

# ESSAY

## THE SOCIAL COST OF CONTRACT

David A. Hoffman\* & Cathy Hwang\*\*

*When private parties perform contracts, the public bears some of the costs. But what happens when society confronts unexpected contractual risks? During the COVID-19 pandemic, completing particular contracts—such as following through with weddings, conferences, and other large gatherings—will greatly increase the risk of rapidly spreading disease. A close reading of past cases illustrates that when social hazards sharply increase after formation, courts have sometimes rejected, reformed, and reinterpreted contracts so that parties who breach to reduce external harms are not left holding the bag. We describe these cases as a sort of contractual anticanon: where social, and not private, ends are the focus of contract judges.*

*This Essay builds on that observation in making two contributions. Theoretically, it characterizes contracts as bargains that always implicitly involve the public. Law has three tools at hand to govern contract's social cost: delineating subject matter about which parties can bargain, interacting with parties as a regulator, and, finally, interpreting and reforming in court. Post hoc consideration of social costs is the least well known, and most unsettled, mode of governing contract externalities. We ground that technique in its history as a specialized application of the law of contract public policy. Practically, this Essay advises parties negotiating whether and how to perform to consider the public's health, since history teaches that, at least some of the time, courts will too.*

INTRODUCTION .....	980
I. THE PARTIES AND THE PUBLIC .....	986
A. Private Law and Public Externalities .....	987
B. Government Intervention into Private Contracts.....	991

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\* Professor of Law, University of Pennsylvania Carey Law School.

\*\* Professor of Law, University of Virginia School of Law. We are grateful to Kevin Daly, Olivia Roat, and Sherrod Smith for excellent research assistance. Omri Ben-Shahar, Chris Buccafusco, Sarah Dadush, Paul Davies, Martin Gelter, Bob Hillman, Matt Jennejohn, Brian Lepard, Jon Lipson, Dorothy Lund, David Noll, Nate Oman, Kish Parella, Edmund Schuster, Dan Sharfstein, Nadav Shoked, James Tierney, Eyal Zamir, and workshop participants at Cardozo, George Mason, Nebraska, Northwestern, Vanderbilt, Virginia, Law and Society's CRN 46, the LSE-UCL Law and Finance Seminar, and the COVID/Contracts Working Group provided helpful comments.

II. PUBLIC HEALTH AND THE ANTICANON .....	997
A. Performance .....	999
B. Interpretation .....	1002
III. ROUGH JUSTICE .....	1005
A. Expected Areas of Friction .....	1006
B. The Impact of Forum .....	1009
C. Some Practical Advice .....	1013
D. Reformation Revisited .....	1014
CONCLUSION .....	1016

### INTRODUCTION

In September of 1916, the Connecticut Fair Association breached its contractual obligation to “promote and manage a baby show” where “babies were in some manner to be exhibited.”<sup>1</sup> Walter Hanford, who was to have supplied the infants for the show, sued.<sup>2</sup>

Ordinarily, *Hanford v. Connecticut Fair Ass’n* would have been a straightforward breach of contract case.<sup>3</sup> But 1916 was no normal year: New York City saw its first cluster of poliomyelitis, a virus that mostly affected children, often paralyzing or killing them.<sup>4</sup>

Indeed, the disease was “so widespread and so serious as to make assemblies of children . . . highly dangerous to the health of the children

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1. *Hanford v. Conn. Fair Ass’n*, 103 A. 838, 838 (Conn. 1918). *Hanford* is a case that used to appear in many contract casebooks, but today is rarely studied or taught. At least seven casebooks used to include the case. See George L. Clark, *Cases on Contracts* 150–51 (1954); William F. Elliot, *Cumulative Supplement to the Commentaries on the Law of Contracts* 479 n.8 (1923); Henry Wilbur Humble & Roy Fielding Wrigley, *Selected Cases on Contracts* 712–14 (1927); Walter H.E. Jaeger, *Law of Contracts* 618 (1953); 5 William Herbert Page, *The Law of Contracts* 4778 n.1 (2d ed. 1921); Harold Shepherd & Harry H. Wellington, *Contracts and Contract Remedies: Cases and Materials* 695–98 (4th ed. 1957); 3 Samuel Williston, *The Law of Contracts* 3293 n.48, 3298 n.70 (1920). But of the modern books, only Murray currently does. See John Edward Murray, Jr., *Contracts: Cases and Materials* 603 (6th ed. 2006). This is certain to change.

2. *Hanford*, 103 A. at 838. You may ask: What is the point of a baby show? From a 1933 newspaper—reporting on an exhibition by the same firm—the answer is to crown, among others, the fattest baby, best brother and sister, and, of course, overall best baby. See *New Rochelle Child Crowned the Best Westchester Baby*, *Irvington Gazette*, June 23, 1933, at 8.

3. In those pre–World War I years, contract law was formalist and advocated straight-ahead interpretative doctrines with few excuses. See 2 Williston, *supra* note 1, at 1157–278 (reviewing contemporary rules for the interpretation and construction of contracts and the parol evidence rule); Jennifer Camero, *Mission Impracticable: The Impossibility of Commercial Impracticability*, 13 *U.N.H. L. Rev.* 1, 2–4 (2015) (reviewing limited origins of impracticability doctrine for commercial parties).

4. *Whatever Happened to Polio?*, Smithsonian Nat’l Museum of Am. Hist. Behring Ctr., <https://amhistory.si.edu/polio/americanepi/communities.htm> [<https://perma.cc/XZ6V-EWD5>] (last visited Oct. 28, 2020).

of the community, and by reason of said facts it was contrary to public policy to hold a baby show of the nature.”<sup>5</sup> The Association breached the contract—allegedly—to slow the spread of the fearsome virus.

Nevertheless, Hanford, suing for damages, had a seemingly easy case: The Association’s performance was neither impossible nor impracticable. Moreover, the contract was clear: The defendant’s obligation to pay was “absolute and unqualified.”<sup>6</sup> In other words, even if it breached the contract to further the public’s interest, the Association still owed Hanford money.

In a passage with special resonance in 2021, the court disagreed. It would neither

require the performance [n]or award damages for a breach of a contract in which the public have so great an interest as the preservation of health, if the health is in fact endangered, no more than it would require one to be performed the tendency of which was immoral, or which interfered with the right of [everyone] to earn a livelihood by a lawful occupation . . . . The baby show . . . would be highly dangerous to health, and this is just what the parties have agreed to promote and carry out for their mutual profit.<sup>7</sup>

There is no general public health exception to contract enforcement—but the court found one.<sup>8</sup> And while the cases on how to adjudicate excuse based on public health risks are rare,<sup>9</sup> *Hanford* is not the only example of its kind. Cases considering public health distortions of

5. *Hanford*, 103 A. at 838.

