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Seana Valentine Shiffrin

Remedial Clauses: The Overprivatization of Private Law

SEANA VALENTINE SHIFFRIN*

This Article considers the growing trend to enforce liquidated damages agreements or what I think are more felicitously called "remedial clauses." I criticize this trend on the grounds that a permissive approach to enforcing remedial clauses contravenes important public values. Although many have claimed the traditional presumption against such clauses is mysterious or unsupported, I contend that the traditional presumption against such clauses enforces important values central to the rule of law, including that private parties should not decide their own cases and that the public has a special interest in deciding what remedies are appropriate for breaches of legal duty. In delineating the theoretical foundations for treating remedial clauses differently than performance terms, I offer a distinctive, liberal, and democratic perspective on contract and contractual breach that answers the common arguments offered by libertarians and law and economics scholars that freedom of contract requires the contrary.

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INTRODUCTION

Contract law is, perhaps, the quintessential example of private law, but even it can overprivatize. Recent interpretations of the Federal Arbitration Act have elevated concerns that enforceable mandatory arbitration clauses will multiply and, thereby, insulate many contractual relationships from appropriate public oversight.[1] But, another disturbing legal trend in the United States has attracted little attention from those concerned about overprivatization—namely, the growing enforceability of what I call *remedial clauses*.

Remedial clauses, commonly labeled "stipulated" or "liquidated" damages clauses, involve subsidiary private agreements within contracts about what remedies should be enforced when the primary contractual agreement is breached. For example, a remedial clause may stipulate, in advance, an overall compensatory figure for failure to render an agreed-upon service, to provide goods by a specified date, or to respect a noncompete clause. Rather than having a court calibrate a remedy to reflect an impartial assessment of the actual damage occasioned by breach, the clause directs that payment of this stipulated amount should constitute the breaching party's remedial behavior.[2] These clauses substitute an

1. *See infra* text accompanying notes 92–98.

2. *See, e.g.*, Monsanto Co. v. McFarling, 363 F.3d 1336, 1344, 1347 (Fed. Cir. 2004) (invalidating a remedial clause imposing a 120 multiplier on a licensing fee for breach of a contractual prohibition on replanting patented seeds); Wechsler v. Hunt Health Sys., Ltd., 330 F. Supp. 2d 383, 413 (S.D.N.Y.

agreement by private parties for what would standardly be a court's judgment and, unsurprisingly, have traditionally faced barriers to enforcement.

For example, in one recent case, a rental car company showed remarkable moxie by attempting to levy a $150 fee *each time* its GPS devices registered a driver exceeding a specified speed limit of seventy-nine miles per hour for two minutes or longer.[3] If the driver's speed fluctuated, an additional $150 fee would be assessed *each time* the threshold was surpassed.[4] The rental car company argued that the fee provision represented a valid "liquidated damages" clause for excessive wear and tear caused by speeding.[5] This rather extreme clause posed an easy case for invalidation given the traditional common law approach in the United States that strongly presumes these clauses are unenforceable, except when actual damages would be difficult to calculate *and* when the stipulations represent reasonable and nonpunitive estimates of damages.[6] Consonant with a traditional approach, the Supreme Court of Connecticut scrutinized the provision and expert evidence closely. The court treated the questions of ease of damages calculation and reasonability of damages separately.[7] Although the court agreed that the exact damage for wear and tear from speeding might be difficult to quantify with precision, it was not satisfied by the company's argument that the parties voluntarily agreed to the arrangement and so the clause was valid given the difficulty of ascertaining precise damages.[8] The court insisted on a close look at the evidence that purportedly supported the reasonableness of the fee. It found the rental car company's remedial clause to be invalid given the unreasonable disparity between the $150 fee and the actual damages for two minutes of speeding, which were likely to range more in the vicinity of thirty-seven cents.[9] The court also intimated that the two-minute interval formula for calculating the stipulated damages was

2004) (upholding a remedial clause requiring defendant to pay $10,000 for each month remaining on a breached accounts-receivable purchase agreement); H & G Ortho, Inc. v. Neodontics Int'l, Inc., 823 N.E.2d 718, 723 (Ind. Ct. App. 2005) (upholding a remedial clause allowing for either the sum of 100 percent of the gross revenues that had been generated in violation of the covenant not to compete or a payment of $5000 for each incident of a violation of the covenant); Valentine's, Inc. v. Ngo, 251 S.W.3d 352, 355–56 (Mo. Ct. App. 2008) (upholding a remedial clause requiring landlord to pay tenant $100,000 if landlord violated the lease agreement's noncompetition clause); Erie Ins. Co. v. Winter Constr. Co., 713 S.E.2d 318, 322–23 (S.C. Ct. App. 2011) (upholding a remedial clause allowing promisee to charge all reasonable costs including attorneys' fees incurred plus an administrative burden allowance of fifteen percent of remaining subcontract value if the subcontractor defaulted).

3. Am. Car Rental, Inc. v. Comm'r of Consumer Prot., 869 A.2d 1198, 1201 (Conn. 2005).
4. *Id.* at 1202.
5. *Id.* at 1201, 1204.
6. *Id.* at 1209–10.
7. *Id.*
8. *Id.*
9. *Id.* at 1203, 1204 n.4, 1207.

unreasonable and irrational: a driver that sped continuously at eighty miles an hour for ten minutes would incur a single charge of $150, whereas a driver who, during the same interval, exceeded the limit for two minutes, dipped below seventy-nine for six minutes, and then sped again for another two minutes would incur two charges totaling $300, although she was speeding for less total time than the first driver.[10]

As this case attests, the strictly applied traditional test is still in circulation. But, of late, in other cases, both courts and commentators are increasingly adopting a more permissive posture toward remedial clauses and signaling a greater willingness to enforce them. Judge Posner, for example, has complained that the common law rule presuming against such clauses represents "one of the abiding mysteries of the common law."[11] Judge Posner hypothesized that the rule is a mere historical artifact, reiterating Holmes' protest that "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[12] The prima facie resistance to enforcing these clauses has begun to relax in many jurisdictions where the rule has come to be understood merely as a rule against penalty clauses—those clauses that penalize breach as such and offer damages that evidently exceed the losses occasioned by the breach.[13] Many commentators urge courts to go further and enforce even some penalty clauses.[14]

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10. *Id.* at 1202.

11. *See* XCO Int'l Inc. v. Pac. Sci. Co., 369 F.3d 998, 1001 (7th Cir. 2004).

12. *Id.* at 1002 (quoting O.W. Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897)) (complaining that "[t]he explanation for the rule against penalty clauses may be purely historical").

13. E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.18, at 303–04 (3d ed. 2004) ("Today the trend favors freedom of contract through the enforcement of stipulated damage provisions as long as they do not clearly disregard the principle of compensation."); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 1017–18, 1022 (1983) (discussing trend toward enforcing liquidated damages clauses between relational, business contractors); *see also* Walter Motor Truck Co. v. State, 292 N.W.2d 321, 323 (S.D. 1980) (recognizing "the modern tendency not to look with disfavor upon liquidated damages provisions in contracts").

14. *See*, *e.g.*, *XCO Int'l Inc.*, 369 F.3d at 1002 ("The rule against penalty clauses, though it lingers, has come to seem rather an anachronism, especially in cases in which commercial enterprises are on both sides of the contract."); Avery W. Katz, *Economic Foundations of Contract Law, in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 171, 185 (Gregory Klass et al. eds., 2014) (discussing "increasing trend in the law and economics literature . . . to encourag[e] greater use of and deference to liquidated damage clauses"); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 69 (3d ed. 2003) (arguing liquidated damages clauses provide preferable remedial approaches in terms of risk allocation assuming transaction costs are low); Steven Walt, *Penalty Clauses and Liquidated Damages*, *in* CONTRACT LAW AND ECONOMICS 178 (Gerrit De Geest ed., 2d ed. 2011) (documenting disparate criticisms of traditional bar); Larry A. DiMatteo, *Penalties as Rational Response to Bargaining Irrationality*, 2006 MICH. ST. L. REV. 883 (arguing negotiated penalty clauses may be efficient); Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 637 (2001) (arguing that "a law that holds all penalties as per se unenforceable is necessarily flawed"); 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) (arguing remedial clauses may compensate for

This contemporary trend represents a significant change in attitude and practice. Traditionally, parties who agree ex ante to terms to resolve a conflict over the breach of a potential contractual duty enjoy little expectation that they will be able to enforce those terms should that contingency arise. Despite the parties' agreement, such clauses are only enforceable under the traditional common law if epistemic difficulties (sometimes actual, sometimes anticipated) preclude damages from being ascertained with certainty.[15] Even then, a resolution previously agreed to by the parties will only be enforceable if it represents a reasonable approximation of actual damages.[16] Arbitrary damages, undercompensatory damages, and overcompensatory damages are thereby precluded. Doctrinally, this rule is intriguing both because it represents a substantial limitation on parties' ability to craft legally enforceable agreements and because its substantive limits are stricter than the limits on the performance terms imposed by the unconscionability doctrine.

This Article contends that the growing clamor to abandon this traditional rule is misguided. The burgeoning permissive stance toward remedial clauses fails adequately to appreciate the public's interest in reserving remedial decisionmaking to impartial adjudicators who are positioned to tailor remedies with sensitivity to the details of the circumstances and significance of a breach. Whereas arbitration clauses permit a putatively impartial private party to substitute for a public official as the *agent* of legal adjudication and enforcement, remedial clauses replace quite partial forms of private judgment for the public's judgment about the very *content* of the appropriate public reaction to a legal wrong. That is, remedial clauses displace the public's role in determining the content of an important area of law and objectionably displace the judiciary's role in providing fair and impartial judgments about the public significance of legal wrongs. The traditional presumption against enforcement of remedial clauses thus protects the public's interest in upholding crucial values associated with the rule of law. By contrast,

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damages typically excluded from expectation damages); Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 616–17 (2003) (arguing parties may reasonably bargain for penalty clauses and court oversight has been flawed). *But see* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1779–80 (2000) (arguing that cognitive limitations may preclude accurate assessment of the significance of breach).

15. FARNSWORTH, *supra* note 14, § 12.18, at 305 (identifying a condition under traditional common law for the enforcement of a remedial clause as "the damages to be anticipated . . . must be uncertain in amount or difficult to prove"); ARTHUR L. CORBIN ET AL., 11 CORBIN ON CONTRACTS § 58.1 (rev. ed. 2013) ("In order to qualify as a liquidated damages clause . . . the injury caused by the breach must be uncertain or difficult to quantify . . . .").

16. CORBIN ET AL., *supra* note 15, § 58.6 (presenting the classical view that courts will only enforce liquidated damages provisions that reflect a genuine pre-estimate of the injury that will be caused by a future breach of the contract and that such pre-estimate must be reasonable).

the contemporary trend toward greater enforcement of remedial clauses represents a distinct form of the overprivatization of the law.

The intellectual source of the move away from the traditional rule emanates mostly from a libertarian infused law and economics perspective, sounding mainly in two registers. First, the barrier to liquidated damages clauses restricts freedom of contract; the contracting parties are best positioned to decide how to negotiate and resolve breaches of the terms and should be free to do so.[17] Second, because there is no principled difference between alternative performance clauses and liquidated damages clauses, there is no justification for subjecting the former to a rather permissive unconscionability standard but subjecting the latter to a higher standard.[18]

As this Article will explore, these arguments for abandoning the strong presumption against these clauses ignore central values concerning the rule of law and the role of the judiciary (by which I mean to encompass the entire judicial branch, including both judges and juries) in administering remedies in a fair and measured way. These are clauses designed by private parties that purport to direct courts how to resolve a conflict and what remedies to administer in response to the breach of a legal duty. To rubber-stamp such clauses and afford them presumptive binding force would diminish a critical role of the judiciary and weaken a crucial component of the rule of law. Contrary to the complaints of Judge Posner and Justice Holmes, the common law resistance to what this Article relabels "remedial clauses" should not be viewed as an anomalous historical remnant. Rather, it represents the integration of an important component of due process into contract law.

