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Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment, by Stephen Waddams

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Abstract

Book Review: *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* by Stephen Waddams

A. Christian Airhart*

What conditions must be met before the law will enforce a promise? If one asks lawyers and students from across the common law world, they will answer: an offer, an acceptance of the offer, and a mutual exchange of value. Of course, they will add, it is not as simple as that; such a formulation on its own can produce highly unfair results, and experience and the passage of time have birthed a myriad of exceptions to the rule. It is those exceptions that are the focus of *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment*.[1] Written by Stephen Waddams, Professor and Goodman-Schipper Chair at the University of Toronto Faculty of Law, the book traces the historical contingencies and normative considerations that led to the creation and development of exceptions to contract enforceability, and challenges the notion that those exceptions should be set in stone.

Waddams' book questions whether contract law's enduring fidelity to the idea of "sanctity of contract," even at the cost of unfair consequences, is justifiable in modern times. The term harkens back to the early moral conception of a contract as a promise binding on one's conscience, in an ecclesiastical sense.[2] One notable commentator remarked that "although 'sin,' on the one hand, and 'crime' and 'breach of contract' on the other are to us today quite distinct conceptions, this was not always so."[3] In contrast, sanctity of contract in contemporary secular society lacks salience as a meaningful moral basis for contract enforcement, so other explanations have arisen to take its place.[4] Human will, reliance, efficiency, fairness, bargain theory, and consent have all been advanced as theories that can supply normative rationales for enforcing contracts.[5] However, Waddams bases his approach in the "fairness" theory, which maintains that the substance of an agreement should be examined—irrespective of the process by which the agreement was reached.[6] If the agreement is sufficiently unfair, courts should refuse to enforce it. Rather than using fairness merely as a way to explain current exceptions to contract enforceability, Waddams instead advocates for recognition of a general power of courts—grounded in equitable principles—to refuse to enforce contracts "where the consequences of enforcement would be highly unreasonable."[7]

The book is divided into thirteen chapters. Thematically, it is divided in two: Waddams devotes the first eight chapters to recapitulating the disparate law of exceptions to strict enforcement of contracts; he then moves on to discuss the role and jurisdiction of the judiciary and locates support for a reinvigorated approach to equity jurisprudence. The book begins by situating exceptions to enforceability in their historical context, as products of the common law, equity, and principles of interpretation and evidence, developed in reaction to highly unreasonable contracts

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[1] Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (Cambridge University Press, 2019) [*Sanctity of Contracts*].

[2] See generally Sir David Hughes Parry, *The Sanctity of Contracts in English Law* (Stephens & Sons Limited, 1959).

[3] *Ibid* at 6.

[4] *Sanctity of Contracts*, *supra* note 1 at 1-7.

[5] For a discussion of these theories and their respective strengths and weaknesses, see Randy Barnett, "A Consent Theory of Contract" (1986) 86 Colum L Rev 269 at 271-91.

[6] See *e.g. Sanctity of Contracts*, *supra* note 1 at 202-203, 218-20. See also SM Waddams, "Unconscionable Contracts: Competing Perspectives" (1999) 63 Sask L Rev 1 at 3-4.

[7] *Sanctity of Contracts*, *supra* note 1 at 233.

and permitting their modification. Waddams then canvasses the principal doctrines of exception derived from equity, the common law concept of duress, and judicial techniques of interpretation that have been used to avoid highly unreasonable consequences in contractual disputes. The book then examines the role of reasonableness in other contexts. Waddams uses existing methods of calculating damages for breach of contract to demonstrate that courts do not treat even valid and enforceable contracts as absolute or sanctified—courts place limits on them to avoid unreasonable consequences. Next, he draws attention to the role of documentary evidence and the urgency of avoiding enforcement of highly unfair agreements in an age where electronic contracts can be formed with the click of a button. Waddams concludes his review of the law with an analysis of the doctrines of unconscionability and unjust enrichment. Up to this point, the book is a brief but thorough review of the many sorts of situations where courts will refuse to order the strict enforcement of agreements, and the rationales they have used for doing so.

The final five chapters set out the larger legal and historical contexts underlying the development of exceptions to strict enforcement of contracts. This part begins with an assessment of the impact of the *Judicature Act* of 1873,[8] which merged the courts of common law and equity into a single jurisdiction that persists today. The judicial role is then explored: Waddams advocates for an active judicial role in contract law development, addressing and rebutting arguments that unfairness in contract enforcement should be a matter solely left to legislative reform, and justifying his position in light of the function and scope of judicial discretion. Waddams then discusses public policy limitations of sanctity of contract when it trenches upon the public interest. He concludes that the foregoing militate in favour of a general power of the courts to offer relief where enforcing contractual obligations would lead to highly unreasonable results.