6. *Id.* at 839.

7. *Id.* Notably, the *Hanford* court stated that were the plaintiff to show that gathering babies posed no health risks—social distancing, 1916-style—it could still potentially recover damages. *Id.*

8. To be sure, there are many cases in which sickness was held to discharge performance of a personal services contract. See, e.g., *Ryan v. Dayton*, 25 Conn. 188, 188 (1856) (excuse for missing work); *Wolfe v. Howes*, 20 N.Y. 197, 197 (1859) (quantum meruit available for work performed); *Green v. Gilbert*, 21 Wis. 395, 400 (1867) (excuse for nonperformance of personal service contracts). There are also cases where markets disrupted by local sickness result in prices that are distorted, and contracts later are found unenforceable. See, e.g., *Kirkland v. Tex. Express Co.*, 57 Miss. 316, 320 (1879) (setting the contract aside when the price was set during a yellow fever epidemic and no longer reflected fair market value). But there is no free-floating rule that contracts must make society healthier or that contracts that hurt society’s health cannot be enforced.

9. In discussing a set of cases requiring schools to pay teachers who were displaced by various diseases that had closed schools, Corbin comments:

[Such] decisions may be justified on the ground that the community is better able to carry the financial risk than is the individual teacher. Furthermore, even though the school district is legally justified in closing the schools, the closure is for the benefit of the community at large and not just for the school or the individual teacher.

14 Arthur Linton Corbin & Joseph M. Perillo, *Corbin on Contracts* § 77.7 (rev. ed. 2020).

ordinary contractual doctrine have resulted from nearly every epidemic of the last two centuries.<sup>10</sup>

*Hanford* and other cases excusing, reinterpreting, and reforming performance obligations on public policy grounds show how the public's interest interacts with private contracting. On a daily basis, private parties enter into contracts—to use a website, lease an apartment, host a family reunion, or merge two companies into one. And while seats at the contract-negotiation table are primarily occupied by the contracting parties themselves, one spot is always implicitly reserved for another party: the public.

Others have written compellingly about the impact of the public on private contracts.<sup>11</sup> Scholars have described divorce as a “bargain in the shadow of the law,”<sup>12</sup> for instance, and a corporate acquisition as a deal with “three parties . . . at the . . . table: the buyer, the seller, and the government.”<sup>13</sup> This Essay adds an important twist to that literature and updates it for the current pandemic climate. It focuses on the ways that private law's contracts become public law's charges.

Contracts flourish when the externalities they create—which are inevitable—are acceptable to the public.<sup>14</sup> The government monitors that acceptability through three main mechanisms: limits on the subject of

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10. See, e.g., *Lakeman v. Pollard*, 43 Me. 463, 463–64 (1857) (awarding quantum meruit for a laborer who left work during a cholera outbreak); *Dynamic Mach. Works, Inc. v. Mach. & Elec. Consultants, Inc.*, 831 N.E.2d 875, 877 (Mass. 2005) (discussing whether a delay by a seller is an excusable reason for a buyer to retract from a contract during the SARS epidemic); *Kirkland*, 57 Miss. at 320 (nullifying a contract made during a yellow fever outbreak); *Sullivan v. Knauth*, 115 N.E. 460, 461–62 (N.Y. 1917) (holding that the possibility of forgery was not a defense when a bank cashed lost travelers checks while the traveler was quarantined during a yellow fever outbreak); *Tong Chi Ying v. Shum Ping Kuen Benson*, DCCJ 3566/2004 121–25 (D.C. Sept. 24, 2010) (Legal Reference System) (H.K.) (denying extra damages for a breach of lease contract during SARS, though the parties were urged to compromise).

11. A classic citation is Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 562 (1933) (arguing that contract law is a branch of public law, as it defines those circumstances where private parties can enlist the state's enforcement powers). For more modern treatments, see, for example, Victor Fleischer, *Regulatory Arbitrage*, 89 Tex. L. Rev. 227, 231–32 (2010) (describing how private parties to acquisition agreements modify their deals to account for regulatory treatment); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 952–56 (1979) (describing the role that laws, regulations, and courts play in private divorce settlements); Cathy Hwang & Matthew Jennejohn, *Contractual Depth 3* (June 20, 2020) (unpublished manuscript) (on file with the *Columbia Law Review*) (describing how contracts between private parties are written with regulators as an intended audience).

12. Mnookin & Kornhauser, *supra* note 11, at 968.

13. Fleischer, *supra* note 11, at 238.

14. The law and economics analysis of social costs, from which this Essay's title was drawn, obviously considers contracts to be in some sense a solution to externalities, not a cause. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 15–16 (1960). A similarly titled essay by Brishen Rogers, *The Social Costs of Uber*, 82 U. Chi. L. Rev. Dialogue 85, 86 (2015), untangles the net social welfare of the ride-sharing app Uber.

contracts, regulatory intervention, and the contract-enforcement process in courts. If a contract survives the scrutiny of the first two types of gatekeeping, the third usually offers only superficial review: Courts almost always enforce contracts even when they create third-party harms.<sup>15</sup>

Contract enforcement remains the norm today. Corporate lawyers, for instance, have rushed to assure their clients that their contracts will be enforced as written, even in the current pandemic.<sup>16</sup> In a client alert, law firm Willkie Farr & Gallagher noted that courts tend to “construe force majeure provisions narrowly”—thereby suggesting that parties could not expect to back out of contracts using force majeure clauses.<sup>17</sup> Law firms Sidley Austin and White & Case offered similar advice.<sup>18</sup> Meanwhile, other major law firms have also advised their clients that the increased cost of performing a contract does not excuse contract performance,<sup>19</sup> with some

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15. See Steven Shavell, *On the Writing and the Interpretation of Contracts*, 22 *J.L. Econ. & Org.* 289, 290 (2006) (observing how courts actively interpret contracts to ensure that they are enforceable). Though exceedingly rare, courts will sometimes decline to enforce contracts as written. But those circumstances are narrowly drawn—the relatively disfavored defenses of unconscionability, public policy, duress, mistake, and the like. With the exception of public policy, none focuses on broader social consequences.

16. Law firm guidance has become so voluminous that Stanford University’s Rock Center for Corporate Governance has collected all the law firm guidance in a searchable database. Since the end of January 2020, law firms have produced more than 200 memos addressing contract breach, renegotiation, and other issues related to the pandemic. See COVID-19 Memo Database, Stan. L. Sch., <https://covidmemo.law.stanford.edu> [<https://perma.cc/BF4T-LX8V>] (last visited Mar. 10, 2021).