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17. *See, e.g.*, *XCO Int'l Inc.*, 369 F.3d at 1001; Charles Fried, *The Ambitions of Contract as Promise*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 17, 27 (Gregory Klass et al. eds., 2012); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 317 (1986); Charles Fried, *Contract as Promise Thirty Years On*, 45 SUFFOLK U.L. REV. 961, 969–70 (2012) [hereinafter Fried, *Contract as Promise*]. *But see* Ian R. Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 498, 500 (1962) (denying that restrictions on remedial clauses interfere with freedom of contract because freedom of contract just supposes an adequate remedy and not a chosen remedy).

18. For an example of such an argument, see Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009). There, Kraus argues, based on a robust notion of individual autonomy, that "the promisor's intent is the sole source of the content of the moral remedy for breaking a promise." *Id.* at 1631. In the case of a single promise, the promisor is held morally accountable to perform that promise. *Id.* at 1637. However, in the case of alternative promises, the promisor may choose from one of many promised actions, each of which fulfills the promisor's moral obligation. *Id.* In the context of agreed remedies, there is very little difference between liquidated damages and alternative promises and, as such, "courts must respect the right of the promisor to choose among the alternatives provided in his agreement." *Id.* at 1643; *see also* Mindy Chen-Wishart, *Controlling the Power to Agree Damages*, *in* WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY 271 (Peter Birks ed., 1996) (arguing that remedial clauses should be subjected to the same standard, namely unconscionability, as performance terms); Fried, *Contract as Promise*, *supra* note 17, at 969–70; Alan Schwartz, *The Myth That Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 383–84 (1990).

Part I describes the traditional common law's doctrinal treatment of liquidated damages clauses as well as the somewhat more relaxed modern approach. It then proceeds to describe the contemporary critique of the limitations on enforcing remedial clauses, and, briefly, the direction of the steady doctrinal shift toward a more permissive stance regarding these clauses, particularly when they represent agreements between sophisticated, corporate actors.[19]

Part II advances this Article's central claim that remedial clauses should not be analyzed as though they were standard contractual terms, affecting only the parties. Rather, they are terms that suggest to a court what the remedies for breach should be and thereby implicate values other than economic efficiency and the parties' autonomy. By considering remedial clauses only from the perspective of contractors, actual and prospective, the dominant law and economics analysis of these clauses has offered a lopsided intellectual treatment of the issues. Remedial clauses, affect not only contractors, but also tread 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. Thus, the enforceability of remedial clauses is justifiably limited and not merely when they impose penalties. I also aim to motivate and vindicate the other two traditional limits on enforceability, namely that the clauses only be enforced when reasonable and when damages would be uncertain.

This argument requires addressing the challenges posed by settlement agreements and alternative performance clauses, which are close relatives, but not direct substitutes, to remedial clauses. Part III offers principled grounds to distinguish between remedial clauses and these distant cousins.

I. A Brief Summary of the Common Law Rule and Its Critique

A. Doctrine

A remedial clause, or what is usually termed a "stipulated damages" or "liquidated damages" clause, is a contractual term that specifies what duties, usually the payment of damages, will be owed by one contracting party to another should the former breach the performance terms of the contract. In essence, they are terms that prospectively specify particular remedies for the contingency that a legal duty is later abrogated.

Because they are terms that purport to respond to the abrogation of a legal duty, I prefer the label "remedial clauses" to "liquidated damages" or "stipulated damages" clauses or agreements for two reasons. First, the

19. *See, e.g.*, Goetz & Scott, *supra* note 13, at 1017–18, 1022.

term "remedial clauses" clearly encompasses clauses that involve remedies other than monetary damages,[20] including clauses that specify specific performance as the designated remedy for breach.[21] Thus, the term is more accurate and transparent. Second, some courts and commentators reserve the use of the expression "liquidated damages clauses" to those clauses that stipulate damages short of penalties.[22] They treat "penalty clauses" and "liquidated damages clauses" as mutually exclusive categories. Because it is often unclear or disputed which category a remedial clause falls into (impermissibly penal or not), one may be at a loss as to how to refer to the clause prior to the resolution of the issue. Thus, it is useful to have an umbrella term that encompasses clauses specifying nonmonetary damages and that encompasses those clauses that are either impermissible penalty clauses or non-penal liquidated damages clauses.

In the United States, the traditional, strict common law treatment of these clauses has been to presume against their enforceability[23] unless actual damages would be difficult to quantify with specificity at the time of contracting or at the time of breach.[24] This limitation is often referred to as the "uncertainty requirement."[25] Even when actual damages would be difficult to calculate with specificity, the damages specified in the clause must also represent a reasonable approximation of damages and

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20. One remedy specified in the contract at issue in *XCO International Inc.* was a royalty-free license to a patent. *Id.* at 1000; *see also* Norwest Bank Minn., N.A. v. Blair Rd. Assocs., L.P., 252 F. Supp. 2d 86, 94 (D.N.J. 2003) (upholding a liquidated damages provision that increased the interest rate on a loan in case of default); *In re* Stein & Day, Inc., 80 B.R. 297, 300 (Bankr. S.D.N.Y. 1987) (remedial clause directing a reversion of copyright interests upon breach); Osterhout v. Brandts, 220 P. 171 (Kan. 1923) (enforcing a remedial clause requiring defendants to forfeit property upon breach); O'Donnell v. Lebb, 178 P. 212 (Or. 1919) (enforcing a remedial clause conveying a property deed in the event of a breach).

21. *See, e.g.*, Reeder v. Carter, 740 S.E.2d 913, 919 (N.C. Ct. App. 2013) (holding that a specific performance clause in a marital separation agreement was not binding as such and does not negate the burden to prove equitable requirements for specific performance); Fazzio v. Mason, 249 P.3d 390, 397 (Idaho 2011) (holding the court need not honor a specific performance clause as such, but that the clause is evidence that specific performance would be equitable).

22. *See, e.g.*, Wassenaar v. Panos, 331 N.W.2d 357, 359 (Wis. 1983).

23. *See* Howard Johnson Int'l Inc. v. HBS Family, Inc., No. 96 CIV. 7687(SS), 1998 WL 411334, at *4 (S.D.N.Y. July 22, 1998) (declaring that reasonable doubts should be resolved against enforceability); Thorne v. Lee Timber Prods., Inc., 279 S.E.2d 521, 523 (Ga. Ct. App. 1981) (declaring that doubts should be resolved against enforceability). What I am calling the traditional or strict common law approach is itself a marked change from the early British common law, which permitted the requirement of a bond, even of penalty proportions, and its forfeiture on nonperformance. *See, e.g.*, JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 125 (5th ed. 2011); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 90–91 (1987).

24. *See* sources cited *supra* note 15.

25. Kenneth W. Clarkson et al., *Liquidated Damages v. Penalties: Sense or Nonsense?*, 1978 WIS. L. REV. 351, 354 (1978); Goetz & Scott, *supra* note 14, at 559 n.22; Aristides N. Hatzis, *Having the Cake and Eating It Too: Efficient Penalty Clauses in Common and Civil Contract Law*, 22 INT'L REV. L. & ECON. 381, 386 n.20 (2003); Alex Y. Seita, *Uncertainty and Contract Law*, 46 U. PITT. L. REV. 75, 79 n.11 (1984).

must not constitute a penalty.[26] Thus, two elements must be met before the clauses are enforceable: first, actual damages must be "uncertain" or difficult to quantify;[27] second, the specified remedy must be a reasonable approximation of the (uncertain) damages and, in particular, it must not be a penalty.[28] Largely, other common law jurisdictions adhere to the same approach.[29]

The legal treatment of these clauses in the United States is in flux. Some courts still take a restrained posture toward enforcement along the lines of what I am calling the "traditional common law rule."[30] But, many

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26. One prominent departure from the traditional disfavor shown toward penalty clauses is contained in the *statutory* authorization of penalty clauses in credit card contracts for late payments and overcharges, clauses that tend not to distinguish the occasions of breach, nor their extent. Between 1996 and 2010, a federal agency regulation permitted their imposition by nationally chartered and state chartered banks, preempted all state limits on their size or conditions of imposition, and imposed no limits on their size or circumstances of imposition. The Credit Card Accountability Responsibility and Disclosure Act of 2009 imposed limitations on the size of the permitted penalties and expressed the principle that they should bear a relation to actual damages, but then created a safe harbor of $25 that arguably ignores this principle. *See* 15 U.S.C. § 1665d(a) (2011); 12 C.F.R. § 226.52(b)(1)(i) (2011); 75 Fed. Reg. 124, 37542 (June 29, 2010). Other constitutional defects with the enforcement of excessive late fees and over-limit fees are discussed in Seana Valentine Shiffrin, *Are Credit Card Late Fees Unconstitutional?*, 15 WM. & MARY BILL RTS. J. 457, 457–500 (2006); *see also In re* Late Fee & Over-Limit Fee Litig., 741 F.3d 1022 (9th Cir. 2013), *cert. denied sub nom.* Piñon v. Bank of Am., NA, 134 S. Ct. 2878 (2014).

27. *See, e.g.*, *In re* Ionosphere Clubs, Inc., 262 B.R. 604 (Bankr. S.D.N.Y. 2001) (declining to enforce a remedial clause within a tax benefit transfer contract for airplanes between corporations because actual damages were calculable and did not bear a reasonable relationship to the designated damages amount); Hickox v. Bell, 552 N.E.2d 1133 (Ill. App. Ct. 1990) (finding a remedial clause unenforceable because actual damages for breach of a real estate contract were susceptible of calculation); *Lee Timber Prods.*, 279 S.E.2d at 523 (citing ability to determine injury caused by breach as one reason not to enforce liquidated damages clause); Lee Oldsmobile, Inc. v. Kaiden, 363 A.2d 270 (Md. Ct. Spec. App. 1976) (declining to enforce a liquidated damages clause directing retention of a $5000 deposit for cancelling a car purchase contract because the actual damages were capable of accurate estimation).

28. *See, e.g.*, *Howard Johnson Int'l Inc.*, 1998 WL 411334, at *7 (finding fixed sum due for cancellation of license agreement was unreasonable because it did not take into account the time remaining on the contract at the time of default).

29. *See* Saloua Hoeve-Ouchan & Giorgio De Rosa, *Liquidated Damages and Penalty Clauses: A Common Law and Civil Law Perspective*, INT'L L. OFF. (July 22, 2013), http://www.internationallawoffice.com/newsletters/Detail.aspx?g=441bae62-38ab-4447-acc5-0edbae222998 (discussing Singapore's rule following English approach); *see also* J. Frank McKenna, *Liquidated Damages and Penalty Clauses: A Civil Law Versus Common Law Comparison*, CRITICAL PATH, Spring 2008, at 3–6 (discussing England, Australia, Ireland, and Canada but noting that by statute, India follows something more like the civil law approach). *But see* Prince Saprai, *The Penalties Rule and the Promise Theory of Contract*, 26 CAN. J.L. & JURIS. 443 (2013) (suggesting that the British approach only forbids penalty clauses but enforces other liquidated damages clauses).