In this comprehensive review, Waddams is particularly concerned with the instances where doctrines of exception have failed, producing absurd or unfair consequences. These failures manifest in marginal cases involving contractual obligations that provoke a strong feeling of injustice and unfairness, but which are enforced because they do not quite fit within existing exceptions. Waddams uses these marginal cases to demonstrate the inherent difficulty, perhaps even impossibility, in creating principled exceptions that rely on precise legal tests with unyielding boundaries. Any attempt to draw a bright line in these liminal areas shifts the margin and creates different problems. Thus, it is argued that a general power to grant relief in highly unfair situations is preferable.

Waddams illustrates the consequences of a strict, technical, and rule-based[9] approach to enforcement using *Arnold v. Britton*,[10] a recent decision of the U.K. Supreme Court. It involved tenants who signed leases of land in the 1970s, during a period of high inflation. The leases required the lessees to pay £90 per year (ostensibly for a "proportionate part of expenses" for repairs and services) and that amount was to increase by "Ten Pounds per Hundred" every three years.[11] This compounded the initial £90 to ten times that amount by 2012, and would exceed one million pounds annually by the time the ninety-nine year leases ended.[12] The Court upheld the leases, leading to a result that a dissenting judge described as "grotesque" and "commercial nonsense."[13] Waddams draws attention to the almost apologetic posture of the majority, who

[8] *Supreme Court of Judicature Act*, 1873, 36 & 37 Vict, c 66.
[9] *Sanctity of Contracts*, *supra* note 1 at 220.
[10] 2015 UKSC 36 [*Arnold v Britton*].
[11] *Ibid* at paras 5-6.
[12] *Sanctity of Contracts*, *supra* note 1 at 54-55.
[13] *Arnold v Britton*, *supra* note 10 at paras 138, 158.

"recognized the unreasonable and unfair nature of the result, but held that the court was powerless to prevent it."[14] Addressing and rebutting the notion that courts are powerless to prevent highly unfair outcomes is the project of this book.

The book adds to a large body of scholarship that has engaged in fraught attempts to locate a unifying moral justification for enforcing or declining to enforce promises. Lord Denning famously attempted a synthesis of unconscionability, undue influence, duress, and the law governing salvage agreement in *Lloyds Bank v. Bundy*,[15] finding a common element of "inequality of bargaining power."[16] Other theories find moral justification in the promisor's voluntarily willed choice to be bound by his or her promise[17] or in the promisee's reliance on that promise.[18] In an article published in 1976,[19] Waddams himself argued in favour of recognizing a "general principle of unconscionability"[20] to unite exceptions—adding to Lord Denning's categories forfeitures,[21] penalties,[22] deposits,[23] and exemption clauses[24] which "address agreements that are unfair, inequitable, unreasonable, or oppressive."[25] Each theory has strengths and weaknesses,[26] but none has succeeded in creating a moral justification that convincingly explains the result in every case. More recent commentary has suggested that doing so may be impossible. In 1998, Robert Summers and Robert Hillman of Cornell wrote that "no one has yet formulated a satisfactory 'unified field theory of civil obligation' and we doubt that anyone ever will or could."[27]

Rather than advancing a unifying theory to explain the law, Waddams pursues a more radical course in seeking to address its inadequacies. Developing on the arguments in his 1976 article, Waddams dispenses with the terminology of "unconscionability" as a proxy for unfairness—the expression is implicitly tied to earlier notions of sanctity of contract and its invocation of conscience. He prefers the clarity afforded by characterizing morally-suspect contracts as "highly unreasonable."[28] This distinction is largely semantic, but nonetheless significant. Rather than expand the existing legal concept of unconscionability as an *explanation* for a series of exceptions, Waddams posits instead that the exceptions are *expressions* of an underlying equitable principle of avoiding highly unreasonable consequences and it is an error to treat them as a closed category.[29] He argues that the root cause of this error is a judicial sensibility that took hold after the English *Judicature Acts*:

> The courts of equity had wide powers to modify contracts in order to avoid highly unreasonable consequences. After 1875 a single court administered both law and equity, and statute provided

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[14] *Sanctity of Contracts*, *supra* note 1 at 55.
[15] *Lloyds Bank Ltd v Bundy*, [1974] 3 All ER 757.
[16] *Ibid* at 765.
[17] See *e.g.* Roscoe Pound, "The Role of Will in Law" (1954) 68 Harv L Rev 1; Morris R Cohen, "The Basis of Contract" (1933) 46 Harv L Rev 553.
[18] See *e.g.* PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979); LL Fuller & William R Perdue, "The Reliance Interest in Contract Damages: I" (1936) 46 Yale LJ 52.
[19] SM Waddams, "Unconscionability in Contracts" (1976) 39 Mod L Rev 369 [*Unconscionability in Contracts*].
[20] *Ibid* at 391.
[21] *Ibid* at 370.
[22] *Ibid* at 373.
[23] *Ibid* at 375.
[24] *Ibid* at 378.
[25] *Ibid* at 390.
[26] Barnett, *supra* note 5.
[27] Robert A Hillman & Robert S Summers, "Casebook Review: The Best Law School Subject" (1998) 21 Seattle UL Rev 735 at 737.
[28] *Sanctity of Contracts*, *supra* note 1 at 233.
[29] *Ibid* at 158-159.