17. Tariq Mundiya, Sameer Advani, Todd G. Cosenza, Jeffrey B. Korn, Wesley R. Powell & Shaimaa M. Hussein, Willkie Farr & Gallagher LLP, *Precedent in Unprecedented Times: Contractual Performance and Defenses in the Age of COVID-19*, at 2–3 (2020), <https://www.willkie.com/-/media/files/publications/2020/03/precedent-in-unprecedented-times.pdf> [<https://perma.cc/TZ7A-RZYK>] (defining force majeure as “a contract provision that excuses a party’s nonperformance when an ‘act of God’ or some other extraordinary event prevents a party from fulfilling its obligations”).

18. Mark Clarke, Markus Burianski, Christian M. Theissen, Maximilian Clasmeier & James Hart, *Suspending Contractual Performance in Response to the Coronavirus Outbreak*, White & Case LLP (Feb. 18, 2020), <https://www.whitecase.com/publications/alert/suspending-contractual-performance-response-coronavirus-outbreak> [<https://perma.cc/5FUF-32EM>] (warning clients not to simply cease performance because an incorrect assertion of force majeure “may amount to a breach (or anticipatory breach) of the contract” and “[d]epending upon the severity of that breach, the aggrieved counterparty could be entitled to claim damages or even to terminate the contract”); COVID-19 and the Impact on English Law Governed Contracts—Force Majeure and Frustration, Sidley Austin LLP (Mar. 16, 2020), <https://www.sidley.com/en/insights/newsupdates/2020/03/covid-19-and-the-impact-on-english-law-governed-contracts-force-majeure-and-frustration> [<https://perma.cc/TU2C-UQ2K>] (advising clients that both force majeure clauses and common law defenses “have a high bar to success”).

19. John A. Trenor & Hyun-Soo Lim, WilmerHale, *Revisiting Force Majeure and Dispute Resolution Clauses in Light of the Recent Outbreak of the Coronavirus* 2–5 (2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200227-revisiting-force-majeure-and-dispute-resolution-clauses-in-light-of-the-recent-outbreak-of-the-coronavirus> (on file with the *Columbia Law Review*) (noting that “a mere increase in the price of supplies or labor, by itself” is insufficient to free parties from their contractual obligations); Wai Ming Yap,

noting that pandemics may not be considered unforeseeable.<sup>20</sup> In other words, the COVID-19 pandemic poses no special problems for contract law, at least according to its most sophisticated practitioners.<sup>21</sup>

We disagree. Sometimes, private parties' performance of their contracts greatly increases the negative externalities borne by the public, in ways no one contemplated when the contract was formed. In the past, when the public's share of the burden has increased dramatically, particularly in the case of disease, courts have declined to enforce contracts as written. Instead, courts have sometimes reformed contracts to ensure that the burden borne by society is acceptable.<sup>22</sup>

The COVID-19 pandemic is another moment when ordinary contracts have become extraordinarily risky for the public.<sup>23</sup> Gatherings—which some contracting parties have not canceled due to a fear of lost deposits, for instance—have caused clusters of viral spread in many communities. Now-infamous examples include a corporate conference in Massachusetts,<sup>24</sup> a funeral and subsequent birthday party in Chicago,<sup>25</sup> a

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Joel Seow & Gina Ng, Can Companies Invoke the Force Majeure Clause in the Context of COVID-19?, Morgan Lewis (Feb. 26, 2020), <https://www.morganlewis.com/pubs/can-companies-invoke-the-force-majeure-clause-in-the-context-of-covid19> [https://perma.cc/Z79V-JTGD] (reminding clients that they generally will not be excused from performance “simply because performing . . . contractual obligations has now become more expensive, onerous, or time-consuming”).

20. Yap et al., *supra* note 19. Advising clients who are entering into cross-border transactions poses a distinct set of problems, as civil law, for instance, expressly incorporates public rules into the question of whether there has been a force majeure event. See Yas Banifatemi, Daniel Reich, Ilija Mitrev Penusliski & Pierre Viguier, Force Majeure and *Imprévision* Under French Law, Shearman & Sterling (Mar. 26, 2020), <https://www.shearman.com/perspectives/2020/03/force-majeure-and-imprevision-under-french-law-covid-19> [https://perma.cc/V7B5-G4KW].

21. To date, even the most astute and thoughtful scholarly commentary on COVID and contract accords with these practitioners' analysis. See, e.g., Andrew A. Schwartz, Contract and Covid, 73 *Stan. L. Rev. Online* 48, 54–58 (2020) (analyzing the role of standard impracticability, impossibility, and force majeure doctrine to the likely outcome of COVID-related disputes).

22. See *infra* section II.A (explaining how courts have sometimes excused performance in light of third-party risk).

23. For other works in the rapidly growing tradition of “COVID and Contract,” see Jonathan C. Lipson, Contracting COVID: Private Order and Public Good (Temple Univ. Legal Stud. Rsch. Paper No. 2020-21), <https://ssrn.com/abstract=3676701> (on file with the *Columbia Law Review*) [hereinafter Lipson, Contracting COVID].

24. Farah Stockman & Kim Barker, How a Premier U.S. Drug Company Became a Virus ‘Super Spreader’, *N.Y. Times* (Apr. 12, 2020), <https://www.nytimes.com/2020/04/12/us/coronavirus-biogen-boston-superspreader.html> (on file with the *Columbia Law Review*).

25. Robin Goist, ‘Super-Spreader’ Attending Funeral, Party in Chicago Resulted in 16 Coronavirus Cases, and Three Deaths, CDC Says, *Cleveland.com* (Apr. 9, 2020), <https://www.cleveland.com/coronavirus/2020/04/super-spreader-attending-funeral-party-in-chicago-resulted-in-16-coronavirus-cases-and-three-deaths-cdc-says.html> [https://perma.cc/9RP7-C7EF].

church service in Daegu, South Korea,<sup>26</sup> and a choir practice in Washington State,<sup>27</sup> which have all been identified as events that caused widespread disease. Contracts for future performance—like the residential housing agreements signed by many college students over the summer of 2020—brought people together into close proximity and spread disease.<sup>28</sup>

This Essay makes two contributions to the literature.<sup>29</sup> The first is theoretical. Building on literatures in contracts, contract design, and other fields, it shows how the public participates in private contracting. It focuses particularly on the final gatekeeping function of courts, which usually enforce—but can reform—contracts. We suggest that the limited cases in this area can be understood as advancing a special defense to obligation, denying obligation due to public policy based on increased social costs. This defense is distinct from ordinary public policy analysis because it arises postformation, and differs from impracticability and frustration doctrines because the costs it relates to are public, and not private.

The second contribution is practical. In extraordinary times, courts sometimes do not enforce contracts as written in an effort to protect public health. Instead, courts turn to half-loaf and compromise solutions, including contract reformation and more equitable damage remedies. When deciding whether to perform contracts—or to hold counterparties to performance—parties should realize that previous courts can and have embraced compromise, rather than rote enforcement. Newly dominant modes of dispute resolution make such solutions more likely than ever.

