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Selling Sex: Analyzing the Improper Use Defense to Contract Enforcement through the Lens of *Carroll v. Beardon*

Julie M. Spanbauer

The John Marshall Law School (Chicago)

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**SELLING SEX: ANALYZING THE IMPROPER USE
DEFENSE TO CONTRACT ENFORCEMENT
THROUGH THE LENS OF *CARROLL V. BEARDON***

JULIE M. SPANBAUER*

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Prostitution will always lead into a moral quagmire in democratic societies with capitalist economies; it invades the terrain of intimate sexual relations yet beckons for regulation. A society's response to

* Professor of Law, The John Marshall Law School, Chicago; LL.M., 1992, Northwestern University School of Law; J.D., 1986, Valparaiso University School of Law. The author would like to thank the following contract law scholars who graciously read this article and provided feedback and support: Joseph M. Perillo, Distinguished Professor of Law, Emeritus, Fordham Law School; Stewart Macaulay, Malcolm Pitman Sharp Hilldale Professor & Theodore W. Brazeau Professor of Law, University of Wisconsin Law School, who additionally provided insights about the underlying case. The author also thanks Glen Weissenberger, Judge Joseph P. Kinneary Professor Emeritus, University of Cincinnati Law School, for his expertise in the field of evidence, for his insightful comments and detailed feedback on an earlier draft of this article, and for his willingness to engage in unending discussion of this article. A special thank you is extended to John Scheid, Professor, The John Marshall Law School, for his assistance in interpreting the warranty deeds and calculating the acreage involved in the transaction. The author would also like to thank Thomas Keefe, Instructional Services Librarian, The John Marshall Law School, for his extraordinary efforts in the research of the many records involved in this case, which were not available electronically and were difficult to obtain. The author wishes to thank her research assistants, Michael Powers, Anne Schmidt, and RaeLeann Smith for their thorough research. A final thank you is extended to The John Marshall Law School Administration, and in particular to Associate Dean Ralph Ruebner, for extending resources and moral support, without which this article would not have been written.

prostitution goes to the core of how it chooses between the rights of some persons and the protection of others.[↓]

ABSTRACT

The 1963 decision of the Supreme Court of Montana in *Carroll v. Beardon* occupies less than three full pages in the Pacific Reporter and involves a simple real estate transaction in which a “madam” sold a house used for prostitution to another “madam.” The opinion is the last in a long line of cases which speak specifically to the issue of enforcement of facially legitimate contracts that in some manner involve or are related to prostitution. It is commonly cited in treatises and hornbooks as representative of the movement by courts toward enforcement of such contracts under the law of improper use—scenarios in which the transaction itself is not illegal, but the underlying purpose or conduct of one or more parties to the transaction involves using the subject matter in an illegal manner. It is unfortunate that this opinion appears in only a handful of casebooks and its subject matter has received so little scholarly attention because it provides both scholars and educators endless opportunities for exploration of the cultural context within which courts operate and construct case narratives. Its humorous tone and deceptive simplicity also belie a serious failure by the court to provide a fair and impartial resolution of the parties’ dispute, to identify and balance the competing policy interests, and to create useful precedent for future courts and litigants. Most importantly, this 1963 decision and its implications remain relevant and merit consideration by scholars exploring the intersection of contract and criminal laws related to intimate sexual relationships.

I. INTRODUCTION

Carroll v. Beardon,¹ a case familiar to some first-year law students,² occupies less than three full pages in the Pacific Reporter.³ Its brevity; its simple,

[↓] BARBARA MEIL HOBSON, *UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION* 3 (Univ. of Chicago Press 1990).

¹ *Carroll v. Beardon*, 381 P.2d 295 (Mont. 1963).

² The case appears in the following textbooks: GERALD E. BERENDT ET AL., *CONTRACT LAW AND PRACTICE* 420-22 (2d ed. 2009); 1 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION, THE INTRODUCTORY COURSE* 494-496 (3d ed. 2010). It also appears to be fairly well known by law professors, perhaps even achieving a sort of cult status as an incorrectly decided, albeit interesting, decision. See, e.g., D.A. Jeremy Telman, *Langdellian Limericks*, VAL. U. SCH. L. LEGAL STUD. RES. PAPER SERIES, no. 10-09, Sept. 2010, at 27, available at <http://ssrn.com/abstract=1681490> (creating a limerick for the case). The limerick reads:

In Montana arose a dispute
O'er a house of doubtful repute.
The seller madame,
Not in on the scam
May partake of her share of the loot.

Id.

uncomplicated subject matter—a real estate transaction; its unsophisticated participants—a “madam” who transferred her ownership in a house used for prostitution to another “madam”;⁴ and the court’s simultaneously playful and sarcastic tone, combine to render this opinion an entertaining diversion for first-year law students from the dry, complicated fact patterns frequently found in contract law casebooks.⁵ This simple fact pattern and sarcastic opinion, however, may have caused both casebook authors and scholars to overlook it and its underlying public policy defense to contract enforcement,⁶ as a worthy subject of scholarly and educational attention.⁷ It is certainly understandable that in an area of law increasingly dominated by a shift from a judicial declaration of public policy to a search for and deference to legislative statements of public policy,⁸ that educators

³ See *Carroll*, 381 P.2d at 295-97. The case word count is a mere 1,474 words (using the Microsoft Word Count tool).

⁴ *Id.* at 295-96

⁵ Michael Hunter Schwartz, *Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 368 (2001) (arguing that “casebooks for first-year law students often start with incredibly difficult cases . . . [addressing such topics as] expectation, reliance, and restitution.”).

⁶ Courts and parties frequently assert that contracts in violation of public policy are illegal. E. ALLAN FARNSWORTH, *CONTRACTS* § 5.1 (4th ed. 2004) (hereinafter FARNSWORTH 4th ed.).

This is misleading insofar as it suggests that some penalty is necessarily imposed on one of the parties, apart from the court’s refusal to enforce the agreement. In some cases, the conduct that renders the agreement unenforceable is also a crime, but this is not necessarily or even usually so. It is therefore preferable to attribute unenforceability to grounds of public policy rather than to “illegality.”

Id. at 315. This misleading label is reflected in the First Restatement, which defined an agreement as illegal “if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy.” *RESTATEMENT OF CONTRACTS* § 512 (1932). “The Restatement (Second) avoids the term ‘illegal’ and subsumes all such unenforceable bargains under the amorphous but ubiquitous concept of ‘public policy.’” JOSEPH M. PERILLO, CALAMARI AND PERILLO ON *CONTRACTS* § 22.1, at 729 (6th ed. 2009). See also *RESTATEMENT (SECOND) OF CONTRACTS* ch. 8, topic 1, intro. note (1981). In conformity with the Restatement (Second) of Contracts terminology, this article will use the phrase “public policy” to also encompass contracts that are truly illegal. For examples of these truly illegal contracts, see *infra* note 139.

⁷ See Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 *GEO. MASON L. REV.* 483, 488 (2010) (commenting that “[d]espite the frequency with which courts analyze illegal contracts, commentary on this issue has been sparse.”) (footnote omitted).

⁸ “The declaration of public policy has now become largely the province of legislators rather than judges. This is in part because legislators are supported by facilities for factual investigations and can be more responsive to the general public.” *RESTATEMENT (SECOND) OF CONTRACTS* § 179 cmt. b (1981). Typically, legislation is silent as to whether contracts are enforceable. *Id.* In these circumstances, a court will find a contract unenforceable “on the basis of a public policy derived either from its own perception of the need to protect some aspect of the public welfare or from legislation that is relevant to that policy although it says nothing explicitly about unenforceability.” *Id.* § 178 cmt. b.

and scholars would focus their attention on cases involving, for example, surrogacy⁹ or prenuptial agreements,¹⁰ over this somewhat dated decision.¹¹

It would also be an overstatement to analogize the historical perspective provided by a case such as *Carroll v. Beardon* to that, for example, of *Webb v. McGowan*¹²

⁹ See, e.g., RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 22-39 (4th ed. 2008); LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 107-09 (8th ed. 2006); IAN AYERS & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* 645-48 (7th ed. 2008); JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* 583-91 (9th ed. 2008); E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 575-82 (7th ed. 2008) (hereinafter FARNSWORTH 7th ed.); CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 647-58 (6th ed. 2007); CHRISTINA L. KUNZ & CAROL L. CHOMSKY, *CONTRACTS: A CONTEMPORARY APPROACH* 535-52 (2010).

¹⁰ See, e.g., FARNSWORTH 7th ed., *supra* note 9, at 571-75; ARTHUR ROSETT & DANIEL J. BUSSEL, *CONTRACT LAW AND ITS APPLICATION* 289-307 (7th ed. 2007). Other contemporary cases found in textbooks include those involving post-employment restrictive covenants. See, e.g., BRIAN A. BLUM & AMY C. BUSHAW, *CONTRACTS: CASES, DISCUSSION, AND PROBLEMS* 492-95 (2d ed. 2008); BRUCE W. FRIER & JAMES J. WHITE, *THE MODERN LAW OF CONTRACTS* 430-41 (2d ed. 2008); JAMES F. HOGG ET AL., *CONTRACTS: CASES AND THEORY OF CONTRACTUAL OBLIGATION* 518-23 (2008); KNAPP, *supra* note 9, at 633-47; ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* 568-71 (5th ed. 2006). These cases are chosen for their strong competing policy interests, which have shifted over time as cultural and, accordingly, judicial views on the employment relationship have shifted. FARNSWORTH 4th ed., *supra* note 6, § 5.3. One commentator explained this tension in competing public policy interests in the context of restrictive employment covenants as follows: “[n]owhere has judicial activism in the service of public policy been more at war with judicial laissez faire in the name of freedom of contract.” *Id.* at 323. The historical policy basis for denying enforcement of such covenants was based upon

the risk of depriving individual employees of their ability to earn a living. During the fifteenth and sixteenth centuries, courts sought to protect apprentices, who purchased their training and license to trade through the guild system, by preventing masters from extending the requisite period of servitude through the use of restrictive covenants. The dominance of the apprenticeship system as a means of entering a trade combined with the relative difficulty of traveling outside one’s town or village made even narrow geographic limitations on postemployment competition particularly onerous. Thus, the earliest recorded cases voided such agreements as unfair restraints of trade.

Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1171 (2001) (footnotes omitted). Blanket invalidity was replaced by “a more tempered approach by the early part of the eighteenth century.” *Id.* The modern approach to these covenants is premised upon three considerations: “the possible loss to the promisor of his or her means of earning a living, the danger of corporate monopolization, and the potential loss to society of the services of one of its members.” *Id.*

¹¹ The Supreme Court of Montana issued its decision on May 9, 1963. *Carroll v. Beardon*, 381 P.2d 295, 295 (Mont. 1963). For the precise date that the relevant contract was entered into in this case, see *infra* note 35 and accompanying text.

¹² *Webb v. McGowan*, 168 So. 196 (Ala. Ct. App. 1935) (holding severely injured employee saved employer’s life and employer’s subsequent promise to compensate employee was enforceable). The problems encountered in this area of case law commonly fall under the

and *Mills v. Wyman*¹³ in the area of promissory restitution.¹⁴ *Carroll v. Beardon*, however, holds its own in establishing a context for both student and scholarly exploration of the problems with the tests devised by the courts in this area of law and, for that matter, in any area in which public policy dominates the analysis.¹⁵ In fact, this 1963 judicial opinion, which is the most recent opinion to address contracts involving prostitution and the improper use defense—scenarios in which the transaction itself is not illegal, but the underlying purpose or conduct of one or more parties to the transaction involves using the subject matter in an illegal manner—is routinely cited in both treatises and hornbooks as representative of the movement by courts toward enforcement of such contracts.¹⁶

It also provides endless teaching and scholarly opportunities for examination of this rich resource and vivid illustration of the importance of cultural context to legal analysis.¹⁷ Because the murky line-drawing inherent in public policy analysis¹⁸ is

labels “past consideration” or “moral obligation” because a strict reading of the promise reveals that it is not supported by consideration, given the fact that the other party’s actions, which were undertaken prior to the making of the promise, could not have induced the promise. Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1115 (1971).

¹³ *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (Mass. 1825) (holding father’s subsequent promise to Good Samaritan to compensate for care of ill son unenforceable as moral, but not legal, obligation).

¹⁴ The theory of promissory restitution does not appear in the Restatement of Contracts and was recognized for the first time in the Restatement (Second) of Contracts. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981). Pursuant to this doctrine, “courts are actually granting the plaintiff restitution for provision of services or goods in the past. Courts emphasize the defendant’s later promise, not because it ‘waives’ a technical defense or because it is binding in and of itself, but because it negates the traditional presumption that the services rendered were gratuitous.” Geoffrey R. Watson, *In the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 TUL. L. REV. 1749, 1793 (1997). *Webb v. McGowan* is cited as an illustration to the Restatement (Second) of Contracts. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d, illus. 7. *Mills v. Wyman* is cited as a contrasting situation in which a promise should not be held enforceable. *Id.* at cmt. a, illus. 1.

¹⁵ See Kerry L. Macintosh, *Am I My Borrower’s Keeper?*, 50 OHIO ST. L.J. 1197, 1203 (1989) (commenting in the context of the improper use doctrine and public policy that “few courts have identified the relevant policy considerations and still fewer have explained how or why the traditional rules further those policies”).

¹⁶ See, e.g., FARNSWORTH 4th ed., *supra* note 6, § 5.6 n.27. The case is cited in all prior editions of this treatise. E. ALLAN FARNSWORTH, CONTRACTS § 5.6 n.27 (3rd ed. 1999); E. ALLAN FARNSWORTH, CONTRACTS § 5.6 n.27 (2d ed. 1990); E. ALLAN FARNSWORTH, CONTRACTS § 5.6 n.26 (1982). Other contemporary treatises and hornbooks citing the case include: PERILLO, *supra* note 6, § 22.2; RICHARD A. LORD, WILLISTON ON CONTRACTS §§ 19.13 n.15, 19.69 n.62 (1998).

¹⁷ For purposes of this discussion, culture is defined as “any set of shared, signifying practices . . . by which meaning is produced, performed, contested, or transformed. . . . [C]ulture is ‘a process, not a conclusion,’ . . . of making, reproducing, and contesting meaning.” Naomi Mezey, *Law as Culture*, 13 YALE J. L. & HUMAN. 35, 42 & n.29 (2001) (quoting RAYMOND WILLIAMS, CULTURE AND SOCIETY 1780-1950, at 295 (1958)). In fact, “law is so deeply embedded in the particularities of each culture that carving it out as a separate domain and only later making note of its cultural connections distorts the nature of

front and center in this decision to reject a line of older authority deeming such contracts unenforceable when the seller has only knowledge of the buyer's intended illegal use,¹⁹ the case serves as evidence of the court's role as a powerful institutional actor simultaneously influenced by and exerting influence upon the larger, social, political, economic, and legal culture within which it operates.²⁰

This overt focus on public policy analysis additionally challenges both the student reader and the scholar to focus on the very process of the legal analysis employed by the court and the malleable standards and tests it invoked to justify the result it reached.²¹ In this way, the case also serves as a vivid example of an

both law and culture.” LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* xii (2006). See also OSCAR G. CHASE, *LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 2* (2005) (describing cultural differences in dispute processes as being largely “a reflection of the culture in which they are embedded”).

¹⁸ See, e.g., Janine Campanaro, Note, *Until Death Do Us Part? Why Courts Should Expand Prenuptial Agreements to Include Ten-Year Marriages*, 48 *FAM. CT. REV.* 583, 590 (2010). In explaining the public policy analysis underlying enforceability of prenuptial agreements, the author stated:

As one judge sitting in the Supreme Court of Appeals of Virginia stated when asked to determine if a prenuptial agreement was void as against public policy, “[t]he meaning of the phrase ‘public policy’ is vague and variable; courts have not exactly defined it, and there is no fixed rule by which to determine what contracts are repugnant to it. . . . The very reverse of that which is public policy at one time may become public policy at another time. Hence, no fixed rules can be given by which to determine what is public policy.

Id. (quoting Wallihan v. Hughes, 82 S.E.2d 553, 558 (Va. Ct. App. 1954)).

¹⁹ These decisions are generally premised on the view that unless the buyer's intended illegal use threatens “grave social harm” or unless the seller actively participates in the buyer's illegal use of the subject matter of the contract, the policies in favor of contract enforcement—the public interest in protecting the parties' reasonable expectations, problems with resulting forfeiture due to reliance, and a party's “excusable ignorance” of the public policy violations—outweigh countervailing policy interests. FARNSWORTH 4th ed., *supra* note 6, § 5.1, at 313-14, § 5.6, at 342. For a detailed discussion of the relevant public policy interests, see *infra* notes 106-118, 135-153 and accompanying text. For a discussion of the application of the active participation test in the context of contracts involving prostitution, see *infra* notes 154-196 and accompanying text.

²⁰ Law is “one (albeit very powerful) institutional cultural actor whose diverse agents (legislators, judges, civil servants, citizens) order and reorder meanings.” Mezey, *supra* note 17, at 45.

[S]ocial practices are not logically separable from the laws that shape them and . . . if one were to talk about the relationship between culture and law, it would certainly be right to say that it is always dynamic, interactive, and dialectical—law is both a producer of culture and an object of culture. Put generally, law shapes individual and group identity, social practices as well as the meaning of cultural symbols, but all of these things (culture in its myriad manifestations) also shape law by changing what is socially desirable, politically feasible, legally legitimate.

Id. at 46.

²¹ Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 *CLINICAL L. REV.* 623, 666 (2003) (describing entering law students' expectations that they will “memorize a

appellate court's use of humor and its unique power to construct facts and to create one story of a given case, complete with factual compression, over-simplification, and distortion.²² Because culture is so intricately connected to this entire area of public policy defenses to contract enforcement, and because the judiciary has failed to articulate a coherent or viable approach to this specific line of cases involving the intersection of contract and criminal laws related to intimate sexual relationships, it is both surprising and disappointing that so little scholarly attention has been devoted to this area of law.²³

In order to provide a context for the discussion of the policy and legal issues, Part II of this article will present the facts of *Carroll v. Beardon* first as constructed by the trial court²⁴ and then by the Supreme Court of Montana.²⁵ These latter facts will then be analyzed along with facts from the record the court failed to mention, which demonstrate that the Supreme Court of Montana, contrary to its holding, should have found the contract unenforceable.²⁶ Finally, Part II will also assess the effect the

body of rules that comprise the sum total of what they need to know about the law . . . They expect that there is a rule of law to fit any situation, so they search for direct fit analogs in black letter law.”).

²² Gerald Caplan, *Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*, 73 ALB. L. REV. 1, 7-10 (2009) (arguing that appellate court's use of “[f]act selection” and compression in writing narratives “is a powerful discretionary tool that can be employed without detection to eliminate or obscure facts that might make the reader uncomfortable with the outcome”). The different points of view or stories of the participants in the litigation process have been explored in a number of texts. See generally RICHARD DANZIG & GEOFFREY R. WATSON, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* (2d ed. 2004); *CONTRACTS STORIES* (Douglas Baird ed., 2007). Neither of these texts includes a case involving the public policy defense to contract enforcement. The earlier edition of the Danzig text did contain analysis of *Karpinski v. Collins*, 252 Cal. App. 2d 711 (Cal. Ct. App. 1967), a case in which the appellate court affirmed a trial court's finding that the parties were not *in pari delicto* regarding a loan agreement, which included “secret rebates.” RICHARD DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* 129-147 (1978).

²³ See Badawi, *supra* note 7, at 488.

²⁴ See *infra* notes 35-38 and accompanying text.

²⁵ See *infra* notes 39-42 and accompanying text.

²⁶ See *infra* notes 83-97 and accompanying text. The parties, their attorneys, and the judges and justices have all passed away and, therefore, could not be interviewed about the case. As to the parties, a public records search in the Social Security Death Index on Lexis and a search of records using www.archives.com revealed that a woman named Agnes Beardon died in Pierce County, Washington on May 25, 1998 at the age of 91. There are numerous death records for Edna Carroll—an Edna Carroll died in Billings, Montana in June, 1976 at the age of 89. Two women named Edna Carroll died in Oregon, one in Marion County in September 1985 at the age of 88 and another in Multnomah County in June 1974, at the age of 83. Ms. Carroll indicated in her deposition that she was living in Portland, Oregon at the time of her deposition, and given the fact that it is located in Multnomah County, this latter record may, in fact, be her death record. See Transcript, *infra* note 35, at 72. See also Oregon County Map with Administrative Cities, <http://geology.com/county-map/oregon.shtml>. In any event, Ms. Carroll indicated in her deposition, which was taken on September 1, 1961, that she was “getting along in years.” Transcript, *infra* note 35, at 71, 94.

