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## The Case Against Equity in American Contract Law

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## THE CASE AGAINST EQUITY IN AMERICAN CONTRACT LAW

JODY P. KRAUS\* & ROBERT E. SCOTT†

*The American common law of contracts appears to direct courts to decide contract disputes by considering two opposing points of view: the ex ante perspective of the parties' intent at the time of formation, and the ex post perspective of justice and fairness to the parties at the time of adjudication. Despite the black letter authority for both perspectives, the ex post perspective cannot withstand scrutiny. Contract doctrines taking the ex post perspective—such as the penalty, just compensation, and forfeiture doctrines—were created by equity in the early common law to police against abuses of the then prevalent penal bond. However, when the industrial revolution pushed courts to accommodate fully executory agreements, and parties abandoned the use of penal bonds, the exclusively ex ante focus of the new contract law that emerged rendered the ex post doctrines obsolete. While initially intended to do justice between the parties, if used today these doctrines perversely and unjustly deny parties contractual rights that were bargained for in a free and fair agreement. Yet judges continue to recognize the ex post doctrines, even as they struggle to reconcile them with respect for the parties' intent. Although infrequently applied, the ex post doctrines are far from dead letter. The penumbra of uncertainty they cast over contract adjudication continues to undermine contracting parties' personal sovereignty. The only case for continuing to recognize these equitable interventions, therefore, must turn on whether they serve a new valid purpose. We consider and reject the possible purposes of paternalism and*

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*anti-opportunism suggested by contemporary pluralist scholars. In our view, the criteria governing theories of legal interpretation support the interpretation of contract law as exclusively serving personal sovereignty rather than any pluralist interpretation. Under its best interpretation, contract law has no place for the ex post perspective.*

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## INTRODUCTION

When Judge Richard Posner decided *Lake River Corp. v. Carborundum Co.*,<sup>1</sup> he went out of his way to explain that the governing Illinois common law doctrine, the “penalty doctrine,” which makes supra-compensatory liquidated damages clauses unenforceable, was clearly unjustified. Yet Posner applied the doctrine anyway. As a federal judge sitting in a diversity case, Posner explained,

we must be on guard to avoid importing our own ideas of sound public policy into an area where our proper judicial role is more than usually deferential. The responsibility for making innovations in the common law of Illinois rests with the courts of Illinois, and not with the federal courts in Illinois. And like every other state, Illinois, untroubled by academic skepticism of the wisdom of refusing to enforce penalty clauses against sophisticated promisors . . . continues steadfastly to insist on the distinction between penalties and liquidated damages.<sup>2</sup>

Having determined that the contract’s liquidated damages clause operated as a penalty, Posner refused to enforce it even though it was the product of a voluntary agreement following extensive bilateral negotiations between sophisticated parties.<sup>3</sup> By refusing to enforce the liquidated

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1. *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284 (7th Cir. 1985).

2. *Id.* at 1289.

3. Posner’s decision has also been criticized on the ground that the clause did not, in fact, operate as a penalty. See VICTOR P. GOLDBERG, *RETHINKING CONTRACT LAW AND CONTRACT DESIGN* 83 (2015).

damages clause, *Lake River* refused to respect the parties' personal sovereignty.

There are numerous instances in which parties might rationally choose to agree to liquidated damages clauses that provide a supra-compensatory recovery. Perhaps most significantly, contract law does not, by its default rules, recognize sentimental, aesthetic, or idiosyncratic value in assessing damages.<sup>4</sup> As a default proposition, this premise makes good sense. But courts violate personal sovereignty if they treat it as a mandatory rule that prevents parties who have such values from opting out. Yet, the just compensation principle, which provides a mandatory rule of compensatory damages for breach of contract, often leads courts to do just that. A striking example is the well-known case of *Peevyhouse v. Garland Coal & Mining Co.*<sup>5</sup> The plaintiffs, a Native American family, signed a strip-mining lease only after foregoing a \$3,000 payment in exchange for the agreement by the Coal Company to restore their land after the end of the lease. The Coal Company breached the agreement, leaving an unusable and unsightly tract filled with pits and spoil banks. On appeal, the court limited the plaintiffs' recovery to the \$300 difference between the value of the land with and without the regrading, despite expert testimony estimating the cost of regrading at \$29,000.<sup>6</sup> Much of the Court's opinion rests on the strict limitations of the compensation principle and the claim that a damage award measured by the regrading cost would confer an inequitable windfall on the Peevyhouses in violation of that principle.<sup>7</sup> By the same logic, the Court would also have refused to enforce a well-drafted liquidated damages clause designed to protect the Peevyhouses' interest in ensuring that their land

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4. See, e.g., *Nat'l Sav. & Tr. Co. v. Kahn*, 300 F.2d 910, 913 (D.C. Cir. 1962) ("Even if [the] action [is] brought in *quantum meruit* . . . the measure of recovery [is] the market value . . ."). Sentimental or idiosyncratic value has traditionally been described as *pretium affectionis*. In *Thomason v. Hackney & Moale Co.*, 74 S.E. 1022, 1024 (N.C. 1912), the court defined it as a "value placed upon a thing by the fancy of its owner, growing out of his or her attachment for the specific article, its associations, and so forth . . ." For discussion, see Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977).

5. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962). The Oklahoma Supreme Court reaffirmed the holding in *Peevyhouse* in 1994 in a case with substantially identical facts, *Schneberger v. Apache Corp.*, 890 P.2d 847 (Okla. 1994).

6. *Peevyhouse*, 382 P.2d at 111, 114. The Peevyhouse family remains on the land, ungraded, to this day. For a discussion of the effort by the Peevyhouses to bargain for regrading in their contract with the mining company and the ongoing costs of the coal company's deliberate breach of their agreement, see generally Judith Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341 (1995).

7. The just compensation principle in Oklahoma provides that "no person can recover a greater amount in damages for the breach of an obligation, than he would have gained by the performance thereof." OKLA. STAT. tit. 23, § 96 (2020). Given that principle, the court held that allowing the Peevyhouses to recover for the cost of regrading their land would impose "unconscionable and [] oppressive damages, contrary to substantial justice." *Peevyhouse*, 382 P.2d at 113.

would be restored to its original condition.<sup>8</sup>

The refusal to permit parties to protect their personal, aesthetic, or idiosyncratic value either through express performance terms or liquidated damages clauses is only one example of the ways in which the penalty doctrine and its twin, the just compensation principle, undermine the parties' sovereignty over the terms of their *ex ante* contract. In this Article, we demonstrate that in the early common law courts of equity created these doctrines, and the related doctrines of forfeiture and excuse, to prevent the abusive enforcement of penal bonds. However, these doctrines no longer served their original purpose once the contemporary practice of relying on fully executory agreements (which courts began to enforce for the first time following the industrial revolution) replaced the practice of exchanging penal bonds to enforce commercial arrangements.

What then explains the persistence of doctrines that history shows courts developed to prevent the abuse of archaic methods of contract enforcement that parties abandoned over two centuries ago? And what explains the injustices visited on the commercial seller in *Lake River* and the homeowners in *Peevyhouse*? The answer lies in the received view that the American common law of contracts properly directs courts to decide contract disputes by considering two opposing points of view: the *ex ante* perspective of the parties' intent at the time of formation, and the *ex post* perspective of justice and fairness to the parties at the time of adjudication.<sup>9</sup> According to the received view, then, American contract law has two faces. The first faces forward. In the ordinary course, courts decide cases based on the *ex ante* perspective.<sup>10</sup> Doctrines based on the *ex ante* perspective support the view that contract law provides "a domain or territory in which the self is sovereign" and therefore vindicates the value of personal sovereignty.<sup>11</sup>

8. For discussion, see generally Alan Schwartz & Robert E. Scott, *Market Damages, Efficient Contracting, and the Economic Waste Fallacy*, 108 COLUM. L. REV. 1610 (2008).

9. We confine our thesis to the American common law of contracts. For ease of exposition, unless otherwise indicated, all references to "American contract law," "contract law," "the common law of contracts," etc. refer only to the American common law of contracts.

10. Intention in contract law is determined objectively and prospectively. A party is taken to intend what its contracting partner could reasonably believe it intended when the parties contracted. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 568–70 (2003).

11. JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 52 (1986). Feinberg explains the personal sovereignty conception of individual autonomy on analogy to state sovereignty: "The politically independent state is said to be sovereign over its own territory. Personal autonomy similarly involves the idea of having a domain or territory in which the self is sovereign." *Id.* Feinberg defines the personal sovereignty view as holding that "respect for a person's autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him." *Id.* at 68. Although Feinberg offers the personal sovereignty conception of autonomy as a normative basis for limiting the exercise of political coercion, we believe it also constitutes a fundamental value in any plausible overall theory of morality. In Rawlsian terms,

According to the personal sovereignty view of contracts, it is always just and fair to the parties to hold them to agreements reached under free and fair conditions.<sup>12</sup> The personal sovereignty view therefore holds that contract law exists to give effect to *ex ante* agreements reached under free and fair conditions, subject to the requirements of the principles of social justice that govern society as a whole.<sup>13</sup> Thus, while justice in society as a whole, or “social justice,” requires the vindication of multiple and potentially competing values, justice between the parties, or “individual justice,” requires only the vindication of the value of personal sovereignty by enforcing an agreement that is just and fair *to the parties*.<sup>14</sup>

The second face of American contract law faces backwards. Doctrines facing backwards take the *ex post* perspective by overriding agreements as the parties’ understood them at the time they reached them. These *ex post* doctrines rest on the premise that enforcing agreements according to the parties’ intent at formation can be individually unjust, even if the parties agreed to them under free and fair conditions.<sup>15</sup> Consider again the penalty rule invoked in *Lake River*, which provides that a “term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a

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personal sovereignty recognizes the fundamental right of individuals to choose, revise, and pursue their own system of ends. See JOHN RAWLS, *POLITICAL LIBERALISM* 19 (1993) (arguing that individuals have the capacity for a conception of the good, which is a capacity “to form, to revise, and rationally to pursue a conception of one’s rational advantage or good”); see also Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1608 (2009).

12. The doctrines of capacity, fraud, duress, and procedural unconscionability together restrict enforcement to only these agreements. For a discussion of these doctrines, see *infra* Part II.

13. The principles of social justice provide various grounds for limiting personal sovereignty, including the prevention of harm to others. We use the term “social justice” to refer to the domain of issues addressed by traditional normative political theories, such as Rawls’ theory of justice, which limit individual liberty not only to prevent harm to others but also to ensure robust equality through measures to effect redistribution and equality of opportunity. In contrast, “individual justice” in contract refers to the normative status of individual relationships arising out of voluntarily incurred moral obligations. Thus, justice in society as a whole, or “social justice,” requires the vindication of multiple, and potentially competing values. We argue, however, that justice between the parties, or “individual justice,” requires the vindication of only the value of personal sovereignty.

14. The personal sovereignty view is not imperialistic. It is therefore consistent with the existence of doctrines, such as illegality and public policy, that permit courts to refuse to enforce agreements reached under free and fair conditions when necessary to satisfy the demands of social justice. Contract law recognizes explicitly that the value of personal sovereignty does not license conduct that harms others, and therefore limits enforcement to agreements that do not materially harm others. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 207 (AM. LAW INST. 1981). For discussion, see *infra* Part II.

15. See, e.g., Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207, 208–09 (2009) (arguing that unexpected circumstances cases “should take *ex post* considerations into account” and rejecting the view that such cases “should focus exclusively on the parties’ expectations *ex ante*, at the moment of contract formation, and should not take into account *ex post* considerations—that is, gains and losses to both parties that either arose under the contract prior to the occurrence of the unexpected circumstances, or resulted proximately from or were made possible by the occurrence”).

penalty.”<sup>16</sup> As the Second Restatement of Contracts explains, the penalty rule is justified by the just compensation principle: “[T]he parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds . . . .”<sup>17</sup> According to the just compensation principle, therefore, supra-compensatory damages offend principles of individual justice: Damages in excess of the actual loss from breach are necessarily unjust to the breaching party, even if that party agreed in a free and fair bargain to pay such damages in the event of breach. On this view, individual justice turns in part on facts that arise only after agreements are formed and events unfold, and so can be discerned only by courts *ex post*, at the time of adjudication.<sup>18</sup> This is the moral logic of the *ex post* perspective.

The same logic underlies other *ex post* doctrines that license courts, for example, to abrogate contract terms when their enforcement would lead to “oppressive results,” such as a “forfeiture” that imposes severe losses on one

16. RESTATEMENT (SECOND) OF CONTRACTS § 356.

17. *Id.* § 356 cmt. a; *see, e.g.*, *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 113 (Okla. 1962) (“[W]here an obligation . . . appears to create a right to unconscionable . . . damages, contrary to substantial justice no more than reasonable damages can be recovered.”) (quoting OKLA. STAT. tit. 23, § 97 (2020)); *see also* *Jaquith v. Hudson*, 5 Mich. 123 (1858). As noted in text, the just compensation principle has also been invoked to justify *ex post* review of expectation damage recoveries. For discussion, see *infra* Sections I.B.2, III.A.2.

18. Of course, doctrines designed to ensure *ex post* justice, so conceived, include doctrines that license courts not only to police against contracts that turn out to be unjust in light of facts that occurred after formation, but to police against contracts that create the risk of *ex post* injustice at the time of formation irrespective of whether that risk materialized after formation. For example, U.C.C. § 2-302 holds that “[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract.” U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM’N 2018) (emphasis added). Likewise, U.C.C. § 2-718(1) states that “[d]amages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach.” U.C.C. § 2-718(1) (AM. LAW INST. & UNIF. LAW COMM’N 2018) (emphasis added). Similarly, the Court in *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985) (emphasis added), holds that “[t]o be valid under Illinois law a liquidation of damages must be a reasonable estimate at the time of contracting of the likely damages from breach, and the need for estimation at that time must be shown by reference to the likely difficulty of measuring the actual damages from a breach of contract . . . .” Even though these doctrines invite courts to invalidate liquidated damage clauses without determining whether or not those clauses turned out to be over-compensatory at the time of adjudication, they are justified on the ground that policing against clauses that create the risk of over-compensation at the time of formation will thereby decrease the frequency of contracts that include clauses that create a risk that courts will (mistakenly) enforce a penalty at the time of adjudication. In short, whether they invite courts to invalidate liquidated damages clauses based on realized *ex post* injustice or the *ex ante* risk of *ex post* injustice, all of these doctrines are ultimately justified on the ground that courts should seek to prevent *ex post* injustice. We are grateful to Ethan Leib for calling our attention to the apparent tension between our definition of *ex post* injustice and doctrines that serve to prevent *ex post* injustice by policing against clauses that create the risk of *ex post* injustice at the time of formation.



party and confers a “windfall” on the other.<sup>19</sup> These doctrines direct courts to interpret contracts, when possible, to avoid the risk of forfeiture,<sup>20</sup> and empower courts to excuse conditions when their imposition will impose an actual forfeiture.<sup>21</sup> The power to excuse conditions applies to “a term that does not appear to be unconscionable at the time the contract is made but that would, because of ensuing events, cause forfeiture.”<sup>22</sup> As Justice Cardozo explained in the landmark case of *Jacob & Youngs, Inc. v. Kent*,<sup>23</sup> the enforcement of contracts—even those agreed to under free and fair conditions—will sometimes “visit venial faults with oppressive retribution”<sup>24</sup> that is “grievously out of proportion to”<sup>25</sup> the loss caused by default. Enforcement in such cases would result in “cruelty”<sup>26</sup> and a “sacrifice of justice.”<sup>27</sup> Even though ex ante contract doctrine takes the enforcement of agreements reached under free and fair conditions to be individually just to the parties, “courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier.”<sup>28</sup>

The moral intuitions fueling Justice Cardozo’s opinion are easy to grasp and difficult to resist. If a builder has built the house he promised to build for a landowner, but his performance falls short of perfection, it seems only just and fair that he compensates the owner for the loss caused by his breach. But to deprive him entirely of his right to a final payment unless he cures the default at enormous expense seems inequitable, unjust, and unfair. As long as he makes the owner whole, the owner should still pay him for his performance. To do otherwise would impose a forfeiture on the builder and provide a windfall to the owner. Surely justice cannot turn a blind eye to the

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19. As the Restatement (Second) of Contracts explains, the “non-occurrence of a condition of an obligor’s duty may cause the obligee to lose his right to the agreed exchange after he has relied substantially on the expectation of that exchange, as by preparation or performance. The word ‘forfeiture’ is used . . . to refer to the denial of compensation that results in such a case.” RESTATEMENT (SECOND) OF CONTRACTS § 227 cmt. b.

20. *Id.* § 227.

21. *Id.* § 229.

22. *Id.* § 229 cmt. a.

23. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921).

24. *Id.* at 891.

25. *Id.*

26. *Id.*

27. *Id.* Justice Cardozo also appears to believe, however, that contract law should nonetheless always enforce even “cruel” terms that result in a “sacrifice of justice” if the parties have included them explicitly. “This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery.” *Id.* The Restatement, however, disagrees: “[u]nder the present Section a court may, in appropriate circumstances, excuse the non-occurrence of a condition solely on the basis of the forfeiture that would otherwise result.” RESTATEMENT (SECOND) OF CONTRACTS § 229 cmt. a.

28. *Jacobs & Youngs*, 129 N.E. at 891.

inequity of forfeitures and windfalls, even if they happen to result from the enforcement of an otherwise free and fair agreement. Courts must therefore subject even agreements reached under free and fair conditions to equitable review at the time of adjudication in order to protect the parties from the possible individual injustice of holding them to their own commitments.

Despite their surface appeal, however, these intuitions rest on crumbling foundations. As a moral matter, if a competent party—such as the Garland Coal Company in *Peevyhouse*—agreed to bear the risk of a loss from regrading property at a cost that exceeds the market value of the land, and was compensated for doing so, that fact alone conclusively establishes the justice and fairness of imposing the loss on that party.<sup>29</sup> To hold otherwise not only unfairly shifts a loss from the party who was paid to bear it to the party who paid to avoid it, but also violates the personal sovereignty of the parties to the agreement and all future contracting parties who lose the option to make and enforce such an agreement. The intuition that profoundly unequal post-contractual gains and losses can be individually unjust or unfair, in and of themselves, is therefore an illusion.

As a legal matter, the view that ex post doctrines are a legitimate part of American contract law is also mistaken. Like the light of a distant star that died long ago, the ex post doctrines that require “just compensation,”<sup>30</sup> forbid penalties,<sup>31</sup> avoid forfeitures,<sup>32</sup> and excuse hardship<sup>33</sup> emanate from a source that no longer exists. Originating in the English Courts of Equity during the early common law, the ex post perspective pervaded early contract law as a necessary corrective to the abusive enforcement of penal bonds.<sup>34</sup> But when the industrial revolution led American courts to enforce executory agreements for the first time, and reject penal bonds as potentially abusive, the ex ante perspective alone formed the foundational doctrines that emerged.<sup>35</sup> The tightly woven fabric of ex ante doctrines comprising the modern American law of contracts left no room for these ancient (and archaic) equitable principles. Although these doctrines continue to enjoy support from the Restatement and prominent commentators, they cannot be

29. For an argument that the opinion in *Jacob & Youngs, Inc. v. Kent* unfairly denied the owners their right to restitution of the price they paid to have the builder bear the risk of repairing or replacing defective conditions, see generally Schwartz & Scott, *supra* note 8.

30. RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. a (“The parties to a contract may effectively provide in advance the damages that are to be payable in the event of breach as long as the provision does not disregard the principle of compensation.”).

31. *Id.* § 356.

32. *Id.* § 227.

33. *Id.* § 261.

34. Performance (or “penal”) bonds were the dominant legal mechanism for arranging exchange transactions from Tudor times until the nineteenth century. For discussion, see *infra* Section I.A.1.

35. See discussion *infra* Section I.A.2.

reconciled with American contract law's otherwise univocal and foundational commitment to vindicating personal sovereignty. By giving these ex post doctrines equal billing on the marquee of American contract law, black letter authorities create the impression that the ex ante and the ex post are two equally important, and compatible, faces of American contract law. They are not.<sup>36</sup>

The vestigial ex post doctrines are in fundamental tension with the commitment to honor ex ante intent: they undermine contract law's commitment to vindicating personal sovereignty by requiring parties either to use less effective means to avoid terms the doctrines forbid, or to abandon their most preferred contracting strategies altogether in favor of less effective ones. The more serious concern, however, is that the prominence of these ex post contract doctrines has led to a body of scholarship that has elevated the influence of the ex post perspective in contract adjudication well beyond the narrow scope of the doctrines themselves. Their official status has misled influential legal scholars into conceiving of contract law as a pluralistic enterprise that serves justice by combining the ex ante and ex post perspectives in every case, not merely the handful of cases to which the ex post doctrines apply. Some scholars have called for the wholesale expansion of the unconscionability doctrine as the primary vehicle for extending the reach of the ex post perspective into every contract case.<sup>37</sup> Others have argued that the goal of preventing opportunism can explain and justify the exercise of ex post equity.<sup>38</sup> The pluralist account of contract law therefore

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36. To be sure, courts quite properly continue to recognize the applicability of doctrines that equate the justice of outcomes under an agreement with the justice of the bargaining process that produced it. Rather than overriding ex ante intent, equitable doctrines such as capacity, duress, fraud, and procedural unconscionability actually reinforce the ex ante perspective that limits enforcement to agreements reached under free and fair conditions. *See infra* Section I.B.2.

37. *See, e.g.*, Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 752–54 (1982) (“Over the last fifteen years, however, there have been strong indications that the principle of unconscionability authorizes a review of elements well beyond unfair surprise, including, in appropriate cases, fairness of terms . . . . [A] number of cases have held or indicated that the principle of unconscionability permits enforcement of a promise to be limited on the basis of unfair price alone . . . . As these phenomena have accumulated, it has become clear that they . . . can be explained only on the basis of an expanded, paradigmatic concept of unconscionability that is not limited to procedural elements such as unfair surprise . . . . This new paradigm does not replace the bargain principle . . . . Rather, the new paradigm creates a theoretical framework that explains most of the limits that have been or should be placed upon that principle, based on the quality of the bargain. What lies ahead is to articulate and extend the unconscionability paradigm through the development of specific norms, other than unfair surprise, that can guide the resolution of specific cases.”)

38. Kenneth Ayotte, Ezra Friedman & Henry E. Smith, *A Safety Valve Model of Equity as Anti-Opportunism* (Northwestern Law & Econ. Research Paper, Paper No. 13-15, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2245098](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245098) [<https://perma.cc/B38L-5ZLR>]. The defenders of equity argue that no set of legal rules can anticipate and thereby prevent the infinitely many and unpredictable ways in which individuals might seek to subvert the parties' intentions after they reach agreement. They conclude that contract law therefore must subject every agreement to ex post judicial review in order to police against opportunistic behavior that the parties could not have anticipated and thus prevented. *Id.* at

treats the ex post doctrines as just one among many other contract doctrines properly dedicated to vindicating multiple values that contract law must take into account, in addition to personal sovereignty, in order to prevent the enforcement of unjust agreements.<sup>39</sup>

In this Article, we offer a contrasting account of American contract law, one that explains and understands contract as vindicating personal sovereignty by honoring the ex ante intentions of contracting parties. On our account, the ex post contract doctrines, as applied today, are legal error—vestigial survivors of an originally noble effort to counteract the injustice of an extinct contract doctrine that is long extinct. They now perversely vitiate, rather than vindicate, justice for parties who rely on the rights and obligations they intended their agreements to create. Moreover, these doctrines cause harm by serving as the anchor for an academic-judicial feedback loop that legitimizes the ex post perspective generally in contract law.<sup>40</sup> The resulting roving portfolio of ex post reasoning in contract cases not only increases the risk that the outcomes of contract adjudication will be (ex ante) unfair, but also increases the opportunity for parties to credibly threaten strategic litigation to exact ex post redistribution of contractual gains and losses.<sup>41</sup>

The Article proceeds as follows. In Part I, we explain how the ex post contract doctrines became unmoored from their original rationale in the early common law and were carried over to modern American contract law through a combination of misunderstanding and allegiance to precedent.<sup>42</sup> Because the early common law came to depend exclusively on the penal bond for commercial exchange, the ex post doctrines emerged in equity to control resulting abuses. We then show how the American common law of contract was transformed by the industrial revolution into an institution devoted exclusively to enforcing executory agreements according to the

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25; see also George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 957 (1992) (defining opportunism as “any contractual conduct by one party contrary to the other party’s reasonable expectations based on the parties’ agreement, contractual norms, or conventional morality”).

39. Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 206, 240–41 (Peter Benson ed., 2001) (“Part of the human moral condition is that we hold many proper values, some of which will conflict in given cases, and part of the human social condition is that many values are relevant to the creation of a good world, some of which will conflict in given cases. Contract law cannot escape these moral and social conditions. In contract law, as in life, all meritorious values must be taken into account, even if those values may sometimes conflict, and even at the expense of determinacy. Single-value, metric theories of the best content of law must inevitably fail precisely because they deny the complexity of life. Accordingly, the theory of contracts—the principle that tells us how to make the best possible rules of contract law—must accommodate multiple values . . . .”)

40. See *infra* notes 142–51 and accompanying text.

41. See Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1574–75 (2016).

42. *Id.* at 1533–45.

parties' ex ante intentions, thereby eliminating the need for penal bonds and the ex post doctrines designed to prevent their unjust enforcement.

In Part II, we provide the philosophical basis for our claim that American contract law is devoted exclusively to promoting the value of personal sovereignty. We lay out Ronald Dworkin's basic criteria for legal explanation and argue that the personal sovereignty interpretation of contract law fares better on those criteria than pluralism because it holds that the ex ante doctrines, which comprise the vast majority of contract law, serve a more compelling moral purpose. Contrary to what we call the "ex post fallacy," the justice and fairness of "disproportionate" or "over-compensatory" outcomes turn entirely on the ex ante justice and fairness of the bargain that produces them. Finally, we demonstrate that the values of paternalism and anti-opportunism are logically incompatible with respect for personal sovereignty.

In Part III, we identify the range of harms caused by the mistaken inclusion of ex post doctrines in American contract law. We show how the ex post doctrines impose obstacles to preferred modes of contracting that require parties to use less effective means for accomplishing their purposes. We illustrate how the presence of these doctrines has cultivated a judicial receptivity to the ex post perspective more generally, sometimes leading courts tempted by the ex post fallacy to override the parties' ex ante intent. We conclude that the ex post perspective is incompatible with the personal sovereignty account of contract law. Although American law certainly vindicates plural and conflicting values, American *contract law* does not. Personal sovereignty is limited by the requirements of social justice, but it conflicts with no values within contract law itself.

## I. THE HISTORICAL DEVELOPMENT OF AMERICAN CONTRACT LAW

### A. THE ROOTS OF AMERICAN CONTRACT LAW

#### 1. The Limits of Contract Law at Early Common Law

At early common law, there was no cause of action for breach of an informal (unsealed) executory promise. The only actions available for breach of contract were the action in covenant (for promises under seal) and the action for debt. The action for debt, moreover, was available only for the recovery of a sum certain owed by the promisor to the promisee.<sup>43</sup> The

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43. JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 92 (1913); JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 322 (2d ed. 2009); A. W. B. SIMPSON, A HISTORY OF THE COMMON

promisee bringing an action in debt sought simply to recover the amount fixed by the parties' agreement. The court would decide whether to award payment based solely on the validity of the instrument, the due date, and evidence of payment. No occasion arose for judges to fill contractual gaps or award compensation for breach.<sup>44</sup>

The evolution of commercial exchange during the late middle ages eventually led the English common law courts to recognize a promisee's right to recover for breach of an informal promise by bringing an action in assumpsit.<sup>45</sup> But that action was available only for plaintiffs who had either conferred benefits or taken action in preparation for performance in reliance on the defendant's promise.<sup>46</sup> In either case, a plaintiff seeking relief via assumpsit for breach of an informal promise sought compensation under a theory of reimbursement for the loss of whatever the plaintiff had already given to the promisor (directly or indirectly).<sup>47</sup> No remedy was available for loss of the promisee's expectancy.<sup>48</sup> Importantly, as we explain below, the final stage of the development of modern contract law—the enforcement of purely executory promises—did not occur in America until the beginning of the nineteenth century.<sup>49</sup>

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LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 47–48 (1987).

44. AMES, *supra* note 43, at 88–89. Where a seller tendered goods to a buyer and the buyer refused to accept delivery, the seller could sue in debt for the purchase price and force the buyer to take delivery of the goods (for which title had passed under the contract). But alternatively, if the buyer tendered the purchase price and the seller refused to transfer goods that were then available, the buyer's only recourse was to bring an action in equity for specific performance because the remedy at law was inadequate. As a consequence of these limited options, contract default rules that assigned unanticipated risks and specified the consequences of nonperformance were simply inapt and thus unknown. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974). Horwitz cites only two English cases in the eighteenth century that even raise the issue of a default measure of damages. In *Flureau v. Thornhill* [1828] 96 Eng. Rep. 635, the court limited the plaintiff to restitution damages, holding that plaintiff could not be entitled to damages “for the fancied goodness of the bargain, which he supposes he has lost.” In the United States, only a few actions for breach of executory contracts were brought before the Revolution. *See, e.g., Boehm & Shitz v. Engle*, 1 Dall. 15, 15 (Pa. 1767), where the seller was allowed to sue for the price of a breached contract for the sale of land.

45. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 637–46 (5th ed. 1956).

46. Assumpsit had developed initially to provide a cause of action for the negligence of a bailee or carrier for hire. Over time, the action in assumpsit was extended to nonperformance of certain promissory undertakings. AMES, *supra* note 43, at 130–31.

47. During this early period of the action in assumpsit, a plaintiff could bring an action for breach of promise independent of the doctrine of consideration and the concept of exchange. *Id.* at 130. The early notion of *special assumpsit* (the contract action) did not require a quid pro quo as was required for an action for debt, which was explicitly tied to the notion of exchange. *Id.* at 147.

48. In the absence of legal enforcement, commercial parties relied on the law merchant and medieval trade fairs as a means of self-enforcing informal promises. Avner Greif, *Informal Contract Enforcement: Lessons from Medieval Trade*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 287, 288–89 (Peter Newman ed., 1998).

49. *See infra* notes 66–79 and accompanying text.

i. The Preeminence of Penal Bonds in Commercial Exchange

Given that executory contracts were not legally enforceable, and actions in debt and assumpsit provided limited legal means for parties to make enforceable future commitments, commercial parties conducted exchange transactions by adapting other legal mechanisms to suit their needs.<sup>50</sup> Although contracting parties participating in annual merchant fairs often relied on self-enforcement of their bargains,<sup>51</sup> they also adapted the penal bond to make legally enforceable commitments. A penal bond was a sealed promise<sup>52</sup> to pay a sum of money subject to a “condition of defeasance,” which appeared on the back of the bond itself. Upon satisfaction of the condition, the bond became void and the promisor had the right to demand return of the bond from the promisee. The advantage of using a formal instrument was that the promise to pay was conclusively enforceable at face value by an action of debt on an obligation at common law, subject essentially only to the defenses of forgery or proof of satisfaction of the condition of defeasance.<sup>53</sup> In effect, the bond served as a means of specifically enforcing a contract, with the stated monetary obligation serving as security to ensure performance.

It is hard to overestimate the importance of the penal bond to commercial exchange during the early common law. Suits on performance bonds were the single most common class of actions in the English courts of law by Tudor times and they remained so for the next three centuries.<sup>54</sup> According to Horwitz, at the beginning of the nineteenth century virtually all large business transactions took the form of two independent bonds, each of which stipulated damages for failure to perform an executory promise.<sup>55</sup> To support an exchange transaction, each party would sign a bond (often for double the value of a promised performance) that was made subject to the defeasing condition of the successful performance of the specific service or

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50. It is possible that the early common law might have been able to enforce executory promises through the action in covenant. But covenants had to be under seal to be enforceable and this would have limited this device to situations where the parties were prepared to go to the expense and difficulty of sealing a deed. We are grateful to David Waddilove for alerting us to this option.

51. Greif, *supra* note 48.

52. A sealed promise is a promise evidenced by a writing and stamped with a wax seal. RESTATEMENT (SECOND) OF CONTRACTS § 96 (AM. LAW INST. 1981).

53. See A. W. B. Simpson, *The Penal Bond with Conditional Defeasance*, 82 LAW Q. REV. 392, 411–12 (1966) (explaining that “[t]he law governing bonds is tough law” and that such conditional bonds were almost always enforced); see also THEODORE SEDGWICK, 3 A TREATISE ON THE MEASURE OF DAMAGES; OR AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF PECUNIARY COMPENSATION AWARDED BY COURTS OF JUSTICE 392, 393 (Arthur G. Sedgwick & Joseph H. Beale, Jr. eds., 2d ed. 1852) (noting a penalty “was recoverable without any reference whatever to the actual damages incurred”).

54. J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 324 (4th ed. 2002).

55. Horwitz, *supra* note 44, at 928.

the delivery of goods or money at a time certain.<sup>56</sup> If the condition was not satisfied, the bond was enforceable and the penalty became due.<sup>57</sup>

Penal bonds thus served as the substitute for legally binding executory contracts throughout the early common law. However, as we note below, these bonds were not only subject to abuse, but their use hindered the development of a law of contract: all of the contractual issues underlying the obligations they were used to enforce, including how courts should fill gaps in the absence of express agreement, were “hidden on the back of the bond.”<sup>58</sup> Indeed, at the beginning of the nineteenth century, the number of bonds used to effect commercial transactions in America greatly exceeded the number of contracts that sought to enforce mutual promises.<sup>59</sup> The dominance of bonds, bills of exchange, and other sealed instruments deprived commercial parties of the incentive to take their transactional disputes to common law courts. As a result, the default rules of contemporary contract law that support parties’ *ex ante* intentions did not develop until the mid-nineteenth century.

ii. The Origins of Ex Post Equitable Doctrines Overriding Party Intent

All of the equitable doctrines that carried over into modern contract law owe their origins to efforts by courts of chancery to constrain the abuses caused by the arcane doctrines used by the courts of law to enforce the ubiquitous penal bonds.<sup>60</sup> Recall that if the condition on the back of the bond was not satisfied, the bond was enforceable and the penalty became due. Alternatively, if the condition was satisfied (for example the promisor performed the designated service or delivered the promised goods), then the promisor was entitled to demand return of the bond. However, if the promisor failed to receive the bond in return for satisfaction of the condition

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56. SEDGWICK, *supra* note 53, at 393.

57. Imagine, for example, that on January 1 a farmer promised to deliver a dozen barrels of apples to a grocer on March 1 in return for the grocer’s promise to pay the farmer £500. To make their promises legally enforceable, the farmer would sign a bond entitling the grocer to payment of £1000 subject to the defeasing condition that the farmer deliver apples to the grocer at the stated time. If the farmer could not prove satisfaction of the condition, the grocer could enforce the bond and the farmer would have to pay the £1000 penalty. Likewise, the grocer might sign a bond entitling the farmer to a payment of £1000 subject to the defeasing condition that the grocer pay £500 to the farmer upon the delivery of the apples on March 1 and the same enforcement conditions would apply.

58. BAKER, *supra* note 54, at 324.

59. Horwitz, *supra* note 44, at 929.

60. The English courts of law followed objective and rigid procedural and substantive rules for enforcing penal bonds, which minimized the need for subjective judgment in their application. In response, the Court of Chancery began to exercise overlapping jurisdiction with the common law courts to hear cases that in “the ordinary course of law failed to provide justice.” BAKER, *supra* note 54, at 117; *see also* LANGBEIN ET AL., *supra* note 43, at 320 (“Chancery developed the practice of relieving against a contractual obligation that was enforceable at common law, in circumstances in which permitting enforcement would have been unjust.”).



and the promisee subsequently sought to enforce the bond, the only defense available to the promisor in a court of law was an “acquittance,” a formal writing signed by the promisee stating that the debt evidenced by the bond had been paid.<sup>61</sup> As a result, when legally naïve promisors failed to demand either return of the bond or an acquittance following performance, and the bondholder sought to enforce the bond, common law courts acknowledged that they were bound to enforce the bond even though doing so penalized a promisor who had already performed their promise.<sup>62</sup>

Predictably, a debtor facing such a risk filed a petition in a court of equity seeking relief from the prospect of an unjust penalty at law. Relief against such penalties was thus one of the earliest examples of equitable interference with courts of law that developed in response to the common law’s lack of adequate machinery for trying cases of fraud.<sup>63</sup> Similarly, doctrines providing relief from forfeiture developed in Chancery alongside the penalty doctrine and were available for parties who failed to fully perform their obligations under the bond.<sup>64</sup> So too, courts of chancery limited the bondholder to “just compensation” for nonperformance under the bond, finding that permitting the creditor to recover more than what it had lost by non-performance of the condition was “unconscionable.” In time, courts of equity adopted the presumption that penalty bonds should be set aside whenever their enforcement created an unacceptable risk of oppression and extortion.<sup>65</sup>

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61. W.T. Barbour, *The History of Contract in Early English Equity*, in 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 9, 85 (Paul Vinogradoff ed., 1914). In an action in covenant brought by a bond holder in possession of the bond, the common law courts simply could not entertain a defense that allowed the promisor to prove satisfaction of the condition absent an acquittance. Even if the court suspected that by seeking to enforce the bond the bond holder was fraudulently misrepresenting that the condition had not been satisfied, the court had to enforce the bond anyway. *Id.*

62. In the case of bonds evidencing a loan from the bond holder to the promisor, debtors often sought to avoid paying twice by filing a petition for relief in a court of equity, which the Chancellor granted if “after such examination right may be done [the debtor] as reason and conscience require.” *Id.* at 88. The potential for such injustice was dramatically exacerbated by the common practice in which borrowers seeking more favorable terms from their lender knowingly signed bonds for double the amount of their loan in order to give their lender the right to impose a penalty in the event of default. A debtor who signed such a “penalty” bond, and paid back the debt it evidenced without receiving the bond or an acquittance in return, could be subject to a triple payment of the face amount of the debt even though the lender had fraudulently represented that the debtor was in default. *Id.* at 89.

63. See 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 292–93 (1924). In addition to granting relief to the obligor from fraud, courts of equity also invalidated bonds upon a finding that the obligor was illiterate or under duress or suffering mental incapacity. Here then we also find the origins of the modern contract rules that regulate the fairness of the bargaining process. BAKER, *supra* note 54, at 325.

