegality. North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd., [1914] A. C. 461 *cf.* Rawlings v. Gen. Trading Co., [1921] 1 K. B. 635; Montefiore v. Menday Motor Co., Ltd., [1918] 2 K. B. 241.

[119] See Fry, L. J., in Mogul Steamship Co., Ltd. v. McGregor Gow Co., 23 Q. B. D. 598, 630 (1889).

which they are investigating.[120] Tendency, it has been pointed out, is not an easy word to define; [121] and it is not clear whether it signifies a mere possibility that a given act may develop into something contrary to the public weal,[122] or whether there must be a probability of this occurrence as well.[123]

(5) What are the limits of public policy? The courts themselves have always been apprehensive of the dangers into which the ill-defined boundaries of public policy may lead them. Complete fencing of the doctrine is impossible if it is to be of the slightest use in developing the law. We are dealing here with something that is part of the spirit of our common law and not with a particular limb of its body that can be completely anatomized. But public policy is not in its narrowed modern meaning the whole spirit of the common law and there are other ingredients which keep it in check.

First among these is the principle that it cannot conflict with existing Parliamentary legislation. It may be useful in resolving a doubtful point in the interpretation of an enactment.[124] But there cannot be public policy leading to one conclusion when there is a statute directing a precisely opposite conclusion.[125] Moreover, where a rule of the common law is itself clear, arguments based upon public policy are beside the mark, however useful and admissible they may be where a new or doubtful question arises.[126] There has been a noticeable tendency to regard public policy as a last resort for molding the law. This was conspicuously exemplified in the famous *Osborne* case [127] when it reached the House of Lords. All the noble and learned lords except one preferred the surer ground of *ultra vires* to the precarious foothold of public

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[120] *Cf.* Egerton v. Brownlow, *supra* note 72, at 161–62, 173–74, 196; Montefiore v. Menday Motor Co., Ltd., [1918] 2 K. B. 241.

[121] Lord Sterndale, M. R., in *In re* Wallace, *supra* note 86, at 283.

[122] Warrington, L. J., *ibid.* at 287. So too Lord Truro in Egerton v. Brownlow, *supra* note 72, at 198 and Swinfen Eady, J., in *In re* Beard, [1908] 1 Ch. at 387.

[123] Lord Sterndale, M. R., in *In re* Wallace, *supra* note 86, at 283; *cf.* Lord Brougham in Egerton v. Brownlow, *supra* note 72, at 173–74.

[124] *Ibid.* at 106–07.

[125] *In re* Houghton, [1915] 2 Ch. 173; *cf.* Cozens-Hardy, M. R., in Estate of Hall, [1914] P. 1, 5.

[126] Dampier, J., in Fletcher v. Sondes, 3 Bing. 501, 525–26 (1926); Lord Mansfield in Jones v. Randall, 1 Cowp. 39 (1774).

[127] Amalgamated Soc. of Railway Servants v. Osborne, [1910] A. C. 87; *cf.* Burrough, J., in Richardson v. Mellish, 2 Bing. 229, 251 (1824).

policy. And that one lord was driven to it only because he felt that *ultra vires* was too doubtful for reliance. The caution which is characteristic of the judicial use of public policy is also illustrated by the curious fact that it generally (though not exclusively) has a negative effect. Most of the cases turn upon forbidding a man to do something or other. To a certain extent this has been the natural result of the terms in which the doctrine is described, and not simply a consequence of judicial caution. Public policy subordinates individual gain to public benefit. The law repeatedly says, " You must not do this because you will injure the public." It rarely says, " You may do this because you will thereby benefit the public." [128] Of course it does not follow that this common negative statement of principle will add no constructive additions to our law, for the denial of a private person's liberty of action in a particular case may very well be an indirect affirmation of a corresponding right in every other citizen.

Finally, public policy is emphatically no ideal standard to which law ought to conform.[129] We have seen, at the outset of this paper, that when the founders of our common law spoke of " reason," " the law of reason," " the law of nature," they doubtless had a vision of some abstraction and wished to make the law harmonize with that. That vision has long passed from public policy as we now understand the phrase.[130] The legislature may have some imperfect grasp of Bentham's utilitarianism, and this, or some more modern ethical standard, may be discoverable in judicial legislation.[131] But it will not be found in public policy. That doc-

[128] Lord Sumner in Rodriguez v. Speyer Bros., *supra* note 110, at 125, said: " Considerations of public policy are applied to private contracts or dispositions in order to disable, not in order to enable. . . . I never heard of a legal disability from which a party or a transaction could be relieved, because it would be good policy to do so."

[129] See Lord Parker in Daimler Co., Ltd. v. Continental, etc., Co., Ltd., [1916] 2 A. C. 307, 344.

[130] Platt, B., in Egerton v. Brownlow, *supra* note 72, at 99, made a belated attempt to resuscitate it.