Supreme Court of Montana's use of humor has on the reader and the role culture may have played in shaping the court's cavalier and dismissive attitude toward the litigants, their attorneys, and the public policy issues.²⁷ Part III will introduce the competing public policy interests generally found relevant to the improper use defense and specifically implicated in the case of *Carroll v. Beardon*, both of which also weigh against contract enforcement.²⁸ Part IV of this article will assess the precedent that, although available to the Supreme Court of Montana, was essentially ignored; it will further demonstrate how this precedent similarly supports the public policy defense in this case.²⁹ Part V will present a brief epilogue to the Supreme Court of Montana's decision in *Carroll v. Beardon*,³⁰ and will assess one alternative approach the court could have taken to achieve a more accurate, honest resolution of the case³¹ and to provide valuable precedent to future courts grappling with current public policy issues related to the competing interests implicated by contract enforcement and the regulation of sexual relationships in this country.³²

II. *CARROLL V. BEARDON*—THE NARRATIVE CONSTRUCTED BY THE COURTS AND THE ATTORNEYS

Carroll v. Beardon is an excellent vehicle to begin exploration of the varied and frequently complex situations in which public policy defenses to contract enforcement arise.³³ First, unlike many such cases,³⁴ the facts as set forth in the trial

As such, it is extremely unlikely that either she or Ms. Beardon would be alive fifty years later. As to the judges, a public records search in the Social Security Death Index on Lexis and at www.archives.com revealed that the trial court judge, LeRoy L. McKinnon, died in 1999. A similar search revealed that the five justices of the Supreme Court of Montana who heard Ms. Beardon's appeal have died—Chief Justice James T. Harrison died in 1982, Justice John C. Harrison died in 2004, Justice Hugh Adair died in 1971, Justice Thomas Castles died in 1981, and Justice Stanley Doyle died in 1975. A similar search revealed that one of Ms. Beardon's attorneys, John Bayuk, died in 1981. The same search revealed that Ms. Beardon's other attorney, Patrick Donovan, died in 1970. The attorney who represented Ms. Carroll beginning early in the proceedings, after the complaint and answer were filed, and continuing through to the final appeal, John C. Hoyt, died in 2001. Prior to his death, one of Ms. Carroll's attorneys was asked about the case and responded in a letter: "as far as I was concerned, this was purely a business transaction between two persons who had made a deal for the sale of property." Macaulay, *supra* note 2, at 494.

²⁷ See *infra* notes 48, 59-63, 69-75, 98 and accompanying text.

²⁸ See *infra* notes 106-153 and accompanying text.

²⁹ See *infra* notes 154-196 and accompanying text.

³⁰ See *infra* notes 197-227 and accompanying text.

³¹ See *infra* notes 206-227 and accompanying text.

³² See *infra* notes 206-210, 221-227 and accompanying text.

³³ As one author noted:

[T]he underlying doctrine that courts will not enforce contracts that are against "public policy" encompasses . . . contracts ranging from promises to commit illegal acts to contracts in restraint of trade to indemnification provisions, to name a few. The doctrine also contains notable exceptions, varying the level of enforcement depending on the particular circumstances. In short, void for public policy doctrine is longstanding, but also rather confusing.

court decision and the majority opinion of the Supreme Court of Montana appear undisputed and straightforward, initially revealing nothing more than a routine real estate transaction gone awry. On March 15, 1960, Edna Carroll signed a warranty deed to sell a house, its contents, and fifty acres of land located in rural Montana along the northwest part of the state bordering Canada for fifty-thousand dollars.³⁵ On the same date, Agnes Beardon paid Ms. Carroll \$8,000.00 as a down payment and signed a note and mortgage pursuant to which she agreed to pay a total amount of \$42,000.00 to Ms. Carroll in \$1,000.00 monthly mortgage payments for the first six months of the year followed by monthly payments of \$2,000.00 for the remaining six months of the year.³⁶ Ms. Beardon was in default from the beginning, making only one partial payment on August 5, 1960.³⁷ The trial court's narrative ended here with no mention of either party's unlawful use of the premises or assessment of Ms. Beardon's public policy defense and its corresponding narrative.³⁸

Harvard Law Review Association, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445, 1445 (2006).

³⁴ See Schwartz, *supra* note 5, at 368 & n.80.

³⁵ Carroll v. Beardon, 381 P.2d 295, 295 (Mont. 1963). The mortgage was actually signed by Ms. Carroll on March 14, 1960. Transcript of Record on Appeal at 1-5, Carroll v. Beardon, 381 P.2d 295 (Mont. 1963) (No. 10493) (hereinafter "Transcript"). It was signed by Ms. Beardon and returned to Ms. Carroll on March 25, 1960. *Id.* at 1. The mortgage was filed in the Office of the Toole County Clerk and Recorder on April 18, 1960. *Id.* at Exhibit B. From the outset, the Supreme Court of Montana oversimplified the facts, omitting mention of a third deposition that was submitted to the trial court, the deposition of Ms. Carroll's, and later Ms. Beardon's, housekeeper. *Id.* at 95-101. The court stated only that the "matter was submitted to the district court on depositions of the parties involved." Carroll, 381 P.2d at 295. The statement is misleading, implying that only the parties provided deposition testimony. For a discussion of the housekeeper's testimony and its relevance to the issues presented in the case, see *infra* notes 91-95 and accompanying text.

³⁶ Carroll, 381 P.2d at 295; Transcript, *supra* note 35, at 1-5. For purposes of clarity, it should be noted that there were actually two contracts entered into by the parties in this case. In the first contract, Ms. Carroll sold the property to Ms. Beardon. In the second contract, Ms. Carroll was the lender and Ms. Beardon was the borrower. The lawsuit filed by Ms. Carroll against Ms. Beardon, involving a mortgage foreclosure action, was based upon the second contract. For purposes of this article, however, the parties will either be referred to by their surnames or as seller and buyer rather than as lender and borrower.

³⁷ Transcript, *supra* note 35, at 66. According to the terms of the contract, and to Ms. Carroll's deposition testimony, the first payment of \$1,000.00 was due in May 1960 and was not paid. *Id.* at 1-5, 89-90. According to the terms of the contract, \$2,000.00 was due in August, Ms. Beardon only paid \$1,000.00, and she also failed to pay the amounts due in June and July of 1960. *Id.* at 1-5.

³⁸ Although the original judge of the Ninth Judicial Circuit, W.M. Black, denied Ms. Carroll's demurrer to Ms. Beardon's public policy defense, Transcript, *supra* note 35, at 15-16, and appeared willing to hear the defense, his replacement, Judge McKinnon of the Tenth Judicial District, never addressed the defense in his written Findings of Fact and Conclusions of Law. *Id.* at 24-29. For a discussion of the reasons for Judge Black's disqualification in this case, see *infra* notes 120-23 and accompanying text.

The additional facts supplied in the majority opinion of the Supreme Court of Montana are also uncontroverted.³⁹ Ms. Beardon admitted in her answer to the complaint and in her deposition that her sole use of the property was to facilitate prostitution, and that when she purchased the property from Ms. Carroll in 1960, the property was commonly known as a house of prostitution and was referred to in the local community as the “Hillside Ranch.”⁴⁰ This common knowledge apparently extended to the federal government. Federal tax records were issued in 1961 by the Internal Revenue Service to Ms. “Edna B. Carroll” at the “Hillside Ranch.”⁴¹ Ms. Carroll’s reluctant admission in her deposition corroborates these records and the fact that this use of the property to facilitate prostitution began when she purchased the property in 1956 and continued until she sold it to Ms. Beardon four years later.⁴²

³⁹ *Carroll*, 381 P.2d at 295-96. The Supreme Court of Montana was bound by the trial court’s findings of fact, but apparently concluded that the additional facts were consistent with the lower court’s conclusions of law that the contract was enforceable. *See Baker Nat’l Bank v. Lestar*, 453 P.2d 774, 779 (Mont. 1969) (“Although [the Supreme Court of Montana] is bound to review the evidence as will [sic] as the law, the review is limited to determining whether there is substantial evidence to support the trial court’s findings of fact and whether such findings are sufficient to support the conclusions of law based thereon.”); *Morrison v. City of Butte*, 431 P.2d 79, 82 (Mont. 1967) (“Where facts are found by the trial court sitting without a jury [the Supreme Court of Montana] is bound by such findings of fact unless they are clearly contrary to the evidence”). Even though the trial court did not explicitly address the public policy defense, the Supreme Court of Montana found “ample evidence in the record to sustain the trial court’s findings and conclusions.” *Carroll*, 381 P.2d at 297. Because the trial court did not mention Ms. Beardon’s public policy defense, its decision should have been reversed and remanded. *See infra* note 206.

⁴⁰ *Carroll*, 381 P.2d at 296. *See infra* note 81. *See also* Transcript, *supra* note 35, at 34, 55, 65, 68. Ms. Beardon also testified that she charged \$15.00 per day for room and board and provided meals to the women living at the Hillside Ranch. *Id.* at 61.

⁴¹ *Id.* at 71-94, Exhibit No. 1.

⁴² *Id.* at 76-82. The following excerpt from Ms. Carroll’s deposition reveals her reluctance:

Ms. Beardon’s attorney: “Did you intend at the time that this property was sold and subject to mortgage that it would be operated as a house of prostitution?”

Ms. Carroll’s response: “No.”

Ms. Beardon’s attorney: “Had it ever been operated as a house of prostitution?”

Ms. Carroll’s response: “Yes.”

Ms. Beardon’s attorney: “And by whom?”

Ms. Carroll’s response: “By myself.”

Ms. Beardon’s attorney: “And when was the last date, if any, that you recall when it was so operated?”

Ms. Carroll’s response: “March 15th.”

Id. at 75-76.

These seemingly simple and straightforward facts stand in sharp contrast to the closely competing public policy interests that are implicated when criminal laws exercising police powers are in tension with the private autonomous system of contract law.⁴³ For this reason alone, the improper use defense as presented in cases such as *Carroll v. Beardon* provides an optimal pedagogical introduction to the public policy defense.⁴⁴ Moreover, the relevant public policy interests include core principles and recurring themes,⁴⁵ rendering the improper use defense a logical starting point and foundation for an exploration of the more contemporary cases involving, for example, identification of and deference to legislative public policy choices,⁴⁶ or situations in which policy analysis has been replaced over time with established tests or standards.⁴⁷

⁴³ Criminal laws rarely control the resolution of the contract defense, because when legislatures define a crime, they rarely speak to the enforcement of contracts that are in some way connected to the commission of the crime. Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 180 n.70 (1985). Judges must, therefore, identify the public policy interests served by the criminal law and determine whether enforcement of the contract will “disserve” the policy interests so identified. *Id.* See also Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 122 (1988) (discussing argument that aspects of contract law reflect “expanding incursions of collectivist and paternalistic notions which have begun to undermine the essentially private world of traditional contract law”) (footnotes omitted).

⁴⁴ For a discussion of the improper use doctrine as applied to the facts of *Carroll v. Beardon*, see *infra* notes 193-96 and accompanying text.

⁴⁵ One such policy interest implicated in the improper use context is protecting reasonable expectations. See *infra* notes 110-13 and accompanying text. The main purpose underlying “contract law is realization of reasonable expectations induced by promises.” Aaron Gershonowitz, *The Strict Liability Duty to Warn*, 44 WASH. & LEE L. REV. 71, 79 n.50 (1987) (quoting 1 CORBIN ON CONTRACTS 1). See also Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813, 821 (2006) (describing the “core principle” driving contract law as “the protection of reasonable expectations”). Another important policy interest implicated with this public policy defense, individual liberty, has been described in the context of employment at will as follows:

Freedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs or affiliations. Just as it is regarded as *prima facie* unjust to abridge these liberties, so too is it presumptively unjust to abridge the economic liberties of individuals.

Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953 (1984). Contract law “assign[s] responsibility to individuals through actions in the private market.” Feinman, at 818.

⁴⁶ See *supra* notes 8-10 and accompanying text.

⁴⁷ For a discussion of the competing policy interests implicated in the restrictive employment covenant scenario, see *supra* note 10. “The law governing restraint of trade has become so well established through legislation and judicial decisions that arguably it should no longer be considered part of the doctrine of public policy.” Prince, *supra* note 43, at 184-85. See also FARNSWORTH 4th ed., *supra* note 6, § 5.3.

[Restrictive] employment [covenants], however, are still governed by common law rules. In these types of cases, there are no flat prohibitions against promises that

The Supreme Court of Montana's narrative, which stands in sharp contrast to the neutral tone of the trial court opinion, incorporates humor⁴⁸ along with other elements of style, including silence or omission, factual compression, and oversimplification to provide additional lessons in critical reading⁴⁹ and a powerful reminder that judicial opinions are as much persuasive documents as are appellate briefs and memoranda submitted by attorneys on behalf of the litigants they represent.⁵⁰ The court's humorous approach also presents the legal issues "in a novel or exciting way" and this "break . . . from formality is more likely to resonate with"⁵¹

restrict competition or employment. Instead, this area of the law is permeated by rules of reason stressing that while restraints on competition and employment are generally not in the best public interest of promoting free enterprise, competition, and employment, occasionally those goals or other important interests are served by enforcing some restraints. More specifically, when parties have freely contracted to restrict their activities in this area, those agreements ought to be enforced unless a well-defined public interest would be derogated.

Prince, *supra* note 43, at 185. "The majority of states follow this general rule; however, some states, including California, have determined that as a matter of law covenants not to compete outside of the context of a sale of a business are unenforceable." Doreen E. Lilienfeld & Sean McGrath, *Drafting and Negotiating Public Company Executive Employment Agreements*, 1858 PLI/CORP 235, 256 n.19 (2011).

⁴⁸ "Commentators, and judges themselves, disagree as to the propriety of humor and other literary devices in judicial opinions." Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 699 (1987).

⁴⁹ Close, critical reading "attends to the implicit text as well as the explicit text and . . . puts more of it in question." Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 164 (1993). As one expert noted,

The reading process . . . is an extremely complicated activity in which the mind is at one and the same time relaxed and alert, expanding meanings as it selects and modifies them, confronting the blanks and filling them with . . . connections. Because of the nature of the reading process, each reading remains as "indeterminate" as the text that it is a response to. But this is precisely the kind of activity—demanding, challenging, constantly structuring them as they structure it—that our students are either reluctant or have not been trained to see as reading. Specifically, it is with the indeterminacy of the text that they have their major difficulties. In their responses to a literary text most students do perform that one action, consistency building, that is central to the reading activity, and they identify what they consider the main idea. They fail, however, to realize that the identification of one idea among many others is only one step toward a more complete and dynamic reading. They perform one synthesis rather than various syntheses and tend to settle too soon, too quickly, for a kind of incomplete, "blocked" reading.

Id. at 172 (quoting Mariolina Salvatori, *Reading and Writing a Text: Correlations Between Reading and Writing Patterns*, 45 C. ENG. 657, 661-62 (1983)).

⁵⁰ See *supra* note 22. One significant difference separating these documents is that the litigants and attorneys do not have an opportunity to "talk back" to the court, rendering the court's opinion the final word on the issues. Richard H. Underwood, *What Gets Judges in Trouble*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 101, 131 & n.147 (2003).

⁵¹ Ryan Benjamin Witte, *The Judge as Author / The Author as Judge*, 40 GOLDEN GATE U. L. REV. 37, 48 (2009). One judge described the judicial opinion as follows: "[w]riting

the reader as it simultaneously deflects attention from the unspoken underlying tensions in public policy and invites the reader to adopt a similarly playful, lighthearted approach to these unsympathetic litigants.⁵² The case, therefore, also serves as an important lesson to readers to closely scrutinize unconventional opinions, and, in this way, to “talk back” to court decisions, assessing their impact upon and their statements about courts, litigants, their attorneys, and the culture within which they all operate.⁵³

A court opinion is affected by and is, therefore, a reflection of the larger culture within which it operates and is also a transformative agent of culture.⁵⁴ The Supreme

opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade.” Gerald Lebovitz et al., *Ethical Judicial Opinion Writing*, 21 *GEO. J. LEGAL ETHICS* 237, 237 & n.352 (2008) (quoting Judith S. Kaye, *Judges as Wordsmiths*, 69 *N.Y. ST. B.J.* 10, 10 (Nov. 1997)). Although students can readily identify the persuasion inherent in a concurring or dissenting opinion, they sometimes struggle to identify persuasion in a majority or unanimous court opinion, often because the court’s language appears neutral and the persuasion is, therefore, subtle. Julie M. Spanbauer, *Teaching First-Semester Students that Objective Analysis Persuades*, 5 *LEGAL WRITING: J. LEGAL WRITING INST.* 167, 178 (1999). “In other words, ‘they fail to see how’ the court ‘worked the text on them.’” *Id.* (quoting Fajans & Falk, *supra* note 49, at 164).

⁵² Of course, the use of humor may backfire in that it may “cause a reader to question whether the court has truly given careful thought to the decision.” Jennifer Sheppard, *The “Write” Way: A Judicial Clerk’s Guide to Writing for the Court*, 38 *U. BALT. L. REV.* 73, 109-110 (2008).

⁵³ See *supra* notes 17, 20, 49, and 50. Given the fact that an important goal of legal education is to teach students to become expert legal readers, the *Carroll v. Beardon* decision is a wonderful vehicle for illustrating and guiding the students through the various stages in the development of critical reading skills:

We must develop techniques that help them move past “stage-one” legal reading (reading for what the court says it is saying) through “stage-two” reading, that is, beyond unquestioning acceptance of textual authority and “found” meaning to an open-ended process of unselfconscious response and self-aware reflection. Then students can move to “stage-three” where purpose informs a “final” reading, where readers take control over “‘two or more opposite or antithetical ideas, images or concepts simultaneously’ activated by the text and thereby synthesize its proliferant meanings as fully as they can.”

Fajans & Falk, *supra* note 49, at 190 (quoting Michael L. Johnson, *Hell is the Place We Don’t Know We’re In: The Control-Dictions of Cultural Literacy, Strong Reading, and Poetry*, 50 *C. ENG.* 309, 314 (1988) (quoting Albert Rothenberg, *The Emerging Goddess: The Creative Process in Art, Science and Other Fields* 49, 55 (1979))). For an evaluation of the different ways in which expert lawyers and novice law students read a case, see Leah M. Christensen, *The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law*, 2008 *B.Y.U. EDUC. & L.J.* 53, 82-83.

⁵⁴ For a definition of culture and an explanation of the social constructivist view of culture upon which this article is premised, see *supra* notes 17 and 20. A more basic definition of culture includes:

[A]ll the customs, values, and traditions that are learned from one’s environment. [I]n a culture there is a “set of people who have common and shared values, customs, habits, and rituals; systems of labeling, explanations, and evaluations; social rules of behavior; perceptions regarding human nature, natural phenomena, interpersonal

Court of Montana's decision in *Carroll v. Beardon*, thus, provides scholars with a snapshot in time of the cultural values and sexual mores the court was affected by and the cultural values and mores it constructed, its relationship to the legislature, its complicity with the agents of the criminal justice system in condoning and validating this house of prostitution, and its relationship to the litigants, the attorneys, and the larger community.⁵⁵

The language employed by the court in communicating its decision is as important as are the “legal and historical context and omissions of fact or lapses in logic.”⁵⁶ Because language and culture are interdependent and socially constructed, language is both a reflection of and producer of culture.⁵⁷ A close reading of the court’s “literary style and jurisprudential or interpretive posture”⁵⁸ reveals that this language is neither lighthearted nor humorous in its effect on the litigants and in its value as precedent.

The court’s language, and in particular, the humor, which pervades the entire majority opinion and is aimed at both the parties and their attorneys, initially appears innocuous, but in fact, has a far-reaching effect.⁵⁹ For example, the court began its

relationships, time, and activity; symbols, art, and artifacts; and historical developments.”