64. Courts of chancery developed the maxim that “equity suffers not advantage to be taken of a penalty or forfeiture where compensation is made.” *Id.* at 326.

65. *Id.* at 325. The doctrine of substantive unconscionability can be traced to these early efforts by courts of equity to limit the abuses of penal bonds.

## 2. The Rise of the Bargained-for Executory Promise

### i. The Industrial Revolution and Emergence of the Ex Ante Perspective

The simple action for debt, supplemented by the use of formal instruments such as the penal bond, sufficed to facilitate mutually beneficial contracting activity from early common law through the eighteenth century.<sup>66</sup> But the industrial revolution of the nineteenth century saw a dramatic expansion of commercial enterprises and transactions, which in turn generated new risks of unprecedented scale. The cumbersome and rigid practice of issuing double bonds simply fell short of the need to manage the new uncertainties facing commercial parties. In this novel environment, parties needed better control over the process of allocating risk and reward: they needed to shape their particular transaction by taking the contract into their own hands. To manage their risks, therefore, commercial actors began to innovate by creating stock and commodities contracts that used executory promises to trade the risks of future price fluctuations.<sup>67</sup> To give effect to the parties' ex ante risk allocations in these new forms of contracts, common law courts for the first time began to award market-based damages for failure to deliver stock certificates in a rising market<sup>68</sup> and for the breach of fixed-price forward contracts for the delivery of commodities.<sup>69</sup>

As these executory contracts became more common, courts for the first time granted sellers the right to resell the contract goods upon the buyer's rejection and then seek market damages—the difference between the contract and resale prices.<sup>70</sup> Although intertwined with the common law's traditional equitable language of justice and fairness, the first court to create the market damages default rule for executory contracts relied on the goal of vindicating the parties' presumed intent to maximize their contract's ex ante value:

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66. During this period, commercial parties used sealed penal bonds and bills of exchange as the primary substitute for legally binding executory contracts. Horwitz, *supra* note 44, at 928; *see also* Simpson, *supra* note 53.

67. This Part of the Article draws on Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428, 1436–47 (2004); *see also* Horwitz, *supra* note 44, at 921–22 (arguing that enforcement of executory promises did not occur until the rise of industrialization and the development of commercial markets in the late eighteenth and early nineteenth centuries). Horwitz's basic thesis—that prior to the industrial revolution the common law of contract was dominated by notions of equity and fairness and that it was thereafter adapted to legitimate the inequalities of the nineteenth century market economy—has been vigorously contested. *See, e.g.*, A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979). Simpson's critique does not, however, challenge the basic point that courts did not regularly enforce executory contracts until the nineteenth century. We rely on Horwitz's historical account only to the extent that it survives Simpson's critique.

68. *See, e.g.*, *Groves v. Graves*, 1 Va. (1 Wash.) 1 (1790).

69. *See, e.g.*, *Shepherd v. Hampton*, 16 U.S. (3 Wheat.) 200 (1818).

70. *See Sands & Crump v. Taylor & Lovett*, 5 Johns. 395 (N.Y. Sup. Ct. 1810).

This [market damages] rule operates justly as respects both parties; for the reasons which induced the one party to refuse the acceptance of the property will induce the other to act fairly, and to sell it to the best advantage. It is a much fitter rule than to require it of the party, on whom the possession of the thing is thrown . . . to suffer the property to perish, as a condition on which his right to damages is to depend . . . . [This rule] appears to me to be founded on principles dictated by good sense and justice.

The article was perishable, and the interest of all parties required that the most should be made of it. Nothing, therefore, is more reasonable, than that the plaintiffs, who were not bound to store or purchase the wheat, should be permitted to sell it at the best price that could be obtained.

[The market damages rule] is convenient and reasonable, and for the best interest of both parties . . . . The vendor ought to have the benefit of that principle as well as the vendee. It would be unreasonable to oblige him to let the article perish on his hands, and run the risk of the solvency of the buyer.<sup>71</sup>

The court's reasoning suggests that it believed the parties would not have intended a forward contract in which the seller would be required to allow rejected goods to waste instead of preserving their value by reselling them, thereby reducing the damages from breach. The market damages default rule thus gave effect to the parties' ex ante intent to create a contract that efficiently allocated market risks.<sup>72</sup>

To manage the risks of the new mass markets of the industrial age, common law courts began to adopt additional default rules that allocated non-price risks between the parties in the ex ante contract. Courts adopted the rule awarding market damages for non-performance of stock and commodities transactions as the default rule for all executory contracts that parties made to implement their objectives. From this development evolved the origins of the bargain principle and the American doctrine of

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71. *Id.* at 406, 409–10. Under the older common law rule, the seller would have been required to tender the contract goods and sue for the contract price. But in *Sands*, the seller covered on the market by reselling the goods to a third party and then sought damages based upon the contract-market differential. The court conceded that this was a case of first impression in America and granted market damages to the plaintiff. *Id.* at 405–06.

72. In addition to formulating a damages default, the courts during this period developed more clearly the principle that the “contract itself furnishes the measure of damages.” SEDGWICK, *supra* note 53, at 200–01. Mid-nineteenth century contract law thus distinguished and rejected a line of earlier cases that gave the jury wide latitude and discretionary authority to determine the measure of damages, either by reducing or enlarging the award. The amount of compensation was now regulated by the direction of the courts, and the sole object was to ascertain the agreement of the parties, which controlled the measure of damages. *Id.* Among other things, this principle was an explicit rejection of the concept of breach as “fault.” The motives behind the breach were irrelevant. THEOPHILUS PARSONS, 2 THE LAW OF CONTRACTS 443 (1855).

consideration.<sup>73</sup> The evolution from commodities and stock transactions to fully executory contracts led to one of the principal default rules designed to reduce the risks of contracting. Based on the parties' presumed intent to maximize the expected value of their contracts, courts assigned to the promisor, by default, the risks associated with any performance under the contract, because courts implicitly presumed that the promisor was better able to reduce the expected losses caused by unanticipated contingencies.<sup>74</sup> Other default rules evolved during this period to protect the utility of market contracts as mechanisms for reducing the incidence of interparty haggling<sup>75</sup> and enhancing expected surplus, including the perfect tender rule for sales of goods,<sup>76</sup> the common law indefiniteness doctrine,<sup>77</sup> and the many default rules governing the process of offer and acceptance of terms.<sup>78</sup> Contract thereafter became an instrument for managing risks *ex ante* through executory contracts.<sup>79</sup>

73. The bargain theory of consideration departed from the earlier common law definition of consideration as consisting of any benefit to the promisor or detriment to the promisee. The theory limiting consideration to bargained for exchange of a promise or performance was a direct result of the market transactions described in the text. J. Willard Hurst observed that the bargain idea of consideration emerged as a method of market control, a legal technique employed by common law courts to regulate the market transactions that were emerging in the early nineteenth century. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 11–13 (1956). While many of these economic conditions existed in England prior to the colonial era, the unique combination of “legal heritage, challenge, opportunity, and individual motivation was irrepressible” in America and resulted in an “explosion of contract behavior.” Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 *STAN. L. REV.* 1161, 1169 (1975).

74. This “performer’s risk” default rule is justified on the ground that the promisor is better able to exercise some degree of control over the manner of its performance under the contract, either by taking precautions to reduce the risk of an unanticipated occurrence or to take steps to reduce its impact should it occur. This default risk allocation imposes no injustice on the promisor since the “premium” for bearing the risks of performance are paid for by the promisee in the contract price. For discussion, see ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 74–94 (5th ed. 2013).

75. The judicial instinct to reduce interparty haggling (that undermines the expected value of the contract) explains the role of the obligation of good faith in American contract law. Under common law and the Uniform Commercial Code, the obligation of good faith is an interpretive principle and not a free-standing independent duty. *See, e.g.*, U.C.C. § 1-304 cmt.1. (AM. LAW INST. & UNIF. LAW COMM’N 2018). Thus, courts assume as a default presumption that both parties would agree to act with each other in good faith to implement their agreement. This commitment deters strategic behavior which otherwise would generate a value-destroying race to the bottom. We develop his point further in Section III.D *infra*.

76. *See, e.g.*, *Beals v. Hirsch*, 211 N.Y.S. 293, 300 (App. Div. 1925) (“[T]he seller is bound to tender the amount of goods contracted for in order to hold the buyer for performance.”), *aff’d*, 152 N.E. 414 (1926); *Reuter v. Sala*, 27 W. R. [1879].

77. *See, e.g.*, *Shepard v. Carpenter*, 55 N.W. 906 (Minn. 1893). The indefiniteness doctrine instructed courts to declare contracts void for indefiniteness if the parties failed to specify the outcome for realized states of the world.

78. *See, e.g.*, *Fitzhugh v. Jones*, 20 Va. 83 (1818); *Carlill v. Carbolic Smoke Ball Co.* [1892] 1 QB 256 (Eng.); *Adams v. Lindsell*, (1818) 106 Eng. Rep. 250. For discussion, see Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 *YALE L.J.* 169 (1917).

79. Horwitz, *supra* note 44, at 919.

ii. Justifying Default Rules on the Basis of Ex Ante Intent

Over the next one hundred years, as the industrial revolution took hold first in England and then in the United States, courts developed a hypothetical bargain justification for implying default terms as part of a common law court's responsibility to interpret the parties' agreement. In 1863, in *Taylor v. Caldwell*, Justice Blackburn explained the emerging impossibility default rule as follows:

[T]his implication [of an excusing condition] tends to further the great object of making the legal construction *such as to fulfil [sic.] the intention of those who entered into the contract*. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.<sup>80</sup>

Subsequently, in *Globe Refining Co. v. Landa Cotton Oil Co.*, Justice Oliver Wendell Holmes generalized the ex ante reasoning in *Taylor*.<sup>81</sup> Courts, he explained, should fill gaps with rules that would facilitate bargained for exchanges between future parties that are similar to the parties before the court:

It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, *and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter*. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and, in many cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation, *and, whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind*.<sup>82</sup>

Thus, the motivating objective of judicial default rules was to allocate risks that the parties had failed to consider in the same way the parties would have allocated those risks had they bargained over the matter explicitly at the time they formed their agreement. By filling contractual gaps in this way, courts maximized the chances that these default risk allocations would reflect the preferred risk allocations of future parties similar to those in the originating case.

80. *Taylor v. Caldwell* (1863) 122 Eng. Rep. 309, 312 (emphasis added).

81. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903).

82. *Id.* at 543 (1903) (emphasis added). Some years later, Justice Cardozo used the same reasoning in *Jacob & Youngs v. Kent*, 129 N.E. 889, 891 (N.Y. 1921), to adopt the rule of substantial performance in construction cases on the grounds that "intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable."

In retrospect, it is easy to see why the decisions by courts at the dawn of the nineteenth century to legally enforce wholly executory agreements was such a watershed event in the development of American contract law. The dam burst thereafter, followed by a flood of innovative decisions by common law courts responding to the demands of commercial parties for a robust contract law. As courts continued to enforce executory promises, they developed by necessity novel doctrines (including the array of default rules) that were self-consciously designed to advance the objectives the parties intended their contracts to serve at the time of formation. As the judicial focus on ex ante intentions began to wax, the relevance of ex post equity began to wane.

## B. THE PRIMACY OF THE LAW OVER EQUITY

### 1. Law and Equity at Common Law

As the common law courts embraced the goal of vindicating the contracting parties' ex ante intentions throughout the nineteenth century, the clash between this ex ante perspective and the ex post perspective of common law equity was inevitable. The English common law had managed to avoid the general tension between law and equity by creating two separate sets of doctrines adjudicated in separate courts.<sup>83</sup> The first originated in the English King's Bench and consisted of rules cast in objective terms. The second consisted of equitable principles originating in the English Court of Chancery, which provided an independent and alternative forum as a response both to the procedural constraints imposed on the common law courts and to the strict, rule-bound inclinations of common law judges.<sup>84</sup> These equitable interventions were not meant to, and did not, displace any of the common law rules. Indeed, for many years the Chancery's decrees had no formal precedential effect,<sup>85</sup> which freed the Chancery from any concern that its ex post rulings could undermine the consistency and predictability of adjudication.<sup>86</sup>

83. The discussion in this part draws on Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1037–41 (2009).

84. BAKER, *supra* note 54, at 104; see also LANGBEIN ET AL., *supra* note 43, at 320.

85. "In Chancery, each case turned on its own facts, and the Chancellor did not interfere with the general rules observed in courts of law. The decrees operated in personam; they were binding on the parties in the cause, but were not judgments of record binding anyone else." BAKER, *supra* note 54, at 104. "So long as chancellors were seen as providing ad hoc remedies in individual cases, there was no question of their jurisdiction bringing about legal change or making law." *Id.* at 202.

86. As an example, though common law courts continued strictly enforcing penalty clauses in breached contracts, equity courts began enjoining such enforcement in the sixteenth and seventeenth centuries, creating the doctrine "equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made." LANGBEIN ET AL., *supra* note 43, at 324.

The premise of equitable jurisdiction was that justice sometimes required courts of equity to make exceptions to the legal rules applied by the courts of law, which assessed justice *ex ante*, from the point of view of the parties at the time of formation.<sup>87</sup> In contrast, chancellors in equity assessed the justice of the outcome of contract disputes *ex post*, at the time of adjudication. Courts of equity thus were free to determine that the resolution of a dispute according to the legal rules was inconsistent with the parties' intended objectives because of unanticipated contingencies that occurred after formation. In such cases, courts of equity could set aside the legal resolution of the dispute and use equitable principles to (re)align the contract with the parties' originally intended purposes.<sup>88</sup>

## 2. The Common Law Absorbs Most of Equity

Historically, the jurisdictional division between the common law courts and the Court of Chancery acted as a barrier between the two incompatible regimes. In the nineteenth century, however, the Chancery was eliminated, and law and equity was merged in both England and the United States. This awkward amalgam confronted courts as they began to develop a modern American contract law.<sup>89</sup> The tension between the *ex ante* and *ex post* was largely mitigated by the practice of American common law courts of absorbing most of the equitable doctrines that had developed in Chancery and then transforming them to suit the *ex ante* perspective.<sup>90</sup> As we explain below, the First Restatement of Contracts reinforced the *ex ante* perspective by cabining the historically equitable doctrines into legal doctrines governing fraudulent and innocent misrepresentation,<sup>91</sup> fraudulent non-

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87. The *ex ante* approach of the common law courts was summarized in *Waberley v. Cockerel* (1542) 73 Eng. Rep. 112, 113:

[I]t is better to suffer a mischief to one man than an inconvenience to many, which would subvert a law: for if matter in writing may be so easily defeated, and avoided by such surmise and naked breath, a matter in writing would be of no greater authority than a matter of fact . . .

88. As Baker explains, "the essence of equity as a corrective to the rigour of law was that it should not be tied to rules. If, on the other hand, no consistent principles whatever were observed, parties in like cases would not be treated alike; and equality was a requisite of equity." BAKER, *supra* note 54, at 109.

89. Ironically, by the nineteenth century, the Chancery had developed a set of procedures more arcane and burdensome than the common law procedures it originally sought to mitigate. The resulting administrative delay, combined with corruption born of the Chancery's practice of paying clerks on a fee basis rather than salary, ultimately led to the Chancery's demise. *Id.* at 111–12. Soon thereafter law and equity were merged. *Id.* at 114.

90. DAVID IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 203 (1999). In general, equity-evolved contract doctrines designed to provide far broader protection against perceived fraud than the common law provided. In particular, the core equitable contract doctrines provided relief where an agreement was not fully voluntary or informed. *Id.* at 208.

91. The equitable defenses of negligent or innocent misrepresentation were the precursors to the contemporary doctrines of fraudulent and material misrepresentation. *Id.* at 208; *see also* RESTATEMENT (SECOND) OF CONTRACTS §§ 162, 164 (AM. LAW INST. 1981).

disclosure,<sup>92</sup> unilateral and mutual mistake,<sup>93</sup> and specific performance and other injunctive relief.<sup>94</sup> Yet, a few of the equitable doctrines absorbed into modern American contract law could not be similarly transformed to accommodate the ex ante perspective. Courts had designed these ex post doctrines, such as the just compensation, penalty,<sup>95</sup> hardship, and forfeiture<sup>96</sup> doctrines, specifically to vitiate clear common law rules.

Because these vestigial ex post doctrines undermined contracting parties' ex ante intentions, courts only infrequently invoked them. Nevertheless, this occasional validation of the ex post perspective increased the risk of more pervasive equitable interventions. The First Restatement of Contracts, however, significantly reduced this risk. The Reporter of the First Restatement, Samuel Williston, sought to formalize and render coherent the diverse legal and equitable doctrines comprising the common law of contract.<sup>97</sup> Williston's Restatement formally incorporated the historically equitable doctrines into the common law of contract as exceptions to the

92. The equity defense of wrongful silence was the precursor to contemporary non-disclosure doctrine. See RESTATEMENT (SECOND) OF CONTRACTS §§ 162, 164 (AM. LAW INST. 1981).

93. IBBETSON, *supra* note 90, at 210.

94. *Id.* at 206, 213; BAKER, *supra* note 54, at 320.

95. The courts initially seized on the "intent of the parties" as the key to distinguishing liquidated damages and penalties. An invalid penalty was a sum intended only as security for the performance of the executory promise and not intended to be paid. Enforceable liquidated damages, on the other hand, were intended to be paid by the promisor if she elected not to perform the agreement. SEDGEWICK, *supra* note 53, at 398–420 (collecting cases). Subsequently, in a much-cited opinion, the Michigan Supreme Court in *Jaquith v. Hudson*, 5 Mich. 123 (1858), rejected the intent test of enforceability. Instead, the court held that the governing principle was that damages must be based on "the principle of just compensation for the loss or injury actually sustained." *Id.* at 133. The court held that the task for the parties was to specify just compensation ex ante in those instances where they had a comparative advantage over a court seeking to do so ex post. Such comparative advantage would exist where the provable loss from the breach of the contract was uncertain, remote, or speculative. While *Jaquith* purported to restrict party sovereignty over stipulated damages, the *Jaquith* rule actually gave substantial latitude to nineteenth century contracting parties. Given the then-prevailing view that lost profits could not be recovered because they were too remote or speculative, the anticipated losses in most commercial contracts would be difficult to prove. Consequently, parties had considerable freedom to stipulate damages under the *Jaquith* rule. For further discussion of the evolution of the contemporary penalty doctrine, see Scott & Triantis, *supra* note 67, at 1436–47.

96. The forfeiture doctrine is another example of a pre-modern equitable doctrine that has survived the merger of law and equity. BAKER, *supra* note 54, at 202–03. The forfeiture doctrine authorizes courts to set aside implied and express conditions under certain circumstances. See RESTATEMENT (SECOND) OF CONTRACTS § 229 (AM. LAW INST. 1981). We critique the forfeiture doctrine in Section III.B *infra*.