30. *See, e.g.*, Bral Corp. v. Johnstown Am. Corp., 919 F. Supp. 2d 599 (W.D. Pa. 2013) (upholding a liquidated damages agreement but stressing that damages were not calculable at time of contracting); Rogers v. Lockard, 767 N.E.2d 982, 990–91 (Ind. Ct. App. 2002) (holding that ambiguous clauses should be construed as penalties and that one factor in invalidating a liquidated damages clause in breach of a real estate contract was that actual damages were easily determinable); Gen. Linen Servs., Inc. v. Franconia Inv. Assocs., 842 A.2d 105, 109 (N.H. 2004) (finding a liquidated damages provision would be unenforceable because damages associated with the loss of business are "not sufficiently

states follow "the modern trend," and adopt a permissive posture toward enforcement, so long as the clauses are not intended, or do not in fact, impose a penalty for nonperformance.[31] The states either explicitly ignore, or pay only lip service to, the "uncertainty" requirement, or they collapse the reasonability constraint into a mere inquiry as to whether the clause clearly operates as a penalty.

The Restatement and the Uniform Commercial Code ("UCC") officially articulate a somewhat more positive approach to remedial clauses than the strict common law doctrine, but still place significant barriers on their enforceability that echo the traditional common law concerns. The Restatement specifies that,

> [d]amages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.[32]

Although couched more permissively, by collapsing the separate elements into factors, the rule does not endorse reflexive enforcement of these clauses. Rather, it demands reasonability and intimates that the clauses are appropriate when and because epistemic barriers obstruct standard methods of anticipating or ascertaining damages at formation or at breach.[33]

The UCC section, which appears in the Chapter devoted to remedies, roughly accords with the Restatement, directing that,

> [d]amages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of

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difficult to prove" to support use of a liquidated damages clause); Tech. Aid Corp. v. Allen, 591 A.2d 262, 274 (N.H. 1991) (holding actual damages associated with loss of a particular client's business are not sufficiently difficult to validate use of liquidated damages clause).

31. *See, e.g.*, Karimi v. 401 N. Wabash Venture, LLC, 952 N.E.2d 1278 (Ill. App. Ct. 2011); City of Davenport v. Shewry Corp., 674 N.W.2d 79 (Iowa 2004); Raisin Mem'l Tr. v. Casey, 945 A.2d 1211 (Me. 2008). California has forged a unique path. By statute, it declares a presumption of enforceability of remedial clauses between commercial or corporate parties, unless the clause was unreasonable at the time of formation. A clause may be shown to be unreasonable if it is designed as a penalty or bears no relationship to a reasonable estimation of damages. *See, e.g.*, Ridgley v. Topa Thrift & Loan Ass'n, 953 P.2d 484, 488 (Cal. 1998). But, California imposes the common law's presumption of the invalidity of remedial clauses in roughly those cases where the parties include individual consumers, renters, or real property purchasers buying for noncommercial purposes. CAL. CIV. CODE § 1671 (West 2015).

32. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (AM. LAW INST. 1981).

33. Many contemporary cases require the uncertainty to be present at formation (at least so long as there are *some* actual damages). *But see, e.g.*, Monsanto Co. v. McFarling, 363 F.3d 1336, 1350 (Fed. Cir. 2004) (invalidating a remedial clause because actual damages were readily calculable at breach). The contemporary trend does not mesh well with the arguments I make below, but may well be dictated by the aim to maintain consistency with the *Hadley* rule requiring consequential damages be limited to those foreseeable at formation. *See* Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145, 151 (1854). The *Hadley* rule might also be subject to criticism, as I argue in Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 724 (2007).

> proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.[34]

The commentary for both the Restatement and the UCC emphasizes the doctrine's aim as, largely, to distinguish penalty clauses from other liquidated damages clauses. On this reading, the former are invalidated as illicit efforts to circumvent the common law ban on punitive damages in contract, but all other remedial clauses are permissible. This gloss, however, is somewhat fast. It does not make sense of the doctrinal elements that stress the "difficulties of proof of loss," nor does it capture the requirement of reasonable approximation and the bar on undercompensation. If the liquidated damages rules simply represented the ban on enforceable punitive damages, whether initiated by a judge or agreed to by the parties, then these other features would be anomalous. Indeed, the "mystery" of these factors runs as an undercurrent behind much of the criticism of the traditional and modern rules governing remedial clauses.[35]

Notably, the civil law approach differs from the common law approach, both by showing no general reluctance to enforce remedial clauses and further, by recognizing enforceable penalty clauses so long as they are not excessive.[36] This substantial difference places pressure to justify (or, in the alternative, modify) the Anglo-American approach, particularly in light of the wrinkles the variation introduces into international contracting.[37]

B. Critiques

The American scholarly treatment of these clauses in recent years has been mostly critical and predominantly conducted along libertarian and law and economics lines, mainly limited to a debate about the efficiency of enforcing these clauses—with a particular focus on penalty clauses. Although some law and economics scholars defend versions of

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34. U.C.C. § 2-718 (Am. Law Inst. & Unif. Law Comm'n 2002).

35. *See, e.g.*, Murray, *supra* note 23, § 125, (acknowledging that the uncertainty of damages is an independent, articulated factor in assessing enforceability, but also stressing many years of doubt concerning this "requirement"); *see also* Farnsworth, *supra* note 13, § 12.18.

36. *See* Hatzis, *supra* note 25, at 400–01. Civil law countries vary. Some enforce penalties without an excessiveness ceiling (for example, Spain), some enforce unless there is "manifest excessiveness" (for example, France and Netherlands), and some require proportionality (for example, Germany and Russia). The civil law approach may have moved slightly toward the common law approach in the last forty years, introducing the excessiveness limitation on penalty clauses and limiting what penalties are available where "part of the main contractual obligation . . . has been performed." McKenna, *supra* note 29, at 4 n.8.

37. *See* Jonathan S. Solórzano, *An Uncertain Penalty: A Look at the International Community's Inability to Harmonize the Law of Liquidated Damage and Penalty Clauses*, 15 Law & Bus. Rev. Am. 779 (2009) (noting the variation either renders the enforceability of remedial clauses uncertain or requires further negotiation and agreement about a choice of law clause).

the common law rule,[38] the majority position favors abandoning the common law view and either endorsing a presumption of enforceability except where the clause is clearly a penalty clause, or enforcing all remedial clauses, including penalty clauses (perhaps with some limit on excessiveness).[39]

The main lines of argument for this reform are: First, these are agreements between the parties, just like any other agreement. If we respect the parties' decisions in other situations, including settlement agreements, without subjecting their agreements to special scrutiny, we should treat remedial clauses on a par.[40] After all, the parties themselves are the best situated agents to assess losses and their significance. Second, enforceable remedial clauses may help parties avoid later negotiation and litigation costs.[41] Third, although penalty clauses may deter efficient breach, the willingness to sign them allows contractors to convey their seriousness, competence, and trustworthiness. These signals of sincerity and preparedness may facilitate the formation of contractual relationships and contribute to their smooth functioning.[42] Finally, enforceable remedial clauses may allow parties to make up for the deficiencies of standard contractual remedies by offering an opportunity to acknowledge and compensate for some nonmonetary harms of

38. *See* Clarkson et al., *supra* note 25, at 368–70 (contending that overcompensatory stipulated damage provisions may encourage uncooperative behavior by promisees in an attempt to induce breach); Paul H. Rubin, *Unenforceable Contracts: Penalty Clauses and Specific Performance*, 10 J. LEGAL STUD. 237, 243–44 (1981) (arguing that enforcing penalty clauses incentivizes parties to claim that the other party breached the contract, "[e]ven if both parties fulfill[ed] their contractual obligations"); Lars A. Stole, *The Economics of Liquidated Damage Clauses in Contractual Environments with Private Information*, 8 J.L., ECON. & ORG. 582, 583 (1992) (stating that many scholars argue "excessive liquidated damages are presumptive evidence of a contractual failure such as fraud or mutual mistake"); Eric L. Talley, *Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule*, 46 STAN. L. REV. 1195, 1198 (1994) (defending the common law rule because it reduces the incentives and abilities of parties "to engage in deceptive behavior during renegotiation"); *see also* Richard Craswell, *Contract Remedies, Renegotiation, and The Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988) (observing both that overcompensatory and undercompensatory damages, including over and undercompensatory liquidated damages clauses, may have untoward price effects but also that uncertainty about damage awards may also have substantial price effects).

39. *See* sources cited *supra* note 14.

40. *See* sources cited *supra* note 17.

41. *See, e.g.*, CORBIN ET AL., *supra* note 15, § 58.1 (noting that "[d]etermining the amount of damages that are recoverable for a breach of contract is nearly always a difficult and expensive proceeding" and, as a result, "contracting parties have from time immemorial attempted to determine in advance the character of the judicial remedy in advance"). *But see* Talley, *supra* note 38 (arguing remedial clauses may encourage deceptive renegotiation).

42. *See, e.g.*, Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289 (7th Cir. 1985); XCO Int'l Inc. v. Pac. Sci. Co., 369 F.3d 998, 1001 (7th Cir. 2004).

breach[43] or other harms of breach that are not legally compensable in contract, such as loss of reputation or emotional stress.[44]

II. A Defense of the Traditional Common Law Rule

A. Remedial Clauses and the Judicial Role

What follows is an effort to justify the traditional common law rule and its separate elements, an account that may offer some answer to these foregoing criticisms. The prominent criticisms of the presumption against remedial clauses overlook the special reasons that courts and judges may wish to exercise special control over remedial actions. Although the penalty clause is an especially clear example, it is not the only, or even the prototypical example of an objectionable remedial clause.[45] Most remedial clauses, whether penal or not, objectionably displace the role of the judiciary in adjudicating conflict and ascertaining remedies.[46]

Broadly speaking, what seems missing from these critiques is any sustained effort to gauge the significance of the fact that these are *remedial clauses,* rather than standard performance terms that embody the primary motivation behind, and the substance of, the contractual relationship. The fact that these clauses identify remedies does substantial work to justify something like the traditional common law approach and implicates the interests of other parties not considered by the dominant critical framework.

Because these clauses purport to establish the proper resolution of a breach of a legal duty, they differ significantly in form from performance terms. This Article later addresses in Subpart III.C *how* remedial clauses may be distinguished from alternative performance terms; but for the moment, assume that a distinction may be drawn. This Article first argues what the significance of the distinction would be, assuming it may be made.

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43. *See, e.g.*, Daphna Lewinsohn-Zamir, *Taking Outcomes Seriously*, 2012 Utah L. Rev. 861.

44. *See, e.g.*, Wassenaar v. Panos, 331 N.W.2d 357, 365 (Wis. 1983); *see also* Goetz & Scott, *supra* note 14, at 583; Richard Manly, *The Benefits of Clauses That Liquidate, Stipulate, Pre-Estimate or Agree Damages,* 28 Building & Construction L.J. 246, 255 (2012) (discussing ability of remedial clauses to compensate for idiosyncratic losses).

45. *See* William Loyd, *Penalties and Forfeitures: Before* Peacy v. The Duke of Somerset, 29 Harv. L. Rev. 117, 129 (1915) ("[T]o carry the principle [of relief against penalties] to its logical conclusion would prevent the parties to a contract from defining in advance the extent of their rights and liabilities, in case of breach."); H.F. Clarke Ltd. v. Thermidaire Corp., [1976] 54 D.L.R. 3d 385, 392 (S.C.R.) ("[J]udicial interference with the enforcement of what the courts regard as penalty clauses is simply a manifestation of a concern for fairness and reasonableness, rising above contractual stipulation, whenever the parties seek to remove from the courts their ordinary authority to determine not only whether there has been a breach but what damages may be recovered as a result thereof.").