Paul R. Tremblay, *Papers Presented at the UCLA/IALS Conference on “Problem Solving in Clinical Education”: Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 379 (2002) (quoting Gargi Roysircar Sodowsky et al., *Ethnic Identity in the United States*, in HANDBOOK OF MULTICULTURAL COUNSELING (Joseph G. Ponterotto et al., eds., 1995) (quoting Gargi Roysircar Sodowsky et al., *Moderating Effects of Sociocultural Variables on Acculturation Variables of Hispanics and Asian Americans*, 70 J. COUNS. & DEV. 194 (1991))).

⁵⁵ See *supra* notes 17 and 20. For this reason, “context teaching” is an important aspect of helping students gain cultural literacy in their studies of cases. Debra Moss Curtis, *Teach the Children Well: Incorporating Cultural Literacy into the Law School Learning Experience*, 37 CUMB. L. REV. 177, 219 (2007). In context teaching, “the case itself becomes about more than the analysis or outcome; it becomes about the facts and history leading up to it, about the people involved in it, and the roles that lawyers could take in solving this problem in a different way.” *Id.*

⁵⁶ Fajans & Falk, *supra* note 49, at 169.

⁵⁷ See Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*, 35 INT’L J. LEGAL INFO. 396, 399 & n.12 (2007) (discussing the social construction of language in a cross-cultural context).

⁵⁸ Fajans & Falk, *supra* note 49, at 169.

⁵⁹ Jordan, *supra* note 48, at 727 (asserting that “law reflects society and culture”). The use of humor in a judicial opinion speaks volumes because, “for the most part, writing opinions is a very serious and focused business.” The Honorable Glenn T. Harrell, Jr., *Judiciary Special Issue, Foreword*, 38 U. BAL. L. REV. 1, 1 (2008). Those who oppose humor in appellate court opinions argue that it “interferes with the goals of justifying the outcome to the litigants and the public . . . [and that] it fails to show the litigants the proper respect by making light of their situation . . . [and it] may cause a reader to question whether the court has truly given careful thought to the decision.” Sheppard, *supra* note 52, at 109-10. Those who favor judicial humor assert that it succeeds when used sparingly. Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 71, 78 (2003). The proponents contend that humor may create an informal tone rendering it more

analysis by noting that the “matter was submitted to the district court on depositions of the parties involved” and followed with an apparently playful explanation that “neither counsel had the effrontery to parade these indignant madams before the court.”⁶⁰ A critical approach to this language is revealing. Beginning first with the court’s description of the two litigants as “indignant madams,” this all-male court’s mocking tone appears sexist as evidenced by the adjective invoked, “indignant,” to ascribe to the parties a strong conviction or belief in the justness of their cause and in their entitlement to a remedy as it simultaneously reminds the reader with the noun that this adjective modifies, “madams,” that the litigants are, in fact, petty criminals.⁶¹ In the same sentence, the court’s use of the word, “effrontery,” although couched in sarcasm, could be interpreted to suggest the court’s view that these parties, whom the court went on to describe as “madams, in the limited sense of the word,” were also not entitled to the same right to present live testimony as is enjoyed by other litigants, and that had they invoked the trial court in this manner, their actions would have been deemed bold, brazen, and possibly unwelcome.⁶² The court’s intent as to these matters cannot be ascertained, but this interpretation of the court’s language is consistent with a recurring theme in the legal and political history of prostitution in this country, and, more prominently, in the Western United States: The prostitution business, which was critical to the western movement, was and will be tolerated as long as its participants remain essentially invisible to, or within a

accessible and that “[h]umor can be an exceedingly persuasive device.” *Id.* at 78-79. All seem to agree that when it takes over or dominates the opinion, the reasoning and analysis suffer. Lebovitz, *supra* note 51, at 237 & n.242. There is uniform agreement that humor at the expense of the parties is an inappropriate, aggressive act: “[f]or a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible. . . .” *Id.* at 237 & n. 246 (quoting George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 210 (1967)).

⁶⁰ *Carroll v. Beardon*, 381 P.2d 295, 295-96 (Mont. 1963).

⁶¹ *Id.* The majority opinion was written by Chief Justice James T. Harrison. *Id.* at 295. Justice Wesley Castles and Stanley M. Doyle joined in the opinion. *Id.* at 297. The dictionary entry for the adjective, “indignant,” is “filled with indignation,” the latter of which is defined as “anger aroused by something unjust, unworthy, or mean.” MERRIAM-WEBSTER COLLEGIATE DICTIONARY 634 (11th ed. 2009). The word, “indignant,” modifies the noun, “madam,” reminding the reader that the parties were subject to prosecution for a misdemeanor offense. Montana statutory law then existing declared:

Every person who keeps any disorderly house or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner, and every person who lets any apartment or tenement knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor.

MONT. CODE ANN. § 94-3608 (1947).

⁶² *Carroll*, 381 P.2d at 296. The word, “effrontery,” is defined as “shameless, boldness: insolence,” with “temerity” listed as a synonym. MERRIAM-WEBSTER COLLEGIATE DICTIONARY, *supra* note 61, at 397.

particular area that is either out of sight or segregated from, the larger, respectable community.⁶³

It is true that the decision to present the parties' depositions in lieu of live testimony may, in fact, have been expedient and economically efficient, especially in light of the undisputed factual record.⁶⁴ Other facts in the record, however, reveal that Ms. Beardon's attorney, in particular, may have understood that he was not playing by the usual rules and that he must proceed cautiously in pursuing his client's defense. For example, in the opening line of his trial brief, Ms. Beardon's attorney apologized:

At the outset of this brief, we must apologize to the Court for the type of case that has been presented for adjudication. However, under our rules of judicial procedure and Constitution, persons charged with acts of treason or rebellion, and those charged with rape and other reprehensible crimes, are entitled to counsel. We take the position that by the same reasoning, the professional madam of a bawdy-house is likewise entitled to counsel and representation and we are, therefore, submitting this brief on that premise.⁶⁵

His exaggerated and overstated comparison of his client's activity to treason, "rape and other reprehensible crimes,"⁶⁶ may simply have been intended to show respect for the tribunal and to separate himself from his client and thereby align himself with the court as an officer of the court engaged in a noble act of representing an

⁶³ By the beginning of the twentieth century, prostitution in Montana was "segregated by zoning into red-light districts." Robert Harvie & Patrick C. Jobs, *Social Control of Vice in Post-Frontier Montana*, 17 J. OF RURAL STUDIES 235, 242 (2001). Although prostitution in Butte and other Montana towns was not expressly authorized by law, a system of monthly fines collected by police officers and elected officials permitted prostitutes to ply their trade. Ellen Baumler, *The End of the Line: Butte, Anaconda, and the Landscape of Prostitution*, DRUMLUMMON VIEWS, Spring 2009, at 290, available at http://www.drumlummon.org/images/DV_vol3-no1_PDFs/DV_vol3-no1_Baumler.pdf. Even when laws were subsequently enacted prohibiting prostitution, it continued with a public scandalous closing of a brothel in Butte, Montana occurring as recently as 1971. *Id.* at 294. "The United States is one of the few Western nations in which all forms of prostitution are illegal almost everywhere. Nonetheless, despite its prohibition, prostitution continues to occur widely. . . ." Scott A. Anderson, *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, 112 No. 4 ETHICS 748, 748-49 (July 2002).

⁶⁴ "Litigation is risky, time consuming, and expensive." Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133, 134 (2010). It may also be true that neither Ms. Carroll nor Ms. Beardon wished to testify in court to their status as madams, but given the fact that they had already made admissions in sworn statements under oath, such live testimony would not have rendered them more culpable or have exposed them to greater criminal liability. See *supra* notes 38-42 and accompanying text.

⁶⁵ Defendant's Memorandum of Authorities at 1, *Carroll v. Beardon*, 381 P.2d 295 (Mont. 1963) (No. 8657) (hereinafter Defendant's Memorandum). This document was not a part of the Transcript. It was obtained from the clerk of the District Court for the Ninth Judicial District of Toole County and is available and on file with the author.

⁶⁶ *Id.*

unpopular defendant.⁶⁷ It is telling, however, that this statement was made by a local Shelby attorney who may not have regularly appeared before this particular judge.⁶⁸

The court's jabs are not limited to the parties and their attorneys, but can also be found in the Supreme Court of Montana's similarly cavalier attitude toward the law.⁶⁹ The detailed and thoroughly researched briefs submitted by the attorneys on behalf of their clients⁷⁰ stand in sharp contrast to the court's dismissive humor and sloppy analysis: "Counsel on both sides . . . dig deep in legal lore to convince the court of the righteousness of their client's cause."⁷¹ The nominalization, "righteousness," when combined with the noun it modifies, "cause," connotes a moral high ground related to a principle or movement these attorneys are defending.⁷² By invoking a parallel structure to describe the attorneys and their clients, the court appears to suggest that the attorneys share their clients' views, thereby, aligning the attorneys with the "indignant madams" they represent, and implying that the attorneys, along with their clients, should not be taken seriously.⁷³

⁶⁷ See W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 143-55 (2010). "[L]awyers are not, strictly speaking, required to represent any particular client." *Id.* at 151. "The existence of discretion within the role [of attorney] does not mean, however, that a lawyer who represents an unpopular client endorses the client's projects or values. Rather, the lawyer should be seen as endorsing more general political values embodied in the legal system." *Id.* at 147.

⁶⁸ From the beginning, Ms. Beardon was represented by counsel from Shelby, Montana, but at the time Ms. Beardon's attorney filed Defendant's Memorandum, Judge Black had been disqualified and Judge McKinnon from the Tenth Judicial District had been assigned to the case. See *supra* note 38. For a discussion of the reasons for Judge Black's disqualification in this case, see *infra* notes 120-23 and accompanying text. Ms. Carroll was originally represented by an attorney whose law practice was located in Shelby. On January 11, 1961, he withdrew and was replaced by an attorney from Great Falls, Montana, a distance of almost 90 miles. Transcript, *supra* note 35, at 12. See also MAPQUEST, <http://www.mapquest.com>.

⁶⁹ See *Carroll v. Beardon*, 381 P.2d 295, 296 (Mont. 1963).

⁷⁰ The Court similarly dismissed Canadian precedent presented by Ms. Beardon's attorney, "perhaps because his client's place of business is some 50 miles from the Canadian border, and to give the case a good neighborly aroma, he cites and argues . . . a case from our neighboring province of Alberta." *Id.* at 296. The Appellant's Brief submitted on behalf of Ms. Beardon was twenty-six pages in length. Appellant's Brief, *Carroll v. Beardon*, 381 P.2d 295 (Mont. 1963) (No. 10493). The Brief of Respondent, filed on behalf of Ms. Carroll, was nineteen pages. Brief of Respondent, *Carroll v. Beardon*, 381 P.2d 295 (Mont. 1963) (No. 10493). Both documents thoroughly analyzed and presented available legal authority. Both briefs were obtained from Susan Lupton, Reference Librarian, State Law Library of Montana (email: mtlawlibrary@mt.gov; web: www.courts.mt.gov/library/). These documents are available and on file with the author.

⁷¹ *Carroll*, 381 P.2d at 296.

⁷² "Righteousness" refers to "an outraged sense of justice or morality," or to feelings of "indignation." MERRIAM-WEBSTER COLLEGIATE DICTIONARY, *supra* note 61, at 1073. The word "cause" as used in the sentence refers to "a principle or movement militantly defended or supported." *Id.* at 196.

⁷³ See WENDEL, *supra* note 67, at 147 (discussing the fact that a lawyer's choice to represent "an unpopular client" is not an endorsement of the client's views or actions). The Supreme Court of Montana, of course, knew that lawyers who voluntarily take on unpopular

The court's characterization of the extensive body of available precedent as "lore" is more troubling as it appears to equate the relevant precedent with traditional knowledge or common understanding rather than with judge-made law, and perhaps to suggest an association with folklore or popular myth.⁷⁴ Once again, the Supreme Court of Montana's intent cannot be ascertained with certainty, but such a characterization of the law is consistent with, and compounded by, the Supreme Court of Montana's decision to ignore an entire line of authority addressing the improper use defense as it applies to contracts involving prostitution.⁷⁵

Instead, the court chose to rely principally upon a decision of the Supreme Court of Wyoming, *Fuchs v. Goe*, in which the Wyoming Court enforced a contract for a five-year lease of nightclub premises and contents, the latter of which included gambling equipment.⁷⁶ The Supreme Court of Montana's choice to analogize prostitution to gambling is certainly defensible.⁷⁷ The problem, however, is first, with the Supreme Court of Montana's mischaracterization of the transaction

clients "are expressing fidelity to the legal system and the values it embodies." *Id.* at 145. This view that lawyers endorse their clients' values and goals "is a familiar theme. It has equivalents in ordinary morality, particularly folk maxims. . . ." *Id.* at 144-45. The Supreme Court of Montana's characterization of the attorneys in this manner, therefore, provides evidence that it may have been appealing to public opinion rather than focusing on a legal resolution of a dispute and the creation of precedent. *See infra* notes 98-101 and accompanying text.

⁷⁴ Lore is defined as "knowledge gained through study or experience," "traditional knowledge or belief," and "a particular body of knowledge or tradition." MERRIAM-WEBSTER COLLEGIATE DICTIONARY, *supra* note 61, at 735. To the extent an association with folklore may have been intended, a body of judge-made law is not tantamount to an "unsupported notion, story, or saying that is widely circulated." *Id.* at 486. Such law is similarly not consistent with "a popular belief or tradition that has grown up around something" that may be "unfounded or false." *Id.* at 822 (defining "myth").

⁷⁵ *See infra* notes 154-57 and accompanying text.

⁷⁶ *Fuchs v. Goe*, 163 P.2d 783, 784-785 (Wyo. 1945). The gambling equipment consisted of the following: "1 roulette table, 1 roulette checks, 9 game chairs, 1 crap table, 1 '21' table, 3 Table Layouts." *Id.* at 785.

⁷⁷ Historically, "red-light districts were neighborhoods officially set aside where prostitution, liquor, and gambling laws were relaxed and other forms of criminality were notorious." Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1734 (2006). *See also* Peter C. Hennigan, *Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16 *YALE J.L. & HUMAN.* 123, 125-126 (2004). Montana legislation followed this pattern as to prostitution and gambling, treating them as nuisances:

Section 11124, Revised Codes, provides: "Every building or place used for the purpose of lewdness, assignation, or prostitution, and every building or place wherein or upon which acts of lewdness, assignation, or prostitution are held to occur, and any building wherein gambling is carried on or occurs, contrary to any of the laws of the state of Montana, . . . is a nuisance which shall be enjoined, abated, and prevented as hereinafter provided, whether the same be a public or private nuisance."

State *ex rel.* *Nagle v. Naughton*, 63 P.2d 123, 125 (Mont. 1936). For the version of the statute in effect at the time the Supreme Court of Montana rendered its decision in *Carroll*, see *infra* note 132.

involved in the case as a “sale of gambling equipment” followed by a block quote taken from the *Fuchs* case, which described the transaction as involving a lease.⁷⁸ In addition to its apparent failure to read a case it quoted and relied upon, the Supreme Court of Montana additionally failed to take notice of the Supreme Court of Wyoming’s primary reason for rejecting the public policy defense to contract enforcement—there were too “few items of gambling equipment which were included in the elaborate list of personal property which Fuchs leased to Goe”⁷⁹ to render the entire contract unenforceable on public policy grounds:

As we look at the matter, it would appear to be a harsh rule if an action for the recovery of the value of property stated by plaintiff, Fuchs, to be over \$14,000, must fail because a few items of gambling equipment, also valued by him at \$850 and which were never used by the lessee [Goe], were included in the list of the leased property. Indeed, it would seem, from the stipulation of the parties under date of March 22, 1944, and hereinbefore reviewed, that this gambling equipment had been returned to Fuchs long before this case was tried and so had thereby been removed from the controversy entirely. Counsel for defendant at the argument, as we understood it, conceded that it was not included in the trial court’s judgment. . . .⁸⁰

These facts clearly distinguish the *Fuchs* case from a situation in which the sole use of the property subject to the contract was to facilitate criminal activity in the form of prostitution.⁸¹

⁷⁸ Carroll v. Beardon, 381 P.2d 295, 297 (Mont. 1963) (quoting *Fuchs*, 163 P.2d at 787 (quoting 32 AM. JUR. § 49)). It did involve an option to purchase the leased property, which is the likely source of the Supreme Court of Montana’s confusion. *Fuchs*, 163 P.2d at 785.

⁷⁹ *Id.* at 787.

⁸⁰ *Id.* at 788-89.

⁸¹ Of course, Ms. Beardon also lived on the premises, but the evidence clearly indicates that Ms. Beardon intended to use the premises for prostitution and without this use, there would be no contract. *See infra* notes 94-97 and accompanying text. There is also evidence that neither Ms. Beardon nor her husband lived at the premises full time; in fact Ms. Beardon testified in her deposition that she left for several months because she “had a job to go to.” Transcript, *supra* note 35, at 51, 53, 58.

Not to be outdone by the majority, another justice added to the murkiness of the Supreme Court of Montana’s pronouncement in a single paragraph, separate opinion professing to be concurring in part and dissenting in part, but he apparently misunderstood the meaning of dissent as he had no disagreement with the decision of the majority of the court. This opinion in its entirety reads:

I concur in the result, but not in all that is said in the above opinion. This is the case of the pot calling the kettle black. However, the calling of names will not pay the promissory note nor discharge nor invalidate the mortgage upon which this action was brought. Each party to the contract is required to keep her promises and to perform her obligations thereunder. Refusal and failure to keep her promises or to perform her obligations subject the defaulting defendant, Agnes Beardon, to the penalties that attach upon the breach of her contract. These penalties were lawfully invoked and judgment for the plaintiff, Edna Carroll, rightfully given and entered.

Accepting the Supreme Court of Montana's decision to adopt a test requiring that the contract be enforced unless the seller actively participated in the buyer's intended improper use, the court never explained why, for instance, Ms. Carroll's anticipated receipt over time of payments known to be derived from or generated solely by prostitution was insufficient to satisfy the active participation test, and in so doing, discourages the reader from such analysis.⁸² Once again, silence operates as a persuasive tool in this court's opinion.

The court similarly failed to mention evidence in the record that strongly supports the improper use defense. For example, when Ms. Carroll initially purchased the property in 1956, she testified that she paid \$6,000.00,⁸³ and, in an apparent attempt to increase her prostitution business, she thereafter added a second story to the house, which included five additional bedrooms, two bathrooms, and two "parlors," before selling to Ms. Beardon four years later for a price of

Carroll, 381 P.2d at 297 (Adair, J., concurring and dissenting). In fact, his only disagreement is with the reasoning of the majority—a classic concurrence. BLACK'S LAW DICTIONARY 309 (8th ed. 2004). If read literally, this concurring opinion, which makes no reference to rules of contract interpretation regarding a public policy defense, could be interpreted as an argument that short of contracts involving wholly illegal consideration or contracts whose only purpose is to perform illegal acts, no public policy defense to contract enforcement should be recognized. *Carroll*, 381 P.2d at 297. In essence, Justice Adair's opinion appears to more accurately reflect the motivations underlying the majority opinion.

⁸² See *infra* notes 193-196 and accompanying text. Ms. Beardon's deposition testimony is also relevant as to her view of the consideration and what it reflected:

Ms. Carroll's attorney: "Wasn't that a fair price for the property?"

Ms. Beardon's response: "As a house of prostitution it was, yes."

Ms. Carroll's attorney: "Mrs. Beardon, I am going to insist that you answer my questions directly without adding your comments. The price of \$50,000.00 for 50 acres of land and the house with all the rooms that you described and all the personal property you obtained, had a reasonable value of \$50,000.00, did it not?"

Ms. Beardon's response: "I wouldn't know."

Transcript, *supra* note 35, at 59-60.