97. Williston's formalism rested on several basic claims: that contract terms could be interpreted ex ante according to their ordinary meaning, and that written terms (and thus the parties' intended means) have priority over unwritten expressions of agreement (that might better reveal their intended ends). In particular, Williston elevated the parol evidence and plain meaning rules as mechanisms for cabinining equitable interventions by courts interpreting disputed contracts. See, e.g., SAMUEL WILLISTON, WILLISTON ON CONTRACTS 631 (3d ed. 1979) ("The parol evidence rule requires, in the absence of fraud, duress, mutual mistake or something of the kind, the exclusion of extrinsic evidence, oral or written, where the parties have reduced their agreement to an integrated writing."). For discussion, see Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 186–88 (1989).



common law rules that applied only in specific circumstances. As a result, the judicial evolution of novel equitable exceptions largely came to a halt.<sup>98</sup> By enshrining these views in the First Restatement, Williston's reformulation significantly influenced the subsequent adoption of contract doctrine by state courts as they decided contract disputes.<sup>99</sup>

The formalist consensus that followed in the wake of the First Restatement minimized the perceived judicial license to exercise equitable discretion in contracts cases. Notably, despite the effort of subsequent private law makers to reframe this consensus in the Second Restatement, the Willistonian resolution of the law-equity dialectic remains today the dominant approach in American contract law, endorsed by courts in the large majority of states.<sup>100</sup> The majority of common law courts now understand and apply contract law to support contracting parties' ability to choose *ex ante* their contractual means for maximizing the expected value of their contracts.

### C. THE DOMINANCE OF THE EX ANTE IN MODERN CONTRACT LAW

The preceding review of the history of the American common law of contracts highlights the explicitly *ex ante* reasoning judges have used over two centuries to explain the decisions creating its bedrock doctrines. As noted above, when common law courts began to resolve disputes over executory contracts that lacked express terms governing those disputes, they confronted the necessity of creating default terms to allocate unexpected risks. The common rationale given by courts to justify their default rules was that the disputing parties would have agreed to the same risk allocation had they been required to bargain over that matter at the time of contracting.

But how did the common law courts decide just how the parties would have allocated any given risk? The answer is that courts reasoned, either explicitly or implicitly, that most parties intend to minimize the expected costs of contracting in order to maximize their contract's *ex ante* value. The judicial rationale supporting this reasoning is that both parties are equally

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98. See Patterson, *supra* note 97, at 169–70.

99. RESTATEMENT OF CONTRACTS § 240 (AM. LAW INST. 1932).

100. A large majority of U.S. courts continue to follow the traditional, formalist approach to contract interpretation that preferences the chosen means to achieve their purposes that parties reflect in their written agreements. A state-by-state survey of recent court decisions shows that thirty-eight states follow the traditional textualist approach to interpretation. Nine states, joined by the Uniform Commercial Code for sales cases (hereinafter UCC) and the Restatement (Second) of Contracts, have adopted a contextualist or anti-formalist interpretive regime. The remainder are indeterminate. See State-by-State Survey (on file with authors). *But see* Lawrence A. Cunningham, *Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-For-The-Job*, 85 GEO. WASH. L. REV. 1625 (2017) (recent state survey finds a number of states have adopted an intermediate position on the text versus context debate).

motivated ex ante to reduce the collective costs of bearing the risks of their contractual venture. Based on this premise, courts allocated contractual risks by default to the party better able to bear them.<sup>101</sup> The justification for this risk assignment is that the party to whom the risk is allocated will (in exchange for a compensating payment) agree to bear the risks that she is best able to reduce (or insure against) by taking appropriate precautions. Both parties gain by acting to make the inevitable risks of contracting smaller than they otherwise would be, thereby enhancing the expected value of their collaborative enterprise. In this way, each contracting party can act as an insurer of the promises it gives to the other, and the parties implicitly impound the “premium” for this insurance in the price for the goods or services provided under the contract.<sup>102</sup> Thus, given the assumption that parties intend to maximize the expected value of their contracts, these defaults are the risk allocations that most parties would intend to incorporate into their agreements.

The evolutionary story we have just described supports the claim that virtually all of the American common law of contracts derives from two premises: the purpose of contract law is to discover and enforce the parties’ ex ante intent and most parties intend to maximize the expected value of their contracts at the time they form them. There are many accounts in the literature of how this ex ante perspective on optimal risk-bearing explains the outcomes of American common law contract cases.<sup>103</sup> The explanatory power of that perspective even accommodates doctrines such as the duty to

101. See *supra* notes 74–81 and accompanying text.

102. This risk reduction principle is one of the oldest default rules in contract law, tracing its lineage to *Paradine v. Jane* (1647) 82 Eng. Rep. 897; see *supra* note 74 and accompanying text.

103. See generally, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 *YALE L.J.* 729 (1992); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87 (1989); Robert L. Birmingham, *Damage Measures and Economic Rationality: The Geometry of Contract Law*, 1969 *DUKE L.J.* 49; Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 *MICH. L. REV.* 489 (1989); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 *VA. L. REV.* 967 (1983) [hereinafter Goetz & Scott, *The Mitigation Principle*]; Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 *VA. L. REV.* 1089 (1981); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *YALE L.J.* 1261 (1980); Goetz & Scott, *supra* note 4; Thomas H. Jackson, “*Anticipatory Repudiation*” and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance, 31 *STAN. L. REV.* 69 (1978); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 *YALE L.J.* 615 (1990); Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 *J. LEGAL STUD.* 1 (1978); Anthony T. Kronman, *Specific Performance*, 45 *U. CHI. L. REV.* 351 (1978); Alan Schwartz, *Sales Law and Inflation*, 50 *S. CAL. L. REV.* 1 (1976); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 *J. LEGAL STUD.* 597 (1990).

mitigate<sup>104</sup> and the widespread practice of relational contracting<sup>105</sup> that appear at first blush to challenge the primacy of the ex ante perspective. The personal sovereignty view of contracts not only demonstrates that these analyses largely succeed, but also argues that their success serves as the cornerstone of a genuine interpretive theory of American contract law. The best interpretation of contract doctrine understands its sole purpose to be the vindication of the personal sovereignty of contracting parties by supporting their presumed ex ante intentions.

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The history and content of American contract law reveals the singular evolution of common law doctrine towards a wholesale embrace of the ex ante perspective, a perspective that carves out “a domain or territory in which the self is sovereign.”<sup>106</sup> However, the same history also shows continuing, albeit limited, instances where ex post doctrines are used to trump the parties ex ante choices, even those that are made freely under fair conditions. In our view, such instances are pathological. These ex post interventions are inconsistent with a robust conception of personal sovereignty in which

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104. At first blush, the mitigation doctrine appears to be an ex post obligation imposed on the nonbreaching party. But to the contrary, this doctrine is clearly congruent with the claim that contract law supports the parties' ex ante choice to impose on each other an ex post obligation for the purpose of maximizing the expected value of the contract. Although some contract theorists view the mitigation doctrine as deeply incompatible with respect for the parties' promissory moral commitments, *see generally, e.g.,* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007), the doctrine actually reflects the parties own most likely understanding of the ex post obligations each agreed to undertake at the time of formation, *see* Kraus, *supra* note 11, at 1638. Contract law's mitigation doctrine anticipates that parties will agree ex ante to extend efforts in sharing information and undertaking subsequent adaptations as necessary to minimize the expected joint costs of adverse future events, even when those events lead one of the parties to breach. Goetz & Scott, *The Mitigation Principle*, *supra* note 103.

105. One reason parties enter relational contracts is to avoid disruption and the spillover effects of volatility. In output and requirements contracts, for example, they achieve this objective by having each party agree ex ante to trade off some of the upside of a future market movement in their favor in return for more protection on the downside. Their stated goal is to keep both parties “in the money” at every period over the life of the contract. By enforcing these agreements despite the parties' reliance on vague standards of performance, courts might create the impression that their primary goal is to provide ex post justice by limiting opportunism. But the judicial enforcement of relational contracts is better explained by the parties' ex ante intent to use the relational bonds that repeated interactions create to maximize the expected value of their contracts. By reinforcing informal norms of trust and reducing volatility, the parties reduce the “haggling” that can result from period to period efforts to extract maximum individual gains. Victor P. Goldberg, *Relational Exchange: Economics and Complex Contracts*, 23 AM. BEHAV. SCIENTIST 337 (1980). By assigning discretion ex ante to the party who values it more, and constraining that discretion through both formal and informal mechanisms, the parties can “smooth the bumps” that otherwise impose spillover costs that impair contract value. Schwartz & Scott, *supra* note 10. The motivation of courts to require cooperative adjustment in relational contracts need not be attributed to policing opportunism ex post at the expense of the parties' ex ante intentions. Rather, it is more naturally attributed to the contracting parties' presumed intent simply to deploy informally enforced norms of trust and fairness to regulate their contractual conduct. Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CALIF. L. REV. 2040–42 (1987).

106. FEINBERG, *supra* note 11, at 52.

“respect for a person’s autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him.”<sup>107</sup> The question, then, is whether the personal sovereignty view better explains American contract law than a pluralist account that purports to accommodate both the ex ante and ex post perspectives. We turn to that question in Part II.

## II. PERSONAL SOVEREIGNTY VERSUS PLURALISM

The examination of the history and content of the modern American common law of contract grounds our claim that its sole purpose is to vindicate personal sovereignty as embodied in the ex ante intentions expressed by contracting parties under free and fair conditions. In this Part, we set out the general criteria of adequacy for explanatory legal theories and then explain why the personal sovereignty account satisfies these criteria better than pluralism, its chief competitor.

### A. LEGAL EXPLANATION, PERSONAL SOVEREIGNTY, AND PLURALISM

The nature of legal explanation has been hotly contested over the last century, dating back at least to the publication of H.L.A Hart’s *The Concept of Law*.<sup>108</sup> For present purposes, however, we rely on Ronald Dworkin’s theory of legal interpretation because it provides a well-known, accessible, and plausible starting point for understanding the criteria governing an explanatory theory of law.<sup>109</sup> Dworkin equates legal explanation with what he calls “constructive interpretation.”<sup>110</sup> For Dworkin, a constructive interpretation has three stages. The first is the “pre-interpretive” stage, in which the legal objects of inquiry to be interpreted are preliminarily identified, such as cases, rules, principles, statutes, and the like. The second is the “interpretive” stage, in which participants in the practice of law attempt to identify purposes that the practice of law purports to serve in the legal sources identified at the pre-interpretive stage. For Dworkin, two considerations guide interpretation. First, the interpreter must seek an interpretation that casts the law in its best moral light by holding it to be serving the best moral purpose possible.<sup>111</sup> As Dworkin describes it, “the

107. *Id.* at 68.

108. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

109. *See generally* RONALD DWORKIN, *LAW’S EMPIRE* (1986).

110. *See id.* at 65–68. This section draws on Jody S. Kraus, *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency*, in 1 *LEGAL AND POLITICAL PHILOSOPHY* 385 (Enrique Villanueva ed., 2002), and Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 *V.A. L. REV.* 287 (2007).

111. As Stephen Perry explains this requirement, [t]his involves showing how the practice, construed in terms of a certain point or function that might plausibly be attributed to it, could under specified conditions give rise to moral

interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is.”<sup>112</sup> Second, the interpreter seeks an interpretation that meets a “threshold” of fit with the legal sources being interpreted.<sup>113</sup> The third is the “post-interpretive” stage, in which the interpreter “adjusts his sense of what the practice ‘really’ requires so as better to serve the justification he accepts at the interpretive stage.”<sup>114</sup> The best interpretation is therefore the one that constitutes the optimal trade-off between casting the law in its best moral light, in both the interpretive and post-interpretive stages, and “fitting” the legal sources that constitute the law as a preinterpretive matter.

As the previous historical discussion has shown, the vast bulk of case law and the legally authoritative materials comprising the modern law of contract (contract law’s “preinterpretive” legal objects of inquiry) aim explicitly at vindicating the parties’ *ex ante* intent. At the conclusion of our interpretive stage, we conclude that the explanation that best fits the preinterpretive facts and casts contract law in its best moral light understands contract law’s exclusive purpose to be the vindication of personal sovereignty, even though this interpretation does not fit the *ex post* doctrines. In the Dworkinian framework, a lack of perfect fit between an interpretation and the legal “data” does not itself disqualify a candidate interpretation. Instead, the framework requires only that a proposed interpretation fit the preinterpretive data sufficiently “to count as an interpretation of it rather than the invention of something new.”<sup>115</sup> As Dworkin explains, any interpretation that meets this threshold of fit qualifies as an acceptable candidate for the best interpretation of the legal practice in question:

When an interpretation meets the threshold, remaining defects of fit may be compensated, in [the interpreter’s] overall judgment, if the principles of that interpretation are particularly attractive, because then he sets off the community’s infrequent lapses in respecting these principles against its virtue in generally observing them. The constraint fit imposes on substance, in any working theory, is therefore the constraint of one type of political conviction on another in the overall judgment which

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obligations for participants that they would not otherwise have. The idea is to make moral sense of the practice by showing people why and under what circumstances they might have reason to comply with it.

Stephen R. Perry, *Hart’s Methodological Positivism*, 4 *LEGAL THEORY* 427, 463 (1998).

112. DWORKIN, *supra* note 109, at 66.

113. Dworkin explains that “[c]onvictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all.” *Id.* at 255.

114. *Id.* at 66.

115. *Id.* at 67.

interpretation makes a political record the best it can be overall, everything taken into account.<sup>116</sup>

Given the near perfect level of fit between the personal sovereignty interpretation and the ex ante doctrines, the case for the personal sovereignty interpretation turns on whether it casts contract law overall in the best moral light possible, despite its lack of fit with the ex post doctrines, compared to the best available alternative interpretations. We argue that the personal sovereignty interpretation provides the most compelling moral justification available for the ex ante doctrines. In addition, because these doctrines comprise the vast majority of contract law itself, we conclude that contract law does not, in Dworkin's terms, "really" include the ex post doctrines. Instead, the personal sovereignty interpretation treats them as legal error. In doing so, the personal sovereignty interpretation "sets off the [judicial] community's infrequent lapses in respecting" the value of personal sovereignty in contract law "against its virtue in generally observing" it.<sup>117</sup>

Moreover, our historical account of the origins and persistence of the ex post doctrines even casts the erroneous judicial practice of recognizing ex post doctrine in its best moral light. It shows how judges applied ex post doctrines out of a misguided respect for stare decisis and an understandable failure to appreciate that the newly formed ex ante core of contract law rendered the time-honored ex post norms of justice and fairness not merely vacuous, but perversely unjust and unfair to impose. Thus, by treating the ex post doctrines as legal error, the personal sovereignty interpretation renders the remaining doctrines of contract law internally coherent, consistent, and principled. It thereby meets the Dworkinian goal of constructing an interpretation that best realizes the ideal of (contract) law as integrity.<sup>118</sup>

Dworkin's theory of the correct interpretation of law, however, is comparative. It identifies the right interpretation with the best interpretation. The personal sovereignty interpretation of contract law is the right theory, then, only if there isn't a better one. The chief rival to the personal sovereignty interpretation is pluralism. Pluralism claims that contract law serves multiple, competing values. Unlike the personal sovereignty interpretation, the pluralist interpretation fits both ex ante and ex post

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116. *Id.* at 257.

117. *Id.*

118.

When a judge declares that a particular principle is instinct in law, he reports . . . an interpretive proposal: that the principle both fits and justifies some complex part of legal practice, that it provides an attractive way to see, in the structure of that practice, the consistency of principle integrity requires.

*Id.* at 228. For Dworkin's understanding of the relationship between interpretations of law generally, and interpretations of particular "departments" of law, such as contract or tort law, see *id.* at 250–54.

doctrines. Instead of treating the ex post doctrines as legal error, pluralism explains them as just one among many kinds of doctrines vindicating multiple values that compete with, and sometimes trump, personal sovereignty. For pluralists, the purpose of contract law is to vindicate, and resolve conflicts between, the many competing values at stake in contract cases.<sup>119</sup> Pluralists argue, therefore, that pluralism is superior to the personal sovereignty interpretation because only pluralism “fits” with the judicial and black letter practice of recognizing the ex post doctrines as legally valid.<sup>120</sup>

In the remainder of this Part, we address the relative merits of the personal sovereignty and pluralist interpretations of contract law. We argue in Section II.B that the personal sovereignty interpretation achieves a better overall balance between the fit and moral light criteria than pluralism achieves. In Section II.C we consider the doctrines that pluralists cite as evidence that contract law vindicates multiple values rather than just the value of personal sovereignty. We show that, with the exception of the ex post doctrines, all of them vindicate personal sovereignty rather than some other value. We then consider the ex post doctrines in Section II.D and argue that they either vindicate no value at all, and perversely undermine justice between the parties, or serve to promote either paternalism or anti-opportunism. We conclude that neither paternalism nor anti-opportunism can justify the existence of ex post doctrines, or the ex post perspective generally, in contract law.

## B. PLURALISM AND FIT

Pluralism’s superior fit with contract law does not provide a reason to prefer it over the personal sovereignty interpretation. This is because pluralism lacks the theoretical resources needed to identify as invalid one among multiple doctrines that may comprise contract law. Given that courts can and do make mistakes, one criterion of adequacy for explanatory legal theories is that they can, at least in principle, determine that doctrines long recognized as valid by legally authoritative sources are nonetheless invalid.<sup>121</sup> Because pluralism fails this test, it begs the question against the

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119. See Eisenberg, *supra* note 37, and accompanying text (setting out the principal pluralist claims).

120. *Id.*

121. See, e.g., *INS v. Chada*, 462 U.S. 919, 979 n.16 (1983) (White, J., dissenting) (“[F]or 40 years Congress has insisted on retaining a voice on individual suspension cases—it has frequently rejected bills which would place final authority in the Executive Branch.”); *id.* at 967 (“Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.’”); *id.* at 1002 (“[This decision] reflects a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state. Today’s decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history.”).

personal sovereignty interpretation, which concludes that the *ex post* doctrines are legally invalid, despite their preinterpretive status as legally valid contract doctrines.

Moreover, pluralism is incapable of determining whether the best interpretation of an area of law should understand its purpose to be the vindication of multiple values, or the vindication of only one value, even though it erroneously includes some doctrines that vindicate other values. Put simply, pluralism cannot designate any doctrine as anomalous. In the end, pluralism makes the purely formal claim that an area of law vindicates more than one value, but lacks the theoretical resources to reject doctrines as invalid or to advance any substantive explanatory or normative claim beyond its assertion that an area of law has a value headcount of greater than one.

### C. REFUTING DOCTRINAL EVIDENCE OF PLURALISM: POLICING THE BARGAIN AND SOCIAL JUSTICE

There is widespread agreement, even among pluralists, that the *ex ante* perspective grounds many of the core doctrines of contract law. The law of offer and acceptance,<sup>122</sup> the basis of contract in promise,<sup>123</sup> the objective theory of intent,<sup>124</sup> and the indefiniteness doctrine<sup>125</sup> are just a few examples of contract rules clearly designed to facilitate the making, interpretation, and enforcement of agreements. Few would disagree that these and similar core structural components of contract law serve to vindicate some conception of individual autonomy. But contract law also contains a set of doctrines designed to “police” the bargains that give rise to agreements. If a bargain violates one of these doctrines, it might not be legally enforceable. These include the doctrines of capacity,<sup>126</sup> duress,<sup>127</sup> fraud,<sup>128</sup> mistake,<sup>129</sup> and procedural unconscionability. In this section, we explain why these doctrines clearly vindicate personal sovereignty rather than some competing value.

#### 1. Policing the Bargain

The capacity doctrine prevents enforcement of any agreement reached with an individual who does not qualify as a morally responsible agent because, for example, he or she is under the age of majority or mentally

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122. See RESTATEMENT (SECOND) OF CONTRACTS §§ 18–70 (AM. LAW INST. 1981).