46. My argument thus resembles but goes beyond Yorio's argument about specific performance clauses, which emphasizes the nondelegability of *equitable* powers. Edward Yorio & Steve Thel, Contract Enforcement: Specific Performance and Injunctions §§ 19.1, 19.2.3, 20.1–3 (2d ed. 2011).

This difference in form between performance terms and remedial clauses justifies the substantial difference in treatment along the following lines. Parties may, within broad limits, determine their mutual commitments and the compensation they will accept for performance. They have substantial latitude in creating a wide range of moral duties through promissory behavior. To the extent they contract, they generate legal duties that, consequently, have public significance and that render them susceptible to the independent oversight and judgment of the community. When they do not comply with these agreements voluntarily and cannot resolve any subsequent disputes amongst themselves, and one or both parties seek a remedy from a court, then they invoke the independent judgment of the judiciary. One of the essential roles of the judiciary is to assess the significance of the abrogation of legal duties and to apply independent judgment to craft a fair response to that abrogation. Sometimes in the guise of a judge and sometimes in the guise of a judge and jury, the judiciary serves as the community's voice, levying its response to an abrogation of a publicly recognized responsibility.[47] Its judgment that a remedial clause is unreasonable need not, therefore, focus merely on whether any specified damages are inappropriate in size. A court may also attend to whether monetary damages are appropriate at all for the relevant breach,[48] or whether they are inconsistent with public policy. Where a nonmonetary remedy is specified, such as specific performance, enforcing the transfer of a copyright, or granting a royalty-free license,[49] the judiciary may not only ask whether the remedy is proportionate and appropriate for the breach and sufficiently responsive to the complaint of the plaintiff, but also whether there is an available, fair remedy that is less burdensome on the defendant or on the judiciary to monitor.

Given this understanding of the judiciary's role in reviewing contract actions and meting out remedies, privately forged remedial clauses should, at best, serve as a suggestion to the judiciary about what a fair remedy would be. They should not presumptively bind because such a presumption would eviscerate the independent role the judiciary is meant to play in the crafting of remedies.[50] Complete judicial deference

47. *See also* Stephen A. Smith, *Remedies for Breach of Contract: One Principle or Two?*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 341 (2015) (offering an extensive defense of the view that breach is a wrong to which damages orders are a public response, importantly delivered by the judiciary).

48. *See, e.g.*, Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494 (Ct. App. 2002) (refusing to enforce a remedial clause specifying a $50,000 damage payment for marital infidelity on the grounds that enforcing damages for infidelity conflicted with California's no-fault divorce system).

49. *See* XCO Int'l Inc. v. Pac. Sci. Co., 369 F.3d 998, 1001 (7th Cir. 2004).

50. *See* Macneil, *supra* note 17, at 502–03 ("[T]he parties are not free to make more strict the legal instrument provided by society. They are not free to change the nature of contract."). *Cf.* Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260, 260–61 (1910) (making

to remedial clauses would render the judiciary merely the servant of private parties and would undermine its role as a party that deploys independent, impartial judgment to resolve legal disputes.[51] As a further consequence, were remedial clauses to become more common, the judiciary's reasoned contributions to the evolution of our public understanding of the proper resolution and remediation of these legal disputes would be substantially diminished.[52]

For these reasons, the issue is not simply one about the sophistication or bargaining power of the parties. A rule like California's[53] that is more permissive with respect to remedial clauses crafted between corporate actors than with respect to those deployed against consumers might be responsive to concerns about the potentially compromised consent of unsophisticated parties or those in weak bargaining positions.[54] Such a rule would still run roughshod over the values served by having the judiciary independently assess and mete out remedies. Indeed, those values may be heightened in the case of corporate agreements. Society arguably has a heightened interest in exercising oversight over the resolution of legal disputes of powerful actors who control important social resources and ensuring that public resources are only employed to enforce fair resolutions to such disputes. Further, to protect the reputation and the integrity of the judiciary as an impartial institution,

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the parallel point that enforcing choice of law clauses and the parties' intent would substitute private parties' judgment for the legislature's and subvert legislative sovereignty).

51. *Cf.* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26–27 (1994) (Stevens, J., dissenting) (quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27, 40 (1993) ("Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.").

52. Similar dangers attend efforts by large companies to shunt disputes into arbitration and away from judicial resolution. Apart from the defects of the arbitration process, another loss occasioned by the (involuntary) shift to arbitration is the diminution of the judicial development of the articulation of the law in heavily arbitrated areas as well as the public awareness of the sites of dispute. *See, e.g.*, Richard M. Alderman, *Testimony Before the United States Senate Committee on the Judiciary*, 1 J. CONSUMER & COM. L. 85 (2008); Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1 (2003); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 785 (2002); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 169 (2011) [hereinafter Resnik, *Fairness in Numbers*]; *see also* Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 417 (1987). *Cf.* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) ("Adjudication uses public resources, and employs . . . public officials . . . [whose] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.").

53. *See* sources cited *supra* note 31.

54. *See also* Fried, *Contract as Promise*, *supra* note 17, at 969; Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1288–89 (7th Cir. 1985) ("Deep as the hostility to penalty clauses runs in the common law . . . we still might be inclined to question, if we thought ourselves free to do so, whether a modern court should refuse to enforce a penalty clause where the signator is a substantial corporation, well able to avoid improvident commitments.").

the public has a special interest in ensuring that the judiciary uses its independent judgment when administering remedies on behalf of and against the socially powerful.

This consideration about reserving the judiciary's remedial power to efforts guided by its own independent and impartial judgments connects to another set of concerns. The posture of presumptive enforceability introduces the difficulty that, in principle, the abrogation of the exact same legal duty, for performance of the exact same activity, at the exact same price, by identically situated parties, in the exact same legal jurisdiction could nonetheless be subject to wildly different remedial orders.[55] Although there may be sound reasons to allow room for some remedial variance between jurisdictions or to allow for the exploration of jurisprudential disputes, any variance arising from different remedial clauses that specified different remedies for the same sort of breach would not engage with those reasons. It seems in tension with the rule of law's commitment that like cases should be treated alike by adjudicators. Thus, one way to understand the common law rule is that it represents the incorporation of some principles of due process into the body of the contract law.

B. The Continuity Between Penalty Clauses and Other Remedial Clauses

On the understanding that this Article urges, the prohibition on penalty clauses is not the central element of the common law approach to remedial clauses, but is simply the most concentrated instance of its fundamental concern. The basic problem with enforceable remedial clauses is that they substitute the judgment of private parties for the judgment of a public official when the decision to be made is an importantly public one. That problem is not confined to the case of penalty clauses, but would also attach to subcompensatory clauses as well as to remedial clauses that dictate the *form* of the remedy, for instance, specific performance clauses.

To be sure, the problem of displacing the judiciary takes a more pronounced form when punishments are meted out. Legally administered punishments importantly express the position of the state—that is, of the community—that a particular behavior requires a special remedy: a rebuke and redress that goes beyond the compensatory and registers the community's special disapprobation. For a court's independent judgment

55. Of course, it is possible that, over time, competition might arise with respect to the content of the terms and that competition may introduce greater uniformity. *Cf.* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203, 1235 (2003). *But see* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 Stan. L. Rev. 545, 565–66, 606 (2014) (arguing that inefficiencies may persist and may be exacerbated by consumer misunderstandings). Even were such competition to transpire and be effective, any emergent horizontal equality would be accidental and not the product of a commitment.

to be bypassed and for the court instead to serve as the mere administrator of a private party's directive to punish is inconsistent with the public expressive purposes of punishment. Those purposes include an interest in replacing vengeance and private retaliation with deliberative and impartial remediation, and an interest in ensuring that punishments are fair, proportionate, and administered with some attention to horizontal equity.

One might object that penalty clauses are not punishments in any standard sense and are not meant to express social disapprobation or disapproval, so the foregoing line of argument is inapt. Penalty clauses may instead serve a number of ex ante communicative purposes, such as conveying the special importance to one party of performance or timely performance, on the one hand, and signaling the other party's strong confidence that she will perform and her strong commitment to doing so, on the other hand.[56] The meaning of a penalty clause might lie more in the initial request for a penalty for failure and the willingness to be vulnerable to one, than in the significance of its later imposition. The later imposition of the penalty might not reflect any judgment about the breaching behavior but might merely be necessary to render credible future uses of this ex ante communicative device.[57]

Despite the accuracy of the description of the motives of many contractors in seeking or agreeing to penalty clauses, I am unpersuaded that these facts create a gulf between penalty clauses and the appropriate legal and judicial norms governing the imposition of punishment. Doctrinally, the objection is hard to square with the commonly cited justification for the bar on enforceable penalty clauses, namely that they would allow parties to circumvent the bar on punitive damages in contract by will.[58] Of course it is true that penalty clauses may be

56. *See, e.g.*, Fried, *Contract as Promise*, *supra* note 17, at 970 (observing that penalty clauses may render the promise and the promisor credible and thereby facilitate formation); *Lake River Corp.*, 769 F.2d at 1289 ("Penalty clauses provide an earnest of performance.").

57. *Cf.* Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 327 (1985).

58. *See, e.g.*, MCA Television Ltd. v. Pub. Int. Corp., 171 F.3d 1265, 1271 (11th Cir. 1999) (striking down a contractual penalty in a liquidated damages provision as impermissibly punitive, explaining that "contract law does not allow for punitive damages unless the breach of contract is also a tort. . . . Parties may not . . . use . . . stipulated damages provisions as a way to secure for themselves greater damages in the event of a breach than contract law would normally allow."); Kalenka v. Taylor, 896 P.2d 222, 229 (Alaska 1995) (holding contractual penalties violate the common law ban on punitive damages despite their different label); Roscoe-Gill v. Newman, 937 P.2d 673, 675 (Ariz. Ct. App. 1996) (holding excessive liquidated damages are unenforceable because they are "punitive"); Pima Sav. & Loan Ass'n v. Rampello, 812 P.2d 1115, 1117–18 (Ariz. Ct. App. 1991) (finding penalty clauses are impermissible because contract law opposes punishment for breach); Lake Ridge Acad. v. Carney, 613 N.E.2d 183, 187–88 (Ohio 1993) (holding penalty clauses are disallowed because of the ban on punitive damages); Wolin v. Walker, 830 P.2d 429, 433 (Wyo. 1992) (finding liquidated punitive damage agreements that "bear no reasonable relationship to the actual damages sustained" are punitive and unenforceable).

incorporated into a contract for reasons other than the motive to punish. For that matter, punitive damages may be sought in torts cases by plaintiffs not because they are interested in the punishment of the defendants per se but simply because they want the money. For example, plaintiffs might, in good faith, regard standard compensatory measures as inadequate given the wrong they suffered, or, in worse cases, plaintiffs might simply spy an opportunity for a windfall. The plaintiffs' nonpunitive motives in such cases do not refute the claim that these are nonetheless punitive damages. In the contracts case, what seems essential about penalty clauses is that the specified damages are not merely nominal, that they exceed what, officially, is deemed to be compensatory, and perhaps, that they do not plausibly aim to fill a gap with respect to what are clearly compensatory damages—as with stipulations for attorneys' fees. The authors of penalty clauses attempt to marshal the power of government to demand more than the damages caused by a party's breach. That effort raises the question of whether the breaching party's conduct merits levying extra-compensatory or punitive damages. Even if the reason penalties are sought does not involve a punitive motive, the effect of a penalty on a defendant and the potential for penalties to serve as levers of governmental and private oppression may suffice to raise the sorts of concerns that require careful, impartial deliberation and fair patterns of application.