> that where 'there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail'. But this apparent victory for equity proved illusory. In 1875, the individualistic spirit of the time, combined with a belief that law, especially contract law, should be clear, certain and predictable, led to a tendency to marginalise the instances in which contracts could be modified for reasons of fairness or mistake. Contractual rights were perceived as primary, and as absolute, subject to established intrusions by equity…modification of contracts was only warranted where the case fell clearly into a distinct category where equity would have intervened before 1875.[30]

A principled overarching explanation for existing exceptions which treats them as exhaustive—effectively functioning as a limiting principle—is neither desirable nor possible, because it would imply that they represent the extent of relief that the law should allow. Expanding the law using substantive fairness as a principle avoids theoretical difficulties faced by attempts to use fairness as an explanation for existing exceptions.[31] For instance, it is difficult to explain the law's historical refusal to enforce penalty clauses as a matter of fairness when it enforces functionally identical clauses so long as they are described as "deposits."[32] Waddams avoids such artificiality, instead viewing these sorts of exceptions as products of historical contingencies that should be modified accordingly if they produce unfair or anomalous results.[33]

Waddams' focus on *highly* unfair and unreasonable agreements is also important. The most prominent critique of substantive unfairness as a basis for contract enforcement is the inherent difficulty in objectively evaluating what is "fair."[34] There is no obvious principled way to draw a bright line between fair and unfair agreements—it is inevitably a discretionary exercise. Waddams seem to recognize this objection as the principal obstacle to adoption of his approach, and he devotes chapters nine through eleven to arguing that, not only do judges have a residual equitable jurisdiction to relieve against highly unfair obligations,[35] but this discretion can be exercised in a legitimate[36] and principled way that does not undermine the goal of minimizing uncertainty.[37] Establishing tests based on subjective and normative criteria is notoriously difficult, but is hardly without precedent. Justice Potter Stewart famously said of the threshold test for obscenity, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*…."[38] This sort of general power to refuse to enforce highly unfair agreements that fall into the interstitial spaces between existing exceptions, in spite of its apparent ambiguity, may be the only way to "fill the gaps between the existing islands of intervention."[39]

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[30] *Ibid* at 158.

[31] See *e.g*. Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 Law Q Rev 257 at 267-69. Moore critiques Waddams' earlier theory in *Unconscionability in Contracts* as failing to distinguish between special exceptions and general rules.

[32] For this argument, see *Sanctity of Contracts*, supra note 1 at 18-19, citing *Bridge v Campbell Discount Co Ltd*, [1962] AC 600 (HL) at 629. See also Hamish Lal, "The doctrine of penalties and the 'absurd paradox' - does it really matter in 2003?" (2003) Int Construction L Rev 505. *Cf Cavendish Square Holding BV v Makdessi*, [2015] UKSC 67.

[33] *Sanctity of Contracts*, *supra* note 1 at 16-19.

[34] See Barnett, *supra* note 5 at 284.

[35] *Sanctity of Contracts*, *supra* note 1 at 158-72.

[36] *Ibid* at 173-81.

[37] *Ibid* at 183-86, 199-200.

[38] *Jacobellis v Ohio*, 378 US 184 at 197 (1964) [emphasis added].

[39] SM Waddams, *The Law of Contracts*, 6th ed (Canada Law Book Inc, 2010) at para 544.

Sanctity of Contracts in a Secular Age is both an argument and a didactic tool. It systematically and comprehensively lays out the history of exceptions to contract enforcement, drawing particular attention to the role of equity, which Waddams fears is fading from the consciousness of law students and judges alike.[40] The book succeeds in demonstrating the arbitrariness, sometimes bordering on incoherence, that characterizes many existing doctrines of contract enforcement, as well as the absurd and unfair consequences that can ensue when they are treated as sacrosanct. It puts forth a solution to the problem, contextualised by its implications for the judicial role, economic and social policy, and the historical development of the common law. It is an excellent supplement for both law students and practitioners, and a serious moral argument about the current state of contract law and the purposes it should serve in the twenty-first century.

[40] *Sanctity of Contracts*, *supra* note 1 at 159.