123. See *id.* §§ 1–5.

124. See *id.* § 2.

125. See *id.* §§ 33–34.

126. See *id.* §§ 12–16.

127. See *id.* §§ 174–177.

128. See *id.* §§ 159–173.

129. See *id.* §§ 151–158.



incapacitated.<sup>130</sup> The duress doctrine prevents enforcement of any agreement to which a party's assent was not fully voluntary.<sup>131</sup> The fraud doctrines, such as intentional misrepresentation and fraudulent concealment, prevent enforcement of any agreement induced by one party's false assertions or efforts to prevent the other from discovering material truths regarding the subject matter of their agreement.<sup>132</sup> The mistake doctrines prevent enforcement of apparent agreements in which one or both parties failed to understand the nature of the agreement, and so actually did not in fact reach any agreement.<sup>133</sup> Finally, procedural unconscionability expands beyond the technical limits of the above doctrines to prevent enforcement of agreements reached under conditions in which one party took unfair advantage of the other. For example, it polices against actions taken for the sole purpose of deliberately misleading, discouraging, or preventing the other from discovering or understanding the true nature or value of their transaction.<sup>134</sup> The classic case is a seller using a pre-printed, standard sales form that states terms disadvantageous to the buyer in a smaller font than the other terms.<sup>135</sup> Taken together, these doctrines erect a bulwark to ensure that contract law respects the value of personal sovereignty by enforcing only agreements reached by morally responsible individuals under free and fair conditions. They certainly provide no support for the pluralist claim that contract law vindicates values other than personal sovereignty.

## 2. Social Justice

Pluralists also cite another set of doctrines as evidence that contract law vindicates values that compete with individual autonomy and thus with personal sovereignty. These doctrines include illegality, immorality, and public policy.<sup>136</sup> For the most part, each of these doctrines vindicates values that sound in what we have called social justice. In particular, they often prevent the enforcement of agreements reached under free and fair conditions that impose costs on third parties, or in the parlance of economics, cause "negative externalities." For example, by voiding contracts for an illegal purpose, the illegality doctrine makes it more difficult for individuals to commit crimes, and many criminal laws prohibit activities that wrongfully harm others.<sup>137</sup> To the extent that the illegality doctrine serves to prevent

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130. See SCOTT & KRAUS, *supra* note 74, at 464–80.

131. *Id.* at 403–20.

132. *Id.* at 420–64.

133. *Id.* at 691–725.

134. *Id.* at 501–14.

135. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

136. For discussion, see SCOTT & KRAUS, *supra* note 74, at 480–500.

137. See, e.g., *Watts v. Malatesta*, 186 N.E. 210 (N.Y. 1933).

such crimes, it serves social justice so understood.<sup>138</sup>

Like the illegality and immorality doctrines, courts sometimes invoke public policy to invalidate bargains that would offend basic notions of human dignity, such as contracts for surrogacy, the sale of body parts, indentured servitude, torture, and the like.<sup>139</sup> Some have argued that the public policy doctrine, when used as a ground to prohibit enforcement of such agreements, reinforces the value of individual autonomy by respecting the inalienable rights of autonomous individuals.<sup>140</sup> Others have argued that respect for individual autonomy is, in principle, incompatible with the legal prohibition of these contracts because truly autonomous individuals are free to alienate their own autonomy.<sup>141</sup> The compatibility of the public policy doctrine with respect for personal sovereignty thus turns on this debate over the foundations and limits of individual autonomy. But as with the illegality and immorality doctrines, the invalidation of such contracts can often be justified again on the ground that doing so is necessary to prevent harm to others not engaging in those activities (or because it is practically impossible to meet the extremely high standard for ensuring that such agreements are truly voluntary). The social “spillover effects” of these activities alone is likely to incentivize sufficiently harmful activity to justify these prohibitions. In short,

138. If there are so-called victimless crimes, as is conceivable, for example, for certain instances of prostitution, gambling, and suicide, then the illegality doctrine cannot be justified on the ground that it prevents harm to others. Legal prohibition of victimless crimes constitutes a form of legal moralism, which condones legislation that restricts individual liberty in order to vindicate a socially designated conception of the good. If the public policy doctrine refuses to enforce agreements because they further a purpose deemed immoral according to a designated social conception of the good, the doctrine is incompatible with respect for individual autonomy. But often, the same activities can be prohibited on the quite plausible ground that they are likely to cause widespread and serious harm to those not engaged in those activities, as is likely true of the most common forms of prostitution, gambling, and suicide.

139. See generally *In re Baby M*, 537 A.2d 1227 (N.J. 1988). Some courts and commentators justify invalidation of such contracts on the grounds of substantive unconscionability. See RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. c (“Theoretically it is possible for a contract to be oppressive taken as a whole, even though there is no weakness in the bargaining process . . .”); *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 829 (N.Y. 1988); see also Eisenberg, *supra* note 37.

140. The locus classicus for this position is JOHN STUART MILL, ON LIBERTY 194–95 (Alburey Castell ed., 1947) (“The ground for thus limiting his power of voluntarily disposing of his own lot in life, is apparent, and is very clearly seen in this extreme case . . . [B]y selling himself for a slave, he abdicates his liberty; he foregoes any future use of it, beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself.”); see also David Archard, *Freedom Not to be Free: The Case of the Slavery Contract in J. S. Mill’s on Liberty*, 40 PHIL. Q. 453 (1990); David Brink, *Mill’s Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/mill-moral-political> [<https://perma.cc/ZAG2-ANKY>] (“Mill thinks that it is impermissible to contract into slavery and that paternalistic laws that prevent such contracts are not only permissible but obligatory.” (citing MILL, *supra*)).

141. The most influential contemporary defense of this position is ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 331 (1974) (“The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would.”). See generally David Ellerman, *Inalienable Rights: A Litmus Test for Liberal Theories of Justice*, 29 LAW & PHIL. 571 (2010); J. Philmore, *The Libertarian Case For Slavery*, 14 PHIL. F. 43 (1982).

the illegality, immorality, and public policy doctrines are justified as reasonably necessary to prevent social harm, and therefore are, at least to that extent, fully compatible with respect for personal sovereignty.

In sum, a careful examination of the doctrines pluralists cite as evidence that contract law pursues multiple purposes reveals that most of them actually ensure that contract law respects both individual autonomy and social justice. In our view, both of these kinds of doctrines support our claim that contract law is exclusively devoted to vindicating personal sovereignty. Obviously, the autonomy-respecting doctrines are fully compatible with the personal sovereignty account of contract law. However, the doctrines that serve social justice are also similarly harmonious with our claim that contract law is devoted exclusively to vindicating personal sovereignty. The value of personal sovereignty gives no license to engage in activities that create an unacceptable, material risk of harm to others. To be sure, there are many other areas of law that contain doctrines serving social justice, including tort and criminal law. But the existence of contract law itself makes the contract-specific social justice doctrines necessary. Once the law of contract committed to respecting individual autonomy fully by empowering individuals to make legally enforceable agreements, social justice required that contract law itself include doctrines to confine its mandate to the limits of its own justification. The social justice contract doctrines, therefore, serve as constitutive components of the personal sovereignty regime, policing the boundaries of contract from within contract law itself.

#### D. REFUTING DOCTRINAL EVIDENCE OF PLURALISM: THE EX POST DOCTRINES

Once the social justice contract doctrines are understood to be compatible with, rather than inconsistent with, the personal sovereignty interpretation of contract law, the case for pluralism rests entirely on the existence of the ex post doctrines. Pluralists often cite the penalty rule, the compensation principle, and the doctrines of forfeiture and excuse from hardship as examples of contract doctrines that vindicate values that compete with personal sovereignty.<sup>142</sup> All of these doctrines claim to vindicate the value of ex post justice, which pluralists claim can override the value of personal sovereignty.

There is no doubt that courts and other legally authoritative sources recognize these ex post doctrines, and these doctrines therefore qualify as part of the legal data for which interpretations of contract law must account. It is also clear that all of these doctrines originated long before the modern

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142. See *supra* notes 15–28 and accompanying text.

transformation of American contract law, and that they served to police against abuses arising out of the widespread use of penal bonds to structure commercial transactions. In addition, it is equally clear that this rationale for the ex post doctrines ceased to exist after the creation of contract law's extensive doctrinal apparatus for interpreting and enforcing executory agreements, which obviated the need for penal bonds. The question, then, is whether these doctrines have been judicially adapted to serve another valid purpose.

### 1. The Ex Post Doctrines and Social Justice

Given that the ex post doctrines invite courts to vitiate the ex ante intent of the parties, it is natural to wonder whether they are actually part of contract law's social justice doctrines. After all, social justice doctrines also serve to limit enforcement of agreements reached under free and fair conditions. But the common denominator among the ex post doctrines is that they are grounded solely in a concern to ensure what we have called "individual justice," or justice and fairness *between the parties*. None purports to upset the parties' intent in order to prevent harm to others. The compensation principle, the penalty doctrine, and the forfeiture doctrine claim to prevent an injustice or unfairness to one of the parties that would result from enforcement, not to prevent a social harm.

Recall that a liquidated damages clause substantially in excess of (ex post) compensatory damages is treated as an unjust and unfair penalty to the breacher, and an unjust and unfair windfall to the non-breacher.<sup>143</sup> Likewise, in *Jacob & Youngs, Inc. v. Kent*,<sup>144</sup> an interpretation construing the owner's obligation to pay the last progress payment as conditional on the builder's perfect completion of the house is taken to impose an unjust and unfair forfeiture on the builder who tenders an imperfect house, and to confer an unjust and unfair windfall on the owner.<sup>145</sup> These doctrines base their findings of injustice and unfairness on a normative evaluation of the distribution of gains and losses at the time of breach that would result from enforcing the ex ante agreement. According to this evaluation, a disproportionate distribution of gains and losses are taken to offend ex post principles of justice and fairness. The value served by the ex post contract doctrines, therefore, is certainly not a species of social justice. Instead, the ex post doctrines purport to be a species of *individual justice*, which

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143. See *supra* notes 60–65 and accompanying text.

144. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921). For a critique of the conventional framing in the *Jacob & Youngs* case as constituting an unjust forfeiture for the homeowner and a windfall for the builder, see Kraus & Scott, *supra* note 83, at 1095–97; Schwartz & Scott, *supra* note 8.

145. See *supra* note 27.

addresses the claims available *to the parties* for objecting to the effects *on them* of enforcing their own agreement.

## 2. The Ex Post Doctrines and Individual Justice: The Ex Post Fallacy

No one disputes that enforcement of an agreement is individually just only if it was reached under free and fair conditions, and that the ex ante doctrines discussed above ensure that contract law enforces only these agreements. The ex post doctrines, however, imply that the ex ante doctrines set out the necessary but not sufficient conditions for securing individual justice. The ex post doctrines presuppose that individual justice has two prongs: the ex ante and the ex post. Thus, an agreement can be individually just when reached (because it was reached under free and fair conditions) but individually unjust to enforce at the time of adjudication, in light of events that occurred only after formation of the agreement. As the above examples demonstrate, the ex post doctrines are premised on the possibility that parties can consent under free and fair conditions to an agreement that turns out to violate the compensatory and proportionality criteria for justice and fairness at the time of adjudication.

In our view, this two-prong understanding of individual justice is based on a conceptual confusion, which we call the ex post fallacy. This fallacy consists of the belief that the allocation of gains and losses between the parties that would result from enforcement at the time of adjudication is relevant to the individual justice and fairness of enforcing their agreement. The fallacy derives from the ubiquitous judicial practice of determining liability from the ex ante perspective but determining remedy from the ex post perspective. The common law has for centuries understood the justice and fairness of a remedy to be logically independent of the theory of legal liability. Thus, the legal remedy to which a plaintiff is entitled never turns on why the defendant was found legally responsible for causing harm to the plaintiff. For example, the remedy to which a plaintiff is entitled is the same whether the plaintiff's harm was caused by a defendant's negligent driving, libelous slander, or physical trespass. In every case, once the court determines that the defendant is liable, the ground for liability has no bearing on the remedy it imposes. The remedial objective in all cases is to restore the plaintiff to the position it was in before it suffered the harm caused by the defendant. A remedy is just and fair, using this approach, if and only if it requires the defendant to pay no more or less than is necessary to compensate the plaintiff for loss the defendant wrongfully caused.

Unsurprisingly, courts accustomed to this intuitive and sound remedial framework for all common law claims prior to the transformation of American contract law have been inclined to take the same approach in

modern contract cases. They have presumed that the remedy to which a plaintiff is entitled is the same for harms caused by the defendant's breach of contract as it is for harms caused by any other conduct for which the defendant is legally responsible, such as negligent conduct in tort or trespass in property. But unlike defendants who cause harm to plaintiffs through their negligence or trespass, defendants who cause harm to plaintiffs by breaching an agreement have always had the prior opportunity, when contemplating the possibility of breach, to agree with the plaintiff on the consequences to the defendant in the event of breach.<sup>146</sup> Indeed, if the defendant paid the plaintiff in advance to agree that the plaintiff would be entitled to only half of any harm caused by the defendant's breach, a remedy requiring the defendant pay the full harm caused by its breach would be unjust and unfair to both parties. It would be unjust and unfair to the defendant because it already paid to transfer the risk of half of any loss from breach to the plaintiff. And it would be unjust and unfair to allow the plaintiff both to receive a payment for assuming the risk of half the loss of any breach, and yet also to be reimbursed for the entire loss caused by breach.<sup>147</sup>

146. The ability of contracting parties to determine the remedy for breach *ex ante*, unlike tort victims, was forcefully made by Justice Holmes in *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1903) (“When a man commits a tort, he incurs, by force of the law, a liability to damages, measured by certain rules. When a man makes a contract, he incurs, by force of the law, a liability to damages, unless a certain promised event comes to pass. *But, unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured . . .* It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter.” (emphasis added)).

147. Seana Shiffrin rejects the view that the common law bar against under or over-compensatory liquidated damage clauses should be viewed “as an anomalous historical remnant.” Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 412 (2016). She justifies the bar on the ground that it prevents contracting parties from “tread[ing] upon the traditional domain of the judiciary and on significant values associated with the rule of law. These other considerations should supersede appeals to the efficiency of the contracting relation and the *ex ante* agreements of the parties.” *Id.* at 413. According to Shiffrin, “values served by having the judiciary independently assess and mete out remedies,” as well as the need “to protect the reputation and the integrity of the judiciary as an impartial institution,” override the value of respecting the parties’ personal sovereignty by enforcing their *ex ante* remedial agreements. *Id.* at 421–22.

“[W]hen remedial clauses are at issue, the judiciary’s role goes beyond that of protecting and facilitating autonomous agreements. If a remedial clause is at issue, then we have an abrogation of a legal duty, which implicates the rule of law, independent of the underlying purposes of the contract law. The parties’ own autonomy interests . . . [do] not suggest a reason to think that determining the public response to an abrogation of a legal duty also falls under their private control.”

*Id.* at 435.

But the historical period during which the remediation for common law wrongs was the traditional domain of the judiciary almost entirely precedes the rise of executory contracts and the transformation of American contract law. Our claim is that Shiffrin’s argument—extending into the domain of modern American contract law the traditional common law conception of remedy as the exclusive province of the judiciary—exceeds its original rationale. Whereas the judicial determination of common law wrongs outside of modern American contract law still makes sense, there is no justification

Thus, in non-contract cases, although the *ex ante* perspective governs liability, only the *ex post* perspective governs remedy. But in contract cases, the agreement changes everything: the *ex ante* perspective governs the justice and fairness of both liability *and* remedy. Judicial recourse to the *ex post* perspective at the remedial phase of a contracts case is an understandable but mistaken instinct borne of the longstanding practice of determining remedies from the *ex post* perspective in all common law cases, a practice that pre-dates the transformation of American contract law. But the use of the *ex post* perspective to determine remedies for breach of contract under the modern law of contracts perversely undermines the goal of treating the parties justly and fairly. The *ex post* fallacy, then, is a product of the (understandable) failure of common law courts to appreciate the anachronism of the *ex post* perspective in modern contract law adjudication.

Unfortunately, the *ex post* fallacy has led some courts to conform to a proportionality standard in the distribution of contractual gains and losses at the time of adjudication despite the parties' *ex ante* contractual allocation of risks.<sup>148</sup> The *ex post* fallacy has led to the assumption that disputes should be resolved, when possible, in order to avoid disproportionate gains and losses, even if the dispute is governed by an agreement in which both parties freely and fairly agreed to take the risk of precisely such an outcome.<sup>149</sup> To be sure, these courts do not abrogate contractual terms outright in order to ensure conformity with an *ex post* proportionality standard. Rather, relying on doctrines governing forfeiture and excuse from hardship,<sup>150</sup> they typically distort their interpretation of terms to avoid such outcomes, often by arguing that, despite clear language indicating otherwise, parties would not have agreed to such an unfairly disproportionate outcome.<sup>151</sup> But if individual justice requires respect for the parties' freely and fairly chosen contract terms, and these terms allocate the risk of a disproportionate outcome to a given party, then the resolution of a dispute according to those terms is not unjust to that party, even if it imposes on him the lion's share of the contractual losses.

In short, the *ex post* fallacy tempts courts to beg the question by

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for overriding the parties' *ex ante* intent when they agree in their contract on the consequences of breach. Shiffrin's justification—the need for courts to ensure the just remediation of wrongs—begs the question by presuming that enforcement of remedial clauses (to which the parties agreed under free and fair conditions) sometimes conflicts with the requirements of remedial justice. Her view rests, therefore, on the assumption that individual justice sometimes turns on *ex post* considerations. Our claim, however, is that there is no defensible *ex post* conception of individual justice.

148. See *infra* notes 222–25 and accompanying text.

149. See *infra* notes 209–10 and accompanying text.

150. See *infra* notes 211–25 and accompanying text.

151. See *infra* note 208 and accompanying text.

claiming that because disproportionate outcomes are *necessarily* unjust and unfair, they should presume that parties bargaining under fair conditions would not have agreed to take the risk of such an unjust outcome.<sup>152</sup> But there is no reason to reject disproportionate outcomes of contracts formed under free and fair conditions as necessarily individually unjust and unfair. The justice and fairness of all contractual outcomes depend on the free and fair allocation of risks specified by the contract's terms, not any objective characteristics of the distribution of gains and losses at the time of adjudication.

### 3. Ex Post Doctrines and Paternalism

Individual justice does not turn on the relative distribution of gains and losses at the time of adjudication. It might turn, however, on the sheer magnitude of the harm that one party suffers as a result of a disproportionate outcome. Pluralists have claimed that by endorsing and applying ex post doctrines, courts are vindicating a paternalistic conception of individual good that licenses courts to override individual autonomy under the conditions provided for by the ex post doctrines.<sup>153</sup> On this view, individual justice requires respect for both individual autonomy and an individual's good, and contract law has doctrines that vindicate both. But whether such a view of contract law is coherent depends on the conceptions of individual autonomy and paternalism that contract law is taken to embrace. Joel Feinberg describes a "compromise" between autonomy and an individual's own good that could coherently vindicate both values:

[A] person's own good in the vast majority of cases will be most reliably furthered if he is allowed to make his own choices in self-regarding matters, but when self-interest and self-determination do not coincide, one [could] simply do one's best to balance autonomy against personal well-being, and decide between them intuitively, since neither has automatic priority over the other.<sup>154</sup>

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152. See, e.g., *Aluminum Co. of America v. Essex Grp., Inc.*, 499 F. Supp. 53, 69 (W.D. Pa. 1980) (holding that Alcoa's failure to include a term reducing the risk of a wide disparity between contract and market prices "can only be understood to imply that the parties deemed the risk too remote and their meaning too clear to trifle with additional negotiation and drafting"); see also *infra* notes 212–26 and accompanying text.