Thus, the concerns with remedial clauses seem heightened when penal remedies are administered, given the social significance of punishment. Yet, the underlying concerns seem the same, even when purely compensatory remedies are at issue. As a general matter, the posture of presumptive enforceability eviscerates the independent role of the judiciary in resolving public legal disputes and in identifying and imposing appropriate and generally applicable remedies for breaches of legal duties.

This understanding of the purpose behind the common law rule fits and illuminates its main contours.[59] Whenever the intention or the effect behind a remedial clause is punitive, it should be unenforceable—not primarily because punitive damages are inappropriate in contract, but because private determinations of remedies are inconsistent with the invocation and use of the public adjudication mechanism. That principle explains the broad rule: unless damages cannot be calculated with

59. Or rather, it fits its main contours at an abstract level. My aim is to give an argument for the approach and its spirit, rather than to conform to the particulars of its interpretation. So, my argument does not account for all of the applications of the common law rule on the ground, including less searching scrutiny for undercompensatory clauses than supercompensatory clauses. My argument also does not account for the U.S. treatment of attorneys' fees. In the United States, successful parties are not—as a default—entitled to attorneys' fees, but parties may affirmatively contract around that default rule and reasonable agreements are subject to enforcement. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 356(d) (AM. LAW INST. 1981).

certainty, the judiciary should determine and impose the relevant damages. Where they are not calculable, private agreements may be used but they must themselves incorporate judicial standards of reasonability and the compliance with that standard will be policed. As a secondary matter, the ban on punitive damages in contract provides a supplementary reason against enforcing a punitive clause because enforcement would permit private parties to circumvent the ban. But, even were the ban reconsidered and lifted, the basic reason to refuse to enforce punitive clauses would persist. That is, private parties should not have substantial power to dictate the punishments that the public authority imposes and to curtail the operation of the independent judgment of an impartial authority about when and what punishments are appropriate.[60] Thus, criticisms that contractual remedies are undercompensatory as a general matter do not, properly understood, entail the claim that remedial clauses should generally be enforceable.[61] If contractual remedies are undercompensatory, as they may be, that points to a defect in the public, judicial treatment of contractual breach. That defect is not appropriately addressed through enforcing occasional bursts of private recognition, but rather by a revision of the public doctrine.

C. The Proper Functions Served by Remedial Clauses

Notice that the common law presumption against enforceability does not render remedial clauses a superfluity. They may still serve three functions. First, they may serve as informal understandings between the parties about how to proceed, in good faith, if the performance terms are not satisfied. Even if the clauses are not automatically enforceable, they may still serve as guidance for how the parties may voluntarily proceed should they encounter mutually recognized problems with performance. At least in those cases where these clauses are deliberately constructed and are not mere elements of a signed, but unread, adhesive contract, these terms may offer a germane blueprint for resolution at a time when the parties may be at odds or otherwise face difficulties in forging a fresh settlement agreement.[62] The terms may exert moral force that may help

60. *See also* Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law 33–36 (2012) (offering an analogous criticism of the ubiquitous use of adhesive fine print by large corporations as facilitating the private circumvention of public decisions, for instance, about fair use policy); Margaret Jane Radin, *An Analytical Framework for Legal Evaluation of Boilerplate*, *in* Philosophical Foundations of Contract Law 215 (Gregory Klass et al. eds., 2014) (advancing an analogous criticism of the use of exculpatory clauses in boilerplate to 'delete' rights against, for instance, negligence).

61. *Contra* Lewinsohn-Zamir, *supra* note 43.

62. I hasten to add, though, that I am not arguing that, morally, by virtue of being agreed upon, the designated amount *perforce* constitutes an adequate moral remedy. I doubt that individual moral agents can specify, by fiat, the moral significance of a moral breach for the same reasons that I dispute that individual parties can specify, by fiat, the public, legal significance of a legal breach. But, the

the parties avoid or resolve a dispute without resorting to judicial assistance.[63]

Of course, the parties may seek legal recourse nonetheless, whether because there is a dispute over whether breach has occurred at all or because, faced with the actual circumstances of breach, one of the parties regards the prognosticated resolution as ill-fit for the occasion. Second, remedial clauses provide advice to the court to help craft a fair remedy, offering information about the perceived worth of performance as well as what a baseline resolution acceptable to the parties would have been under some circumstances of breach. If that suggested baseline seems fair and appropriate to the court given the anticipated circumstances of breach, the court may calibrate from there if the actual circumstances of breach differ.

Third, as the common law explicitly allows, the clauses may determine the remedy where a court is disabled from ascertaining actual damages after breach has occurred. Where epistemic barriers prevent the court from directly applying its independent judgment about the ramifications of breach, the prior understandings of the parties may serve as a superior substitute to failing to offer any remedy. Although a prior agreement between the parties both lacks the imprimatur of an impartial assessment and a tailoring to the specific circumstances of the breach, it offers some approximation of what a fair remedy might be from the parties who are likely to have the best ex ante information about the significance and value of the prospective performances. By invalidating penalty clauses and by reviewing the remaining remedial clauses to ensure they represent fair approximations of actual damages, the judiciary maintains its role in calibrating remedies, even when information is sufficiently elusive to preclude the judiciary from playing its full standard role in setting remedies.

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agreed upon terms may serve as a reminder of what may have seemed like a fair resolution when heads were cooler. This may help to guide a fair assessment after breach, whether by serving as counterweight to any inflamed passions or by revealing the implications of prior assumptions that contemporary circumstances belie. Of course, as discussed in the text of this Article, ex ante negotiations may not be responsive to the nuances of the particular circumstances of breach and therefore may not be more accurate than ex post determinations.

63. Wilkinson-Ryan argues that when parties include remedial clauses in a contract, their interpretation of the obligation tends to shift. Subjectively speaking, "they transform a promise to perform into a promise to perform *or* pay." Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 669 (2010). Thereby, breach may disappoint, but will not blindside, the promisee. In another Article, Wilkinson-Ryan and her colleague, David A. Hoffman, also suggest that hammering out remedial clauses may reduce some feelings of resentment and betrayal occasioned by breach because the process of formulating the clauses involves the parties together contemplating the possibility of breaching them. Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1001, 1038 (2010). Although both Wilkinson-Ryan and Hoffman associate these effects with enforceable clauses, it is not clear that the mitigation of ill will depends on the *enforceability* of these clauses rather than their free, deliberate formation.

D. The Larger Theoretical Context

As with almost every issue about contract doctrine, there is a danger in proceeding as though any particular doctrine can be adequately analyzed in isolation, apart from some of the larger, foundational questions about why we enforce contracts and the meaning of breach. In this case, the foregoing discussion may invite the observation that there seems to be a strong affinity between one's view about breach, more generally, and one's view about remedial clauses. Unsurprisingly, the defense of the common law view that this Article advances represents a stronger fit with those views of breach that regard at least some breaches as moral wrongs, that is, whose status as an abrogation of a legal duty is not a mere formality.[64] The law and economics defense dovetails with more permissive views of breach that do not generally regard it as a moral wrong or as an important legal wrong.[65] If breach is not an important legal wrong, then it may seem a little precious to put so much weight on the procedure by which we respond to it and fashion remedies to it.[66] This connection between one's theory of contractual breach and one's theory of remedial clauses raises (at least) two issues, one methodological and one substantive.

The methodological question is whether it is worth continued investigation of remedial clauses as such, or whether the issue should be pursued at the more foundational level of resolving whether the breach is a true or merely a pro forma legal wrong. Without denying these broader connections, there are good reasons to hone in on a corner of the doctrine, if only to gain a closer, vivid glimpse of the detailed implications of larger theoretical positions to deepen our understanding and evaluation of them. That closer look, of course, may gain greater focus if we also pan out on occasion to take in the larger theoretical context. Further, although the more morally permissive position about breach may fuel the more permissive stance on remedial clauses, the former does not entail the latter. One may think that breach is not an intrinsically significant moral

64. I discuss various facets of the morality of contractual breach in the following works: Seana Valentine Shiffrin, *Could Breach of Contract Be Immoral?*, 107 Mich. L. Rev. 1551 (2009); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 Harv. L. Rev. 708 (2007); Seana Valentine Shiffrin, *Is a Contract a Promise?*, *in* Routledge Companion to Philosophy of Law 245–47 (Andrei Marmor ed., 2012); Seana Valentine Shiffrin, *Must I Mean What You Think I Should Have Said?*, 98 Va. L. Rev. 159, 159–76 (2012).

65. *See, e.g.*, Steven Shavell, *Is Breach of Contract Immoral?*, 56 Emory L.J. 439, 459 (2006); Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 Va. L. Rev. 1939, 1986–2005 (2011).

66. Fleshing out this connection requires some maneuvering since one might think that the more permissive view of breach resonates with a strong *resistance* to penalty clauses. Of course, this does represent the position of a portion of the law and economics community. One might defend the more permissive view of breach, a strongly permissive position on enforceable remedial clauses, including penalty clauses, and reject judicial imposition of penalties for breach as such by stressing the ex ante signaling and reassurance functions of penalty clauses, or by stressing the fact of voluntary agreement.

episode, but once we render performance of a legal duty and we bother to extend judicial attention to its abrogation, even if only for instrumental reasons, distinct questions about the rule of law and the fair dispersal of remedies emerge. So, methodologically, an investigation in the arguments regarding the putative wrong of breach need not precede and does not completely determine the answers to issues about remedial clauses.

A related substantive question is, if the defense of the common law doctrine on remedial clauses does implicitly feed off the view that breach is morally wrong, whether that then limits the scope of the justification for the common law doctrine. Even if intentional breach may represent a non-negligible moral or political wrong—whether in its deliberate, reckless, or negligent varieties—it is harder to defend any claim that breach itself involves wrongdoing in those cases where contract law's strict liability rule operates. That is, where a party commits breach only inadvertently without intent or irresponsibility, no important moral or political wrong has occurred for which we can claim that the public, through the voice of the judiciary, has a stake in controlling and articulating the public response. So, perhaps this suggests that the presumption against remedial clauses should only hold where breach is intentional (broadly construed), but not where breach is inadvertent.

While this position is available, it may be resisted even if one's embrace of the common law presumption against remedial clauses leans hard on the immorality of breach. Although the case is stronger for exclusive judicial control over publicly imposed remedies when the public is expressing its assessment of a moral wrong, whenever we designate activity as legally actionable, we have interests in ensuring the fair dispersal of remedies. Where strict liability rules extend to cover a wide range of innocent, non-risky behavior, the risk of unjust penalty clauses may occupy the forefront of our attention. We have a special concern to ensure that the remedies for strict liability offenses do not exceed the compensatory; we may also be concerned to ensure that the policies underlying strict liability are implemented fairly uniformly. Even if our doctrine evolved to contemplate permitting punitive damages for some breaches, we might still think it important to limit the imposition of penalties to cases of fault, for reasons of fairness and to ensure the messages sent by penalties and by the strict liability rule are not misconstrued.

III. Are Remedial Decisions Special?—Settlements and Alternative Performance Clauses

This argument so far depends on the idea that there is something special about private remedial agreements that renders them appropriately subject to judicial disapproval or, less strongly, to judicial scrutiny. This

idea is closely allied with one side of another large debate about whether there is a strong distinction between rights and remedies.[67] Much skepticism about that distinction revolves around the observation that some agents do not respect rights and duties as such, but price them out according to what remedies are assigned to them. Further, the meaning of a remedy reduces to what anticipatory behavior it will provoke or deter on the part of such agents. The general rejoinder in this Article is that that even if the bad man or the cynical (or prudential) planner predictably prices or gauges the significance of a right (or a duty) in terms of the remedies available for enforcing it, the meaning and significance of the right and of the remedy may reasonably differ to third parties, the public, and joint ventures of good faith partners.[68] The acknowledgement of that difference may, in turn, perpetuate the differential meanings, justify them, and undergird practical differences in treatment.