[131] As to which, *cur. adv. vult,* for this paper is confined to public policy. Dean Pound's opinion is expressed in his LAW AND MORALS 50 *et seq.* The judicial application of the term " natural justice " is too wide a topic to be discussed here. Indeed, it would require a separate essay. A good starting point (because it includes older authorities) is Local Gov. Board v. Arlidge, [1915] A. C. 120, 128, 130, 138, 150–51, and (in the courts below) King v. Local Gov. Board, [1913] 1 K. B. 463, 475, 477, [1914] 1 K. B. 160, 176, 178, 181, 182, 190, 199, 200–01. *Cf.* Valentini

trine may answer the question, " What is it that the community wants now? " It is dumb before the question, " What is it that an ideal community ought to want? " A judicial decision on public policy will give us something more subtle than the commonplaces of a Greek tragic chorus, but it will not soar to the ideals of the citizens in Plato's *Republic*; and, if one may say so without impertinence, nothing but danger and confusion could result if the judges made any such attempt. Our common law is at such a mature age now that the lines of its trunk are settled, whatever may be the direction of its new branches.

(6) Terms analogous to " public policy " have been, and still are, used in our law. Fuller analysis of them would unduly lengthen this article. To " natural justice " a bare reference has already been made. Then, again, the old vague meaning of public policy as any canon by which the law is to be kept tolerably abreast of the needs of the community appears in the " discretion " which is repeatedly given by statutes in express terms to the judges, and in the existence of the " reasonable man," a legal figment whose conduct is ascertainable by the brains of the judge or of the judge and jury. " Discretion " and " reasonableness " serve a twofold purpose. They enable the legislature to make laws which are fairly certain and they save it from ridiculous attempts to cover every problem *ejusdem generis*. They are one mode of securing stability without rigidity in legal rules.

I return, then, empty handed from the quest on which I set out. My problem was to find out whether the judges take the view that public policy is an ideal to which they should shape English case law. It is not. It is still a useful and important barometer of educated public feeling, but it is not a machine for altering its pressure. The value of the doctrine depends on the men who administer it, and the nation may rest assured that it is in safe hands.

It would be vain to attempt here a treatment of the attitude of the law of the United States towards public policy. But a short appendix may be added with respect to one side of it. That side is as " tedious as a twice-told tale " to American lawyers, but it is by no means so well known in England, and I refer to it for the benefit of English readers. It is remarkable that, in the United

v. Canali, 24 Q. B. D. 166, 167 (1889); ALLEN, LAW IN THE MAKING (1927) 168, 172, 195, 198, 219, 227, 254.

States, judicial interpretation of two amendments to the Constitution has put the Supreme Court in a position which English courts have long ceased to occupy. The old vague meaning of public policy is in lively operation at this very day on the western side of the Atlantic. The Fifth Amendment to the Constitution provides that no person shall be " deprived of life, liberty, or property, without due process of law." This is perfectly general in terms and applies only to the federal government. The Fourteenth Amendment, passed much later than the Fifth, referred specifically to the separate states, and provided that no state should enact any law which should " deprive any person of life, liberty, or property, without due process of law." The Supreme Court, though it has disclaimed any intention of framing a comprehensive definition of the phrase " due process of law," has at any rate stated its general views on what these words mean.

" Due process of law in the latter [the Fifth Amendment] refers to that law of the land which derives its authority from the legislative power conferred upon Congress by the Constitution of the United States, exercised within the limits there prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State exerted within the limits of *those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions*,[132] and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure." [133]

" This statement," says Professor Charles K. Burdick, " has been paraphrased in later cases but it has not been improved upon." [134]

A friendly alien may be pardoned for detecting a strong family resemblance between the phrases italicized and the " reason," " convenience," " equity," and " law of nature " by which English judges anciently molded the common law. Moreover, neither Congress under the Fifth Amendment, nor a state legislature under the Fourteenth Amendment can, conformably to the Constitution, pass a law which violates these respective " due process "

[132] Italics mine.

[133] Hurtado v. California, 110 U. S. 516, 535 (1884).

[134] BURDICK, LAW OF THE AMERICAN CONSTITUTION (1922) 512; and see especially cc. XVII, XXVIII.

clauses. Englishmen may dismiss as an archaism Coke's statement that an act of Parliament which conflicts with "common right and reason" is void, but Coke might, without absurdity, point to his doctrine as flourishing under a disguise at this moment in America. Where, as has frequently happened, this has led the Supreme Court to declare certain enactments of the state legislatures unconstitutional, this result has often been achieved neither with unanimity in the Supreme Court itself nor with the general approval of the legal profession.[135] It has been urged with some acidity that a state legislature is a better judge of its own "public policy" than the Supreme Court is likely to be.

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[135] *E.g.*, Tyson v. Banton, 273 U. S. 418 (1927).