⁸³ *Id.* at 74. This mortgage deed was not a part of the record in this case. An independent research at the Toole County Recorder's Office revealed that the deed listed Ms. Carroll's purchase price on February 18, 1956 as being much lower: "[a]ctual consideration less than \$100.00." 66 Warranty Deed 503. There were no United States Internal Revenue Tax Stamps on the Deed, which would reflect the actual purchase price, depending upon then prevailing real estate sales tax rates. 71 AM. JUR. 2D *State and Local Taxation* § 567. The tax "is a relatively small percentage of the consideration" and "must be paid as a prerequisite to recording the transfer instrument[]." *Id.* It appears that if Ms. Carroll did, in fact pay \$6,000.00 to purchase the Hillside Ranch, she may have listed a much lower purchase price on the mortgage deed to avoid paying taxes on the sale.

\$50,000.00.⁸⁴ Because it is implausible that a mere four years later these improvements would increase the market value of this same rural property by more than 800%, the \$50,000.00 sales price provides strong evidence that the bargained-for consideration represented the sale of an ongoing prostitution business in the same manner in which parties value good will as a component of the purchase price in the sale of an ongoing legitimate business.⁸⁵

Additional evidence in the record reveals that neither party had the property appraised or had any awareness of comparable property values at the time they negotiated the price term, further suggesting that the consideration exchanged had nothing to do with the value of the property as a residence surrounded by acres of farmland.⁸⁶ Neither Ms. Carroll nor Ms. Beardon had the property surveyed and neither knew the precise acreage.⁸⁷ In fact, Ms. Beardon testified in her deposition: “When I bought it [Hillside Ranch] Mrs. Carroll said she didn’t know for sure on that, but she thought it was 50 or 49 acres. She didn’t know exactly.”⁸⁸ The mortgage documents include a detailed description of the property, a portion of which expressly describes the property as “embracing and including 10 acres, more or less.”⁸⁹ This detailed description, when converted to acres, reveals that the property encompassed approximately ten acres of land and, at the very least, establishes that Ms. Carroll and Ms. Beardon were not concerned with the value of the property as conventionally measured, and, in fact, overestimated the acreage by 500%.⁹⁰

⁸⁴ Transcript, *supra* note 35, at 35. After the addition was built, there were eight bedrooms. *Id.* at 74. The furnishings were described by Ms. Beardon in her deposition as being “secondhand” and “old,” some of which had allegedly been transferred from Ms. Carroll’s prostitution business at the Viaduct Hotel: “I don’t know how old they were. Some of them were brought up from the Viaduct, they tell me.” *Id.* at 67.

⁸⁵ Good will is an intangible business asset, which can be valued in different ways. Kevin M. Kelly, Comment, *Drafting Enforceable Covenants Not to Compete in Author-Publisher Agreements Under New York Law*, 36 UCLA L. REV. 119, 126 n.25 (1988) (defining good will as primarily consisting of the “customers of a business whose patronage has become an asset of the business”) (internal quotations omitted). In her deposition, Ms. Carroll estimated that the furnishings and personal property accounted for \$6,000.00 of the total sales price with the house and land accounting for \$44,000.00 of the price. Transcript, *supra* note 35, at 84-85.

⁸⁶ Transcript, *supra* note 35, at 60, 70, 84.

⁸⁷ *Id.* at 67-68.

⁸⁸ *Id.*

⁸⁹ 70 Warranty Deed 342 (dated March 14, 1960 and filed April 18, 1960). *See also* Transcript, *supra* note 35, at 2.

⁹⁰ Although not a part of the evidence in the case, the mortgage documents were obtained for Ms. Carroll’s original purchase in 1956 and for her later sale of the property in 1965, two years after the judgment against Ms. Beardon was enforced by a public auction at which Ms. Carroll regained title to the property when she bid \$20,000. *See supra* note 83 (discussing 1956 and 1965 mortgage deeds); note 145 and accompanying text (discussing enforcement of judgment through public auction). This same statement to the effect that the property includes ten acres of land is on the warranty deed Ms. Carroll provided when she subsequently sold to Marian Martin on October 13, 1965. 80 Warranty Deed 253. This description of the land as encompassing “ten acres more or less” was not included in the warranty deed provided to Ms.

The court did mention the fact that the contract was structured to require higher monthly payments “during the harvest months,” but failed to mention the deposition testimony of a nonparty witness to a segment of the contract negotiations who clarified any lingering doubt that the reference to the harvest season was a reference to an increased demand for prostitutes.⁹¹ Geirthana Wilson, who was initially hired to work for Ms. Carroll as a maid at the Hillside Ranch and who continued to live and work “off and on” there when Ms. Beardon purchased the property, testified that “Mrs. Carroll said to Mrs. Beardon, ‘You can make good money here. It is slow in the winter, but you can make good money during the harvest season.’”⁹² Taken together, this evidence reveals that the very structure of the payment terms, designed as they were to reflect fluctuations in the prostitution business, contemplated that the only source of money to pay the mortgage was to be derived from prostitution, and Ms. Carroll actively accommodated that business use of the premises in the way she agreed to structure the payment terms in the contract.⁹³

Carroll by Fred Marlett when she originally purchased the property on February 18, 1956. 66 Warranty Deed 503. With the exception of the reference to ten acres, all three deeds, including the deed involved in the case, describe the area of land included in the property precisely as follows:

Beginning with a point which is the Southwest corner of SW1/4 SW1/4 of Sec. 23, Twp. 32N., Rge. 2W.; thence North on said section line a distance of 80 rods to the Northwest corner of said SW1/4 SW1/4 of said Sec. 23; thence East along the North line of said SW1/4 SW1/4 of Sec. 23 for a distance of 40 rods; thence running Southwesterly from said last mentioned point for a distance of 89.442 rods, to the point of beginning, embracing and including 10 acres, more or less.

Transcript, *supra* note 35, at 2. At the outset, it should be noted that the reference to a boundary running from the southwest corner of the property north “on said section line” must be understood. *Id.* The Public Land Survey System of 1785, created a standard system for surveying western public land, with section lines on these surveyed lands forming “a grid of north-south and east-west lines spaced at one mile intervals.” Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 528 n.12 (2005). The Western boundary of the property, thus, runs on a straight line from the south to the north a distance of 80 rods. One rod equals 5.50 yards; the distance south to north is, therefore, 440 yards (80 x 5.5). MERRIAM-WEBSTER COLLEGIATE DICTIONARY, *supra* note 61, at 1420. The north boundary runs east at a right angle for 40 rods or 220 yards (5.5 x 40). “[T]he area of a right triangle is one-half the product of its two legs,” Brian Galle, *Hidden Taxes*, 87 WASH. U. L. REV. 59, 79 (2009). Thus, the area or acreage is $(440 \times 220)/2 = 48,400$ square yards. This figure must then be converted to acres: one acre equals 4,840 square yards. MERRIAM-WEBSTER COLLEGIATE DICTIONARY, *supra* note 61, at 1420. $48,400/4,840 = 10$ acres.

⁹¹ Carroll v. Beardon, 381 P.2d 295, 296 (Mont. 1963) (the Court’s precise reference was to “the harvest months and the Christmas season,” but this latter period was not mentioned by either the parties or Ms. Wilson and is apparently another attempt at judicial humor).

⁹² Transcript, *supra* note 35, at 96-98. Ms. Wilson testified that she was in the living room within “two or three feet” of Ms. Carroll and Ms. Beardon for “two or three minutes” during their conversation. *Id.* at 98.

⁹³ *Id.* at 4.

Ms. Wilson also testified to a conversation she had with Ms. Carroll the day after she witnessed the contract negotiations.⁹⁴ This conversation provides additional evidence of Ms. Carroll's understanding regarding Ms. Beardon's intended use of the premises: "Mrs. Carroll said to me, 'If the joint was closed I [Ms. Carroll] would have to give her [Ms. Beardon] her money back.'"⁹⁵ This conversation reveals that Ms. Carroll and Ms. Beardon unequivocally contemplated that prostitution was the only intended use of the premises and that if the premises could not be used for this unlawful purpose, the contract would have no effect.⁹⁶ These facts, therefore, provide additional evidence that the contract involved the sale of an ongoing prostitution business, and without this business use, there would be no contract because there would be no source of money to satisfy the exceptionally high mortgage payments.⁹⁷

Unfortunately, the court devoted more attention and care to creating a comedic tone than it did to these facts and to its legal analysis in this appeal which it apparently did not wish to hear, but was required by law to entertain.⁹⁸ In 1963, the Supreme Court of Montana did not have the authority it currently possesses to decline to publish the opinion.⁹⁹ The humorous tone and style of the majority

⁹⁴ *Id.* at 99-100. Ms. Wilson testified that she and Ms. Carroll were alone in the kitchen at the Hillside Ranch the next morning when this conversation occurred. *Id.*

⁹⁵ *Id.* To the extent this conversation arguably reflects the parties' contractual intent regarding a contingency or condition subsequent to formation, there would ordinarily be a parol evidence issue presented by this oral testimony. See *Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 164 P.3d 851, 857 (Mont. 2007). Because the contract contains all essential terms and is silent as to rescission rights of either party, it is arguably integrated and unambiguous. See *Holman v. Hansen*, 773 P.2d 1200, 1205 (Mont. 1989). See also RESTATEMENT (SECOND) OF CONTRACTS §§ 209, 210. Courts and commentators, however, agree that the parol evidence rule does not bar admission of such evidence because the purpose of the evidence is not to show contractual intent, but rather to establish that the contract is not enforceable. See *Plath v. Kline*, 45 N.Y.S. 951, 952 (N.Y. App. Div. 1897) (ruling such evidence admissible to show party's "understanding or intent" as to improper use of premises). See Farnsworth, *supra* note 6, § 5.1. In any event, this evidence is cumulative of other evidence and, therefore, not necessary to Ms. Beardon's public policy defense. See *supra* notes 39-42, 83-84 and accompanying text.

⁹⁶ Transcript, *supra* note 35, at 99-100.

⁹⁷ See *supra* note 82, 93 and accompanying text.

⁹⁸ The Montana state court system has no intermediate courts of appeal. *Fiscus v. Beartooth Elec. Coop., Inc.*, 591 P.2d 196, 199 (Mont. 1979). See *Hutchinson v. Burton*, 247 P.2d 987, 991 (1952) (discussing civil trial court litigant's right to appeal to Supreme Court of Montana so long as timely bill of exception is filed). See also MONT. CODE ANN. § 93-5505 (1947) (setting time limit for filing bill of exceptions for purposes of appealing a civil trial court judgment).

⁹⁹ It was not until December 1989 that the Supreme Court of Montana amended its "Internal Operating Rules to allow for noncitatable, unpublished, abbreviated opinions in certain cases." *Worts v. Hardy Constr. Co.*, 817 P.2d 231, 237 (Mont. 1991). The current Supreme Court of Montana Internal Operating Rules I.3.(c) provides in pertinent part:

If an appeal presents no constitutional issues, no issues of first impression, does not establish new precedent or modify existing precedent, *or, in the opinion of the Court, would otherwise not be of future guidance for citation purposes to the citizens of*

opinion, however, invited and received widespread public attention¹⁰⁰ and, in so doing, indicated that the cultural context within which the court operated permitted a very public judicial indifference to and disrespect of the litigants, their attorneys, and the available precedent.¹⁰¹ To the extent that the court's opinion invited public attention, the court's style and tone are also indicative of confidence that its views were in accord with the views of the court's intended audience—the general public.¹⁰²

It is understandable that the court was unhappy that it was called upon, and indeed required, to resolve this petty dispute.¹⁰³ The court, however, had other duties in this case extending beyond a pair of unsympathetic litigants—the duty to create and dispense the law.¹⁰⁴ It also bears noting that neither litigant in this case is

Montana, the bench, or the bar, the Court may classify the appeal as one for a noncitable opinion. The decision for the case will provide the ultimate disposition without a detailed statement of facts or law. The decision shall not be citable as precedent but shall be filed as a public document with the clerk; shall be reported by result only to the State Reporter Publishing Company and to West Group along with the case title and Supreme Court cause number.

MONT. INTERNAL OPERATING R. I.3.(c), available at <http://courts.mt.gov/clerk/rules/internal.mcpX> (emphasis added).

¹⁰⁰ The Supreme Court of Montana's decision in *Carroll v. Beardon* received widespread attention from newspapers throughout the state. The appeal was initially reported in a Helena newspaper: *Where Wild Oats are Sown in Big Wheat Field*, INDEPENDENT RECORD, Oct. 26, 1962, at 7. Other stories ran after the decision was issued. See, e.g., *State's High Court Upholds 'House' Sale*, BILLINGS GAZETTE, May 10, 1963, at 16; *Tongue-in-Cheek Supreme Court Upholds Sale of 'House' by Ex-Madam to Madam*, MONTANA STANDARD AND THE BUTTE DAILY POST, May 10, 1963, at 9; Lyle Downing, *Court Asked to Fix Issue Involving Wild Oats Ranch*, INDEPENDENT RECORD, May 9, 1963, at 8.

¹⁰¹ For a definition of culture and explanations of the social construction of law and culture see *supra* notes 17, 20, 54-57 and accompanying text.

¹⁰² The intended or expected audience is always critical to writing style:

[T]he audiences from which assent must be won are often multiple. In many a Supreme Court opinion . . . one can detect the Court's attempts to address different listeners: dissenting Brethren first of all, then lower court judges, then state legislatures and the police forces of the nation, then the public at large.

Kaplan, *supra* note 59, at 97. Most judges are “driven by the very human desire for popular approval and public respect.” Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future From the Roberts Court to the Learned Hand - Segmentation, Audience, and the Opportunity of Justice Sotomayor*, 13 BARRY L. REV. 29, 55 (2009). Judges are strongly motivated by “the perception of them as ‘elite’ groups in American society, ‘whose values are more similar to those of the mass public than they are different.’” *Id.* (quoting LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 5 (2006)).

¹⁰³ Witte, *supra* note 51, at 63 (discussing as one reason for a humorous tone in a judicial opinion “the court's discontent with being forced to resolve petty disputes”). For a discussion of the reasons that neither party had the higher moral ground in this transaction they both benefitted from, see *supra* notes 39-42, 82-97.

¹⁰⁴ See Brian T. Fitzpatrick, *Originalism and Natural Law*, 79 FORDHAM L. REV. 1541, 1542 (2011) (discussing in the context of federal courts “the uncomfortable relationship of

sympathetic. As with criminal defendants who enjoy a presumption of innocence, both Ms. Carroll and Ms. Beardon enjoyed a presumption of fair access to the legal system to present their claims and defenses and to receive a fair and impartial resolution of their dispute, something the Supreme Court of Montana denied them.¹⁰⁵

III. IMPROPER USE AND THE COURT'S FAILURE TO BALANCE THE PUBLIC POLICY INTERESTS

Although the Supreme Court of Montana failed to balance the competing policy interests, this balance also tips in Ms. Beardon's favor. The court, through its simple narrative, effectively ignored the closely competing policies implicated by this defense to contract enforcement for which there may be no easy resolution or at least no resolution without negative consequences and undesirable incentives.¹⁰⁶ In fact, the use of humor by the court provides a perfect diversion from the court's brief single sentence concession, buried in the middle of the opinion, that the improper use defense presented difficult legal issues over which courts were divided, and the closely competing equities presented by the facts of the case tempted the court to accept Ms. Beardon's defense and to decline to enforce the contract.¹⁰⁷

Ms. Beardon's unsuccessful public policy argument against mortgage foreclosure, and any such argument against contract enforcement, operates as "a rare limitation on freedom of contract,"¹⁰⁸ pursuant to which an individual's right to enter into contracts is considered a paramount right of private lawmaking and private

common-law lawmaking to democracy" in which judges are required "to make choices as to what should or should not be the law"). See also Stephen M. Johnson, *From Climate Change and Hurricanes to Ecological Nuisances: Common Law Remedies for Public Law Failures?*, 27 GA. ST. U. L. REV. 565, 574-75 (2011) (discussing the local nature of common law adjudication and its benefits in the context of making law in response to environmental issues).

¹⁰⁵ See Matthew W. Perkins, Comment, *War and National Defense—Foreign Intelligence Surveillance Act—Civil Actions and the Foreign Intelligence Surveillance Act: You Can Knock, But You Can't Come In*, American Civil Liberties Union Foundation of Southern California v. Barr, 952 F.2d 457 (D.C. Cir. 1991), 16 SUFFOLK TRANSNAT'L L. REV. 807, 819 n.54 (1993) (discussing "civil litigant's inherent right to a fair trial").

¹⁰⁶ Carroll v. Beardon, 381 P.2d 295, 296-97 (Mont. 1963). For a discussion of the competing policies, see *supra* note 43, 45 and accompanying text. See also *infra* notes 108-113, 116-138, 143-153 and accompanying text.

¹⁰⁷ The Supreme Court of Montana noted that "[m]any courts refuse to aid either party to contracts where the transaction is illegal." Carroll, 381 P.2d at 296 (internal citations omitted). The court rejected this authority, reasoning instead:

A review of the evidence put before the court in this case tempts this court to dismiss the appeal, however, there are many decisions to the effect that where the sale is of property that may or may not be used for an illegal purpose, that it is no defense that the seller knew the purpose of the buyer, without further evidence implicating the seller.

Id.

¹⁰⁸ Kostritsky, *supra* note 43, at 116.

ordering.¹⁰⁹ Given this strong presumption of enforceability, the Supreme Court of Montana may have been motivated to rule as it did in order to promote protection of reasonable expectations of contracting parties, which in turn, arguably promotes stability in contract law and encourages “the formation of productive contracts that contribute to the general economic good.”¹¹⁰ The court may also have been motivated, as many courts are in the improper use scenario, by a desire “to protect individual liberty.”¹¹¹ Courts generally refuse enforcement only if the public interest in the protection of reasonable expectations and individual liberty is outweighed by the countervailing public interest in deterring misconduct and in refusing the use of judicial resources to sanction such misconduct, a balancing of interests the Supreme

¹⁰⁹ *Id.* Freedom of contract exists only if a contract has been freely entered into by all parties to the transaction. *Id.*

¹¹⁰ Macintosh, *supra* note 15, at 1203 (footnote omitted). “Accordingly, any refusal to enforce properly formed contracts must be firmly grounded upon strong countervailing policy considerations.” *Id.*

¹¹¹ *Id.* at 1204. The court, however, mentioned none of these concerns, but did mention the fact that Ms. Beardon “had the benefit of” the contract and “reaped its benefits” as a factor requiring proof of more active participation by Ms. Carroll in the improper use of the premises. *Carroll*, 381 P.2d at 297. *See also infra* notes 151-153 and accompanying text. These brief statements may represent a reference to a policy interest routinely deemed less important—the interest of the nonbreaching party in avoiding forfeiture due to detrimental reliance on the contract. “[F]orfeiture’ is used to refer to the denial of compensation that results when the obligee loses his right to the agreed exchange after he has relied substantially, as by preparation or performance, on the expectation of that exchange.” RESTATEMENT (SECOND) OF CONTRACTS § 197 cmt. b. “The law abhors forfeitures, therefore every reasonable presumption is against a forfeiture.” Thomas P. Egan, *Equitable Doctrines Operating Against the Express Provisions of a Written Contract (Or When Black and White Equals Gray)*, 5 DEPAUL BUS. L.J. 261, 295 (1993). In the case of contracts in contravention of public policy, forfeiture operates as an exception to the rule denying restitution: “[a]ccount will be taken of such factors as the extent of the party’s deliberate involvement in any misconduct, the gravity of that misconduct, and the strength of the public policy.” RESTATEMENT (SECOND) OF CONTRACTS § 197 cmt. b. There is very little relevant case law. *See, e.g.*, *Yank v. Juhrend*, 729 P. 2d 941, 944 (Ariz. Ct. App. 1986). The court in *Yank* also found important the fact that the legislation did not declare such contracts void, but rather rendered them voidable. *Id.* A final policy consideration is the excusable ignorance exception, which is very limited:

If a promisee is excusably ignorant of facts or of legislation of a minor character, of which the promisor is not excusably ignorant and in the absence of which the promise would be enforceable, the promisee has a claim for damages for its breach but cannot recover damages for anything that he has done after he learns of the facts or legislation.