To stay focused on contract law, this Article will not delve further into that large debate at the abstract level. Instead, it will address two immediate objections specific to remedial clauses elicited by the assertion of a strong distinction between rights and remedies. First, if remedial clauses are suspect because they purport to resolve the treatment of the abrogation of a legal duty through nonpublic means, then why may parties generally elect to settle disputes and to choose their settlement terms without judicial oversight or interference?[69] Second, if remedial clauses are suspect, then why are alternative performance clauses enforceable, since they may yield the identical outcome as a rejected remedial clause?[70] Do these arguments about the presumptive unenforceability of remedial clauses entail more radical conclusions, such

67. For one example of skepticism toward the distinction, see Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

68. *See* Rebecca Stone, Legal Design for the "Good Man" (2015) (unpublished manuscript) (on file with the author) (arguing that laws may offer a variety of reasons for compliance to good, compliant agents who differ amongst themselves and that differ from those offered to the "bad man").

69. There are, of course, exceptions. For example, consent judgments in antitrust cases are subject to judicial oversight and determinations that their entry serves the public interest. *See* 15 U.S.C. § 16(b)–(e) (2004). To take another example, under federal law, settlements of class actions require judicial approval to ensure that absent class members are adequately represented. FED. R. CIV. P. 23(e). Many states' laws also require judicial approval of class action settlements. *See, e.g.*, MASS. R. CIV. P. 23(c) ("A class action shall not be dismissed or compromised without the approval of the court."); PA. R. CIV. P. 1714(a) ("No class action shall be compromised, settled or discontinued without the approval of the court after hearing."); TEX. R. CIV. P. 42(e) ("The court must approve any settlement, dismissal, or compromise of the claims, issues, or defenses of a certified class."); *see also* Philipps Petrol. Co. v. Shutts, 42 U.S. 797, 810 (1995) (implying judicial approval of settlements is required by due process).

70. *See, e.g.*, Minnick v. Clearwire U.S. LLC, 275 P.3d 1127, 1140 (Wash. 2012) (en banc) (upholding a diminishing early termination fee in a cell phone contract because fulfilling the contract was a real alternative and hence the termination fee was an alternative performance provision, not a liquidated damages clause or penalty).

as that settlements and alternate performance clauses should attract greater judicial scrutiny and skepticism? If so, would that consequence serve as a *reductio* of my position?

A. SETTLEMENTS

Let me start with the first objection and suggest three reasons courts might distinguish between settlements and remedial clauses, both of which arise from the fact that settlements are responses to purported claims of actual, not merely projected, breaches. First, as a general matter, settlement agreements involve the retraction of a complaint and the voluntary dismissal of a case.[71] They do not require a public official to pass judgment on whether a legal duty has been abrogated and, if so, to levy an appropriate remedy in response. Nor do settlements ask a public official to identify an abrogation of a legal duty, but withhold their own judgment about what would be an appropriate remedy, while implementing the judgment of private, partial parties about that very matter. Because settlements do not implicate the judiciary's judgment and *direct* the judiciary to levy a particular remedial assessment, they skirt some of the previously articulated concerns.[72]

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71. FED. R. CIV. P. 41(a).

72. This argument requires at least three qualifications. First, some settlements involve a mutual agreement to circumvent the judiciary's remedial assessment, as when settlements occur after a finding of liability but before the remedial order.

Second, although the vast majority of settlements dismiss a claim, Rule 68 of the Federal Rules of Civil Procedure permits a defendant to make a distinctive "offer of judgment" whose acceptance involves not dismissal but the registering of a *judgment* against the defendant without judicial oversight of its terms. FED. R. CIV. P. 68. Even stranger, in many jurisdictions, the defendant may offer to accept judgment against him while nonetheless disclaiming liability. *See, e.g.*, Chathas v. Local 134 IBEW, 233 F.3d 508, 512 (7th Cir. 2000); Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1567 n.24 (2008). Perhaps this is a harmless counterpart to nolo contendere pleas in criminal law but it comes with a questionable sting. Should the plaintiff reject the offer but fail to win a higher award at trial, the plaintiff is then subject to a cost-shifting provision requiring her to pay the defendant's costs incurred after the offer is rejected. FED. R. CIV. P. 68(d). This provision seems insensitive to those plaintiffs who seek an official finding of liability because they seek recognition of the legal wrong as much, or more, than they seek damages. Likewise, the position that a plaintiff's claim may be rendered moot if she rejects a settlement offer for the full amount of her claim seems insensitive to the plaintiff's interest in official recognition of liability. *See* Weiss v. Regal Collections, 385 F. 3d 337, 340 (3d Cir. 2004) ("An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation."); Pla v. Renaissance Equity Holdings LLC, No. 12-CIV-5268(JMF), 2013 WL 3185560, at *1 (S.D.N.Y. June 24, 2013) (finding plaintiffs' claims moot because offer of judgment exceeded possible awardable damages). *But see* Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 950 (9th Cir. 2013) (holding that "an unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot"); McCauley v. Trans Union, L.L.C., 402 F.3d 340, 342 (2d Cir. 2005) (holding an offer of complete relief did not moot plaintiff's claim when the offer was conditioned on confidentiality and judgment was not entered against defendant).

Third, at one point, California state courts were so eager to encourage settlements that they accommodated settlements contingent on vacatur of a lower court judgment by acceding to the

Second, many remedial clauses are rather broadly framed and are triggered by breach (or material breach), but are made in ignorance of the particular circumstances of the breach at issue. As crafted, they often make no attempt to calibrate the recovery to whatever specific circumstances of breach arise. It is true that, roughly speaking, contract law is indifferent to whether breach is intentional, reckless, negligent, or utterly inadvertent, so the breadth of remedial clauses on that score may be considered unremarkable. Although for the reasons stated above, it would be sound to maintain continued, informed oversight of that legal policy and its ramifications. But, remedial clauses often specify a particular sum of damages for breach and thereby do not take into account the particular, as opposed to the projected, consequential damages of a specific breach. By contrast, settlement agreements are tailored to the circumstances of the particular breach. So, we may have more confidence that a settlement involves a remedy crafted to reflect the significance of the particular legal wrong after the parties have sat with the wrong, rather than the application of a more general topical bandage to a wound that happens, in this case, to require stitches.

Finally, even when remedial clauses are crafted in ways that reflect greater sensitivity to the particular circumstances of breach, such as by using percentages of estimated damages rather than flat fees, remedial clauses are nonetheless prospective agreements about a hypothetical breach, rather than contemporary agreements in response to an actual breach. Why should that matter? The traditional rule on remedial clauses might be thought to reflect something like the following view: when one party abrogates a legal duty against another, the latter should have the opportunity to seek public legal recognition of the fact of a legal wrong, an impartial reckoning of its significance *in light of the circumstances*, and an impartial determination of the remedy. One's need for public

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request for vacatur, solely on the grounds that the parties both wished it and not because any new facts or legal considerations suggested that the lower court decision was in error or improvidently issued. *See* Neary v. Regents of Univ. of Cal., 834 P.2d 119 (Cal. 1992). This stance of accommodation came perilously close to allowing private parties to edit judicial findings, as the dissent in *Neary* by Justice Kennard and the overturned lower court decision complained. *See* Neary v. Regents of the Univ. of Cal., 278 Cal. Rptr. 773 (Ct. App. 1991). Reassuringly, the Supreme Court seems hostile to this approach within the federal system. *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 27 (2004). And, in California, the decision was sufficiently controversial to have inspired a narrowing statute. *See* CAL. CODE CIV. PROC. § 128(a)(8) (West 2000) (permitting vacatur to facilitate a private agreement only when there is no reasonable possibility of an adverse effect on nonparties and the public, and only when the parties' interests are sufficiently weighty to overwhelm the erosion in the public trust occasioned by such vacaturs); *see also* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1472–73, 1485 (1994) (discussing the tension between litigant autonomy, illustrated by the vacatur in *Neary*, and judicial control of litigation); Stephen C. Yeazell, *Good Judging and Good Judgment*, 35 CT. REV. 8 (1998) (discussing the fervency of lower court judge's opposition to the *Neary* rule and the resultant controversy).

recognition and an impartial resolution may reasonably depend upon the particular circumstances of the abrogation of the legal duty. Some abrogations might be predictable and not morally charged, especially where a strict liability rule concerning performance does the work, but other abrogations might involve mistreatment—for example, where fraud, duress, or other forms of intentional breach are involved.

Enforceable remedial clauses, when they are satisfied by the breaching party, deprive promisees of the opportunity to seek such recognition and reckoning. They require promisees to absorb the significance of an abrogation of duty before it has happened, before the specific circumstances and motivations of the breach are known, and during the period in which the parties are correctly more focused on arranging mutually satisfactory circumstances for performance. Having to absorb the significance of breach, as a general, hypothetical matter[73] seems potentially insensitive to the reasonable promisee's reaction to the actual occasion of breach.[74] It also seems in tension with a reasonable legal resistance to blanket pre-authorizations for breaches of legal duties. Whereas, accepting or pursuing a settlement offer after breach involves having consciously waived one's opportunity *after* the particular facts and circumstances of the breach are known to the promisee. Because those who settle had an opportunity to pursue public recognition of the wrong, the settlement process shows greater sensitivity to this interest than the pre-ordaining involved in enforceable remedial clauses.[75]

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73. *See* Eisenberg, *supra* note 14, at 1780–89; Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 227 (1995) (stressing the difficulty of accurately imagining all the possible circumstances of breach).

74. There is some evidence that people disvalue breach less strongly ex ante than ex post. *See* Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 415–17 (2009) (finding, in web-based polls about hypothetical scenarios, that people set lower damages ex ante than ex post).

75. Does this position suggest hostility to the enforcement of prenuptial clauses as examples of blanket remedial clauses? Not necessarily. For one thing, many marriages end without any allegation of breach or some failure to perform a duty within the marital relationship. Many prenuptial clauses do not represent themselves as responses to breach by one party rather than another but as guidelines in the event of dissolution. Moreover, prenuptial clauses may, in part, attempt to specify what previously acquired assets constitute individual property and therefore not subject to future application of community property rules or other background rules of marital property. Such specification would be relevant to later remedial action but, however framed, that content in itself is not a contractual remedial provision. Finally, a posture of enforcement of many prenuptial clauses may also represent a political position that, at least as a default, the community should take the position that the parties share responsibility for the dissolution of a marriage and many of its particularities are private and epistemically impenetrable; so, a judicial investigation into the particular circumstances of the dissolution would be in tension with respecting the privacy of the parties and the intricacy of the marital relationship. This comports with some of the cases refusing to enforce, where the clause would involve finding one party at fault, an activity in tension with no-fault divorce policies. *See* Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494 (Ct. App. 2002). Conversely, a posture of skepticism toward prenuptial clauses may reflect less of a resistance to remedial clauses than a general skepticism about stretching the analogy between marriage and other contracting relations too far. Like other

But, one might object, why shouldn't the preservation of this interest be up to the parties? If it matters to them, they may refuse to sign remedial clauses and, if it does not, they should be allowed to take advantage of the benefits that remedial clauses afford. The potential for later regret or one's failure to anticipate the nuanced feel of conditions of future performance does not count, generally, as a reason to refuse to enforce performance clauses in executory contracts. Why should they constitute reasons to be shy in enforcing remedial clauses?