The remainder of this Essay proceeds as follows. Part I shows how the public influences private contracts through three main mechanisms: ex ante definition of legally permissible subject matter for private bargains, regulation, and contract interpretation. Part II focuses on the contract interpretation piece. It shows that in response to contracts that increase

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26. Youjin Shin, Bonnie Berkowitz & Min Joo Kim, How a South Korean Church Helped Fuel the Spread of the Coronavirus, Wash. Post (Mar. 25, 2020), <https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/> (on file with the *Columbia Law Review*).

27. Richard Read, A Choir Decided to Go Ahead with Rehearsal. Now Dozens of Members Have COVID-19 and Two Are Dead, L.A. Times (Mar. 29, 2020), <https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak> (on file with the *Columbia Law Review*).

28. See, e.g., Charlotte West, Colleges Are Telling Students They Won't Get Housing Refunds if Campuses Close Again for Coronavirus, Money.com (July 9, 2020), <https://money.com/colleges-dorms-refunds-coronavirus> [<https://perma.cc/PDC4-AVSH>].

29. For other examples of COVID-19 and contract papers, see Hanoch Dagan & Ohad Somech, When Contract's Basic Assumptions Fail, Canadian J.L. & Juris. (forthcoming 2021) (manuscript at 26–34), <https://ssrn.com/abstract=3605411> (on file with the *Columbia Law Review*); Ian Ayres, Corona and Contract, Balkinization (Mar. 23, 2020), <https://balkin.blogspot.com/2020/03/corona-and-contract.html> [<https://perma.cc/8GZQ-CW93>] (arguing that consumers should pay some cancellation costs in light of public health benefits that might accrue).

the public's risks, courts have sometimes reformed, rather than enforced, contracts. Public health crises, like the current pandemic, are particularly salient in this set of cases: Courts excuse performance or reach for interpretations that align with equitable solutions. Part III discusses implications, including remedies for breach. In the modern litigation environment, which is dominated by mass adjudication through nontraditional tribunals, courts are unlikely to take a textual approach to enforcing contracts breached during pandemic times. Instead, they will likely dole out rough justice through arbitration and like fora that promote compromise, all but ensuring that breachers will not be held to the specific damages of any particular individual contract.

### I. THE PARTIES AND THE PUBLIC

Contracts begin with private deals, but are bounded by public interests.

An apartment lease is a good example. The landlord and tenant—both private parties—can agree to many little details that the law cares little about, such as how warm to keep the apartment in winter or how large the tenant's dog can be. But there are limits to what they can bargain for: Occupancy limits, damages for early lease termination, notice of lead paint, and eviction rules are obvious examples.<sup>30</sup> When laws set the boundaries of what parties can agree to, parties are said to “bargain in the shadow of the law.”<sup>31</sup> But boundary setting is not the only way that the public influences private contracts. The public also exerts its influence through contract enforcement. Suppose that the parties agree in a lease that the tenant may use the premises as a meth lab. If a dispute arises, the public has another chance to intervene—through a court, which can find that the contract is unenforceable because it is illegal.<sup>32</sup>

This Part explores how the public influences private contracts.<sup>33</sup> Section I.A shows why the public gets involved in contracts between private parties at all: Contracts between private parties inevitably expose the public to negative externalities, and the public has an interest in keeping those negative externalities at an acceptable level. Section I.B explores the ways that the public gets involved. Although the public's reach is tentacular, this Essay focuses on a few concrete examples: *ex ante* guardrails that force parties to bargain in the shadow of the law, the role of regulators, and the role of courts.

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30. See, e.g., N.Y. Real Prop. Law § 227-e (McKinney 2020) (establishing a landlord's duty to mitigate damages if a tenant vacates an apartment in violation of the lease); *id.* § 235-f(3)–(4) (establishing occupancy limits for residential leases and rental agreements).

31. See Mnookin & Kornhauser, *supra* note 11, at 968–69 (explaining how legal rules affect bargaining outcomes in the divorce context).

32. Restatement (Second) of Contracts § 178 (Am. L. Inst. 1981).

33. For an excellent treatment of the role of public-facing factors in contract interpretation, see Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 *Colum. L. Rev.* 1710, 1777–84 (1997).

A. *Private Law and Public Externalities*

It is well understood—in both kindergarten and in the halls of academia—that one person’s actions might have an impact on others.<sup>34</sup> These impacts—or externalities—can, of course, be positive.<sup>35</sup> A few years ago, American humorist Dave Sedaris, like many, developed a drive to meet the daily step goals set by his Fitbit pedometer.<sup>36</sup> His eagerness to hit his daily step goals soon turned into an obsession with picking up roadside trash on long daily walks. This delighted his neighbors in West Sussex, England, who were so pleased by the cleanliness that they named a trash truck for Sedaris.<sup>37</sup>

Many private actions and deals result in benefits for third parties, from the trivial to the profound: Your agreement with a painter to brighten your shutters makes your neighbor feel better about her house; your purchase of a vaccine from the pharmacist increases the likelihood of herd immunity. But often, the impact of one person’s actions can also cause negative externalities. Pollution, cigarette smoke, and construction are ready examples.<sup>38</sup>

Contracts are no different. Private contracts create externalities for the public, and the public—through law, regulation, and contract interpretation—is very interested in keeping those externalities to an acceptable level.<sup>39</sup> We are not the first to notice that contracts create externalities, nor the first to notice that the public exerts influence on private contracts. We briefly recap these literatures here, before turning to our novel argument: that when externalities to the public spike, the public can step in through courts.

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34. See, e.g., James M. Buchanan & Wm. Craig Stubblebine, *Externality*, 29 *Economica* 371, 371 (1962).

35. See *id.* at 374 (discussing possible responses to positive and negative externalities); Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 *Wm. & Mary L. Rev.* 211, 220 (2012) (“Positive externalities are the uncompensated *beneficial* effects of one’s activities enjoyed by third parties.”).

36. David Sedaris, *Stepping Out*, *New Yorker* (June 23, 2014), <https://www.newyorker.com/magazine/2014/06/30/stepping-out-3> (on file with the *Columbia Law Review*).

37. Tim Dowling, *David Sedaris? Who? Oh, You Mean the Local Litter-Picker*, *Guardian* (July 31, 2014), <https://www.theguardian.com/books/shortcuts/2014/jul/31/david-sedaris-litter-picker-rubbish-waste-vehicle-pig-pen-west-sussex> [<https://perma.cc/B7WS-AEH8>]. For a general theory on the relationship between positive externalities and the law, see generally Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 *Colum. L. Rev.* 257 (2007).