RESTATEMENT (SECOND) OF CONTRACTS § 180. When the ignorance relates to the law, it is excused if the illegality involves something minor and if there was justifiable reliance on the specialized knowledge of the other party regarding the law. *See, e.g.*, *Harrison v. Flushing Nat’l Bank*, 370 N.Y.S.2d 803, 806 (N.Y. Civ. Ct. 1975). *See also Weinsklar Realty Co. v. Dooley*, 228 N.W. 515, 518 (Wis. 1930) (enforcing a contract when one party was unaware that the other party had signed the contract in violation of a statute prohibiting business transactions on Sunday).

Court of Montana failed to undertake.¹¹² Given the facts of this case, it is difficult to understand how the policy interests favoring contract enforcement outweigh the policy interests militating against enforcement.¹¹³ In any event, a close reading of the case reveals that the court failed to take even a first step in analyzing the defense—identification of the public interests at stake in the case.¹¹⁴ This omission is not unusual when well-developed tests reflecting the underlying policy interests substitute for overt policy analysis, but, in a case of first impression, such as *Carroll v. Beardon*, judicial perceptions of policy are a necessary prerequisite to adoption of a test or standard by which to assess the improper use defense.¹¹⁵

Situated within a policy perspective favoring enforceability, Ms. Beardon's sole argument against foreclosure also introduces the reader to a unique and perhaps intractable public policy dilemma presented in many cases involving the improper use defense—in an effort to evade civil liability, a party must admit in court pleadings and under oath to criminal activity.¹¹⁶ These facts, thus, present an

¹¹² *Trimble v. Ameritech Publ'g, Inc.*, 700 N.E.2d 1128, 1129 (Ind. 1998) (citing a “very strong presumption of enforceability”) (quoting *Fresh Cut, Inc., v. Fazli*, 650 N.E.2d 1126, 1130 (Ind. 1995)). The *Trimble* court recited five factors Indiana courts consider when they assess whether a contract not prohibited by statute nor which tends to injure the public contravenes public policy:

- (1) the nature of the subject matter of the contract; (2) the strength of the public policy underlying any relevant statute; (3) the likelihood that refusal to enforce the bargain or term will further any such policy; (4) how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain; and (5) the parties' relative bargaining power and freedom to contract.

Id. (internal citations omitted). In addressing the policy against enforcement, one court commented, “[s]traight shooters should always win, but when there are none, bad guys need not look to us for help.” *Certa v. Wittman*, 370 A.2d 573, 577 (Md. Ct. Spec. App. 1977).

¹¹³ See *infra* notes 137-150 and accompanying text.

¹¹⁴ *Carroll v. Beardon*, 381 P.2d 295, 296-97 (Mont. 1963). When a contract arguably runs afoul of public policy, a court will ordinarily proceed through a “three-step analysis”:

The court must first ascertain the relevant public interest. Next, the court must verify that there is a conflict between that interest and the contract in question. Then the court must determine what remedy would best serve the public policy interest. In deciding what comprises public interests, the courts look to legislative enactments as well as to established notions of public decency that are reflected in past judicial decisions.

Prince, *supra* note 43, at 171.

¹¹⁵ Badawi, *supra* note 7, at 512. For an example and explanation of areas in which well-established tests have been created, see *supra* note 10.

¹¹⁶ See Badawi, *supra* note 7, at 488.

Agreements that are obviously illegal and impose significant harm are unlikely to end up in court because they often carry collateral consequences like criminal and civil liability. Taking these cases to court can expose the existence of the bargain to prosecutors, potential plaintiffs, and others who can impose the collateral consequences. Contracts that are only arguably illegal and do not obviously impose harm are much more likely to be litigated than a drug deal gone wrong or a dispute over a murder hit.

opportunity for analysis of the built-in tensions facing litigants and courts presented with this defense to contract enforcement and of the different functions and processes of the criminal and civil law systems operating and overlapping within our legal system.¹¹⁷ The built-in disincentive to Ms. Beardon, and to any litigant in her position, to assert the improper use defense is ameliorated by the surrounding facts—law enforcement officials were aware of and tolerated the improper use over time, and the risk of criminal prosecution was, therefore, remote.¹¹⁸

Research beyond the record in this case, which is not relevant to the court's decision, but which may explain the cultural context within which the court operated and was affected by in rendering its decision, revealed overwhelming evidence that local law enforcement officials in Shelby, Montana, a rural town with a population at the time of approximately 4,000,¹¹⁹ were aware that prostitution was occurring at the Hillside Ranch and declined to institute legal proceedings. Ms. Carroll was known by local law authorities and the attorneys involved in the litigation as a madam. Just one year and four months before Ms. Carroll set up business at the Hillside Ranch, in October, 1954, W.M. Black, then County Attorney, successfully pursued an action to abate a nuisance against Ms. Carroll for running a house of prostitution out of the Viaduct Hotel located in Shelby.¹²⁰ The complaint described the Viaduct Hotel and Edna Carroll as follows:

Id. at 487-88. See also Harvard Law Review Association, *supra* note 33, at 1445 (commenting that “[m]ost individuals are not so foolish as to ask a court to enforce a bargain to divide ill-gotten gains.”).

¹¹⁷ Badawi, *supra* note 7, at 507-08 (explaining that “[t]he tension between the lack of harm posed by a particular contract and the aversion to failing to punish illegal conduct sometimes arises in doctrine”).

¹¹⁸ See *infra* notes 119-127 and accompanying text.

[C]riminal laws are [frequently] not enforced, or are enforced only rarely, as a matter either of deliberate law enforcement policy or because of the practical difficulties of enforcement. Both conditions are frequently encountered in the area of sex crimes. For example, although many states retain on their statute books criminal prohibitions against adultery and fornication, these laws are almost never enforced. Sodomy laws are with very rare exception enforced only when the offender has committed other crimes in which the authorities are also interested. Some sex laws are enforced sporadically (laws against prostitution are a good example), others consistently, such as those involving children. Sexual regulation is a particularly clear example of the frequent divergence between the law on the books and in action.

RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 3 (Univ. of Chicago Press 1996).

¹¹⁹ U.S. CENSUS BUREAU, CENSUS OF POPULATION AND HOUSING: 1960 CENSUS (12 Montana, Volume I Part 28, Table 7: Population of Counties, by Census County Divisions: 1960-Con.), available at www.census.gov/prod/www/abs/decennial/1960cenpopv1.html. Shelby had a population of 4,017. *Id.*

¹²⁰ The Complaint was filed on August 3, 1954. Complaint, State v. Carroll, No. 577 (9th D. Mont. Aug. 3, 1954) (hereinafter Complaint). A copy was ordered from the Toole County Clerk and is available and on file with the author. On October 22, 1954, the trial court entered an order enjoining and abating the further use of the premises as a house of prostitution. Findings of Fact and Conclusions of Law, State v. Carroll, No. 577 (9th D. Mont. Oct. 22,

That the said Viaduct Hotel has had the reputation for being a house of ill fame for the purposes of practicing of prostitution for more than one year last past, . . . and that the said Defendant Edna Carroll has the reputation of being the Lessee and Manager and conductress of said Viaduct Hotel and of the business conducted therein for more than two months last past.¹²¹

This same W.M. Black, who was subsequently appointed to the bench, was the original trial court judge to which the *Carroll v. Beardon* case was assigned.¹²² He was disqualified pursuant to a motion filed by Ms. Carroll's original attorney,¹²³ and he was replaced by Judge LeRoy L. McKinnon of the Tenth Judicial Circuit who was "called in to assume" jurisdiction over the case.¹²⁴ Although the case remained under Judge McKinnon's jurisdiction, Judge Black died in late 1962, while the case was on appeal before the Supreme Court of Montana, and was, in turn, replaced by Ronald D. McPhillips, who at the time of his appointment to the bench was the Toole County Attorney and had also worked in private practice with Ms. Carroll's primary attorney, John C. Hoyt.¹²⁵

The cultural perspective of local law enforcement authorities may have rendered these officials more inclined to take action against someone running a house of prostitution located in a residential and commercial area within Shelby, as was the

1954) (hereinafter Findings of Fact and Conclusions of Law). A copy of this order was also ordered from the Toole County Clerk and is available and on file with the author.

¹²¹ Findings of Fact and Conclusions of Law, *supra* note 120, at 2-3. The Complaint states that the Viaduct Hotel was run as a house of prostitution "for more than one year last past." Complaint, *supra* note 120, at 2. The Findings of Fact and Conclusions of Law contain this same language, but with lines typed through the words "one year" as if to strike them with the words "two months" typed immediately above the words "one year." Findings of Fact and Conclusions of Law, *supra* note 120, at 3. Apparently, the court found the evidence established two months rather than one year as the relevant time frame.

¹²² Transcript, *supra* note 35, at 20.

¹²³ *Id.* at 19. In this Affidavit, Ms. Carroll's attorney stated:

That your affiant has good reason to believe and does believe that the above named Plaintiff cannot have a fair and impartial hearing or trial before the Honorable W.M. Black, Judge of the above entitled Court, who is about to preside at the trial in the above entitled case, by reason of the prejudice and bias of the said Judge.

Id. The reason for disqualification, quite clearly, is the fact that Judge Black prosecuted the abatement action against Ms. Carroll just one year and four months earlier. See *supra* note 120 and accompanying text.

¹²⁴ Transcript, *supra* note 35, at 20.

¹²⁵ SUPREME COURT OF MONT., SECOND ANNUAL REPORT OF THE MONTANA JUDICIAL SYSTEM (1989), available at http://courts.mt.gov/content/annual_reports/1989rpt.pdf. One of Ms. Beardon's attorneys, Patrick Donovan, also served as the Toole County Attorney in the late 1950's. *Id.* Patrick Donovan represented Ms. Carroll in the abatement action in 1954. A court order dated November 8, 1954 granting Ms. Carroll an extension of time to file a bill of exceptions is available and on file with the author. See also Obituary of Ronald Dale McPhillips, available at <http://www.legacy.com/obituaries/greatfalltribune/obituary-preview.aspx?n=ronald-d-mcphillips&pid=138218571&referrer=1630>.

case with the Viaduct Hotel.¹²⁶ The sole affidavit presented in support of the abatement action supports this theory as it was submitted by an individual who lived with his family in close proximity to the Viaduct Hotel and who also owned business property in this same location:

Affiant further alleges that on various occasions certain men, unknown [sic] to Affiant, have, at night, called at his residence and place of business asking the question “Where are the girls kept”? And otherwise molesting the peace and happiness of his home and family. That Affiant alleges that said persons making such inquiry had mistaken his residence and place of business for the said Viaduct Hotel which said hotel is located at a short distance from the premises and property of Affiant.¹²⁷

Ms. Carroll very likely learned a lesson from this earlier experience and strategically chose to relocate her prostitution business to the Hillside Ranch, which was situated “on a road that ran past the local fairground about a mile east of the small [rural] city” and where she thereafter ran her prostitution business for four years without any interference by authorities.¹²⁸

Although the Supreme Court of Montana may have been unaware of the actions taken against Ms. Carroll for her activities at the Viaduct Hotel, the record and the majority opinion reveal that the court was aware of, and perhaps influenced by, the criminal justice system’s failure to prosecute either Ms. Carroll or Ms. Beardon for their activities at the Hillside Ranch, choosing “[i]n effect . . . to leave matters to the discretion of law enforcement officials,”¹²⁹ the latter of whom apparently declined prosecution so long as the prostitution business remained quietly out of sight and separate from the larger community.¹³⁰ The court’s majority opinion could also be interpreted as a statement that local law enforcement authorities were complicit in the illegal activities occurring at the Hillside Ranch, although the humorous, dismissive tenor of the opinion, and the court’s decision to enforce the contract, do not readily lend the opinion to such an interpretation.¹³¹

Although there is no indication that the Supreme Court of Montana had knowledge of the nuisance action instituted against Ms. Carroll for her prostitution activities occurring at the Viaduct Hotel in 1954, the choice of local law enforcement to pursue a nuisance action¹³² rather than a criminal misdemeanor prosecution is

¹²⁶ See *infra* note 127 and accompanying text.

¹²⁷ Affidavit by S. A. Hole, *State v. Carroll*, No. 577 (9th D. Mont. Aug. 3, 1954). The Affidavit was ordered from the Toole County Clerk and is available and on file with the author.

¹²⁸ MACAULAY, *supra* note 2, at 497.

¹²⁹ *Id.*

¹³⁰ See *supra* notes 118-120, 126-127 and accompanying text.

¹³¹ See *supra* notes 48, 59-63, 69-75 and accompanying text.

¹³² The Montana statute in effect at the time of the incidents giving rise to the lawsuit in *Carroll v. Beardon* provided as follows:

Every building or place or tract of land under one ownership used for the purpose of lewdness, assignation, or prostitution, and every building or place or tract of land under one ownership wherein or upon which acts of lewdness, assignation, or

again a reflection of cultural values.¹³³ This prosecutorial choice is, therefore, evidence of, if not a more tolerant attitude toward prostitution, an attitude that the offense did not constitute a serious moral or criminal wrong.¹³⁴ The problem, however, with either judicial deference to local law enforcement or a judicial judgment of law enforcement complicity in the wrongdoing, is that it is misplaced. If the court's role in this instance is to identify legislative intent regarding prostitution, the public policy underlying criminal and civil statutes regulating prostitution, and, in turn, to balance these public policy interests involved in a contract dispute, the decisions made by law enforcement authorities are not relevant to this assessment.¹³⁵ Moreover, to the extent that the decisions of elected officials responsible for enforcing the laws represent the views of the larger culture within which the Supreme Court of Montana rendered its decision, such decisions should not be the court's primary focus when applying the active participation test.¹³⁶

In fact, the undisputed and uninterrupted improper use of the premises by both parties, not just Ms. Beardon, the party attempting to evade contract enforcement, render the improper use defense stronger from a public policy perspective. Such strong facts of continuous improper use by both parties to the contract suggest that the balance of equities tipped against contract enforcement because neither Ms. Carroll nor Ms. Beardon nor any individuals similarly situated would be less culpable or less in need of deterrence, and contract enforcement would directly implicate the court in the parties' wrongdoing.¹³⁷ As to deterrence, a no enforcement rule in these circumstances should also be economically efficient.¹³⁸ Such

prostitution are held or occur, and any building, place or tract of land under one ownership wherein or upon which gambling or those other illegal acts prohibited by chapter 24 and chapter 30, Title 94 Revised Codes of Montana, 1947, are carried on or occurs, contrary to any of the laws of the state of Montana, or wherein any wine rooms are conducted or maintained, contrary to the laws of the state of Montana, or wherein any opium or coca leaves, their salts, derivatives, and preparations thereof are sold or given away or used contrary to the laws of the state of Montana, is a nuisance which shall be enjoined, abated, and prevented as hereinafter provided, whether the same be a public or private nuisance.

MONT. CODE ANN. § 94-1002 (1947).

¹³³ See MONT. CODE ANN. § 94-3608 (1947). Moral views of crimes related to sex vary within the United States and this variation is reflected in different state laws: "So far as the regulation of sexual behavior is concerned, by crossing a state boundary one may be stepping into a different moral universe." POSNER & SILBAUGH, *supra* note 118, at 2.

¹³⁴ *Id.* See also *supra* notes 118-120, 126-127 and accompanying text.

¹³⁵ See *supra* notes 110-12 and accompanying text.

¹³⁶ See *supra* note 8 for an explanation as to why deference is made to legislators when statutory law governs.

¹³⁷ For a presentation of the balance of interests employed by the courts, see *supra* notes 108-12 and accompanying text. For a discussion of the facts rendering Ms. Carroll and Ms. Beardon equally involved in the illegal use of the premises, see notes 39-42, 81-97 and accompanying text.

¹³⁸ As one author explained,

Efficient deterrence theory seeks to minimize the costs resulting from the nonenforcement of contracts. When an illegal contract is not enforced, parties lose the

uninterrupted improper use thus compares favorably to other contract situations readily found to violate public policy, such as: executory contracts to perform illegal or wrongful acts,¹³⁹ contracts whose subject matter is intended to be used to commit a felony or an act involving “‘serious moral turpitude’ and ‘grave social harm,’”¹⁴⁰

economic resources that they allocated to an activity calculated to maximize their respective self-interests. It also is costly to society because resources spent to enter or even perform a contract that is of no effect could have been productively utilized elsewhere in the economy.

Kostritsky, *supra* note 43, at 123. “Because no clear benefit results when the loss is shifted from one equally guilty party to another, [as with Ms. Carroll and Ms. Beardon] it is more cost efficient to leave the parties where they are.” *Id.* at 146.

¹³⁹ An example of a contract to perform an illegal act would include a contract to sell a human organ. Wayne R. Barnes, *Rethinking Spyware: Questioning the Propriety of Contractual Consent to Online Surveillance*, 39 U.C. DAVIS L. REV. 1545, 1610 & n.375 (2006). A contract involving performance of a wrongful act would include a contract to commit a tort. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1320 (2001).

¹⁴⁰ Macintosh, *supra* note 15, at 1212. Courts have never clearly defined “serious moral turpitude,” but many have distinguished between offenses that are *malum prohibitum*—“unlawful by virtue of statute”—and those that are *malum in se*—morally wrong; “inherently evil.” *Transocean Enter., Inc. v. Ingalls Shipbuilding, Inc.*, 33 So.3d 459, 467 (Miss. 2010). If a contract is deemed merely *malum prohibitum*, these courts may find it voidable and may order restitution. Alex B. Long, *Attorney-Client Fee Agreements that Offend Public Policy*, 61 S.C. L. REV. 287, 293-94 & n.51 (2009). Restitution is generally unavailable if a contract is found to violate public policy. *Id.* at 294. A few courts have declared contracts involving prostitution immoral and presumptively void, but the majority of courts to consider the issue have narrowly construed the serious moral turpitude exception to exclude misdemeanor criminal activities such as those involved in *Carroll v. Beardon*, absent criminal or tortious conduct on the part of the seller or statutory prohibition of the contract itself. The early cases in this area were cases involving treason or rebellion. *Hanauer v. Doane*, 79 U.S. 342 (1870). By virtue of this decision, the United States Supreme Court weighed in on the serious moral turpitude exception to contract enforcement more than 150 years ago, in a case involving a contract of supplies intended for the Confederate army, when it ruled that the contract was unenforceable:

With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it, without turpitude, when he knows, or has every reason to believe, that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose.

Id. at 346.

contracts whose subject matter's sole use is to commit a crime,¹⁴¹ or contracts expressly declared unenforceable by legislation.¹⁴²

To the extent the Supreme Court of Montana was not motivated as much by deference to local law enforcement decisions as it was by a conclusion that the contract resulted in no real harm to the public welfare, the court may have ignored an important externality and negative social cost to third parties caused by its enforcement of a clearly illegal contract. In so doing it conveyed “a message that the state tolerates violation of positive law.”¹⁴³ In affirming the trial court decision to enforce the contract, the Supreme Court of Montana not only sent a message of tolerance of illegal activity, but also directly implicated itself in the parties' wrongdoing, which was foreseeable to continue given the uninterrupted improper use of the premises from the time that Ms. Carroll initially purchased the property.¹⁴⁴ On remand, pursuant to the trial court's earlier order, the property was sold for \$20,000.00 at a public auction, to satisfy the judgment, to none other than Ms. Carroll, who happened to be the highest bidder.¹⁴⁵ The court thereby awarded Ms. Carroll title to the property and also awarded her a deficiency judgment against Ms. Beardon in excess of \$20,000.00.¹⁴⁶ In the end, with the aid of both the trial court and the Supreme Court of Montana, Ms. Carroll gained economically from the transaction and the litigation and was placed in a position to once again carry on her prostitution business.¹⁴⁷

¹⁴¹ “Where the article sold is itself a device for the commission of an offense, designed solely for that purpose, the plaintiff by the mere sale of it has shared the guilt of the offense and cannot recover the price.” J.E. Macy, Annotation *Seller's, Bailor's, Lessor's, or Lender's Knowledge of the Other Party's Intention to Put the Property or Money to an Illegal Use as Defense to Action for Purchase Price, Rent, or Loan*, 166 A.L.R. 1353, 1360 (1947).

¹⁴² See *supra* note 43. A simple example of a statutory prohibition would include a sale of alcohol “in a jurisdiction where the sale and purchase of alcoholic beverages is prohibited by statute. If the seller later seeks to recover the purchase price . . . the buyer may assert that the contract is unenforceable because it directly violates a statute.” Macintosh, *supra* note 15, at 1200.