The best answer to this objection appeals to the underlying fact that all private law has public law dimensions. Once we create legal duties, as a general matter, the public has an interest in their fulfillment and their vindication. As a predominantly "private" form of law, much of the contract law's attention is directed by decisions made by private parties, including the determination of the content of those primary legal duties. Moreover, with the duties of "private" law, because private parties bear the brunt of their burdens as well as the effects of their violation, we generally assign private parties the power to pursue their vindication, despite the underlying, concomitant public interest.[76] When the parties decide to settle, in addition to representing themselves, they are, morally speaking, partly representing the public's dual interests in the vindication of these rights and duties as well as in the resolution of conflicts amicably and with sensitivity to the particularities of the conflict. The public may reasonably decide both that: (1) given the strong stake held by the private parties involved, they may be safely empowered exclusively to act on the public's behalf to vindicate legal rights and duties when those parties come to an agreement in the aftermath of a dispute but (2) that the public's interests would not be satisfied if that delegation of authority stretched so far as to include a permissive doctrine toward ex ante resolutions, in essence, enforceable remedial clauses. The public might adopt this latter stance on the ground that those clauses reinforce the incorrect impression that breach is permissible so long as a price is paid (or that rights and remedies are in fact interchangeable). It might also take this stance for the milder reason that such agreements are less likely to represent a nuanced reaction to the particularities of breach, a reaction that the public has its own interests in facilitating. For these reasons, it seems that some principled distinctions may be made between the permission to parties to fashion their own enforceable settlements

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contracts, the agreement to marry or to cohabitate may alter one's legal duties, but, usually, there are no specific performance obligations and it seems strained to think of the dissolution of the relationship as a form or product of breach. If so, then prenuptial clauses might be resisted, not for the reasons stated here, but because they presuppose a neat framework that these relationships do not fit.

76. In class actions, because the interests of the particular plaintiffs may not represent the entire class, that assumption might not hold and our rules about settlements correspondingly differ. *See supra* note 69 and accompanying text.

after breach and the resistance to permitting them to fashion enforceable remedial clauses *prior* to breach.[77]

B. Alternative Performance Clauses

Let me now turn to the challenge posed by alternative performance clauses. Under traditional common law, parties may specify alternative performance terms that, for example, specify different prices depending on when performance occurs such as, offering a bonus for performance by a deadline or a discount for late performance. Although courts will police such terms to ensure they are not unconscionable and they do not represent a circumvention of the rule against penalties, the greater deference afforded to such terms seems in tension with the supposed barrier against enforcing remedial clauses unless proof of loss is difficult. If alternative performance clauses are enforceable, subject to the unconscionability constraint, and if they may produce the same outcome in response to the same activities as a remedial clause, then how could it make sense to subject remedial clauses to different standards of enforcement?[78]

A deeper theoretical point lurks: one might be tempted to say that the enforcement of remedial clauses both demands that the judiciary put its imprimatur on the clause and implicates the judiciary in its content because the judiciary lends its approval and the resources of enforcement measures behind the clause. Given the judiciary's involvement, it may reasonably set terms for its approval and the use of its powers. But, this line of argument will not explain why the doctrine of remedial clauses differs so mightily from the doctrine regulating performance terms. When a judge interprets a performance term or deems it enforceable, the court will then lend its approval and its resources of enforcement behind that term. So, if judicial involvement is a rationale for searching judicial scrutiny of the content of remedial clauses or for the presumption against enforceability, then that argument should rear back and impugn the presumption for enforceability of performance terms.

Of course, the divergence between the scrutiny of performance terms and remedial terms can be overstated. Not any old agreement between parties is enforceable. The doctrines of consideration, public

77. Even so, drawing this distinction is compatible with the critique that we may have become overly complacent about settlements, whether on the grounds that settlements preclude a public reckoning of an important wrong or, as some believe, that settlements favor particular parties to the disadvantage of others who would be more fairly treated by litigation and by the judiciary. *See* Fiss, *supra* note 52, at 1076–77 (arguing that poorer parties may be disadvantaged in terms of time and access to information in ways that affect their bargaining position in settlements but that might be partly mitigated in litigation because, for example, the judiciary can ask questions, call its own witnesses, and invite amici participation).

78. *See* sources cited *supra* note 17.

policy, and unconscionability already represent constraints on parties' ability to determine for themselves the content of enforceable terms and the fact of judicial implication may help to explain why.[79] Still, even if the degree of difference is not as dramatic as that between acid and base, parties enjoy greater degrees of freedom in dictating enforceable performance terms. The judicial implication argument cannot alone explain that difference.

So, why are remedial clauses special? Should parties enjoy greater autonomy in setting enforceable performance terms than they do in formulating remedial clauses? The answer, I suspect, has its source in an account of the purpose of contracting and contract law. Setting performance terms allows parties to exercise their autonomy by curtailing their freedom in one domain in order to engage in cooperative activities with another, to enter into and shape relationships with one another, and thereby to expand their opportunities and agency through another's permission. Judicial oversight of formation terms and of their interpretation serves both the function of celebrating cooperative activity, by rendering it a public subject matter to which we are willing to lend our community resources, and to ensure that alterations in a party's portfolio of freedom and commitment stay within the range of normatively available transformations; that is, that no party makes a commitment to engage in activity not freely available to her or to demand from another something she was not free to give or did not in fact give. Judicial interference with parties' performance terms, then, may correctly be thought to involve a lighter touch because the judicial role here is to protect and facilitate parties' autonomy, to ensure their agreement does not overstep the parties' legitimate domains of authority, and to protect any third-party rights at stake.

Whereas, when 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 and the purpose of contract suggest a reason why they enjoy substantial power in reconfiguring their individual portfolios of rights and responsibilities,[80] but it does not suggest a reason to think that determining the public response to an abrogation of a legal duty also falls under their private control. Where duties that assume a public status are

79. *See generally* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205 (2000) (arguing that the rationale for unconscionability might be the court's self-regarding concern not to facilitate or be complicit in exploitation).

80. Thus, it is compatible, with the argument offered here, which pertains to remedial clauses within a legally enforceable contract, to respect clauses disclaiming that the agreement reflects the intention to be legally bound as per Restatement § 21.

unsatisfied, we might have public reasons to ensure that our response remains measured, sensitive to intention and culpability, sensitive to consequences and the particularities of the situation, and sensitive to the treatment of like cases. We might also have public reasons to ensure that our response takes into account how and to what end our collective resources will be deployed.

These points are not belied by the possibility that permissible performance terms and unenforceable remedial clauses might point toward the same material outcomes. Two related differences in formal posture matter here. First, when the parties devise alternative performance terms, they represent the options as genuine options, election of either of which would satisfy the parties and achieve the purpose of the interaction and the object of exchange. That is, the alternatives are not weighted by priority with one the fallback or second option relative to the other. One might, in fact, be the better option for one or both parties but, as represented, the promisor is free to choose between them.[81] The election to perform one or the other, coupled with performance, amounts to adequate performance under the contract.

By contrast, a remedial clause attaches to an activity that amounts to a breach—a failure to perform a legal duty. Its use suggests a ranking by the parties of one activity (performance) over another (breach) and the form conveys that the ranking is not merely of preference but of kind. That is, nonperformance is not a matter of discretionary election by the promisor but consists of a unilateral abrogation of a duty. One path to the material outcome officially amounts to performance under the contract and the other path represents a failure under the contract, unilaterally imposed by the promisor, and not what the parties represented to themselves as one of the sought-for methods of conducting their contractual relationship. Were the parties to think otherwise and the promisee truly regarded payment in lieu of performance of the primary term as perfectly acceptable, the parties could convey this through an explicit alternative performance clause.

Second, even if some parties in fact are indifferent to whether a remedial clause is invoked or not, the *form* of the remedial clause represents a defective performance of a legal relationship, a breakdown in the relationship, and an abrogation of a legal duty. This status activates the special concern of the judiciary to remedy such tears in the fabric of legal compliance and resolve the conflicts arising from them.

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81. *Compare generally* Minnick v. Clearwire U.S. LLC, 275 P.3d 1127, 1127 (Wash. 2012) (en banc) (analyzing an early termination fee as an alternative performance clause on this ground) *with In re* Cellphone Termination Fee Cases, 122 Cal. Rptr. 3d 726, 752–53 (Ct. App. 2011) (using the same analysis but finding an early termination fee in a cellphone contract was not an alternative performance clause but a penalty clause because the "alternatives" would not be reasonable choices for the promisor and because the promisee invoked the clause as liquidated damages).

These formal distinctions mark important differences for the relations between the parties, and may also carry legal consequences. As Allen Farnsworth observes, with alternate performance clauses, the promisee cannot seek specific performance for the failure to perform one of the specific alternates (even when one alternate is the primary duty and the alternative is to pay).[82] This marks an instance of the more general point that where the clause is remedial and the promisor has *breached*, promisees may also seek equitable relief in addition to the relief in the remedial clause in those jurisdictions that do not regard remedial clauses as exclusive avenues of relief.[83]

Indeed, given the different meanings embedded in these structures, coupled with the possibility of similar material outcomes, one might argue the availability of alternative performance terms buttresses, rather than undermines, the argument for the common law stance. Parties who are truly indifferent to performance at Time 1 for one price or performance at Time 2 for a different price may signal that through clear language in the body of the contract by specifying genuinely alternative performances. The general posture against enforceable remedial clauses cannot, then, be criticized for precluding that relationship between parties. The conjunction of these doctrines enables parties who wish to make performance at Time 1 uniquely salient and to make the agreement for that performance the locus of the legal duty. Still, using a remedial clause, they may specify a proposed remedy to communicate other information to their contractual partner and to the judiciary about a preferred course of action at Time 2, in case damages are difficult to prove for the disfavored case of nonperformance at Time 1. The preservation of the traditional common law rule offers parties more concrete forms by which to communicate with each other and to form substantively different sorts of relationships, whereas, its elimination would constrain these differentiated opportunities.

Thus, it is ironic that law and economics scholars and others who champion freedom of contract criticize the traditional common law on the grounds that the obstacles it poses to remedial clauses may be circumvented by resort to alternative performance clauses. Instead, the ability to achieve the same material outcome through another means should be regarded as an argument for the common law approach because the possibility of circumventing the rule renders it immune to the criticism that it frustrates the will of freely consenting parties. To the contrary, the conjunction of the restriction on remedial clauses and the mechanism of alternative performance clauses offers parties an

82. *See* FARNSWORTH, *supra* note 13, § 12.18, at 848.

83. *See, e.g.*, Pinnacle Healthcare, LLC v. Sheets, 17 N.E.3d 947, 953–55 (Ind. Ct. App. 2014) (holding that the presence of a liquidated damages clause did not preclude injunctive relief stemming from a noncompete clause).

additional option they lack in a system that is more permissive toward enforcing remedial clauses. A doctrine presuming against enforceability allows parties to communicate information to each other and prospective adjudicators about remedies that might be appropriate, while conveying that they are not indifferent between performance of the primary duty and provision of the remedy but categorically favor the former. Because the traditional common law rule supplies a mechanism for parties to convey a distinct message to each other and third parties about their relationship while also permitting them to achieve, through other means, the same material outcome that enforceable remedial clauses would permit, the traditional common law rule should be celebrated as promoting freedom of contract, rather than disparaged.