153. As an example of such a claim, see Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995) (justifying the penalty rule and other ex post doctrines on the grounds of individuals' propensity to err).

154. FEINBERG, *supra* note 11, at 59–60. Feinberg describes three other possible relationships between autonomy and paternalism, but none of them are open to the pluralist that claims contract law endorses the conception of autonomy vindicated by the ex ante doctrines as well as a conception of paternalism strong enough to account for the ex post doctrines' capacity to override the ex ante doctrines. The first renders the right of self-determination "entirely derivative and instrumental. On this view, we may exercise a right to self-determination only because, and only insofar as, it promotes our good to do so." *Id.* at 58. We presume that even the pluralist concedes that such a weak and empty conception of



The problem with this compromise position is that it must interpret the *ex ante* contract doctrines as vindicating a relatively weak conception of individual autonomy, compared to the personal sovereignty conception, and by doing so casts contract law in a less compelling moral light than the personal sovereignty interpretation. Feinberg explains that the personal sovereignty conception rejects this compromise because it “follows from a pure conception of individual sovereign autonomy, and anyone who holds such a conception, tacitly or explicitly, can find no appeal in—indeed is logically precluded from embracing—legal paternalism.”<sup>155</sup> Thus, the compromise position “will not satisfy the liberal adherent of personal sovereignty since it restricts individual authority to some degree even in the wholly self-regarding domain. . . . [It] allows room for personal autonomy but does not conceive of it on the model of territorial sovereignty, since it permits it to be balanced against other considerations, and thereby deprives it of its trumping effect.”<sup>156</sup>

We believe that contract law’s *ex ante* doctrines are most plausibly interpreted as vindicating an “underivative sovereign right of self-determination,”<sup>157</sup> one which “accords uniquely with a self-conception deeply imbedded in the moral attitudes of most people.”<sup>158</sup> The pluralist who endorses the paternalistic interpretation of the *ex post* doctrines must insist on an interpretation of the *ex ante* contract doctrines that reject this powerful conception of individual autonomy in favor of one that allows a court to subordinate an individual’s own freely and fairly made choices to a court’s judgment of what would best serve that individual’s interests. American contract law, in our view, definitively rejects this view. We think Feinberg accurately captures the spirit of the modern American common law of

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individual autonomy cannot account for the breadth and depth of the express reasoning and application of the *ex ante* contract doctrines. The second takes the right of self-determination always to override concerns for an individual’s personal good (because overriding self-determination, as an empirical matter, will always be self-defeating given the psychological costs on doing so on the individual whose self-determination is undermined). *Id.* at 59. This conception is obviously too strong for the pluralist, who insists that the *ex post* doctrines sometimes justify the overriding of *ex ante* intent, and thereby defeating the parties’ efforts at self-determination. The third version is the personal sovereignty conception, which gives no quarter to paternalism even in principle, and so, like the second version, cannot account for the capacity of *ex post* doctrines to override the parties’ intent. (“[This interpretation] that follows from a pure conception of individual sovereign autonomy, and anyone who holds such a conception . . . can find no appeal in—indeed is logically precluded from embracing—legal paternalism.”) *Id.* at 59.

155. *Id.* at 59, 61 (“[A] person’s right of self-determination, being sovereign, takes precedence even over his own good. Interference in these cases is justified only when necessary to determine whether his choice is voluntary, hence truly his, or to protect him from choices that are not truly his; but interference with his informed and genuine choices is not justified to protect him from unwisely incurred or risked harms. He has a sovereign right to choose in a manner we think, plausibly enough, to be foolish, provided only that the choices are truly voluntary.”).

156. *Id.* at 60.

157. *Id.* at 61.

158. *Id.* at 61–62.

contract when he summarizes the conviction inherent in the personal sovereignty conception of individual autonomy:

Even in the cases where the person subsequently regrets his choice, he may not regret that he had not been forcibly prevented from making it. There must be a right to err, to be mistaken, to decide foolishly, to take big risks, if there is to be any meaningful self-rule; without it, the whole idea of *de jure* autonomy begins to unravel.<sup>159</sup>

The paternalistic interpretation of the value underlying the ex post contract doctrines requires the pluralist to deprive the vast majority of contract doctrines of their most powerful and intuitive moral justification—the vindication of not merely any conception of individual autonomy, but of personal sovereignty. Given that the ex post doctrines comprise a small percentage of contract doctrine, and are directly applied only infrequently in litigation, this pluralist interpretation comes at too high a cost on the Dworkinian balance between the criteria of fit and best moral light. The personal sovereignty interpretation casts contract law in a far better moral light than this pluralist interpretation and more than compensates, in our view, for the relative sacrifice in fit required by treating ex post doctrines as understandable legal error rather than valid components of contract law.

#### 4. Ex Post Doctrines and Opportunism

The scholarly support for equity in general, and in contract law in particular, has experienced a gradual renaissance over the last several decades.<sup>160</sup> Rather than grounding equity, and contract law's ex post doctrines, in paternalism, these scholars claim these doctrines serve the purpose of preventing opportunism.<sup>161</sup> Proponents of the anti-opportunism rationale for the ex post contract doctrines define "opportunism" in the contractual setting as

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159. *Id.* at 62. Feinberg defines "*de jure*" autonomy as "the sovereign right of self-government" and contrasts it with "*de facto*" autonomy, which he defines as "the actual condition of self-government." *Id.* at 65.

160. See, e.g., Ayotte, Friedman, & Smith, *supra* note 38; Cohen, *supra* note 38; Juliet P. Kostritsky, *Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation*, 96 KY. L.J. 43 (2007); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981). On equity more generally, see also Henry E. Smith, *Equitable Defences as Meta-Law*, in DEFENCES IN EQUITY 17 (Paul S. Davies, Simon Douglas & James Goudkamp eds., 2018); Henry E. Smith, *Fusing the Equitable Function in Private Law*, in PRIVATE LAW IN THE 21ST CENTURY 173 (Kit Barker, Karen Fairweather & Ross Grantham eds., 2017); Yuval Feldman & Henry E. Smith, *Behavioral Equity*, 170 J. INSTITUTIONAL & THEORETICAL ECON. 137 (2014).

161. Unfortunately, the key concept of "opportunism" is notoriously difficult to define. Oliver Williamson, the father of the concept, defined it vaguely as "self-interest seeking with guile." OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 47 (1985).

a special case . . . that gets past other devices for dealing with it. Opportunism in general appears to contain an element of deceit because the opportunist takes unanticipated or unintended advantage of the law to the detriment of others . . . In the contractual context, its unanticipated or unintended nature takes the behavior out of the shared contemplation of the parties, but perhaps not out of the plans of the opportunist . . . [T]he opportunist takes advantage of unusual knowledge about gaps in the contract or in the law. So opportunism is using the law (or contract) in a way that it is not intended, and can at most be anticipated in a general (and behavior-distorting) sense.<sup>162</sup>

Our present inquiry is whether anti-opportunism provides a rationale for the ex post doctrines that leaves the pluralist in a stronger position than did their paternalist rationale. The anti-opportunism rationale does, in fact, purport to reconcile the ex post doctrines with respect for personal sovereignty. Scholars defending the “safety valve model of equity” argue that equity “has a role even in an area of law as centered on party autonomy and intent as contracts.”<sup>163</sup> They claim that “opportunists are operating outside of the domain of what was actually contracted about.”<sup>164</sup> No matter what contractual measures the parties might have taken to anticipate and prevent opportunism, those measures hold “only over the domain over which the parties contract, or, more accurately over the domain over which the parties can be expected to contract cost-effectively.”<sup>165</sup>

The idea that contract terms are domain-specific is, in fact, the explicit premise of ex post doctrines, such as mutual mistake, commercial impracticability, and frustration of performance. As the Restatement (Second) of Contracts defines them, each of these grounds of excuse from hardship is predicated on the possibility that

[a]n extraordinary circumstance may make performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance. In such a case the court must determine whether justice requires a departure from the general rule that the obligor bear the risk that the contract may become more burdensome or less desirable. . . . [T]he central inquiry is whether the non-occurrence of the circumstance was a ‘*basic assumption on which the contract was made.*’”<sup>166</sup>

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162. Ayotte, Friedman & Smith, *supra* note 38, at 25. George Cohen provides an alternative definition of “opportunism” in the contract setting as “any contractual conduct by one party contrary to the other party’s reasonable expectations based on the parties’ agreement, contractual norms, or conventional morality.” Cohen, *supra* note 38, at 957.

163. Ayotte, Friedman & Smith, *supra* note 38, at 29.

164. *Id.*

165. *Id.* at 30.

166. RESTATEMENT (SECOND) OF CONTRACTS ch. 11, intro. note (AM. LAW INST. 1981) (emphasis

According to the “basic assumption” requirement, the ex post doctrines would apply only in circumstances that the parties failed to anticipate, or anticipated but failed to address, in their contract. Thus, rather than vitiating the parties’ intent, they serve to fill gaps not covered by the parties’ intent.

The key to the anti-opportunism rationale, therefore, is that opportunistic behavior always qualifies as a failure of a basic assumption, and any intervention to address a failure of a basic assumption cannot possibly violate personal sovereignty.<sup>167</sup> As proponents of this defense have defined it, opportunistic behavior is necessarily impossible to anticipate and cost-effectively address in advance. Therefore, when it occurs, it is necessarily beyond the scope of the parties’ agreement and constitutes a failure of a basic assumption. Ex post equitable intervention under such circumstances therefore never vitiates the parties’ consent but rather fills gaps not covered by the contract.

The anti-opportunism defense of ex post doctrines, therefore, provides a better interpretation of contract law only if the basic assumption requirement makes them consistent with respect for personal sovereignty. It does not. It is true that there will always be some circumstances beyond the contemplation of the parties at the time of formation. It does not, however, follow from this truism that the parties cannot agree on whether their terms will control such circumstances anyway, no matter what the result. Indeed, every contracting party knows that there are circumstances beyond their contemplation that may upset their expectations. To be sure, it is possible that parties will prefer to limit the application of their agreement to the circumstances within their contemplation and license a court to resolve disputes arising under any other circumstances.<sup>168</sup> But it is also possible that parties will agree that their terms should apply even in circumstances that are beyond their contemplation. In such cases, although the parties by definition did not foresee the circumstances that have materialized, they foresaw the possibility that unforeseeable circumstances might materialize and agreed that their terms should nevertheless govern such cases.<sup>169</sup>

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added).

167. “[C]ombating opportunism has to be at least in part judicial because of the open-endedness of opportunism. The ability of a better informed party to engage in opportunism is hard to bound: opportunism might occur on as yet unknown and undefined margins.” Ayotte, Friedman & Smith, *supra* note 38, at 28.

168. Indeed, if most parties have this preference, contract law should have a default rule that implies a term licensing such intervention in every contract.

169. George Triantis has challenged the assumption that contracting parties are unable rationally to manage and allocate risks of unanticipated events:

While an unknown risk cannot be priced and allocated specifically, it can be priced and allocated as part of the package of a more broadly framed risk. For example, consider a party who agrees to transport a shipment of goods for a fixed fee. The risk of a nuclear accident in the Middle East that causes a dramatic decrease in the production of oil and a consequent

The ex post doctrines, however, do not confine ex post judicial intervention to contracts in which the parties explicitly or implicitly subjected their agreements to judicial intervention when unanticipated circumstances materialize. Instead, they subject every contract to such review, irrespective of whether parties have explicitly disavowed their consent to such intervention.<sup>170</sup> The idea that every contract is necessarily intended to be subject to a basic assumption inquiry is false. Parties can and do anticipate that there may be unanticipated circumstances, and yet provide that their contract applies to such circumstances. When they do, and the ex post doctrines nonetheless license courts to override the parties' intent anyway, they violate the parties' personal sovereignty.

## 5. Summary

The personal sovereignty interpretation of contract law provides a more morally compelling justification for the ex ante doctrines, and therefore casts contract law in a better moral light, than pluralist interpretations that recognize the ex post doctrines as valid and ground them in either paternalism or anti-opportunism. In the end, both purported justifications for the ex post doctrines render them fundamentally incompatible with respect for personal sovereignty and thus require the pluralist interpretation to ground the ex ante doctrines on a conception of individual autonomy that is morally less compelling than personal sovereignty. In our view, the personal sovereignty interpretation is justified in treating the ex post doctrines as legal error in order to cast the vast majority of contract law in the best moral light possible. Moreover, by explaining the seductive appeal of the ex post fallacy that separates liability and remedy, the personal sovereignty interpretation casts this sustained judicial error in a historically understandable and psychologically plausible light as well.

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increase in its price might not be foreseen. As a result, this risk cannot be allocated explicitly in the contract. However, the broader risk of a large increase in the price of oil for any reason can be. Therefore, there is no gap to be filled by the doctrine of impracticability: the risk of nuclear accident, though unforeseen, is allocated implicitly. Instead, the doctrine alters the contractual allocation of the risk and its proponents must advance a rationale for the reallocation.

George G. Triantis, *Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability*, 42 U. TORONTO L.J. 450, 452 (1992).

170. The anti-opportunist argument for equity explicitly contemplates that the ex post doctrines should apply even if the parties expressly reject them:

The ability of a better informed party to engage in opportunism is hard to bound: opportunism might occur on as yet unknown and undefined margins. It is not enough to say that contract law will supply defaults for incomplete contracts or that problems can be left to renegotiation. The problem is that widening the contractual domain (the state space it covers) might lead to the opposite from what one of the parties expected. Although our model provides a reason to think that equity should be a strong default, these considerations of uncertainty point to how the model might be extended to provide a *rationale for mandatory equity* in some circumstances.

Ayotte, Friedman & Smith, *supra* note 38, at 28 (emphasis added).

## III. THE HARMS OF THE EX POST PERSPECTIVE

As we showed in Part I, the penalty rule, the just compensation principle, and the rules ranging from forfeiture to excuse from hardship are vestiges of the centuries-long tradition of policing penal bonds, a tradition begun at equity and transplanted into the common law. While few contemporary cases invoke these doctrines directly, they cast a long shadow over the ability of contracting parties to implement their *ex ante* intentions. The *ex post* fallacy continues to influence common law judges and the insistence on separating liability and remedy in contract application provides prominent exemplars to support the claim of pluralist scholars that *ex post* fairness properly remains a doctrinal constraint on *ex ante* contracting. In contrast, as we argued in Part II, the personal sovereignty explanation of American contract law justifies the rejection of the *ex post* doctrines as legal error. In this Part, we explain how these lingering errors gratuitously increase the difficulties parties face in achieving their *ex ante* goals and thereby undermine personal sovereignty. We then illustrate how the presence of erroneous doctrine has cultivated a judicial receptivity to the *ex post* perspective more generally, fostering a judicial reluctance to apply *ex ante* doctrines rigorously and predictably.

## A. CONTEMPORARY LIMITATIONS ON CONTRACT REMEDIES

We have seen that American contract law endorses a “just compensation principle” that provides a mandatory rule of compensatory damages for breach of contract.<sup>171</sup> Parties can attempt to opt out of court-determined compensatory damages by indicating the amount to which a non-breacher will be entitled in the event of a breach, but contract doctrine constrains their choice of an appropriate liquidated or limited damage clause. The doctrine of unconscionability places a process constraint on the lower bound of limited damages,<sup>172</sup> and the penalty doctrine imposes a hard, upper bound on supra-compensatory liquidated damages.<sup>173</sup> Thus, under black-

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171. RESTATEMENT (SECOND) OF CONTRACTS § 355 cmt. a (“The purposes of awarding contract damages is to compensate the injured party.”); *id.* at ch. 16, topic 2, intro. note (“The initial assumption is that the injured party is entitled to full compensation for his actual loss.”); RESTATEMENT OF CONTRACTS § 329 (AM. LAW INST. 1932) (“Where a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused and gains prevented by the defendant’s breach . . . if established in accordance with the rules stated in §§ 330–346.”); *see also* U.C.C. § 1-305(a) (AM. LAW INST. & UNIF. LAW COMM’N 2018) (“The remedies provided by the Uniform Commercial Code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in [the Code] . . .”).

172. *See, e.g.*, U.C.C. § 2-718 cmt. 1 (“An unreasonably small amount [in liquidated damages] . . . might be stricken under the section on unconscionable contracts or clauses.”).

173. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. e (“Some types of terms are not enforced, regardless of context; examples are provisions for unreasonably large liquidated damages . . .”); *id.*

letter contract doctrine, courts will not enforce any liquidated or limited damage clause that does not fall within the range of “compensatory damages.”<sup>174</sup> By limiting the range of party freedom to choose the remedial duties triggered by breach, the mandatory liquidated and limited damages rules undermine contracting parties’ ability to choose terms that maximize the expected value of their contracts.<sup>175</sup>

American courts have partially mitigated the effects of these autonomy-limiting doctrines by permitting parties to end-run the penalty doctrine’s constraints. In Section III.A.1, we show how common law courts have sought to cabin the just compensation principle by enforcing contractual arrangements that are clearly designed to subject a breaching party to both under-compensatory and supra-compensatory damages, provided those arrangements violate only the spirit, but not the letter, of the penalty rule. Nonetheless, as we show more fully in Section III.A.2, there is little question that the penalty doctrine and its companion, the mandatory just compensation principle, impair the parties’ ex ante choices of how to allocate risks.

#### 1. Common Law Courts Require Parties to Work Around the Penalty Rule

The judicial instinct to police extortionate and fraudulently enforced penal bonds was far too ingrained by the beginning of the nineteenth century for common law courts simply to set it aside to accommodate the contractual innovations attending the industrial revolution.<sup>176</sup> Instead, they left those doctrines intact but over time allowed parties to contract around them. Well-known and time-honored drafting techniques now allow parties to include some enforceable remedial schemes that are under—or over—compensatory.<sup>177</sup>

One method of escaping the penalty rule is to frame remedial provisions as substantive terms of the contract rather than as the consequences of a contract breach. Damages, after all, are only a subset of the available choices the law gives parties to choose how and whether to terminate the contract, choices that give the promisor control over the extent of the remedial

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§ 355 cmt. a (“[C]ourts in contract cases do not award damages to punish the party in breach or to serve as an example to others unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.”).

174. See, e.g., *id.* § 356; U.C.C. § 2-718.

175. Scott & Triantis, *supra* note 67, at 1429.

176. See, e.g., *Jaquith v. Hudson*, 5 Mich. 123, 133 (1858) (adopting the principle of “just compensation for the loss or injury actually sustained” (emphasis omitted)).