¹⁴³ Badawi, *supra* note 7, at 507-08 (discussing “[t]he tension between the lack of harm posed by a particular contract and the aversion to failing to punish illegal conduct”).

¹⁴⁴ For a discussion of the competing policy interests implicated in the improper use defense, see *supra* note 112 and accompanying text. See also *infra* notes 146-53 and accompanying text.

¹⁴⁵ She actually paid nothing to get the property back because the total judgment against Ms. Beardon, which included attorney's fees as a part of the written contract, was \$47,711.19 (\$41,805.00 reflecting the balance due on the mortgage, \$3,905.66 in interest, \$2,000.00 in attorney's fee, plus 6% interest to be added from the date of judgment). Transcript, *supra* note 35, at 24. The auction was held on July 8, 1963 by Edwin Pierson, Sheriff of Toole County. Sheriff's Return on Foreclosure No. 8657 was obtained from the Toole County Clerk and is available and on file with the author.

¹⁴⁶ The deficiency judgment was \$27,711.19 plus interest accruing after judgment. See Transcript, *supra* note 35, at 24. A search of court records for the three-year period following the Supreme Court of Montana's affirmance revealed no attempt by Ms. Carroll to collect this judgment.

¹⁴⁷ *Id.* See also *supra* note 145 and accompanying text.

Ms. Carroll would have profited from the transaction with or without the aid of the Supreme Court of Montana's judgment enforcing the contract,¹⁴⁸ but the court's decision to enforce the contract was an affirmative decision that validated the sale of a prostitution business and thereby directly implicated the judiciary, and in fact, the highest court in the state of Montana, in the parties' wrongdoing.¹⁴⁹ In this manner, the court did not simply look the other way and fail to take action, as the local law enforcement authorities may have; instead the court, in declaring the contract enforceable, chose to legitimize and officially institutionalize the sex commerce business.¹⁵⁰ To the extent that the court's statement that because Ms. Beardon "had the benefit of the contract for several years . . . [h]er status naturally does not appeal to the favor of this court,"¹⁵¹ reflects a view that Ms. Beardon did not have clean hands, or that the parties were not *in pari delicto*,¹⁵² the better approach in the application of the active participation test would have been to deny enforcement of the contract and to craft an equitable remedy for Ms. Carroll.¹⁵³

¹⁴⁸ She originally purchased the property for \$6,000.00 (and perhaps significantly less money) and after some improvements, was actually paid by Ms. Beardon \$9,000.00, which represents a 50% increase in a four-year period. See *supra* notes 35-36, 83-84 and accompanying text.

¹⁴⁹ See Badawi, *supra* note 7, at 507.

¹⁵⁰ For a discussion of the harmful public policy effects of court enforcement of clearly illegal contracts, see *supra* note 143 and accompanying text. See also BARBARA MEIL HOBSON, *UNEASY VIRTUE* 3, 215-16 (Univ. of Chicago Press 1990) (describing the sex commerce business as an institutionalized business in the United States).

¹⁵¹ *Carroll v. Beardon*, 381 P.2d 295, 297 (Mont. 1963).

¹⁵² "*In pari delicto* means 'of equal fault.' The *in pari delicto* defense arose from the equitable maxim that one who seeks equitable relief must come into court with 'clean hands.'" Mark Georg Strauch, Note, *Rule 10b-5-Application of the In Pari Delicto Defense in Suits Brought Against Securities Brokers by Customers Who Have Traded on Inside Information*, 37 VAND. L. REV. 557, 561 (1984). There are three reasons for the *in pari delicto* defense:

First, since both parties are 'equally at fault,' the courts do not want to reward one party by allowing him to profit by the illegal act. Second, courts feel that denying recovery will deter future illegal conduct. Finally, the *in pari delicto* defense publicly affirms the court's dissatisfaction with the plaintiff's conduct.

Id. (footnotes omitted).

¹⁵³ When courts deny enforcement of a contract based upon public policy, they sometimes deny all remedies, including standard contract damage remedies, rescission, restitution, and other equitable relief. *Levy v. Davis*, 80 S.E. 791, 792 (Va. 1914).

"As a general rule the law will leave all equally guilty of an illegal immoral transaction where it finds them, and will neither lend its aid to enforce the contract while executory, nor to rescind it and recover the consideration parted with when executed. 'It is a well settled principle of law that the courts will not aid a party to enforce an agreement made in furtherance of objects forbidden by the statute, or by common law, or general policy of law, or to recover damages for its breach, or when the agreement has been executed in whole or in part by payment of money to recover it back.'"

Id. (quoting 2 ELLIOTT ON CONTRACTS § 1064). "Courts are founded to execute the laws, and not to sanction or assist in their violation." *Mitchell v. Campbell*, 72 So. 231, 233 (Miss.

IV. IMPROPER USE AND THE COURT'S DISREGARD OF EXISTING PRECEDENT

At the time the Supreme Court of Montana issued its decision in *Carroll v. Beardon*, fourteen state supreme court decisions involving analogous facts had been rendered over a fifty-year timeframe beginning in the late nineteenth century and ending in the early twentieth century.¹⁵⁴ This period leading up to the decision in

1916) (involving lease of premises used for prostitution). As one author explained, this “no-effect” rule, as it is often referred to, is couched in absolute language, but in actuality there are many exceptions for contracts found to violate public policy:

Courts sometimes grant a one-sided voidability right, giving one party the option either to affirm or avoid his contractual obligations, but deny any relief to the other party. Courts also may grant a one-sided enforcement right. Additionally, in cases in which one party has partly performed, courts may grant a one-sided rescission right, plus restitution. Finally, courts can deny enforcement but grant rescission to both parties. Commentators have detailed the various qualifications to the no-effect rule without offering a comprehensive theory to explain why the exceptions exist and how they interrelate.

Kostritsky, *supra* note 43, at 120-21.

¹⁵⁴ The state supreme court decisions include the following: *Belmont v. Jones House Furnishing Co.*, 125 S.W. 651, 652 (Ark. 1910) (holding a contract for sale of furniture for use in a house of prostitution enforceable where seller had knowledge of intended use, but “had no interest in the business”); *Dougherty v. Seymour*, 26 P. 823, 823 (Colo. 1891) (holding a lease of a house used for prostitution unenforceable where lessor knew of intended use); *Jones v. Owens*, 99 S.E. 121, 122 (Ga. 1919) (holding the sale of house to individual intending to use for prostitution unenforceable because seller’s knowledge of intended use rendered seller “participant in the immoral purposes” of buyer), *overruled on other grounds by Stapler v. Anderson*, 170 S.E. 498, 500 (Ga. 1933); *Rosenblath v. Sanders*, 91 So. 252, 253 (La. 1922) (holding a lease of house for prostitution void because lease “was entered into for the purpose of enabling the defendant to conduct a house of prostitution”); *Berni v. Boyer*, 97 N.W. 121, 122 (Minn. 1903) (holding a lease of house used for prostitution void); *Mitchell*, 72 So. at 232 (holding lease of premises by landlord of house used for prostitution “against public policy . . . against morality, and absolutely void”); *Darling v. Kipp*, 141 N.W. 830, 830 (Neb. 1913) (holding sale of goods to person running house of prostitution enforceable where seller had mere knowledge of buyer’s intended illegal use); *Loose v. Larsen*, 161 P. 514, 516 (Nev. 1916) (holding sale of alcohol to person running house of prostitution enforceable where seller had mere knowledge of buyer’s intended use); *Ernst v. Crosby*, 35 N.E. 603, 604 (N.Y. 1893) (holding lease of premises used for prostitution unenforceable where lessor had knowledge of such use); *Fineman v. Faulkner*, 93 S.E. 384, 385 (N.C. 1917) (holding sale of “Edison talking machine” to prostitute enforceable where seller did not participate “in the illegal purpose of the purchaser”); *Almy v. Greene*, 13 R.I. 350, 352 (R.I. 1881) (holding knowledge by lessor that lessee intended to use premises for prostitution insufficient to invalidate contract); *Reed v. Brewer*, 37 S.W. 418, 420 (Tex. 1896) (holding that a knowing sale of furniture to person running house of prostitution unenforceable where seller also knew payments would be made from proceeds of prostitution); *Levy*, 80 S.E. at 792 (holding sale of goods to person running a house of prostitution unenforceable where seller knew only means of payment would come from prostitution business); *Washington Liquor Co. v. Shaw*, 80 P. 536, 537 (Wash. 1905) (holding a knowing sale of liquor to person running a house of prostitution enforceable if seller did not assist or participate in prostitution business). In some jurisdictions, intermediate appellate court decisions had been rendered, but the issue had not been decided by the state supreme court. *See, e.g., Schankel v. Moffatt*, 53 Ill. App. 382 (Ill. App. Ct. 1893) (involving sale of household furniture, lease of premises, and sale of good will of house of prostitution by one prostitute to another prostitute). In another intermediate appellate court decision, for

Carroll v. Beardon was followed by a forty-one year gap during which no state supreme court opinions were published addressing the improper use defense as applied to contracts involving prostitution.¹⁵⁵ Because “judicial perceptions [of these policy-driven issues] are likely to change over time, in a loose synchronization with the developing attitudes and beliefs of society as a whole,”¹⁵⁶ it would have been understandable had the Supreme Court of Montana rejected this entire body of precedent. Instead, the Supreme Court of Montana chose to ignore this inconsistent and dated precedent rather than to articulate a more contemporary assessment of the competing public policy interests.¹⁵⁷

Recognition and assessment of this body of inconsistent precedent would have complicated the Supreme Court of Montana’s analysis, something the court clearly avoided even though the bulk of this precedent supported the court’s decision to adopt a test requiring more than knowledge by a seller of a buyer’s intended subsequent improper use to implicate the seller sufficiently to invalidate a contract.¹⁵⁸ Although few courts explained their reasons for adopting this test, the courts that did offer an explanation concluded that to rule otherwise would render one party to a contract “the keeper of” the other party’s morals.¹⁵⁹ Thus, in addition to knowledge, these courts, in conformity with the Supreme Court of Montana, uniformly required some participation, usually described as active participation, by the seller in the buyer’s subsequent illegal use of the property.¹⁶⁰

example, the court addressed a situation very similar to the facts in the *Carroll v. Beardon* case when it ruled that the transaction was not enforceable because it involved the sale of an ongoing prostitution business, including its good will and was, therefore, “based on an illegal consideration.” *Finley v. Williamson*, 215 S.W. 743, 746 (Mo. Ct. App. 1919).

¹⁵⁵ *Id.*

¹⁵⁶ *Macintosh*, *supra* note 15, at 1212.

¹⁵⁷ *Carroll v. Beardon*, 381 P.2d 295, 296 (Mont. 1963). The court was, or should have been, aware of this precedent given the fact that the parties cited to it and discussed it in the briefs they submitted on appeal. *See supra* notes 70, 76-80, 106-07, 113-14 and accompanying text.

¹⁵⁸ *See HOBSON*, *supra* note 150.

¹⁵⁹ *Michael v. Bacon*, 49 Mo. 474 (Mo. 1872) (involving contract for work on a house contractor knew to be used for gambling). Judge Adams reasoned, “I am not aware of any principle of law which compels a merchant, laborer or mechanic to overlook the morals of his customers. He is not the keeper of their morals in any sense of the word.” *Id.* at 476.

¹⁶⁰ *See, e.g., Washington Liquor Co. v. Shaw*, 80 P. 536, 537 (Wash. 1905). The Supreme Court of Washington explained its holding as follows:

“And it may be difficult to distinguish between the cases in which the vendor, with knowledge of the vendee’s unlawful purpose, does not become a confederate, and those wherein he aids and assists to an extent sufficient to vitiate the sale; but this difficulty is not apparent in the case at bar.” We are therefore of opinion that, where property is sold absolutely and unconditionally, mere knowledge on the part of the vendor that the property will thereafter be sold illegally, or applied to some illegal or immoral use, will not bar an action to recover the purchase price, unless it is a part of the contract of sale that the property shall be so sold or used, or unless the vendor aids or participates in the illegal objects otherwise than by the mere act of making the sale.

Id. (quoting *Anheuser-Busch Brewing Ass’n v. Mason*, 46 N.W. 558, 559 (Minn. 1890)).

The difficulty for these courts was in developing a meaningful test or standard by which to draw the line between conduct or actions that directly connected the seller to the buyer's illegal use of the property and those that were too remote or collateral to the subsequent use by the buyer.¹⁶¹ This difficulty is compounded by the fact that these same courts failed to articulate how the rules developed in the area of improper use furthered the relevant policy interests.¹⁶² Had the Supreme Court of Montana presented and evaluated this precedent, it may have directly confronted the uncertainty and potentially inconsistent resulting precedent inherent in an area of law in which courts are afforded a high degree of discretion as they balance vaguely defined competing public policy interests that shift and change as societal mores and values change.¹⁶³

The confused state of the law of improper use and public policy analysis relative to contracts involving prostitution can be traced to interpretation of nineteenth century British precedent, *Pearce v. Brooks*,¹⁶⁴ a case the Supreme Court of Montana cited in its opinion, but failed to analyze.¹⁶⁵ From the outset, some American courts rejected the analysis presented in the *Pearce* decision, and others, perhaps many, may have misinterpreted it.¹⁶⁶ In this case, the plaintiff leased a specially designed

¹⁶¹ *Id.*

¹⁶² Macintosh, *supra* note 15, at 1203.

¹⁶³ *See id.* The task is easier for courts when the legislature has spoken on the enforceability of contracts involving illegal activities. *See, e.g.,* *Almy v. Greene*, 13 R.I. 350, 351 (R.I. 1881), in which the Supreme Court of Rhode Island relied upon a statute providing in pertinent part:

Whenever the lessee of a dwelling-house shall be convicted of keeping the same as a house of ill-fame, the lease or contract for letting such house shall, at the option of the lessor, become void; and such lessor shall thereupon have the like remedy to recover possession as against a tenant holding over after the expiration of his term.

Id. (internal quotations omitted). In Louisiana, a statute existed beginning in the late nineteenth century declaring void “all contracts having an immoral object.” *Campbell v. Gullo*, 78 So. 124, 125 (La. 1918). One author has cautioned in the context of the improper use defense:

In dealing with American precedents, care should be taken to eliminate any in which a statute has operated directly upon the transaction itself. Often this fact does not appear in the report, and often the plaintiff's knowledge may be the focus of inquiry under such a statute. . . . If, for example, the action is to recover the rent of premises let with knowledge that the tenant intended to use them for a gambling hall, a statute may have imposed a penalty upon any owner who “permits” his premises to be used for such a purpose. The effect of this will have been to bring the case under the principle which nullifies illegal contracts, although the knowledge and intent of the plaintiff may be the nub of the controversy.

Macy, *supra* note 141, at 1356-57.

¹⁶⁴ *Pearce v. Brooks*, (1866) 1 L.R. Exch. 213.

¹⁶⁵ *Carroll v. Beardon*, 381 P.2d 295, 296 (Mont. 1963).

¹⁶⁶ *See, e.g.,* *Michael v. Bacon*, 49 Mo. 474 (Mo. 1872):

The case of *Pearce et al. v. Brooks*, 1 Court of Ech. Law Rep. 213, so strongly relied on by defendants' counsel as overruling the doctrine of previous English cases, does

miniature ornamental carriage to the defendant, a prostitute.¹⁶⁷ When the defendant subsequently failed to pay a contractual forfeiture fee upon surrender of the carriage, the court ruled that the lessor-plaintiff could not enforce the contract due to the lessor's knowledge at the time of entry into the contract that the defendant was a prostitute,¹⁶⁸ some members of the court argued that this knowledge also included a requirement that the lessor know the defendant intended to use the carriage as a part of her illegal and immoral purpose—to display herself in order to attract customers,¹⁶⁹ while other members argued that the knowledge requirement included awareness by the lessor of the fact that the defendant would fulfill her contractual obligations from the proceeds of prostitution.¹⁷⁰

This British decision was relied upon by a handful of early American courts that found mere knowledge by a seller or lender of a buyer's intended subsequent illegal use of property sufficient to invalidate a contract.¹⁷¹ Other American courts either rejected this reasoning, finding mere knowledge insufficient to connect the seller or lessor to the buyer or lessee's subsequent improper or illegal use,¹⁷² or interpreted *Pearce* as involving unique facts regarding the subject matter of the contract rendering it distinguishable from many superficially similar contracts.¹⁷³ These latter courts, which came to encompass a majority, found the fact that the carriage in *Pearce* was actually used to facilitate prostitution outcome determinative:¹⁷⁴

not in terms profess to do so. The point made in that case was that a man who hired a brougham to a prostitute, knowing that she was a prostitute, and knowing that she intended to use the brougham for purposes of display and attraction, could not recover for the hire, because such knowledge in that case amounted to an intention or design on his part to aid the prostitute in her illegal calling. The Court of Exchequer does not profess to overrule the previous cases, but by a sort of hairsplitting distinction to agree with them. We doubt whether the point was properly ruled in that case, and we therefore disregard it as any authority here.

Id. at 476-77. See also Macy, *supra* note 141, at 1359 (noting that *Pearce* “has not been clearly understood in America”).

¹⁶⁷ *Pearce*, 1 L.R. Exch. at 214.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Macy, *supra* note 141, at 1356 (asserting that “[t]he American courts long ago stopped discussing the English decisions” in the area of improper use contracts).

¹⁷² *Bishop v. Honey*, 34 Tex. 245, 252 (Tex. 1870) (finding mere knowledge by mechanic of buyer's intent to use premises for prostitution insufficient to invalidate contract where house was to be paid for “as the work progressed,” not out of prostitution business proceeds); *Schankel v. Moffatt*, 53 Ill. App. 382, 382 (Ill. App. Ct. 1893) (concluding that “[a] contract which is in itself legitimate is not void because the beneficiary thereof knows that the other party intends to use the subject-matter to aid him in violating the law”).

¹⁷³ *Michael v. Bacon*, 49 Mo. 474, 477 (Mo. 1872) (distinguishing *Pearce* as involving a situation in which the subject matter of the contract aided “the prostitute in her illegal calling”).

¹⁷⁴ *St. Louis Fair Ass'n v. Carmody*, 52 S.W. 365, 368 (Mo. 1899). See also *Martin v. Wade*, 37 Cal. 168, 171 (Cal. 1869) (commenting in a case not involving prostitution that

[I]n some sense, everything which was supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a street walker; and that the things supplied must be not merely such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but that they must be such as would under the circumstances not be required, except with that view. The jury, by the mode in which they answered the question, shewed that they appreciated the distinction; and on reflection I think they were entitled to draw the inference which they did. They were entitled to bring their knowledge of the world to bear upon the facts proved. The inference that a prostitute . . . required an ornamental brougham for the purposes of her calling, was as natural a one as that a medical man would want a brougham for the purpose of visiting patients; and the knowledge of the defendant's condition being brought home to the plaintiffs, the jury were entitled to ascribe to them also the knowledge of her purpose.¹⁷⁵

Based upon this reasoning, the majority of American courts to address the issue have routinely enforced contracts for the sale of alcohol, furniture, and other items of personal property to be used as a part of conducting a house of prostitution when, at the time of entry into the contract, the seller knew of the buyer's intended use, but had no involvement in the subsequent illegal activity or use of the property.¹⁷⁶ These courts have found the seller or lessor too remotely connected to the illegal activity to be deemed an active participant in the buyer's or tenant's subsequent illegal activity.¹⁷⁷

“recovery cannot be had for supplying clothing or lodgings to a prostitute for the purpose of enabling her to ply her vocation”).

¹⁷⁵ *Pearce*, 1 L.R. Exch. at 215.

¹⁷⁶ One court commented:

The plaintiff was a retail dealer in furniture at Alliance. He sold these articles in the regular course of his business. He had no interest in the defendant's business and was in no way connected with it. There seems to be no reason for holding him responsible for her business, any more than one who should sell her groceries, fuel, wearing apparel, or any such like articles. Under such circumstances, he is not *particeps criminis*, and was entitled to recover for the goods sold.

Darling v. Kipp, 141 N.W. 830, 830 (Neb. 1913).