38. See Claire A. Hill, *The Rhetoric of Negative Externalities*, 39 *Seattle U. L. Rev.* 517, 517 (2016) (citing pollution as the “paradigmatic example” of negative externalities); Carol M. Rose, *Crystals and Mud in Property Law*, 40 *Stan. L. Rev.* 577, 578–80 (1988) (discussing the possible negative externalities of construction); Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 *Notre Dame L. Rev.* 135, 178–81 (2014) (describing the negative externalities of smoking).

39. Alternatively, contract law seeks to maintain an efficient level of externalities.

There is a relatively nascent literature on the externalities of contracts.<sup>40</sup> Professor Aditi Bagchi's *Other People's Contracts* provides a general overview.<sup>41</sup> Bagchi describes private contracts as potentially creating negative externalities for unrelated third parties and argues that contract doctrine currently fails to protect third parties sufficiently from these harms.<sup>42</sup> She proposes that when a contract is ambiguous, courts should interpret the contract with an eye toward protecting third-party interests, particularly when harms are discrete and previously recognized by law.<sup>43</sup>

At the heart of Bagchi's account is her understanding of the proper focus of contract jurists. For example, she notes that contract philosophers tend to think that contracts are purely private law, so courts should con-

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40. See, e.g., Farshad Ghodoosi, *International Dispute Resolution and the Public Policy Exception* 39–40 (2017) (discussing negative externalities as a rationale for government involvement in contracts); Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 *Geo. Mason L. Rev.* 483, 493–95 (2010) (analyzing social costs of illegal contracts in the form of negative externalities); Aditi Bagchi, *Other People's Contracts*, 32 *Yale J. on Reg.* 211, 243 (2015) [hereinafter Bagchi, *Other People's Contracts*] (arguing that the interests of third parties should be considered when construing ambiguous contract terms); Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 *Wm. Mitchell L. Rev.* 627, 700–01 (1999) (arguing for whistleblower protection in the case of public hazards); F.H. Buckley, *Perfectionism*, 13 *Sup. Ct. Econ. Rev.* 133, 143 (2005) (analyzing negative externalities in the context of contracts voided for promoting sexual immorality); Kishanthi Parella, *Protecting Third Parties in Contracts*, 57 *Am. Bus. L.J.* (forthcoming 2021) (manuscript at 9–10), <https://ssrn.com/abstract=3697273> (on file with the *Columbia Law Review*) (proposing a new form of liability for contract externalities that cause third parties physical harm); Benjamin Porat, *Contracts to the Detriment of a Third Party: Developing a Model Inspired by Jewish Law*, 62 *U. Toronto L.J.* 347, 352–58 (2012) (focusing on third-party business harms); Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 *Tex. L. Rev.* 1943, 1945 (1996) (discussing the relationship of at-will employment with tort principles founded in public policy and based on external effects of termination); Jan M. Smits, *The Expanding Circle of Contract Law*, 27 *Stellenbosch L. Rev.* 227, 237 (2016) (arguing that courts should enjoin contracts with socially destructive effects on third parties); Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 *Harv. L. Rev.* 1445, 1446–49 (2006) (arguing for externalities as the basis for voiding contracts as against public policy); Ryan M. Philp, *Comment, Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 *Seton Hall L. Rev.* 845, 857 (2003) (arguing that courts should refuse to enforce NDAs that threaten the public welfare); James E. Rooks Jr., *Let the Sun Shine In*, *Trial*, June 2003, at 18, 22 (on file with the *Columbia Law Review*) (discussing provisions intended to consider public hazards in prospective secrecy agreements); Lipson, *Contracting COVID*, *supra* note 23, at 36 (discussing externalities in contracts in relation to the pandemic). Notably, as Professor Jonathan Lipson pointed out to us, bankruptcy scholars have focused on the externalities created by contracts in considering issues such as creditor priority for decades. See, e.g., Kenneth Ayotte, Anthony J. Casey & David A. Skeel, Jr., *Bankruptcy on the Side*, 112 *Nw. U. L. Rev.* 255, 261–63 (2017) (proposing that when intercreditor agreements have the potential to cause value-destroying externalities, courts should limit remedies to expectation damages).

41. Bagchi, *Other People's Contracts*, *supra* note 40, at 217.

42. *Id.* at 215.

43. *Id.* at 212.

sider only “the rights and duties of litigants toward each other” when resolving disputes.<sup>44</sup> Contract economists also embrace a version of this: They argue that judges should “consider only the contractual intentions of those party to an agreement.”<sup>45</sup> In part, this party-centric view of contract interpretation exists because scholars think that laws mitigate the public harms of private contracts—so there is little third-party harm mitigation left for courts to do.<sup>46</sup>

While Bagchi’s article takes an important first step toward thinking about how contracts affect third parties, another paper, by Erik Lampmann and one of us (Hoffman), takes an even more expansive view of the intersection of public harm and private contract.<sup>47</sup> This work argues that “hush contracts”—nondisclosure agreements that suppress information about sexual wrongdoing—harm society by, for instance, allowing society to believe it has remedied issues of sexual harassment and abuse, insulating perpetrators from accountability, and allowing perpetrators to continue harming new victims.<sup>48</sup> Thus, even when private parties mutually assent to them, courts should be leery of enforcing them because the costs of hush contracts extend beyond the signatories themselves.<sup>49</sup>

Similarly, Professor Jonathan Lipson argues that lessons from supply chain agreements ought to be employed to understand the public health consequences of contracting.<sup>50</sup> In the supply chain context, as he has explored,<sup>51</sup> firms use terms to manage reputational risk (such as being branded as a user of child labor) and ensure consistency across networks. During the COVID-19 pandemic, firms may employ supply contract terms to make sure that their partners adhere to safety guidelines, and then turn around and use those guidelines as the grist for enforceable COVID-19 waivers.<sup>52</sup> Lipson argues that such waivers should be enforceable only if they comply with protocols that make the spread of disease less likely.<sup>53</sup>

Another important literature focuses on the interaction between private bargaining and public influence. Perhaps the most influential paper in this tradition is Professors Robert Mnookin and Lewis Kornhauser’s *Bargaining in the Shadow of the Law*.<sup>54</sup> In it, they describe how the law creates

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44. *Id.* at 219.

45. *Id.* at 220.

46. *Id.* at 219–20.

47. David A. Hoffman & Erik Lampmann, Hushing Contracts, 97 *Wash. U. L. Rev.* 165 (2019).

48. *Id.* at 167, 174–79.

49. *Id.* at 169–70.

50. Lipson, Contracting COVID, *supra* note 23, at 4.

51. Jonathan C. Lipson, Promising Justice: Contract (as) Social Responsibility, 2019 *Wis. L. Rev.* 1109, 1141 [hereinafter Lipson, Promising Justice].

52. Lipson, Contracting COVID, *supra* note 23, at 14.

53. *Id.* at 14, 17.