177. See, e.g., *Cal. & Hawaiian Sugar Co. v. Sun Ship, Inc.*, 794 F.2d 1433, 1435 (9th Cir. 1986) (enforcing a clause providing that “if ‘Delivery of the Vessel’ was not made on ‘the Delivery Date’ of June 30, 1981, Sun would pay C and H ‘as per-day liquidated damages and not as a penalty,’ . . . ‘a reasonable measure of the damages’ [of] \$17,000 per day”).

commitment embedded in its promise. Termination provisions grant the promisor the option to terminate the contract by incurring a cost that is unrelated to compensation.<sup>178</sup> Similarly, parties may frame remedial provisions as substantive terms such as the right to cancel upon payment of a fee or loss of a deposit.<sup>179</sup> Buyers often agree to make over-compensatory payments: they pay cancellation fees for walking away from airline tickets or hotel reservations even when the seller resells their seats or rooms. Parties may also escape the compensation principle by agreeing to an explicit option<sup>180</sup> or to alternative methods of contract performance rather than providing for a primary obligation to perform and a secondary obligation to pay damages.<sup>181</sup>

This array of doctrinal work-arounds reflects the implicit judicial understanding that the penalty doctrine is at war with the animating purpose of contract law. If courts fully supported not just the letter, but the spirit, of the penalty doctrine, they would not tolerate, let alone facilitate, termination clauses and other contractual devices that, in effect, allow the parties to circumvent the purpose of that rule. Yet the longevity of the precedents creating the doctrine have thus far prevented courts from simply dismissing it as a holdover from a by-gone era that undermines parties' contractual intent. That tradition of well-established doctrine continues to constrain the doctrinal options facing common law courts and has provided a prominent exemplar to support the claim of pluralist scholars that *ex post* fairness remains a doctrinal constraint on *ex ante* contracting.<sup>182</sup>

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178. Scott & Triantis, *supra* note 67, at 1454.

179. Buyers of goods can often return goods and cancel the contract for free with no questions asked or upon the payment of a small fee. An example is the electronics store that sells television sets for \$1,000 and offers full refunds for any returns made within thirty days. This contract makes no effort to compensate the seller for losses suffered when the buyer walks away from the exchange. *Id.* at 1430–31.

180. See generally Avery Wiener Katz, *The Option Element in Contracting*, 90 VA. L. REV. 2187, 2200 (2004) (“Structuring a contract as an option can also help the parties evade the penalty doctrine . . .”).

181. Many options are categorized doctrinally as alternative contracts. Traditional analysis has distinguished the alternative provision designed to secure performance of the primary promise (a liquidated damage clause) from two promised alternatives between which the promisor can choose, each an agreed exchange for the consideration given by the promisee (an option). RESTATEMENT OF CONTRACTS § 339 cmt. f (AM. LAW INST. 1932); see also, e.g., *Garrett v. Coast & S. Fed. Sav. & Loan Ass’n*, 511 P.2d 1197, 1201 (Cal. 1973) (recognizing “validity of provisions varying the acceptable performance under a contract upon the happening of a contingency”).

182. See, for example, Melvin Eisenberg’s paternalist justification of the penalty rule on the ground, *inter alia*, that it prevents parties subject to various cognitive errors from binding themselves to supra-compensatory damages. Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1779–86 (2000).



## 2. The Compensation Principle Undermines Ex Ante Intent

We have shown how common law courts have enforced substantive terms that enable parties to avoid many of the constraints of the penalty rule and the just compensation principle. But these measures are costly and largely fail to protect liquidated damages agreements that fail to satisfy the penalty rule. *Lake River Corp. v. Carborundum Co.*<sup>183</sup> provides a salient example of the problem facing contracting parties. By striking down a “take or pay” clause that had been carefully negotiated between sophisticated parties, the court deprived a commercial seller of an important contractual protection against moral hazard risk that was paid for in the ex ante contract.<sup>184</sup> Moreover, the costs of a mandatory rule of just compensation extend beyond cases, like *Lake River*, which strike down freely negotiated liquidated damages agreements.<sup>185</sup> Individuals bargain at their peril to protect personal, sentimental, or idiosyncratic value in their contracts. Cases such as *Peevyhouse v. Garland Coal & Mining Co.*<sup>186</sup> illustrate how the just compensation principle is used to deny recovery unjustly to injured parties, and the deterrent effect of these decisions continues to prevent others from protecting important values in their contracts.<sup>187</sup>

The mandatory just compensation principle has other pernicious effects. As we explained in Part II, the ex post fallacy has led some courts to conform to a proportionality standard in the distribution of contractual gains and losses that ignores the ex ante contractual allocation of risks. Courts have denied recovery of actual losses in a number of cases in which the fear of overcompensation caused them to overturn fairly negotiated agreements designed to enhance the expected value of the contract. Consider the choice between market damages and lost profits in breached contracts for the sale of goods traded in well-developed markets. Here, common law courts have long held that market damages—the difference between contract price and market price—is the proper default measure of recovery.<sup>188</sup> In some cases,

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183. *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284 (7th Cir. 1985).

184. In questioning the continued validity of the penalty doctrine, the court stated that [T]he parties . . . will, in deciding whether to include a penalty clause in their contract, weigh the gains against the costs . . . and will include the clause only if the benefits exceed those costs as well as all other costs. On this view, the refusal to enforce penalty clauses is (at best) paternalistic—and it seems odd that courts should display parental solicitude for large corporations.

*Id.* at 1289.

185. See, e.g., *Rye v. Pub. Serv. Mut. Ins. Co.*, 315 N.E.2d 458 (N.Y. 1974); *Fisher v. Schmeling*, 520 N.W.2d 820 (N.D. 1994).

186. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962). The Oklahoma Supreme Court reaffirmed the holding in *Peevyhouse* in 1994 in a case with substantially identical facts, *Schneberger v. Apache Corp.*, 890 P.2d 847 (Okla. 1994).

187. See *supra* notes 170–74 and accompanying text.

188. See, e.g., U.C.C. §§ 2-708(1), 2-713 (AM. LAW INST. & UNIF. LAW COMM’N 2018); see

however, had the seller delivered the goods and the buyer accepted them, the injured party would not have derived its economic gain from the fluctuations in market value. In these cases, courts have too often limited the injured party to its ex post lost profits rather than apply the ex ante market damages default.

Such was the case in *Nobs Chemical, U.S.A., Inc. v. Koppers Co.*,<sup>189</sup> where the court limited the plaintiff seller to its ninety-five thousand dollars guaranteed profit and denied recovery of the three hundred thousand dollars market price differential on the ground that market damages would overcompensate the seller.<sup>190</sup> The concern that this damage measure may undercompensate mirrors the concern that market damages may overcompensate. Thus, market damages are often thought (incorrectly) to deny a volume seller full recovery for the loss of a sale that cannot be replaced by reselling the goods to another buyer on the market.<sup>191</sup> In both of these circumstances, courts that substitute lost profits for market damages fail to appreciate that damage rules are contract terms that allocate risks between the parties differently. Lost profit damages reflect an ex post perspective. They measure the value of the completed contract based on what the parties actually did. Market damages, on the other hand, apply a measure of events extrinsic to the parties' behavior. Before a court applies a damage measure, therefore, it must first decide how the parties expressly or by implication allocated the relevant market risks. The question, therefore, is

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Schwartz & Scott, *supra* note 8, at 611–12.

189. *Nobs Chemical, U.S.A., Inc. v. Koppers Co.*, 616 F.2d 212 (5th Cir. 1980).

190. *Id.* at 214, 217. Other courts have followed the ex post reasoning in *Nobs Chemical*. See, e.g., *H-W-H Cattle Co. v. Schroeder*, 767 F.2d 437 (8th Cir. 1985); *Coast Trading Co. v. Cudahy Co.*, 592 F.2d 1074 (9th Cir. 1979); *Union Carbide Corp. v. Consumers Power Co.*, 636 F. Supp. 1498 (E.D. Mich. 1986). But see *Tongish v. Thomas*, 840 P.2d 471 (Kan. 1992) (compensation principle does not trump market damages simply because contract-market differential exceeds promisee's economic loss).

191. The critiques of the lost volume seller cases are many. See, e.g., Robert E. Scott, *The Case for Market Damages: Revisiting the Lost Profits Puzzle*, 57 U. CHI. L. REV. 1155 (1990). Scott and Triantis argue that the debate over lost volume damages has missed the important point that parties can (and do) choose among contract terms that will provide the buyer different options to terminate the contract.

Scholarly debate has focused on how much of the seller's selling costs or overhead were "consumed" by the breaching buyer and whether the default measure of damages ought to be the full profit lost by the seller (which often is over compensatory) or incidental damages (which may be under compensatory). But the focus on lost volume and selling costs is a red herring.

Rather, the choice between market damages and lost profits [in the lost volume cases is really] a choice between alternative provisions [for terminating the contract].

Scott & Triantis, *supra* note 67, at 1483.

Contracting parties may choose different terms that provide a buyer the right to terminate an executory contract for a fee. The choice of the termination fee will necessarily affect the price paid in the ex ante contract by the buyer for the privilege to terminate. If the exercise price is very large, the option price (reflected in the breach damages) may be very small. The parties do not intend that the option price reflect the seller's loss from the terminated sale. Indeed, the parties might rationally choose a free option to terminate as a marketing tool. In sum, whether a given volume seller would have chosen to write an option to a buyer and at what price the option would be offered simply cannot be determined a priori.

not which damage default rule better protects a given economic advantage. Rather, the ex ante perspective should frame the question: what economic advantage did the contract protect?<sup>192</sup> In *Nobs Chemical*, for example, the fixed price contract functioned as an option on the future supply of the goods at the contract price. The market damages the plaintiff claimed reflected the ex ante value of the option.<sup>193</sup> Substituting an ex post lost profits measure undermined the value of the option contract and denied the plaintiff the recovery it had paid for.<sup>194</sup>

In sum, in a fixed price market contract, the market damages default rule supports the ex ante risk allocation that most parties would choose precisely because it maximizes the value of the contract at the time it was made. In cases where market damages might be thought to be excessive because, as in *Nobs Chemical*, the injured party has laid off a portion of the contract risk, a court that substitutes the ex post lost profits measure is, in effect, imposing a mandatory limited damages rule. In the polar case, where buyers breach contracts with volume sellers, a lost profits rule functions as a mandatory cancellation penalty. In both cases, courts that are tempted by the ex post fallacy to separate liability and remedy have impaired contract rights that were paid for and compromised the ability of future parties to control the allocation of market risks in ways that reflect their concern to maximize the expected value of their contract.

The continued allegiance of courts to the just compensation principle is supported and reinforced by pluralist scholars who rely on the doctrine to support the broader claim that ex post review is essential to preserving individual justice. The stubborn resistance of some courts and commentators to the clear preference for market damages in the common law and the Uniform Commercial Code is fueled by the argument that the mandatory compensation principle (embodied in UCC §1-305(a))<sup>195</sup> trumps the ex ante market damages rules.<sup>196</sup> Here, assertion substitutes for argument and

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192. Henry Gabriel, *The Seller's Election of Remedies Under the Uniform Commercial Code: An Expectation Theory*, 23 WAKE FOREST L. REV. 429 (1988); Victor P. Goldberg, *Reckoning Contract Damages: Valuation of the Contract as an Asset*, 75 WASH. & LEE L. REV. 301 (2018).

193. See, e.g., Victor P. Goldberg, *Protecting Reliance*, 114 COLUM. L. REV. 1033 (2014); Scott & Triantis, *supra* note 67.

194. An analogous problem occurs when the seller breaches a fixed price contract (after the market rises) and the buyer has, before breach, contracted to resell the goods at a fixed price to a remote purchaser. Here, courts have been similarly inclined to limit the buyer to its lost profits as measured by the contract price/resale price differential, rather than awarding full market damages. See, e.g., *Allied Canners & Packers, Inc. v. Victor Packing Co.*, 209 Cal. Rptr. 60 (Ct. App. 1984).

195. “The remedies provided by the Uniform Commercial Code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . .” U.C.C. § 1-305(a) (AM. LAW INST. & UNIF. LAW COMM’N 2018).

196. See, e.g., Roy Ryden Anderson, *A Look Back at the Future of UCC Damages Remedies: Strategic Behavior and Market Price Damages*, 71 SMU L. REV. 185, 196 (2018) (asserting that the most

abandons careful analysis of *ex ante* intent. Thus, once again the vestiges of centuries of policing penal bonds undermines respect for personal sovereignty.

The default rules governing recovery of consequential damages are another area where the compensation principle leads courts to promote recoveries inconsistent with the terms that most parties would prefer. Under current doctrine, for example, a seller must deliver conforming goods or pay the buyer damages, including allowable consequential damages, measured by the difference between the value of the goods accepted and the value of conforming goods to the buyer.<sup>197</sup> This damages default rule supports most parties' intentions because it increases the joint expected value of the contract at the time of formation by motivating the seller to perform by tendering goods when doing so will increase value. Early common law cases limited a buyer's ability to recover consequential damages by requiring a tacit agreement between the parties as to the particular consequences that affected the buyer's valuation.<sup>198</sup> However, most modern courts (encouraged by the Second Restatement of Contracts and the UCC) have replaced the tacit agreement test with a softer "reason to know" standard on the ground that otherwise buyers would too readily be denied full compensation.<sup>199</sup> But valuations are often very difficult to verify. As a consequence, buyers often have an incentive to overstate their valuations and, in the absence of an *ex ante* agreement specifying the buyer's valuation, sellers often are disabled from insuring risks that turn on the buyers' private information.

The "reason to know" standard for recovering consequential damages functions unfairly to impose costs on sellers that were not contemplated in the initial agreement. The result is that commercial parties routinely opt out of the consequential damages default rule. In place of the default term, parties create complex repair-and-replacement provisions that strive to allocate the risks of product defects in other ways.<sup>200</sup> This method of opting out is a more costly and less accurate means of achieving the risk allocation

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important reason why courts should not award *ex ante* market damages when the *ex post* losses are either greater or smaller is that the compensation principle "does not allow it").

197. U.C.C. § 2-714 (2), (3) ("The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted . . . In a proper case any incidental and consequential damages under [§ 2-715] may also be recovered.").

198. *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145, 151 ("If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants . . . the damages resulting from the breach . . . would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.").

199. *See, e.g.*, U.C.C. § 2-715(2)(a); *id.* cmt 2 ("The 'tacit agreement' test . . . is rejected."); RESTATEMENT (SECOND) OF CONTRACTS § 351(2)(b) (AM. LAW INST. 1981).

200. For discussion, see Schwartz & Scott, *supra* note 41.

parties most prefer. Yet it would be unnecessary if courts appreciated the moral hazard consequences of this extension of the compensation principle and returned to the tacit consent doctrine.

B. HARDSHIP EXCUSES FOR FAILURES TO PERFORM: FORFEITURE, FRUSTRATION, AND IMPRACTICABILITY

The black letter doctrines governing forfeiture,<sup>201</sup> frustration,<sup>202</sup> impracticability,<sup>203</sup> and related doctrines excusing performance on grounds of hardship illustrate the inherent tension between the ex ante and the ex post in contemporary contract doctrine. There is a deep rift within the common law between the ex ante contract doctrines requiring strict enforcement of formal terms agreed to under free and fair conditions and the ex post doctrines permitting abrogation of those terms when strict enforcement appears to impose severe hardship. Here the ex post fallacy invites courts to distort formal doctrine and interpret contracts in ways that undermine the parties' chosen ex ante means of accomplishing their contractual objectives.

1. The Reluctance to Enforce Express Contract Terms (Herein of Forfeiture)

The doctrines of contract interpretation direct courts to respect the parties' express terms. Express terms can specify both primary terms governing the parties' performance obligations, and secondary, or meta, terms governing the interpretation of their agreement.<sup>204</sup> Express terms therefore provide the most powerful tool available to parties for signaling their ex ante intentions: they allow the parties not only to communicate to each other and to courts the precise content of certain terms they wish to include in their agreement, but to control the extent to which courts may imply additional terms into their agreement.<sup>205</sup> The doctrines governing the

201. RESTATEMENT (SECOND) OF CONTRACTS § 227 cmt. b.

202. *Id.* § 265.

203. *Id.* § 261.

204. For example, as discussed in Part II.A *supra*, express written terms can constrain a court's discretion to imply terms into an agreement by directing the court under the parol evidence doctrine not to admit prior evidence of implied terms. *See, e.g.*, U.C.C. § 2-202 (evidence not admissible to prove even additional terms consistent with express terms of fully integrated writing); U.C.C. § 1-205(4) (express terms control both course of dealing and usage of trade); U.C.C. § 2-208(2) (express terms control course of performance); RESTATEMENT (SECOND) OF CONTRACTS § 215 (evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict term of writing). *Id.* § 216(1) (evidence of consistent additional term is not admissible to supplement fully integrated agreement).

205. For discussion, *see* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interaction Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 281-86 (1985) (arguing that express terms are signals that enable parties to opt out of implied default terms and to supplement the defaults with additional customized terms); Schwartz & Scott, *supra* note 10, at 584-94 (maximizing party control over express terms promotes efficient contracting).

interpretation of express terms thus present another occasion in which ex post equity can undermine the parties' ex ante intent. The law of conditions vividly illustrates this deep tension between the formal obligation to respect the parties' ex ante specification of express terms and the desire to provide ex post justice.

Since parties incur duties in contracts by making promises, a party who makes an event a condition of its promise is under a duty to perform that promise only if the event occurs.<sup>206</sup> A common example is an insurance contract that imposes on the insurer a duty to pay if the insured brings a claim within a specified time period after the insured suffers a covered loss. The insurer's duty to pay arises when the insured suffers a covered loss, but that duty is discharged if the insured fails to bring the claim within the specified time period. The law of conditions explicitly endorses the principle of personal sovereignty by committing to the strict enforcement of all express conditions agreed to under free and fair circumstances.<sup>207</sup> Yet it is also home to the hoary equitable maxim that the law abhors a forfeiture.<sup>208</sup> The anti-forfeiture norm suffuses the law of conditions, which therefore reads like a schizophrenic text, in one sentence insisting on the sanctity of strict construction and enforcement of conditions in spite of forfeiture, while in the next sentence admonishing courts, whenever interpretation allows, to avoid the conclusion that the promisor's obligation is subject to an enforceable condition if enforcement of the condition would raise the specter of forfeiture.<sup>209</sup>

206. RESTATEMENT (SECOND) OF CONTRACTS § 224. The event on which the promise is conditioned may be "largely within the control of the obligor (the homeowner's honest satisfaction with the paint job), the obligee (the insured's furnishing proof of loss), or a third person (the bank's approval of the mortgage application), or is largely beyond the control of anyone (damage as a result of fire)." E. ALLAN FARNSWORTH, *CONTRACTS* 520 (3d ed. 1999).

207. *Renovest Co. v. Hodges Dev. Corp.*, 600 A.2d 448, 452–53 (N.H. 1991) ("[W]hen the parties expressly condition their performance upon the occurrence or non-occurrence of an event, rather than simply including the event as one of the general terms of the contract, the parties' bargained-for expectation of strict compliance should be given effect."); *see also* *Nielsen v. Provident Sav. Life Assurance Soc'y of N.Y.*, 66 P. 663, 665 (Cal. 1901) ("[C]onditions . . . when made, must be construed and enforced . . . according to the expressed understanding of the parties making them. It is not for the courts to dispense with such limitations and conditions, nor by judicial legislation to insert a different contract from that deliberately made by the parties.").