C. WHICH IS WHICH?

Understanding the distinction this way offers some resources toward answering the question how remedial clauses are to be identified as against alternative performance clauses. Remedial clauses, of course, may appear late in the contract, and may refer to *breach* as such, but, importantly, they will not explicitly represent the remedial activity as a disjunctive option to be elected at the discretion of the promisor.

Despite this structural difference, not all clauses will wear their structures on their sleeves. In such cases, determining whether one is handling a remedial clause that is appropriately treated by the traditional rule might be challenging. Courts could engage in interpretative analysis to unearth the submerged structure of the relationship in order both to honor the intentions of the parties and to protect the social values so far surveyed. But, even a functional analysis may prove challenging.

To take one example, waivers of consequential damages pose a hard case. In large part, these are explicitly and specifically allowed by the UCC, although their enforceability is rebuttably presumed invalid for injury caused by consumer goods and further limited both by the unconscionability rule and by the requirement that the UCC's general remedial provisions will apply where "circumstances cause an exclusive or limited remedy to fail of its essential purpose."[84] Whether this permissive stance is justified (or, how often respect for these clauses would fail the essential purpose of a remedy) raises some hard issues, the resolution of which depends in some measure on the resolution of some issues concerning strict liability in contract.

On the one hand, such waivers seem like a variety of remedial clause because they dictate that the promisor will not be liable for certain sorts of damages occasioned by breach, and so they seem to fall squarely in the category of a remedial clause. General waivers of consequential

84. U.C.C. § 2-719(2) (AM. LAW INST. & UNIF. LAW COMM'N 2002).

damages replace the law's assessment of the significance of breach, which makes the breaching party responsible for the foreseeable consequences of breach, with a private parties' assessment of a more limited appropriate remedy. At this level of generality, they seem to be defective for the same reasons as other remedial clauses.

On the other hand, unlike many remedial clauses, a waiver of consequential damages isolates a discrete form of damages. It does not represent itself as offering a comprehensive remedy for breach (nor does it attempt to value those consequential damages). Hence, its enforcement would not entirely displace the judiciary's role in assessing the significance of breach as more comprehensive remedial clauses do.

Moreover, imagining other specific cases, consequential damage waivers could be reasonably viewed as performance terms. Specifically, these waivers seem a plausible mechanism for specifying the extent of one's exposure in the specific case where breach is faultless. That is, they might be viewed as liability specifications rather than remedial specifications.[85] As I argue elsewhere,[86] liability for faultless breach is a reasonable, implicit default term that accompanies the promise to perform; it is an assumed responsibility, rather than a remedy for the breach of the promise to perform. Although a valuable moral mechanism encouraging relations of trust is embedded in the strict liability default, as a theoretical matter, promisors might reasonably negotiate around this default term, consistent with their primary promise to perform. That is, they might promise to do all they can to perform, without fault, but decline to assume responsibility (and therefore, liability) for obstacles to success that are not reasonably attributable to them. In this light, one might view some narrowly tailored consequential damage waivers as performance terms that partly disclaim the default implicit term that assigns promisors the additional responsibility of liability for faultless failure.[87]

Although such waivers, if specifically tailored and transparently worded, are consistent with the resistance to enforceable remedial clauses advanced here, this is not the form consequential damages waivers typically take. Standard consequential damage waivers make no distinction between faulty and faultless breach and so would, insofar as they are enforceable, wrongfully substitute private remedial judgments for public remedial judgments.

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85. *Cf.* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES (4th ed. 2010) (distinguishing liability limitations from remedy limitations).

86. Seana Valentine Shiffrin, Seybert Lecture at University of Pennsylvania: Extending Responsibility Beyond Fault (Oct. 21, 2014).

87. Could this argument be extended to other remedial clauses, if they were limited to faultless breach? In theory, yes, but consequential damages waivers and "best efforts" performance clauses are the most salient mechanisms to limit liability and exposure for faultless breach.

Given some of the difficulties of interpreting the implicit structure of clauses of this kind and of disentangling reasonable performance term elements from elements that represent remedial overreaching, courts could sharpen that boundary by imposing default interpretation rules that force greater transparency from the parties. For example, they may presume that, unless the disjunctive form is explicitly used, the clause is a largely advisory, often unenforceable, remedial clause. Similarly, courts may presume that unless consequential damage waivers distinguish between faultless and faulty breach, they represent advisory remedial clauses.[88]

CONCLUSION

The trend toward relaxing the bar against remedial clauses and the arguments I have been rehearsing against such clauses may be viewed as a sliver of the larger general trend toward and resistance to privatization of the law, whether through private policing,[89] private prisons,[90] or contracting out government work to private companies.[91] Indeed, in the contracts domain, similar arguments may be made, for instance, against the expansion of the use and enforcement of arbitration clauses. Independent of legitimate charges about the unfair conditions of their imposition and industry capture,[92] the enforcement of mandatory arbitration clauses, critics claim, usurps a traditional judicial function and deprives victims of access to crucial mechanisms of justice.[93] Arbitration clauses

88. Of course, other default rules could be adopted. Courts could assume that unless clearly labeled as a remedial clause that addresses *breach* as such, the clause is an enforceable alternative performance clause or, to take the other example, a performance term limiting consequential damages (insofar as such limitations are not unconscionable and do not frustrate the underlying purpose of a remedial regime). Diffidently, I would suggest against such default rules in favor of approaches that protect the unwary from non-salient performance terms, but a developed argument for one interpretative approach rather than another seems a task for another paper.

89. *See, e.g.*, David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

90. *See, e.g.*, Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 128 (Jody Freeman & Martha Minow eds., 2009); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 439–548 (2005).

91. *See, e.g.*, Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013). *See generally* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009) (raising concerns regarding the widespread shift of federal and state government work to private organizations).

92. *See, e.g.*, *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1174–75 (2009) (discussing charges of arbitrator bias "in favor of the repeat-player corporation . . . ."); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876, 895 (2008) (documenting "corporations' selective use of arbitration clauses against consumers, but not against each other . . . .").

93. *See, e.g.*, Judith Resnik, *Diffusing Disputes*: *The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); David Schwartz, *Enforcing*

direct the substitution of a private adjudicator for a public official and may use procedures and evidentiary rules that do not satisfy the demands of due process. Arbitration decisions often go unpublished, do not enter any public record that could be the basis of accountability and public evaluation, and often do not establish precedents.[94] Further, the recent trend to use arbitration clauses to preclude class-wide adjudication (and arbitration) threatens, in practice, to render a variety of legal wrongs beyond redress.[95] I agree with that critique and subscribe to the more general anxiety about the privatization of legal functions.

The commonalities are strong but, nonetheless, remedial clauses present some distinctive theoretical issues in addition to those posed by arbitration clauses. Although arbitrators lack the status and full panoply of responsibilities of judges, in theory, arbitrators nevertheless attempt to act in their stead and to assess and express a public, impartial reaction to legal wrongs after their occurrence (rather than before in a mode that might be (mis)construed as price-setting).[96] That is, roughly speaking, arbitrators may follow different procedural rules, but in the theories that justify the use of arbitrators, the presupposition is that arbitrators are neutral third parties. Often, they aim to interpret and implement the substantive law, including the law of remedies, and to follow judicial precedents.[97] All of these aspirations may be outrageously belied by the

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Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 WIS. L. REV. 33 (1997); David S. Schwartz, *If You Love Arbitration, Set It Free: How "Mandatory" Undermines "Arbitration,"* 8 NEV. L.J. 400 (2007); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005); Myriam Gilles, *The End of Doctrine: Private Arbitration, Public Law and the Anti-Lawsuit Movement* (Benjamin N. Cardozo Sch. of Law, Faculty Research Paper No. 436, 2014).

94. *See* Resnik, *Fairness in Numbers*, *supra* note 52, at 114. Some arbitrators do use prior arbitration decisions and awards as rough precedent, more so in labor arbitrations than other kinds of arbitrations. *See* W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091 (2012).

95. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2308 (2013) (holding that the Federal Arbitration Act does not permit invalidation of a class-arbitration waiver just because the cost of individual arbitration would be prohibitive and exceed the potential recovery); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (holding that the Federal Arbitration Act preempted finding class-arbitration waivers unconscionable under California state law); *see also* Gilles, *supra* note 93; Resnik, *Fairness in Numbers*, *supra* note 52.

96. *But see* Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 473–88 (2010) (arguing that arbitration sometimes should be understood on this arbitration-as-judging model but sometimes should be conceived differently, on an arbitration-as-gap-filling model).

97. *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); *see also* Weidemaier, *supra* note 94. Nonetheless, the view that arbitrators are to interpret and implement the law is not comprehensively followed or agreed to by arbitrators; arbitrators sometimes favor the content of the agreement over the law. *See* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 59 (5th ed. 2014); FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS, at 10-1–10-80 (Kenneth May et al. eds., 7th ed. 2012). Parties who wish to ensure arbitrators follow the law might encounter obstacles under federal law. *See, e.g.*, Hall

practice,[98] but without resisting those empirical facts, there is a theoretical point to make here as well.

What seems distinctive (and distinctively troubling) about remedial clauses is that they aim to substitute a private, particularist judgment for what, traditionally and for good reason, has been a public, general, impartial judgment about the significance of a legal wrong. For this reason, a regime of presumptively enforceable remedial clauses represents a further, distinct inroad against public values and the rule of law. Hence, the combination of enforceable mandatory arbitration clauses and enforceable remedial clauses seems doubly problematic because even when one party seeks redress for a legal wrong, that wrong will not only be privately adjudicated and the disposition shielded from public view, but the disposition will turn on a privately fashioned, partial remedial rule.

Where challenging epistemic circumstances preclude the operation of the judiciary's independent judgment, enforceable remedial clauses might serve a helpful function. But, a broader reliance on them further eviscerates the important role of the judiciary in vindicating the public interest in addressing legal wrongs fairly, impartially, and independently. In this case, the traditional rule got it right. The judiciary's special role in crafting and meting out remedies should not be outsourced.

St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584–86 (2008) (holding that parties may not expand expedited judicial review under the Federal Arbitration Act to include review for mistakes of law). Some states, however, permit review of arbitration awards for mistakes of law. *See, e.g.*, Sands v. Menard, Inc., 767 N.W.2d 332, 335 (Wis. Ct. App. 2009) ("We are satisfied that manifest disregard of the law remains a basis for vacating arbitration awards in Wisconsin."), *rev'd on other grounds*, 787 N.W.2d 384 (Wis. 2010). Other states allow parties to limit arbitrators' authority to issue decisions containing legal errors. *See, e.g.*, Raymond James Fin. Servs., Inc. v. Honea, 55 So. 3d 1161, 1170 (Ala. 2010) (holding that expanded judicial review of arbitration awards are enforceable under Alabama law and stating that "the holding of *Hall Street* is applicable only in a federal court"); Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 599 (Cal. 2008) ("We conclude that the *Hall Street* holding is restricted to proceedings to review arbitration awards under the [Federal Arbitration Act], and does not require state law to conform with its limitations."); Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 100 (Tex. 2011) (holding that parties may expand judicial review of an arbitration award under the Texas Arbitration Act to include review for mistakes of law).

98. *See, e.g.*, Resnik, *Fairness in Numbers*, *supra* note 52, at 109, 114 (documenting major arbitrator's track record of favoring corporate clients over consumers and discussing failure to publish opinions with lack of accountability over time); *see also* Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Meditation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 53 (2014) (finding that when Fortune 1000 companies have not used arbitration in disputes, leading concerns included: arbitrators may not follow the law and lack of confidence in neutrals); Nancy A. Welsh, *What Is "(Im)partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 416–27 (2010) (describing possible issues of bias in mandatory arbitration of consumer, employment, and securities disputes).