54. Mnookin & Kornhauser, *supra* note 11.

the boundaries of acceptable bargaining in a divorce.<sup>55</sup> Importantly, Mnookin and Kornhauser differentiate between situations where the couple has children and where they do not. Specifically, they note that “[w]hen there are minor children, the state obviously has broader interests than simple dispute settlement. The state also has a responsibility for *child protection*.”<sup>56</sup> In other words, Mnookin and Kornhauser recognize that private divorce settlements always happen within the boundaries of the law, but when there are additional state interests involved—such as the interests of children—the law reaches its tentacles a little deeper into the parties’ private contract.

Professor Vic Fleischer, in his article *Regulatory Arbitrage*, takes a more modern stab at this idea of the relationship between private bargains and public interest. Fleischer’s article describes the role of regulators in corporate acquisitions. He aptly describes the typical corporate acquisition as having “three parties, not two, at the negotiating table: the buyer, the seller, and the government—typically acting through statutes and regulations written in advance of the deal.”<sup>57</sup> Buyer and sellers often plan around those regulatory issues by restructuring their deals—this often involves a change in the form of the deal, rather than a change in its economic substance.<sup>58</sup> In other words, how the government will treat a deal for purposes of, say, taxation will change how the parties choose to structure the deal.

The government’s role is not static. A deal’s regulatory treatment may vary across jurisdictions and may even depend on which particular government bureaucrat is reviewing the deal. As Fleischer puts it, “[T]he politically well-connected can bargain more effectively . . . over the regulatory treatment of a deal.”<sup>59</sup> Because of this, the relationship between the parties to the contract and the government may be a dynamic dance that runs for the duration of the deal’s lifecycle. Others, too—including Bagchi, in a separate article, and one of us (Hwang) with Professor Matthew Jennejohn—have explored the ways in which regulators influence contract terms, sometimes directly influencing what parties put into their contracts.<sup>60</sup>

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55. *Id.* at 950.

56. *Id.* at 957.

57. Fleischer, *supra* note 11, at 238; see also Michael P. Vandenberg, *The Private Life of Public Law*, 105 *Colum. L. Rev.* 2029, 2030–31 (2005) (proposing a theory of “private second-order regulatory agreements” into which private parties enter in response to government regulatory requirements).

58. Fleischer, *supra* note 11, at 238.

59. *Id.* at 230.

60. See Aditi Bagchi, *Interpreting Contracts in a Regulatory State*, 54 *U.S.F. L. Rev.* 35, 41 (2019) (noting that “[o]ur modern regulatory state can, and sometimes does, directly regulate those terms”); Hwang & Jennejohn, *supra* note 11, at 30 (highlighting the heavy influence of regulators over private contracts in highly regulated industries, such as energy and utility companies).

The argument in this Essay depends on an interweaving of these two literatures—on contract’s externalities and on the public–private interplay in contracting.<sup>61</sup> We agree that contracts create externalities—but not only for third parties who have “legally-protected interests,” as Bagchi would have it. Instead, like Hoffman and Lampmann, we argue that contracts externalize risk on *the general public*.

A merger, for instance, might create a monopoly, raising prices for consumers. A wedding in a public park deprives the public of using the park and might reduce the number of parking spaces around the park. Airbnb users reduce the supply of rental units, thereby driving up rental costs. A contract for the sale of prescription pain medication externalizes the social risks of addiction.

Because of these externalities, the general public has many reasons to intervene in private contracting—and *it does, all the time*. And the role of government in limiting contract’s externalities is more important when the magnitude of those externalities changes between the time of the contract’s signing (during an ordinary time) and a later date (during, say, a pandemic).

#### B. *Government Intervention into Private Contracts*

The public, reasonably, has a strong interest in intervening in private contracts that shift costs to the public. Although the public can intervene in many ways, this section focuses only on three common ways:<sup>62</sup> by setting the boundaries of acceptable private ordering *ex ante*, through regulation (which often causes parties to change their contracts to ensure compliance), and through judicial interpretation of private contracts.<sup>63</sup>

Mnookin and Kornhauser described perhaps the most obvious way the public intervenes to manage the risk of contracts: by setting the boundaries of acceptable private ordering through laws and regulations.<sup>64</sup> Through public law, the government prescribes the allowable subject

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61. A different account, separately suggested to us by Vanderbilt Law Professors Kevin Stack and Dan Sharfstein, would focus on contract law becoming more in rem–like when it considers shifting public harms. This property-like account of contract doctrine may become the subject of our further work.

62. Of course, these ways of intervention are complex: Each of these ways can be implemented at various stages of the contract’s lifecycle, for instance. For more on public intervention, see generally Eyal Zamir & Ian Ayres, *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 *Tex. L. Rev.* (forthcoming 2021), <https://ssrn.com/abstract=3420179> (on file with the *Columbia Law Review*).

63. There are other ways in which “publicness” infuses into private contracting. For example, as Professor Lipson points out to us, reputation and notoriety are plausibly “public” phenomena that constrain private behavior. Lipson, *Promising Justice*, *supra* note 51, at 1141. So too is the bankruptcy system. Similarly, contract law courts provide default rules, interpretative methodologies, and modes of enforcement that infuse their way into private bargains. Douglas G. Baird, Anthony J. Casey & Randal C. Picker, *The Bankruptcy Partition*, 166 *U. Pa. L. Rev.* 1675, 1700 (2018).

64. Mnookin & Kornhauser, *supra* note 11, at 952–56.

matter for private bargains. For example, parties cannot strike a deal to kill for hire,<sup>65</sup> they cannot contract for the sale and distribution of illegal substances,<sup>66</sup> and they cannot agree to buy and sell human organs.<sup>67</sup> There are also less striking examples: Parties cannot contract to fix prices,<sup>68</sup> landlords cannot make tenants pay liquidated damages in many states,<sup>69</sup> employers cannot ask employees to agree to noncompetition clauses with long durations,<sup>70</sup> and many retailers cannot sell alcohol to residents of the states of Utah or Pennsylvania.<sup>71</sup>

In addition to setting guardrails, *ex ante*, for what private parties can bargain for, the government can also intervene through regulation. Fleischer describes this process best: Regulation, which changes frequently and which may be inconsistently enforced even when static, forces private parties to consider and *continue to renegotiate* with regulators as they shape their deals.<sup>72</sup>

Antitrust review of major corporate deals provides an apt example of regulators' role in negotiating private deals. Before a large deal in the United States can close, the parties need to seek and obtain approval from antitrust authorities.<sup>73</sup> This process is overseen by the FTC or the DOJ and gives the relevant regulator a seat squarely at the table. For example, not only do the parties have to provide relevant information to regulators about the deal so that regulators can determine the deal's impact on the market, but also regulators can request additional information through the costly and time-consuming "second request" process. Once regulators have reviewed the deal, they can also engage in a negotiation process with the parties.<sup>74</sup>

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65. 18 U.S.C. § 1958 (2018).