208. *See, e.g.,* *Naftalin v. John Wood Co.*, 116 N.W.2d 91, 100 (Minn. 1962) ("[It is a] well-recognized principle that forfeitures are not favored either in law or equity . . . . One claiming forfeiture carries a heavy burden of establishing his right thereto be clear and unmistakable proof."); *Stevenson v. Parker*, 608 P.2d 1263, 1267–68 (Wash. Ct. App. 1980) ("This court has held the general doctrine that forfeitures are not favored in the law, and that courts should promptly seize upon any circumstance . . . that would indicate an election or an agreement to waive the harsh, and at times unjust, remedy of forfeiture . . . ." (quoting *Spedden v. Sykes*, 98 P. 752, 754 (Wash. 1908))).

209. *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 227 cmt. b ("The policy favoring freedom of contract requires that, within broad limits . . . the agreement of the parties should be honored even though forfeiture results."), *id.* § 226 cmt. c ("[T]o the extent that the parties have, by a term of their agreement, clearly made an event a condition, they can be confident that a court will ordinarily feel

The judicial embrace of the anti-forfeiture norm is another manifestation of the ex post fallacy. Even if contracting parties write an express term that unequivocally creates a condition, equity invites courts to exercise their discretion ex post to excuse the condition whenever its enforcement would create a forfeiture and the court finds the condition was not a material part of the agreement at the time of formation.<sup>210</sup> Even if a court agrees that a contract contains a material, express condition, the norm encourages the court to find that the promisor has implicitly waived the condition, either retrospectively or prospectively, whenever enforcement of the condition would create a forfeiture.<sup>211</sup>

In sum, the doctrinal residue of the forfeiture rule, which was designed to prevent the abuse of penal bonds, explicitly stacks the deck heavily against the finding and enforcement of conditions on the ground that the law abhors a forfeiture. Viewed from the perspective of the commitment to vindicate the parties' ex ante intentions, the anti-forfeiture norm leads courts to make two false assumptions. The first is that parties are unlikely to select terms that create the risk of forfeiture. This assumption underlies the doctrines directing courts to avoid finding a condition absent express language that unmistakably creates it. The second assumption is that express conditions sometimes are not material at the time of formation. This assumption underlies the doctrines directing courts to avoid enforcing even clear, express conditions. Yet contracting parties often favor the selection of precise terms that create rule-like obligations that are easy for the parties not only to observe but also to verify and enforce in court. Express conditions serve just

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constrained strictly to apply that term"), and *id.* § 229 cmt. a ("[I]f the term that requires the occurrence of the event as a condition is expressed in unmistakable language, the possibility of forfeiture will not affect the interpretation of that language."), with *Bornholdt v. S. Pac. Co.*, 327 F.2d 18, 20 (9th Cir. 1964) ("A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. . . . Where there are two possible constructions, one of which leads to a forfeiture and the other avoids it, the rule of law is well settled . . . that the construction which avoids forfeiture must be made if it is at all possible." (citing CAL. CIV. CODE § 1442 (Deering 1872))), and *Kalina v. Eckert*, 497 A.2d 1384, 1385 (Pa. Super. Ct. 1985) ("[A] provision will not be construed to result in a forfeiture unless no other reasonable construction is possible.").

210. See RESTATEMENT (SECOND) OF CONTRACTS § 229.

211. See, e.g., *Knarston v. Manhattan Life Ins. Co.*, 73 P. 740, 741 (Cal. 1903) ("[T]he right to declare a forfeiture, being a matter entirely for the benefit of a lessor or vendor, can be, even by parol, effectually waived by either."); *Bielski v. Wolverine Ins. Co.*, 150 N.W.2d 788, 790 (Mich. 1967) ("[W]aivers [of contract clause requiring arbitration as condition precedent to suit] need not be expressed in terms, but may be implied by the acts, omissions, or conduct of the insurer or its agents authorized in such respect.") (quoting 29A AM. JUR. *Insurance* § 1617 (1936)); *Cochran v. Grebe*, 578 S.W.2d 351, 354 (Mo. Ct. App. 1979) (asserting that forfeitures are highly disfavored by law and courts are therefore quick to find a waiver or estoppel); *Miraldi v. Life Ins. Co. of Va.*, 356 N.E.2d 1234, 1236 (Ohio Ct. App. 1971) (law abhors forfeiture and waiver will be inferred whenever it can be reasonably inferred from the facts); *Brown v. Powell*, 648 N.W.2d 329, 333 (S.D. 2002) ("Because forfeitures of land sale contracts are highly disfavored by the law, courts are generally quick to find a waiver of conditions alleged as a basis for a claim of breach.").

this purpose: they afford a promisor protection from certain risks, in lieu of having to prove losses that are difficult to verify in a suit for damages.

When sophisticated commercial parties clearly agree to express conditions, there is no principled reason to doubt that the promisee understood the risk of forfeiture and bargained for compensating contractual benefits from the promisor. On this view, conditions are always material from the *ex ante* perspective because they allocate risks between the parties, the contract compensates each party for bearing those risks, and the parties inevitably rely on that allocation of risks. Since the parties' intent at the time of formation determines materiality, conditions will always be material. More fundamentally, the concept of forfeiture begs the question by presuming that the party against whom the condition is invoked is sacrificing an entitlement. If the condition is agreed to and (presumably) paid for in the *ex ante* contract, there is no entitlement to refuse to abide by the exercise of the condition *ex post*.

## 2. The Misuse of Excuse

*Ex post* doctrines granting excuse from hardship, including mistake, frustration, and commercial impracticability, are contemporary manifestations of early equity's effort to prevent the enforcement of the face amount of a penal bond despite either full or substantial performance by the promisor.<sup>212</sup> When applied to a commercial contract reached under free and fair conditions, the outcome can result in denial of individual justice for the party seeking to enforce the terms agreed upon (and paid for) in the contract. A particularly salient example is the well-known case, *Aluminum Co. of America v. Essex Group, Inc.* ("*ALCOA*").<sup>213</sup> *ALCOA* is a paradigmatic illustration of those instances where courts conclude that individual justice requires them to intervene under the post-formation circumstances that have materialized. In *ALCOA*, the court granted the plaintiff relief from the contract's detailed price indexing provision on the grounds of mutual mistake, commercial impracticability, and frustration of purpose.<sup>214</sup> While

212. See *supra* notes 60–65 and accompanying text.

213. *Aluminum Co. of Am. v. Essex Grp., Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980).

214. Alcoa and Essex had entered into a long-term tolling contract whereby Alcoa undertook to convert alumina supplied by Essex into aluminum. The contract specified a fixed quantity of seventy-five million pounds of aluminum to be delivered to Essex per year. The contract contained a detailed price indexing provision. At Essex's insistence, the index relating to Alcoa's costs included a circuit breaker if the index rose too fast relative to the underlying market price, but Alcoa did not require a corresponding "booster" if the index moved too slowly. Unfortunately for Alcoa, the index moved much too slowly relative to the actual market price for alumina owing, in part, to the underrepresentation of energy costs in the basket of inputs that comprise the WPI-IC relative to the costs of converting alumina into aluminum. The court granted Alcoa relief on the grounds of mutual mistake, commercial impracticability, and frustration of purpose. Rather than excuse Alcoa, however, the court chose to reform the contract by rewriting the price term. *Id.* at 55–93.



the reformation remedy adopted by the court in *ALCOA* has not been followed elsewhere (as we have noted, claims of excuse are only rarely granted by courts),<sup>215</sup> nevertheless the case provides a vivid illustration of how courts in other cases can use ex post reasoning in similar but more subtle ways to vitiate ex ante intent.

One question in *ALCOA* was whether both parties were mistaken about the ability of the price index to track future market prices as accurately as its historical performance had indicated it would. The evidence strongly suggests that both the Aluminum Company of America (“Alcoa”) and Essex were allocating the risks of a deviation between market prices and the index by agreeing to a carefully drafted pricing mechanism.<sup>216</sup> By choosing a precisely defined price index in conscious recognition of the risks that the index might deviate from future market prices, the parties implicitly allocated to the seller the risk that the index might malfunction and increase too slowly, and allocated to the buyer the risk that the index might malfunction and increase too rapidly. Essex chose to reduce the risk of the index rising too rapidly by insisting on a circuit breaker once the index price exceeded 65% of the market price of aluminum. Alcoa, represented by sophisticated legal and economic experts, chose not to insert a corresponding “booster” should the index rise too slowly.

Despite these facts, the court held that Alcoa was excused from full performance on the ground that both parties mistakenly believed that the escalator term in the price index would function in the future in the same way it had when tested against past economic conditions. The court rejected the argument that the error, if any, was in predicting future economic conditions and not in any erroneous beliefs relating “to the facts as they exist at the time of the making of the contract”<sup>217</sup> as required by the doctrine of mutual mistake. The court was equally unmoved by the fact that black letter doctrine requires a finding that the parties made a definite assumption that the fact in question exists and made their agreement in the belief that there was no risk with respect to it.<sup>218</sup> Clearly, there was sufficient sense of risk to motivate Essex to insert a cap on the risk that market prices might outstrip

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215. Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 317 (1992).

216. The parties incurred substantial front-end drafting costs. These costs are rational to incur only if they exploit the parties’ informational advantage ex ante. For discussion, see Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 822–51 (2006).

217. RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (AM. LAW INST. 1981). The court held that the mistake did not relate to future economic conditions but rather was a mistake as to a “present actuarial error.” *Aluminum Co.*, 499 F. Supp. at 63.

218. TIMOTHY MURRAY, ARTHUR L. CORBIN, JOSEPH M. PERILLO & JOHN E. MURRAY, JR., CORBIN ON CONTRACTS §605 (1960).

the escalator.

The court in *ALCOA* also found grounds to excuse Alcoa based on commercial impracticability and frustration of purpose. These doctrines grant excuse only if one party experiences extreme hardship because of a future event whose occurrence was unforeseeable.<sup>219</sup> The court did not even address the question of whether the occurrence of an unforeseeable future event was essential to granting excuse on the grounds of impracticability or frustration.<sup>220</sup> Rather, the court focused exclusively on the element of hardship, finding that Alcoa's losses of \$8 million after 10 years, coupled with projections that future losses might total \$60 million, was sufficient to grant relief from hardship. This finding runs counter to the statements by many courts that the hardship necessary to grant excuse must "be more than merely onerous or expensive. It must be positively unjust to hold the parties bound."<sup>221</sup>

The court in *ALCOA* claimed to be maintaining fidelity to the parties' contractual intent by reforming the price index when it did not function as the parties anticipated it would. The court's solution was to guarantee that Alcoa could at least recover its costs plus a minimum one cent per pound profit.<sup>222</sup> Even if the court correctly divined that the parties' purpose in this case was to implement the equivalent of a cost-plus contract, the ex post intervention was indefensible. The court's decision undermined the parties' careful efforts to design their contract optimally. By distorting the doctrines of mistake, impracticability, and frustration, the court deprived the parties of their ex ante choice of how best to mimic a cost-plus contract while avoiding the moral hazard risk that such a contract would impose on Essex. Furthermore, the prospect of ex post judicial intervention under these circumstances severely impairs the ability of future commercial parties to choose the contract terms that best achieve their purposes.

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219. *E. Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975).

220. On the question of foreseeability, the court held that "the foreseeability of a variation between the [escalator term] and Alcoa's costs would not preclude relief under the doctrine of impracticability." *Aluminum Co.*, 499 F. Supp. at 76. The case occurred during the period of volatile energy prices in the 1970s owing to changes in environmental standards and the OPEC oil embargo. Other courts have consistently held that events owing to the energy crisis of the 1970s were reasonably foreseeable by commercial parties contracting during this period. *E. Air Lines*, 415 F. Supp., at 441.

221. *Ocean Tramp Tankers v. V/O Sovfracht (the Eugenia)* [1964] 2 QB 226, 239; *see also* *Neal-Cooper Grain Co. v. Texan Gulf Sulfur Co.*, 508 F.2d 283, 293 (7th Cir. 1974); *Schafer v. Sunset Packing Co.*, 474 P.2d 529 (Or. 1970).

222. *Aluminum Co.*, 499 F. Supp. at 80. The court held that the failure of the price index to achieve the parties' ends was: (1) a mistake of both parties as to a basic assumption of the contract justifying rescission on the grounds of mutual mistake, (2) the occurrence of an event whose non-occurrence was a basic assumption of the contract justifying excuse on the grounds of commercial impracticability, and (3) the occurrence of an event whose non-occurrence was a basic assumption thus frustrating Alcoa's principal purposes under the contract. *Id.*

To be sure, *ALCOA* may be seen as an outlier; a court ignoring controlling legal principles to grant excuse from hardship to a Fortune 500 company contracting with a much smaller firm. Cases like *ALCOA*, however, have a feedback effect by prompting pluralist scholars to call for an even broader exercise of ex post judicial review in cases of alleged hardship. Melvin Eisenberg, a leading pluralist scholar, has recently argued for expanding the domain of the excuse doctrines based on the presumed inability of private actors to anticipate remote risks.<sup>223</sup> Eisenberg argues that ex post relief should be granted if, because of an unexpected rise in prices, performance would result in a loss to a promisor that is significantly greater than the risk the parties reasonably would have expected the promisor to take.<sup>224</sup> In a similar vein, Robert Hillman has argued for a pluralist approach to commercial impracticability that considers fairness norms.<sup>225</sup> Hillman identifies a number of fairness norms that should determine whether one party to an agreement is entitled to cease or curtail performance, such as when the parties fail expressly to allocate the risk of a calamitous event. Here he argues that the courts should adjust the contract ex post based on the fairness principle that the parties should agree to share unallocated losses.<sup>226</sup> The irony, of course, is that calls to increase ex post intervention for hardship on fairness grounds is unfair to the party who paid the counterparty to bear the risk in question.

### C. EX POST INTERVENTION TO SANCTION OPPORTUNISTIC BEHAVIOR

Breach of contract claims are the result of many different factors. Often one of the parties has inadvertently failed to fulfill its obligations under the contract. A second possibility, however, is that the dispute occurs because one of the parties is opportunistically violating the deal. As we discussed in Part II, pluralist scholars have argued that the task of policing opportunism is an appropriate exercise of ex post intervention by common law courts.<sup>227</sup> Ayotte, Friedman, and Smith believe that the risk of opportunistic breach is sufficiently grave that courts should zealously deploy their equity powers ex post to punish the opportunistic party, even in the face of an ex ante agreement explicitly assigning the contract rights to the alleged opportunist.<sup>228</sup> They contend that this heightened risk of opportunism

223. Eisenberg, *supra* note 15. For a critique of Eisenberg's analysis, see Victor P. Goldberg, *Excuse Doctrine: The Eisenberg Uncertainty Principle*, 2 J. LEGAL ANALYSIS 359 (2010).

224. Eisenberg, *supra* note 15, at 209.

225. Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617 (1983).

226. Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 3.

227. George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225 (1994).

228. See Ayotte, Friedman & Smith, *supra* note 38.

undermines any argument that contracting parties are equipped to deal with the risk of opportunism in advance through free and fair ex ante contracting.

Pluralists typically advert to the obligation of good faith as the doctrinal mechanism for policing opportunism. However, the claim that good faith can and should be used as an all-purpose weapon for aggressively pursuing ex post justice badly misunderstands the role of good faith in American contract law. To be sure, both the Restatement and the UCC affirm the duty of good faith and fair dealing that attaches to the performance of every contract.<sup>229</sup> But the foundation of the obligation of good faith in American contract law is the shared interest of both parties at the time of contract to reduce the incidence of behavior that may impair performance of the deal. As §1-304, Comment 1 of the UCC makes clear, in American contract law the obligation of good faith is not an independent invitation for courts to police bargained for exchanges.<sup>230</sup> Rather, good faith is an interpretive principle based on the presumed ex ante intent of both parties to forego behaviors that might lead to tit-for-tat retaliation. By reinforcing informal norms of trust and good faith, the parties reduce the expected haggling costs that can result from period-to-period efforts to extract maximum individual gains.<sup>231</sup>

In short, good faith in American contract law serves the ex ante goals of individual justice. The common law and UCC's good faith doctrines do not invite courts to sanction bad faith actions<sup>232</sup> by vitiating contractual intent, as pluralist scholars maintain. Rather, the good faith requirement reflects the judicial presumption that parties ordinarily intend to maximize their expected joint gains by relying on courts to enforce norms of trust and fairness only when the conditions under which non-legal norms usually operate break down.

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We have outlined the many ways that the vestigial doctrines developed by equity to police the abuses of penal bonds at early common law undermine respect for personal sovereignty, the value that we have argued best explains American contract law. Moreover, we have seen how pluralist scholars have used the residue of ex post doctrine to push for an expansion of equity into many other domains of contract, including by empowering courts to reallocate risks in order to promote paternalism or prevent

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229. RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981); U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM'N 2018).

230. U.C.C. § 1-304 cmt. 1.

231. For discussion, see Scott, *supra* note 103.

232. The Restatement defines bad faith actions as including "lack of diligence and slacking off . . . and interference with or failure to cooperate in the other party's performance." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d.

opportunism. By continuing to recognize and apply the *ex post* doctrines, courts and commentators perpetuate and exacerbate the significant harm these doctrines create by gratuitously increasing the burdens and lowering the benefits of contracting, thereby undermining respect for personal sovereignty within contract law.

#### CONCLUSION

Given that the *ex post* doctrines of contract law no longer serve the purpose of policing against abuses of penal bonds in the common law, the puzzle is not why courts are reluctant to apply them, but why they apply them at all. Our answer is that the near sacred status of *stare decisis*, the historically entrenched *ex post* perspective on remedies, and the powerful appeal of the *ex post* fallacy have together placed the *ex post* doctrines beyond judicial reflection. Moreover, by devoting five of its sixteen chapters to extensive endorsement of the *ex post* doctrines, the Second Restatement of Contracts effectively enshrined them in the black letter pantheon of valid contract law.<sup>233</sup> Their formal investiture in the Restatement was the culmination of the centuries-old common law practice of treating disproportionate outcomes as inherently unjust and unfair. But the common law causes of action that gave rise to liability during the period in which this practice evolved left the remediation of legal wrongs entirely to the courts. The transformation of American contract law into an institution that enforced executory agreements enabled the parties to control not only the extent of their liability but the consequences of breach as well. Yet the instinctive judicial aversion to forfeitures and penalties—a product of the longstanding practice of policing against the fraudulent enforcement of penal bonds—was too strong to yield to the new logic of the *ex ante* perspective in contract adjudication. Fueled by *stare decisis*, the old equitable doctrines remained on the books even as courts have struggled to reconcile the inherent contradiction between contract law's *ex ante* perspective and the *ex post* abrogation of the parties' agreement. That subterranean tension continues to destabilize contract adjudication today.

The case for retaining the *ex post* doctrines turns on whether they now serve a new and compelling purpose. However, the only purposes identified by proponents of *ex post* doctrine—paternalism and anti-opportunism—are deeply incompatible with the promotion and protection of personal sovereignty. In our view, the personal sovereignty account provides the most morally compelling, and therefore the best, explanation of American contract law's *ex ante* doctrines. Given that these doctrines not only comprise the

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233. These include Chapters 6, 8, 9, 11, and 16.

overwhelming majority of American contract doctrines, but also form its foundational core, the continued recognition of the ex post doctrines as valid components of American contract law cannot be justified. The time has come for courts and commentators to prune the ex post vestigial branch from the common law tree.