¹⁷⁷ This has been the case even when one prostitute has sold goods to another prostitute. *Schankel*, 53 Ill. App. at 382. See also *Hayes v. G.A. Stowers Furniture Co.*, 180 S.W. 149, 152 (Tex. Civ. App. 1915), a case in which the Court of Civil Appeals of Texas reversed a trial court judgment that a contract was unenforceable based upon facts found by the jury:

We have reviewed a great number of cases, and, while they are not all agreed as to what facts are necessary to render a claim founded on an immoral consideration uncollectible through the courts, they are in harmony on the proposition that, where a transaction is had with knowledge, purpose, and effect to aid another in the commission of an unlawful act, a consideration founded upon such transaction cannot be enforced.

Id. But see *Ham v. Wilson*, 86 So. 298, 298-99 (Miss. 1920), a case in which the sellers simply knew that the goods were purchased to furnish a house of prostitution. One of the sellers was the mayor of the town “and after a large part of the purchase price had been paid

When a lessor, however, retained a reversionary interest in leased premises, some courts were more inclined to find the lessor implicated in a tenant's business use of the premises as a house of prostitution even in the face of negligible evidence that the landlord was involved in any way in the prostitution business.¹⁷⁸ These courts appear to more readily find that the landlord was interested in the subsequent business use by the tenant than were sellers of real estate given the fact that rent was paid on an ongoing basis from the proceeds of this illegal use and the landlord thereby directly gained from the illegal activity.¹⁷⁹ Some courts found crucial to the landlord's involvement the assumption that the consideration, the value of the rent, had been negotiated at a higher rate based upon the property's value as an ongoing illegal enterprise and the corresponding risks associated with illegal activity.¹⁸⁰

[I]t is the opinion of this court, that rent should not be recovered for a house knowingly let to a person who will use it, or who does use it, for the depraved and immoral purposes of prostitution. It is not a question of whether women of this unfortunate class should be deprived of the shelter of a roof, as counsel puts it, but a question of whether a court will enforce a contract founded upon a vicious and degraded occupation, and from which must spring the consideration of a contract.¹⁸¹

the mayor issued an order compelling the defendant and all others of her kind to close up their houses and leave town." *Id.* at 298. The buyers were unable to pay the balance remaining due on the goods and could not remove the goods without the sellers' consent, which was not given. *Id.* The court refused to "lend its aid to such immoral and unholy transactions" and held the contract unenforceable. *Id.* at 299.

¹⁷⁸ *See, e.g.,* *Almy v. Greene*, 13 R.I. 350, 352 (R.I. 1881) (statutory provision intending to benefit lessor by declaring that lessor has right to have lease contracts declared void when premises used for prostitution effective unless lessor "has been cognizant of the illegal use and has consented to it"). *See also* *Ernst v. Crosby*, 35 N.E. 603, 604 (N.Y. 1893) (finding that purchaser of premises subject to a lease could not enforce lease when purchaser "had the opportunity to ascertain about the lease and the use by the lessee").

¹⁷⁹ For the application of this same concept in the context of personal property, see *Standard Furniture Co. v. Van Alstine*, 62 P. 145, 146 (Wash. 1900) (involving a sale of property in which the seller retained control and use of property: the seller "not only reserved 'title, ownership, and possession of the property,' but reserved the right to 'take possession of the aforesaid personal property whenever it may deem itself insecure, even before the maturity' of the deferred payments").

¹⁸⁰ *Hunstock v. Palmer*, 23 S.W. 294, 295 (Tex. Civ. App. 1893) (citing as an example of an unenforceable contract one in which "'A assigned to B his lease of a house, knowing that he intended to use it as a brothel, receiving from him an excessive rent, which was to be paid out of the profits of the place'"). *See also* *Ashbrook v. Dale*, 27 Mo. App. 649, 653 (Mo. Ct. App. 1887) (citing to evidence in the record "that the rental value of the premises, for legitimate purposes, was from thirty to forty dollars per month, while its rental value, as a house of prostitution, was seventy dollars (the difference in rent arising, presumptively, from the risk[s] . . . attending illegal tenancies)").

¹⁸¹ *Hunstock*, 23 S.W. at 295. Some courts have treated cases involving leasehold interests no differently than those involving the sale of real estate and have consequently required more active participation by the landlord in the subsequent illegal use of the property before invalidating the contract. *Almy*, 13 R.I. at 350. *See also* *Kessler v. Pearson*, 55 S.E. 963, 964 (Ga. 1906) (concluding that "only when the landlord aids or abets the tenant in the unlawful

The problem has been not with an active participation requirement, but rather with how the courts measure the seller's participation.¹⁸² Some courts have taken an intent-based approach, assessing whether the seller intended at the time of entry into the contract to further the buyer's illegal purpose.¹⁸³ An intent-based approach is problematic for several reasons. First, courts invoking this test of seller participation focused on the seller's intent, but these same courts appear to have conflated the buyer's and seller's intent, treating the intent requirement as a shared purpose.¹⁸⁴ Second, even if the courts in these situations were truly measuring the seller's intent at the time of entry into the contract, the seller's intent, assumption, or even hope, regarding the buyer's future conduct is simply irrelevant to the buyer's subsequent use of the property.¹⁸⁵ Stated another way, a seller's intent regarding a buyer's use of the property, standing alone, would not in any way constrain the buyer's subsequent actions and, therefore, should not serve as the sole test of contract invalidity.¹⁸⁶

Other courts appear to have adopted a more coherent approach through their assessment of the seller's intent and actions as alternative reasons for denying contract enforcement: A contract was not enforced if the seller knew of the buyer's intended illegal use of the property and if the seller either participated in the buyer's illegal purpose or acted to further that purpose.¹⁸⁷ When the cases are closely analyzed, these latter courts appear to have focused not upon the seller's intent, but rather upon the seller's direct gain from or direct participation in the buyer's

enterprise, or by some affirmative act gives his consent and approbation to the tenant's maintaining a brothel, that he shares the tenant's guilt").

¹⁸² As one author explained, "[t]he traditional rules draw a sharp distinction between mere knowledge of an improper use and active participation in the improper use." Macintosh, *supra* note 15, at 1201. "When a person not only knowingly supplies property, money, or services, but also takes further steps to assist the customer's improper use, he will not be permitted to enforce the contract." *Id.* For an example of this vaguely stated standard, see *Standard Furniture Co.*, 62 P. at 146:

[I]f the vendor has knowledge of the immoral or illegal design of the vendee, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vendor cannot recover.

¹⁸³ "As hard as it may be to distinguish mere knowledge from participation, some courts draw an even more difficult distinction by granting enforcement when the supplier knows of the improper use but is indifferent to it, and denying enforcement when the supplier not only knows of the improper use, but also acts for the *purpose* of furthering it." Macintosh, *supra* note 15, at 1202 (emphasis added).

¹⁸⁴ Given the fact that the distinction between knowledge and intent is murky, a finder of fact may "achieve whichever outcome it desires through conclusory characterization of . . . mental state." Macintosh, *supra* note 15, at 1202.

¹⁸⁵ That is, particularly in the context of a sale where the seller relinquishes control of the subject matter, the buyer can choose to use the property in a legal manner. For a discussion of the distinction between absolute and conditional sale in the context of the public policy defense, see *Standard Furniture Co.*, 62 P. at 146.

¹⁸⁶ *See id.*

¹⁸⁷ *See supra* notes 179, 182, and 184. *See also* Macy, *supra* note 141, at 1384-86.

subsequent illegal use of the property as measured by, for example, the consideration—a higher rental rate or purchase price representing the monetary value of the illegal use.¹⁸⁸ Active participation was found by these courts when the seller was actually involved in some way in the subsequent prostitution activity of the buyer or tenant,¹⁸⁹ when the seller instigated the buyer to use the property for prostitution,¹⁹⁰ when the seller acquired a monetary interest in the buyer's prostitution business,¹⁹¹ or when the seller assisted the buyer in evading detection.¹⁹²

¹⁸⁸ See *supra* notes 182-83 and accompanying text.

¹⁸⁹ Such involvement has been found under the following circumstances:

We are of the opinion that from the facts: (1) That so large an amount of furniture was sold by Erastus Reed to defendant on open account, apparently without security, with the knowledge on his part of the very purpose for which it was to be used and that the money to pay for same "had to come out of prostitution;" (2) that the payments were to be made weekly or monthly in such small sums as defendant might be able to realize from such business, conducted with the aid of the furniture, extending over a number of years; (3) that thereafter defendant, 'at the request of Erastus Reed, and in order to enable him to raise money at the bank,' executed the notes and the instrument securing same; (4) that said instrument provided that until all the money was paid the title to the furniture was to remain solely in Reed, defendant to retain possession, but not to remove same from the house of prostitution, where it then was being illegally used, nor sell same; the trial court might properly have found not only that Erastus Reed sold the furniture to defendant knowing that she was to use it for the purpose of putting up and carrying on a house of prostitution and that his pay must come from the revenues derived therefrom, but also that Erastus Reed, at the time of the sale contemplated, and subsequently was actually aiding and abetting her in the venture.

Reed v. Brewer, 37 S.W. 418, 420 (Tex. 1896).

¹⁹⁰ Instigation has been found when the evidence established that the seller of furniture "instigated the defendant to buy the property for the avowed purpose of using it in a house of prostitution, and advised the defendant to enlarge the profits of the business by increasing the number of wretched victims of their avarice and doom them to a life of infamy." Levy v. Davis, 80 S.E. 791, 793 (Va. 1914).

¹⁹¹ Such an interest has been found when a seller expects to receive mortgage payments from "the proceeds of the avocation of conducting a bawdyhouse or brothel." Finley v. Williamson, 215 S.W. 743, 744 (Mo. Ct. App. 1919).

¹⁹² In the improper use context involving prostitution, such cases are rare and involve strong facts of seller participation:

Price held out certain inducements to her, assuring her that there had been a change in the police force and that she would likely do a good business on Oakley street; that Price rented her part of the furniture which he had before that time rented to Flora Campbell when she was in the house; and that he also employed the services of a negro to build a "trap" in the house under which she might conceal beer from the officers of the law. Some of the statements of the witness were denied by George C. Price; but this witness, himself several times convicted upon a charge of selling intoxicating liquor, virtually admits that he knew the purpose of the tenant and the use to which she expected to put the property and the assistance which he rendered in providing the "trap" to conceal the beer. In other words, the proof justifies the conclusion that the agent not only had knowledge of the fact that Blanche Campbell was a common prostitute, but that she intended to use the very premises here leased as a bawdy house and a "blind tiger."

Had the Supreme Court of Montana invoked any of these approaches to measuring seller participation, Ms. Carroll should have been found an active participant in Ms. Beardon's illegal use of the premises. First, her own words establish an understanding that the premises would be used solely for prostitution, and because such use was necessary to enable Ms. Beardon to pay the mortgage, Ms. Carroll understood that without this criminal use, there would be no contract.¹⁹³ The strongest evidence of intent in this case is the consideration or values exchanged—the price term, which was so clearly out of proportion to the price a legitimate use would support, reflects Ms. Carroll's intent to sell an ongoing prostitution business, complete with payment terms that were linked to seasonal fluctuations in demand.¹⁹⁴ Stated another way, Ms. Carroll's direct gain from Ms. Beardon's criminal use of the premises is evidenced by the purchase price.¹⁹⁵ Ms. Carroll's actual or active participation in Ms. Beardon's improper use arguably also stems from this payment structure which enabled Ms. Beardon to engage in the prostitution business and pay the mortgage. Given the overwhelming evidence that the contract's sole purpose was to facilitate prostitution, it is difficult to understand the Supreme Court of Montana's statement requiring Ms. Beardon to "show more active participation by the seller than has been shown here."¹⁹⁶

V. EPILOGUE TO *CARROLL V. BEARDON* AND THE IMPROPER USE DEFENSE

The opinion has proved to be of very little value to future courts and litigants, representing a failure by the Supreme Court of Montana in one of its primary duties: the duty to create, interpret, and dispense the law.¹⁹⁷ In fact, the case has been cited on only one occasion by the Supreme Court of Montana, occurring almost twenty-five years after the court initially issued the *Carroll v. Beardon* decision.¹⁹⁸ In this subsequent decision, the Supreme Court of Montana was explicit in its description of the contract in *Carroll v. Beardon* as violating public policy, but due to the relationship of the parties, permitting the court to enforce the contract: "Montana cases have established that under certain circumstances a plaintiff may pursue a

Mitchell v. Campbell, 72 So. 231, 232 (Miss. 1916).

¹⁹³ See *supra* notes 94-97 and accompanying text.

¹⁹⁴ See *supra* notes 83-90 and accompanying text.

¹⁹⁵ For a discussion as to how the payment terms provide evidence that the contract involved the sale of a prostitution business, see *supra* notes 91-93 and accompanying text.

¹⁹⁶ *Carroll v. Beardon*, 381 P.2d 295, 297 (Mont. 1963).

¹⁹⁷ See *supra* note 104.

¹⁹⁸ *Powder River Cnty. Bank v. Arness-McGriffin Coal Co.*, 732 P.2d 1326, 1329 (Mont. 1987). The case involved an illegal loan agreement pursuant to state statutory law limiting loans to partnerships and corporations for "20% of the amount of the unimpaired capital and surplus of that bank." *Id.* at 1328. The Supreme Court of Montana rejected the company's argument that it was not *in pari delicto* with the bank and should, therefore, be permitted to pursue an action against the bank. *Id.* at 1329. The court relied on the policy underlying the legislation—the protection of "depositors of a bank"—and concluded that "[t]o allow appellant to pursue his claims against the Bank would circumvent that public policy." *Id.* at 1330.

claim based on an illegal contract where the plaintiff is not *in pari delicto*.¹⁹⁹ The Court then cautioned, in classic form used to overrule by implication, that the *Carroll v. Beardon* case was limited to “very particular situations and specific illegal contracts.”²⁰⁰

The Supreme Court of Montana not only failed in its duties to the parties, to their attorneys, and to the public, but it also missed an opportunity to craft law in an area in which no state supreme court had spoken in more than forty years about the active participation test in the context of improper use and contracts involving prostitution.²⁰¹ Although the precise issue has not been presented to the Supreme Court of Montana²⁰² or another high court since the decision in *Carroll v. Beardon*, relevant cases arise in a variety of contemporary contexts, including, for example, lawsuits filed to recover expenditures made in establishing and running “an escort and dating service” which operated as a prostitution business.²⁰³ Other related, more

¹⁹⁹ *Id.* at 1329. Neither the trial court nor the Supreme Court of Montana explicitly concluded that Ms. Beardon and Ms. Carroll were not equally at fault and neither explained how the facts supported such a conclusion. *See supra* notes 111, 152.

²⁰⁰ *Id.* The Supreme Court of Montana could not have more clearly limited the *Carroll v. Beardon* decision to its facts, “a method of overruling it” without saying so. Gregory C. Cook, Note, *Footnote 6: Justice Scalia’s Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL’Y 853, 884-85 n.166 (1991). *See also* Chad Flanders, *Please Don’t Cite This Case! The Precedential Value of Bush v. Gore*, 116 YALE L.J. (Pocket Part) 141, 142 (2006) (commenting that when the United States Supreme Court limits a case to its facts, “it is on the way to overruling it, by nullifying the principle that decided the case”).

²⁰¹ *See supra* notes 154-55 and accompanying text.

²⁰² The Supreme Court of Montana has been called upon to resolve issues involving *quid pro quo* claims of sexual harassment under state statutory law and involving the intersection of contract law and prostitution. *See, e.g.*, *Schmidt v. Cook*, 108 P.3d 511, 515-16 (Mont. 2005). In this case, the defendant, Elvin Cook, advertised for a “Live in Maid” to work at a hotel he managed. *Id.* at 512. The plaintiff, Nina Schmidt, “an emancipated sixteen-year-old” interviewed for the position. *Id.* During the interview, which occurred in a motel room,

Elvin stripped his bed and asked Schmidt to remake it to demonstrate that she could make a bed. After she did so, Schmidt testified, Elvin informed her that she was hired for the maid position. Elvin then informed Schmidt that as part of her job, she would be required to have sex with him and with Motel customers. He described in detail a variety of sexual acts that Schmidt would be required to perform. He told her that she might eventually make \$20,000 to \$40,000 per month.

Id. The issue presented to the Supreme Court of Montana in this case involved a question as to whether “the parties operated *in pari delicto*.” *Id.* at 515.

²⁰³ *Youshah v. Staudinger*, 604 N.Y.S.2d 479, 479 (N.Y. Sup. Ct. 1993) (finding plaintiff’s claim for \$27,752.34 for renting and furnishing apartments in Manhattan and for placing advertisements to hire “personnel” illegal and unenforceable). In another case, a Florida appellate court reviewed a lower court order compelling discovery of a plaintiff’s alleged history of prostitution and money earned from such activity. *Balas v. Ruzzo*, 22 Fla. L. Weekly 2375 (Fla. Dist. Ct. App. 1998). The lawsuit was filed against “a leisure spa,” which allegedly operated as a house of prostitution, by two former employees who alleged they were coerced into prostitution. *Id.* Pursuant to Florida statutory law, a person coerced into prostitution has a “cause of action for compensatory and punitive damages.” *Id.* (citing FLA. STAT. § 796.091(1)). Individuals have sued alleging tort-based theories of recovery. *See, e.g.*,

frequently litigated, disputes include lawsuits to enforce contracts to provide financial support in the context of unmarried cohabitation or intimate relationships.²⁰⁴ If the Supreme Court of Montana had been as confident about the larger social and political culture within which it operated, as the *Carroll v. Beardon* opinion appears to indicate, it could have taken a leadership role in approaching the regulation of these contemporary contract claims.²⁰⁵

Peoples v. Dayle, 16 Pa. D. & C.5th 85, 86 (Pa. Com. Pl. 2010). In this case, a plaintiff, who was blind, alleged that the defendant, whom he hired for sex, allegedly “had him sign credit card receipts with the wrong amount on them exceeding \$3,000 in fraudulent charges.” *Id.* The court denied his claims based on theories of “common-law theft, theft by deception and conversion, common-law fraud, Pennsylvania statutory consumer fraud and intentional infliction of emotional distress” finding the transactions illegal. *Id.* In another case, a former wife filed a lawsuit against her former husband for “intentional and negligent conduct” in infecting her with the herpes virus when they, “shortly before the marriage . . . ‘engaged in consensual sexual intercourse.’” *Zysk v. Zysk*, 404 S.E.2d 721, 721 (Va. 1990). The Supreme Court of Virginia held that because the sexual activity occurred prior to marriage, it amounted to illegal fornication under statutory law and such illegal conduct could not form the basis for a tort claim. *Id.* at 722.

²⁰⁴ Courts are not in agreement on this issue. *See, e.g.,* *Watts v. Watts*, 405 N.W.2d 303, 305 (Wis. 1987) (finding plaintiff stated a claim based upon an express or implied in fact contract for “property accumulated during their nonmarital cohabitation relationship which spanned 12 years and produced two children”). *But see* *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979) (finding on similar facts that such claims “contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants”). In another case, a court denied a plaintiff’s attempt to retain money given to her in contemplation of a future marriage when the subsequent marriage failed to occur because the relationship began when the woman was married to another man. *Taylor v. Frost*, 276 N.W.2d 656, 658 (Neb. 1979). The Supreme Court of Nebraska explained its decision as follows:

As we have noted, Phyllis, while still married, claims to have made a contract of prostitution in order to gain a house. Such contracts by a married person are also contrary to the public policy which is designed to protect marriage, as well as the legislative public policy making prostitution illegal. If we were to hold that the “clean hands” maxim enables one in her claimed position to keep her “illegal” gains, then that would also tend to interfere with the marriage relationship and might promote fraud.

Id. at 659. Claims have also been made upon an alleged oral contract to provide financial support in exchange for sexual services:

Despite the attempt by plaintiff, an admitted prostitute, to characterize her claims for breach of contract and promissory estoppel against the individual defendant as being premised on her provision of services other than and distinct from sexual relations, the record discloses that the association between the parties was one founded upon the exchange of money for sex. It is well settled that an agreement for financial support in exchange for illicit sexual relations is violative of public policy and thus unenforceable.

Anonymous v. Anonymous, 740 N.Y.S.2d 341, 342 (N.Y. App. Div. 2002).