66. 21 U.S.C. § 841 (2018).

67. 42 U.S.C. § 274(e) (2018); Kimberly D. Krawiec, Wenhao Liu & Marc L. Melcher, Contract Development in a Matching Market: The Case of Kidney Exchange, 80 *Law & Contemp. Probs.* 11, 14 (2017).

68. Price Fixing, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing> [<https://perma.cc/JZN7-TXWF>] (last visited Oct. 28, 2020) (describing price-fixing as "almost always illegal").

69. Fees and Liquidated Damages, Tenant Res. Ctr. (July 19, 2018), [https://www.tenantresourcecenter.org/liquidated\\_damages](https://www.tenantresourcecenter.org/liquidated_damages) [<https://perma.cc/568C-DACN>].

70. *Stryker Sales Corp. v. Zimmer Biomet, Inc.*, 231 F. Supp. 3d 606 (E.D. Cal. 2017); *Edwards v. Arthur Andersen LLP*, 189 P.3d 285 (Cal. 2008).

71. A miserable fate for both authors, who, at the time of this writing, were residents of Utah and Pennsylvania. 47 Pa. Cons. Stat. § 4-491-3 (2016); Utah Code § 32B-4-401 (2016).

72. See Fleischer, *supra* note 11, at 238–39.

73. FTC Announces Annual Update of Size of Transaction Thresholds for Premerger Notification Filings and Interlocking Directories, FTC (Jan. 28, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-announces-annual-update-size-transaction-thresholds-premerger> [<https://perma.cc/RGF9-4R8M>].

74. See 15 U.S.C. § 18(a) (2018) (outlining the required premerger procedure).

For instance, in the 2010 merger between travel behemoths United Airlines and Continental Airlines, the parties engaged in just such a back-and-forth with regulators.<sup>75</sup> Among the DOJ's concerns was the fact that, after the merger, there would be little competition in flights between Continental's hub in Newark and existing United hubs.<sup>76</sup> Moreover, because the Newark airport has a limited number of "slots" for takeoff and landing—and many were held by Continental—it would be nearly impossible for another carrier to gain a foothold in the Newark markets.<sup>77</sup> After much negotiation, the parties—United, Continental, and the DOJ—agreed that Continental would lease thirty-six of its slots at the Newark airport to low-cost carrier Southwest Airlines, which would then begin to offer service from Newark, thereby alleviating monopoly concerns.<sup>78</sup>

Antitrust regulators are also far from the only ones that have a role in corporate acquisitions. A slew of authorities, from the SEC to the EPA to a joint committee on national security, can play a role in dealmaking, causing parties to restructure their deals with regulators in mind or to renegotiate their deals with regulators directly. In fact, regulators are so important that private parties often write contracts using magic words that they know regulators prefer—in other words, writing contracts with *regulators* in mind as an audience, rather than each other or the courts.<sup>79</sup> The result is often one contract trying to speak to too many audiences at once—the parties themselves, courts, and regulators.

Finally, the government also intervenes in contracts through courts. This is the intervention that Bagchi and others explicitly contemplate (and celebrate). In her article, Bagchi suggests that, should courts have a chance to interpret contracts, they ought to consider the impact of the contract on the legally protected interests of third parties.<sup>80</sup> And while Bagchi's argument certainly makes sense—courts certainly could consider those interests more explicitly—courts already consider the interests of third parties, and not just third parties with legally protected interests. Instead, courts protect the interest of a broader swath of third parties—the general public.

For example, in the city of Berkeley, California, residential rentals for less than a thirty-day period are subject to a special twelve-percent tax, which the landlord is supposed to collect.<sup>81</sup> This local ordinance is an ex

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75. See Chris Davis, U.S. OKs Continental, United Merger, Southwest to Take Newark Slots, *Business Travel News* (Aug. 27, 2010), <https://www.businesstravelnews.com/2010/US-OKs-Continental-United-Merger-Southwest-To-Take-Newark-Slots/13945> [https://perma.cc/JD6L-2UGD].

76. *Id.*

77. *Id.*

78. *Id.*

79. See Hwang & Jennejohn, *supra* note 11, at 29.

80. Bagchi, *Other People's Contracts*, *supra* note 40, at 241–44.

81. Berkeley Mun. Code § 7.36.030 (2020).

ante boundary, as described by Mnookin and Kornhauser.<sup>82</sup> But the ordinance cannot physically prohibit landlords and tenants from entering into short-term leases that do not contemplate the special tax. Instead, if there is a dispute about the lease, the matter goes before a judge who, standing in for the public, has another opportunity to vindicate the public's interests—perhaps by invalidating the contract or by reforming it so that the twelve-percent tax is included.

Through contract interpretation and enforcement in courts, the general public always has the last say in a contract.<sup>83</sup> And this final intervention by the public is expansive. For example, when a contract covers illegal subject matter, the court is likely to invalidate it—thereby vindicating the preferences of the public, as expressed through law.<sup>84</sup> And although the court does not specifically consider the rights of third parties, as Bagchi would urge, the public's interests are always the backdrop against which the court makes decisions.<sup>85</sup>

One of the most important ways for courts to have the final say is through contract interpretation. Ordinarily, contract interpretation allocates burdens in contracts where the parties have resolved to be rid of one another. Sometimes, however, parties in ongoing relationships seek court intervention to settle the meaning of a contract with ongoing performance obligation. Courts in such cases may turn to reformation.<sup>86</sup>

Reformation is an equitable remedy that applies most commonly in cases of mistake or fraud.<sup>87</sup> In those cases, courts might “transpose, reject, or supply words” to make the contract more closely align with what it believes to be the parties' true intent.<sup>88</sup> The idea of reformation is to adjust the contract, so that the written agreement can better align with the substantive (“real”) mutual understanding of the contracting parties.<sup>89</sup>

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82. Mnookin & Kornhauser, *supra* note 11, at 956–57, 994.

83. Our bankruptcy friends think their word is last, of course, and indeed bankruptcy and its shadow do play an important role in the end of certain classes of contracting. See generally Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization After Jevic*, 93 *Wash. L. Rev.* 631, 657 (2018) (arguing for the hybrid public–private nature of the bankruptcy system).

84. See Badawi, *supra* note 40, at 483; *supra* note 32 and accompanying text.

85. See Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 *Fordham J. Corp. & Fin. L.* 597, 597–98 (2009) (stating that courts will render a contract unenforceable for violating the public policy exception, which is “a judicial construct prohibiting courts from enforcing illegal contracts or contracts that, while not illegal per se, are against public interest”).

86. Loosely, scholars speak of reformation whenever the contract's meaning is readjusted in ways beyond ordinary processes of interpretation. But it is clearer to distinguish between deals that do, and do not, contemplate future performance.