²⁰⁵ *See supra* notes 98-102 and accompanying text.

Rather than omitting facts and distorting the record, the Supreme Court of Montana should have remanded the case to the trial court, which failed to even mention, much less consider, the public policy defense to contract enforcement raised by Ms. Beardon.²⁰⁶ The court should have directed the trial court on remand to assess the overwhelming evidence showing that the transaction involved the sale of an ongoing prostitution business.²⁰⁷ Rather than directing the lower court to apply an outmoded, ill-fitting active participation test to the contract defense, the Supreme Court of Montana, with whom rested the ultimate authority as to the applicable law,²⁰⁸ could have, for example, declared that the appropriate test of contract enforceability in these situations turned on prevailing local cultural views of the prostitution scenario presented by the facts—the sale and continued operation of a brothel located in a rural area. The parties would have then been permitted the opportunity on remand to introduce evidence as to whether there existed a prevailing cultural view of indifference or tolerance on the matter.²⁰⁹ If the evidence satisfied the trial court that such a view existed or if the fact was “of general notoriety” and “not subject to reasonable dispute,” the trial court would be entitled to take judicial notice of such cultural facts and enforce the contract.²¹⁰

²⁰⁶ See *supra* notes 83-90 and accompanying text. The public policy defense to contract enforcement “is an affirmative defense and as with other affirmative defenses, the defendant who pleads it has the burden of proving it by a preponderance of the evidence.” *A Better Place, Inc. v. Giani Inv. Co.*, 445 So. 2d 728, 732 (La. 1984). Ms. Beardon raised the public policy defense in her answer to the complaint and as a basis of appeal. She, therefore, preserved the defense. See Transcript, *supra* note 35, at 9-10.

²⁰⁷ See *supra* notes 40-42, 82-97 and accompanying text.

²⁰⁸ John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary is Different*, 35 VT. L. REV. 475, 491 (2010) (explaining that “[a] State’s highest court is unquestionably the ultimate exposito[r] of state law”) (quoting *Riley v. Kennedy*, 128 S. Ct. 1970, 1985 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975))).

²⁰⁹ Pursuant to prevailing law, the Supreme Court of Montana was permitted to “take judicial notice of any matter of which the court of original jurisdiction” could take notice and could do so sua sponte without notice to the parties and without providing an opportunity for the parties to be heard. *Holtz v. Babcock*, 390 P.2d 801, 802-03 (Mont. 1964) (quoting 20 AM. JUR. EVIDENCE § 27). Montana adopted the Federal Rules of Evidence in July, 1977, MONT. CODE ANN. § 26-10-100, including Rule 201. See MONT. CODE ANN. § 26-10-201; see also FED. R. EVID. 201. The court was not, however, permitted to take judicial notice on appeal of facts because such facts were considered evidentiary matters which an appellate court was empowered to review only after initial consideration by the trial court. *Holtz*, 390 P.2d at 803. As the *Holtz* court explained,

“In the event a party relies on the judicial knowledge of the trial judge as to local conditions, he must in some form procure that knowledge to be brought into the record, so that an appellate court may rely thereupon, for the general rule is that if the attention of the trial court is not called to a fact within its judicial knowledge and such fact is not judicially noticed, the appellate court will not take judicial notice of it.”

Id. at 802 (quoting 20 AM. JUR. § 21).

²¹⁰ MONT. CODE ANN. § 26-10-201, Commission Comments (describing Montana statutory and judicial interpretation of judicial notice doctrine consistent with standard of Federal Rule 201).

Had the Supreme Court of Montana taken this novel approach and invoked the judicial notice doctrine, it would not have found itself in the untenable position of misstating and omitting facts from the record to create a case that did not exist in order to reach the result it deemed appropriate. The judicial notice doctrine is particularly appropriate to this common law defense to contract enforcement because it

derives from the reality that all social institutions—including the courts—must be run by humans who are a part of the culture served by those courts. The complex dynamics of a culture’s entire fabric of shared values, its learning and lore, its social and professional networks, political allegiances, general normative standards and customs, are integral to a judge who is both cocooned within the culture while also serving in the most pivotal role of its system of justice.²¹¹

There is also precedential support for a court to take judicial notice of a wide range of facts including facts related to “human life, health, habits, customs and usages as well as sociological matters.”²¹² In specific cases, courts and judges have taken judicial notice of local culture and history.²¹³

²¹¹ Bruce W. Burton, *The “O.K. Corral Principle” in the Age of Terrorism: Proposed New Protocols for Judicial Notice in Cases of Alleged Misconduct by Law Enforcement*, 41 IDAHO L. REV. 85, 123 (2004); Bruce W. Burton, *The “O.K. Corral Principle”: Finding the Proper Role for Judicial Notice in Police Misconduct Matters*, N.M. L. REV. 301, 316 (1999).

²¹² GLEN WEISSENBERGER & JAMES J. DUANE, WEISSENBERGER’S FEDERAL EVIDENCE § 201.9 (4th ed. 2001) (hereinafter WEISSENBERGER’S FEDERAL EVIDENCE). The Supreme Court of Montana has taken judicial notice of the following: “[t]he tremendous loss of life and injury occurring daily from the operation of automobiles on our highways,” *State v. Bosch*, 242 P.2d 477, 482 (Mont. 1952), “the fact that vodka is an ‘intoxicating liquor,’” *State v. Moore*, 357 P.2d 346, 348 (Mont. 1960), and “‘that cattle range widely, paying no attention to county [as in this case] or state lines,’” *State v. Elmore*, 247 P.2d 488, 492 (Mont. 1952) (quoting *State v. Keeland*, 104 P. 513, 517 (Mont. 1909)).

²¹³ See, e.g., Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27, 40 (1990) (arguing that courts “border on taking judicial notice of the cultural phenomenon,” of sex stereotyping because they do not require proof); *Hellar v. Cenarrusa*, 682 P.2d 524, 533 (Idaho 1984) (taking judicial notice of social and economic connections within a state); *McQueen v. Fayette Cnty. Sch. Corp.*, 711 N.E.2d 62, 67 (Ind. Ct. App. 1999) (Kirsch, J., dissenting) (advocating for judicial notice of the role of a particular sporting event “in the culture, history and persona” of a state); *In re Guardianship of Ashley Elizabeth R.*, 863 P.2d 451, 455 (N.M. Ct. App. 1993) (taking judicial notice of the “very significant cultural presence of the [Navajo] Tribe” in a community); *Creative Rests., Inc., v. Memphis*, 795 S.W.2d 672, 676 (Tenn. Ct. App. 1990) (taking judicial notice of “a cultural and historical reputation nationwide” of an area within a city); *Gilbert v. Nat’l Enquirer, Inc.*, 51 Cal. Rptr. 2d 91, 95 (Cal. Ct. App. 1996) (taking judicial notice of “‘the growing and insatiable media culture in society whereby tremendous efforts are taken to obtain a[nd] publish very private information about people in general, and celebrities in particular’”) (quoting trial court order); *Amana Soc’y v. Colony Inn, Inc.*, 315 N.W.2d 101, 118 (Iowa 1982) (Supreme Court of Iowa taking “judicial notice of the extraordinary historic, cultural, and architectural value” of area). In an action by a landlord against a tenant to terminate occupancy so that a building could be demolished for construction of an art museum, the New York City Municipal Court found:

The court takes judicial notice that New York City is one of the world’s great centers of art, music, culture and entertainment. The area where the instant property is

Courts also take judicial notice of legislative facts:²¹⁴

This involves the court taking judicial notice of matters of public policy, criminal or civil, which undergird the principles of law that are applicable to a particular case. . . . [B]y judicially noticing public policies or tendencies, judges become “an active participant . . . adopting law to a volatile socio-political environment.”²¹⁵

There is evidence in both the local history and in local law enforcement practices and policies of a cultural view of tolerance or indifference and perhaps even support for the form of prostitution presented by the facts of the *Carroll v. Beardon* case. Montana, like other rural Western states whose development had roots in male-dominated occupations and industries, such as mining, agricultural work, the railroad industry, and the military, had a strong history of prostitution.²¹⁶ This prostitution, though never legalized, was controlled and even contributed to the local economy.²¹⁷ Throughout Montana’s history can be found statements of support for houses of prostitution made by public officials. For example in 1914, when the Custer County

located was only recently cleared of slums and the magnificent Coliseum erected. Not far away, the new Lincoln Center development is being constructed. A new opera house, a law school, the Philharmonic Society and other cultural and artistic endeavors will be housed there. Landlord’s projected contribution here is and will be a welcome contribution to the people of the city and all its visitors. In an ever expanding and kaleidoscopic change, social welfare and progress must take place. In such an evolution certain private rights must be subordinated to the demands and needs of many.

Hartford v. Regal Shoe Store No. 162, Inc., 192 N.Y.S.2d 167, 172 (NY. Mun. Ct. 1959).

²¹⁴ For a discussion of the distinction between legislative and adjudicative facts, see Christopher Onstott, *Judicial Notice and the Law’s “Scientific” Search for Truth*, 40 AKRON L. REV. 465, 470 (2007). Montana did not, however, adopt the terms “adjudicative facts,” and “legislative facts,” finding this distinction confusing:

The Commission rejects the approach under the Federal Rule 201 of limiting judicial notice to adjudicative facts because this is a basis which is totally new, not clearly defined, and contrary to existing Montana practice. The confusion and litigation bound to result are clearly contrary to a rule which is meant to save time and expense.

MONT. CODE ANN. § 26-10-201, Commission Comments. For a discussion of Federal Rule of Evidence 201, see WEISSENBERGER’S FEDERAL EVIDENCE, *supra* note 212, §§ 201.1-201.7.

²¹⁵ Burton, 29 N.M. L. REV., *supra* note 211, at 314 (quoting MCCORMICK ON EVIDENCE § 328 (4th ed. 1992)).

²¹⁶ In early Western “mining camps women were a minority, and frequently the first and most numerous female migrants were prostitutes.” MARY MURPHY, *MINING CULTURES: MEN, WOMEN, AND LEISURE IN BUTTE, 1914-41*, 77 (1997). “Prostitutes probably made up the second largest group of gainfully employed women in the West” in the late nineteenth century. Judith K. Cole, *A Wide Field for Usefulness: Women’s Civil Status and the Evolution of Women’s Suffrage on the Montana Frontier, 1864-1914*, 34 AM. J. LEGAL HIST. 262, 270 n. 61 (1990).

²¹⁷ See *supra* note 63. The fines paid by prostitutes amounted to “no small portion of [a] city’s revenue.” Larry V. Bishop, *Law Enforcement in Custer County, Montana, 1893-1918*, 3:3 POLICE STUD: INT’L REV. POLICE DEV. 3, 8 (Fall 1980).

Law Enforcement League passed a resolution urging elimination of prostitution and gambling, “the Custer County Attorney argued that most people in the community favored the houses” of prostitution.²¹⁸ Butte, Montana, the most infamous and enduring location of prostitution within the state of Montana, was described in a 1953 article appearing in *Esquire* magazine, as “one of [the nation’s] ‘most wide-open towns.’”²¹⁹ The last house of prostitution located in Butte, Montana closed in 1981, eighteen years after the Supreme Court of Montana issued its decision in *Carroll v. Beardon*, and after a very public battle in 1971 involving the closure of another house of prostitution and a statement made by the mayor of Butte, which was published in the *Great Falls Tribune*: “‘The people of Butte want prostitution . . . [and] at least we’re honest in Butte and admit we’ve got houses of prostitution.’”²²⁰

As to local law enforcement practices, throughout the history of the nation law enforcement has been sporadic and costly, aimed mostly at other types of prostitution, such as street prostitution and, more recently, individuals who coerce women, and particularly minors, to engage in prostitution.²²¹ Federal crime statistics

²¹⁸ Bishop, *supra* note 217, at 8. The County Attorney also asserted “that by keeping the districts segregated it would be easier to control those that visited the area.” *Id.* Local reform movements failed and the houses of prostitution remained open. *Id.*

²¹⁹ Baumler, *supra* note 63, at 293 & n.26 (quoting Monroe Frye, *The Three Last Wide-Open Towns*, *ESQUIRE* 47 (June 1953)). A cab driver’s comments were included in a report issued in 1953 by the Montana Attorney General:

With all the miners here in Butte and the soldiers we get from other towns, the guys have to have some way to blow off steam, so the cops let the line run. . . . The girls don’t bother anybody. The line is in an alley and nobody has any business going in there unless he wants a girl.

Id. at 293 & n.24 (quoting MONT. ATTORNEY GEN., REPORT ON PROSTITUTION (Feb. 1953)). The phrase, “wide open town,” refers to the fact that “a man could buy a drink, place a bet, or visit a prostitute at any hour of the day or night without worrying about being arrested.” Mary Murphy, *Bootlegging Mothers and Drinking Daughters: Gender and Prohibition in Butte, Montana*, 46 (No. 2) *AM. Q.* 174, 177 (June, 1994). Helena, Montana also had a strong history of tolerance and unofficial regulation of prostitution.

²²⁰ Baumler, *supra* note 63, at 294 (quoting MONTANA STANDARD (Butte) (Feb. 22, 1991)). See also MACAULAY, *supra* note 2, at 498; John Cloud, *The Oldest Profession Gets a New Museum*, *TIME*, Aug. 14, 2000, at 4.

²²¹ “Street walking” or street prostitution has been “long viewed as the most disorderly and dangerous form of the trade.” Nicole Stelle Garnett, *Relocating Disorder*, 91 *VA. L. REV.* 1075, 1106 (2005).

The criminal law is most frequently enforced against street prostitutes, the poorest and greatest minority of women who deal in sex work. Since these women are the most visible prostitutes, they account for roughly ninety percent of all prostitution arrests. However, street prostitutes comprise only ten to twenty percent of all prostitutes in the U.S.

Gregg Aronson, Note, *Seeking a Consolidated Feminist Voice for Prostitution in the U.S.*, 3 *RUTGERS J. L. & PUB. POL’Y* 357, 377-78 (2006). A few larger U.S. cities “have shifted their emphasis from the street to indoor prostitution, ostensibly going after the ‘big fish.’” Ronald Weitzer, *Prostitution Control in America: Rethinking Public Policy*, 32 (No. 1) *CRIME, L. & SOC. CHANGE* 83, 90 (1999). The United States Congress passed the Trafficking Victims Protection Act in 2000, which was expanded in 2006 “to address abusive practices and the

indicate that there were 71,355 arrests for prostitution nationwide in 2009.²²² Arrest patterns within Montana appear to support law enforcement tolerance of the kind of prostitution occurring at the Hillside Ranch.²²³ Such evidence would strengthen the cultural fact argument, as would evidence of legislative policies and legislative intent to focus efforts on eradicating other forms of prostitution.²²⁴

Whether such evidence existed to the degree that it would have been sufficient to convince the trial court to take judicial notice of it is difficult to determine. Had the Supreme Court of Montana taken this alternative route, it would have engaged in an intellectually honest approach to and resolution of the issues, and it would have

exploitation of minors in the U.S. prostitution industry.” Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 429 (2009). “Yet, while federal law now prioritizes protecting victims and deterring traffickers, state prostitution enforcement still indiscriminately targets persons in prostitution. . . .” *Id.*

²²² U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009, Table 29, available at http://www2.fbi.gov/ucr/cius2009/data/table_29.html. “The fiscal costs are substantial. A study of the country’s sixteen largest cities found that they spent a total of \$120 million in 1985 enforcing prostitution laws.” Weitzer, *supra* note 221, at 83. Different reasons are advanced for prohibiting prostitution, including the following:

[T]he Model Penal Code emphasizes disease prevention as the primary goal. Other reasons have included suppressing the organized crime surrounding prostitution, protecting the integrity of the family, protecting nonparticipants from unwelcome solicitations, protecting prostitutes from physical abuse, and protecting minors who are coerced into a life of prostitution. The criminalization of prostitution has become controversial in recent years, but the controversy appears not to have led to any changes in state law.

POSNER & SILBAUGH, *supra* note 118, at 155.

²²³ Arrest data does not exist for the precise years surrounding the case because such records were not kept until 1974. Data from 1974 forward, however, is available and was supplied by Jimmy Steyee, SAC Director/Statistician for the Montana Board of Crime Control via email at jstyeec@mt.gov. This data indicates that there were ten arrests in Montana in 1974 for prostitution. More current arrest data is available online and reveals two arrests for prostitution in Montana in 2000. *Arrests in 2000, Seventh Judicial District MT District Court*, FEDSTATS (Oct. 5, 2011, 8:29 p.m.), available at <http://www.fedstats.gov/mapstats/arrests/statecourt/271070.html>. More recent data from 2009 reveals zero arrests for prostitution in Toole County, Montana. MONT. BD. OF CRIME CONTROL, MONTANA-CRIMES REPORTED TO LAW ENFORCEMENT, 2009, TOOLE COUNTY (Oct. 5, 2011), available at <http://www.mbcc.mt.gov/CrimeReport/default.asp>.

²²⁴ The comments accompanying the criminal laws passed in 1973 appear to indicate support for such legislative intent underlying the prostitution laws existing in 1963 and, therefore, applicable to the decision in the case. See MONT. CODE ANN. § 45-5-601, Criminal Law Commission Comments, indicating that

prior law reflects the common-law concern for prostitution—i.e. the public nuisance aspects of open solicitation. The requirement that the solicitation be public seems at odds with the modern conception that prostitution, discreetly or indiscreetly carried on, ought to be controlled. Thus section 94-5-603(1)(a) now *MCA 45-5-602(1)(a)* reflects the position that professional prostitution is criminal even if carried on in private.

furthered the public interest in judicial integrity.²²⁵ By invoking cultural views via either the judicial notice doctrine or as a component of an alternative test to assess contract enforceability, the court would also demonstrate an interest in and respect for public opinion about positive law as the court grappled with this area of overlapping and intersecting criminal and civil laws aimed at regulating sexual behavior.

Judicial recognition of cultural values in the public policy balance of interests would additionally move the analysis away from the “hyperindividualistic starting point—the ‘separation thesis’—that underlies modern American jurisprudence” in which

[w]e imagine ourselves as disconnected self-sufficient beings; we believe that we are essentially and fundamentally free-floating independent selves. Accordingly, we think that the greatest danger we face is that other individuals will interfere with or violate our otherwise blissfully isolated independence. This “separation thesis” drives us to fortify ourselves with laws that preserve values like autonomy and privacy, while ignoring other values that are equally essential to human flourishing like . . . mutual responsibility. Human beings are social animals, we are all inescapably interdependent, we are mutually bound, and we need one another. Thus, . . . building and cultivating a “connection thesis” to counterbalance the prevailing separation bias is critical to creating a more humane jurisprudence.²²⁶

It is particularly appropriate for a court to prioritize community cultural values in the public policy balance given the fact that laws related to sex crimes vary significantly in the United States such that “by crossing a state boundary one may be stepping into a different moral universe.”²²⁷ Had the court engaged in such analysis this 1963 decision could have been relevant to contemporary courts and legislatures as they continue to struggle with similar issues.

V. CONCLUSION

The Supreme Court of Montana’s, three-page opinion in *Carroll v. Beardon* is a treasure for those who teach first-year law students. Its deceptive simplicity is a lesson in close reading. It provides scholars and teachers endless opportunities to explore the cultural context within which courts operate and construct case narratives. Its humorous tone additionally belies a serious failure by the court to provide a fair and impartial resolution of the parties’ dispute and to create useful precedent for future courts and litigants. The decision and its implications remain relevant and merit consideration by scholars exploring the intersection of contract

²²⁵ See Burton, 41 IDAHO L. REV., *supra* note 211, at 91. Burton asserts that the purposes served by the judicial notice doctrine are “judicial economy,” “intellectual honesty,” and “scientific accuracy.” *Id.*

²²⁶ Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 658-59 (2011) (discussing the legal treatment of unmarried sexual partners who conceive a child together). See also Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917, 941-42 (2010) (discussing the legal treatment of unmarried sexual partners who conceive a child together).

²²⁷ POSNER & SILBAUGH, *supra* note 118, at 2. See also *supra* note 133.

and criminal laws related to intimate sexual relationships, particularly in the context of the public policy defense to contract enforcement.