87. Restatement (Second) of Contracts § 155 (Am. L. Inst. 1981); 27 Richard A. Lord, *Williston on Contracts* § 70:25 (4th ed. 2020).

88. 27 Lord, *supra* note 87, § 70:19.

89. See *id.*

To be clear, reformation has long been the black sheep of contract interpretation and has always been susceptible to powerful critiques sounding in predictability, legitimacy, and court competency.<sup>90</sup> A leading treatise calls reformation an “extraordinary equitable remedy” that “should be granted with great caution,”<sup>91</sup> notes that it should not be used to fix immaterial mistakes,<sup>92</sup> and speaks sternly of the need to prove several onerous elements with clear and convincing evidence before a court can reform a contract.<sup>93</sup>

In part, reformation has a bad reputation because the straightforward, textual enforcement of a contract has long been regarded as a feature, rather than a bug, of American law.<sup>94</sup> Contracting parties can enter into deals with the full confidence that, except in a few narrow circumstances, American courts will interpret them as written, rather than trying to change the contract after the fact to meet other goals. Indeed, scholars have long argued that parties—especially sophisticated ones—know what they are putting into a contract, and that any seemingly odd omissions are the result of considered and thoughtful drafting.<sup>95</sup>

But although reformation embarrasses jurists, courts have reformed contracts repeatedly in the modern era. For example, courts have readily reformed contracts where there was mutual mistake.<sup>96</sup> In addition to individual reformations, courts have also engaged in large-scale reformation of contracts, typically in litigations that follow systemic crises. After the 2008 Great Recession and during 1920s hyperinflation, for example, even

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90. See, e.g., Robert Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 *Duke L.J.* 1, 2–3. Professor Robert Hillman provides the best modern defense of reformation in long-term relationships, although he would confine reformation to adjustment of duration instead of terms.

91. 27 *Lord*, *supra* note 87, § 70:25.

92. *Id.* § 70:31.

93. *Id.* § 70:25.

94. See Shavell, *supra* note 15, at 291.

95. See Albert Choi & George Triantis, *Strategic Vagueness in Contract Design*, 119 *Yale L.J.* 848, 852 (2010) (arguing the same in the context of material adverse change clauses in mergers and acquisitions); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 *Yale L.J.* 814, 816 (2006) (arguing that vague provisions in contracts are the result of parties’ decision not to expend the upfront cost to draft specific provisions because that provision is unlikely to be the subject of a costly litigation).

96. See *Providence Square Ass’n v. Biancardi*, 507 So. 2d 1366, 1369 (Fla. 1987) (reforming a contract that allocated equal ownership shares to units in a condominium when a developer and owners understood that the percentage would vary with the size of the units); *Twin Forks Ranch, Inc. v. Brooks*, 964 P.2d 838, 839–40 (N.M. Ct. App. 1998) (reforming a contract where the parties failed to convey water taps that both parties agreed were supposed to be conveyed); *Jensen v. Miller*, 570 P.2d 375, 376 (Or. 1977) (reforming a contract where both parties were mistaken about the location of a land boundary); *Trip-Tenn, Inc. v. Schultz*, 656 N.W.2d 747, 748 (S.D. 2003) (reforming a contract that contained incorrect amortization calculations); *Mathis v. Wendling*, 962 P.2d 160, 165 (Wyo. 1998) (reforming a contract where a mathematical mistake led to one party not fully paying a debt to another).

usually formalist courts were willing to reform contracts where the parties' fundamental agreement had been eroded by a sudden turn of events.<sup>97</sup> Moreover, Delaware state courts, easily the most influential for business contract disputes, have long decided cases using equitable principles that amount to reformation.<sup>98</sup>

It is worth noting that *ex ante* boundary setting, regulatory intervention, and the court's role as a final checkpoint are not the only ways that the public interacts with contracts. Far from it! Doctrine can infuse contracting even outside of court (for example, through the creation of interpretative hierarchies, courts can motivate particular forms of negotiation). But they are three common ways that the public interacts with contracts, and they all illustrate the same point: that private-party contracting inflicts negative externalities upon the public and that the public, through these various mechanisms, has a way to keep those externalities in check.

Each of these government-intervention measures comes attended by a mixture of costs and benefits. Boundary setting can be both over- and underinclusive. Borderline cases can blur the lines on what is allowable or not, and—perhaps more troublingly—clear demarcations of legality allow clever contracting parties to engage in arbitrage and gamesmanship.<sup>99</sup> Regulatory intervention introduces considerable uncertainty to contracts, slows down the pace of deals, and can impede bargaining and economic growth.<sup>100</sup> It also sometimes leads parties to insert excessive boilerplate language that they know will pass regulatory scrutiny, rendering the text of contracts to be so inflated as to be meaningless.<sup>101</sup> And *ex post* policing

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97. See John P. Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 *B.U. L. Rev.* 1039, 1039–40 (1983) (stating that unexpected events, such as the great inflation, led to a rise in the power of German courts to rewrite private contracts); Emily Strauss, *Crisis Construction in Contract Boilerplate*, 82 *Law & Contemp. Probs.* 163, 164 (2019) (arguing that courts often engage in “crisis construction” to interpret contracts in a way that is directly at odds with its plain language (internal quotation marks omitted)). Indeed, as one scholar has recently explored, reformation of contractual agreements is common in even extremely sophisticated markets where the need for stability would seem to be preeminent. See generally Julian Arato, *The Private Law Critique of International Investment Law*, 113 *Am. J. Int'l L.* 1 (2019) (critiquing private law practices in investment treaties that undermine the goal of stability and noting that some countries have adopted provisions and reforms to rectify this issue).

98. See, e.g., *Haley v. Talcott*, 864 A.2d 86, 98 (Del. Ch. 2004) (permitting dissolution using a statute instead of the contractually required exit mechanism “because [the contract] does not equitably effect the separation of the parties”).

99. See, e.g., Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 *Brook. L. Rev.* 807, 852 (2015) (describing the line-drawing concerns of an outright ban on inversions and explaining how U.S.-based companies have “invented creative structures” to thwart federal tax laws that otherwise prohibit them from reincorporating in lower-tax jurisdictions).

100. See Hwang & Jennejohn, *supra* note 11, at 28–37.

101. See *id.* at 28 (discussing how parties insert boilerplate into contracts even though the parties themselves do not have a common understanding of its meaning).

of contract terms via litigation is horribly expensive and inefficient, difficult to predict given the many variables at play, and subject to gamesmanship as parties choose the place and law that govern their deals.<sup>102</sup>

These challenges give rise to a familiar problem of institutional choice: When is it best to use which method of mitigating risky contracts?<sup>103</sup> Generally speaking, *ex ante* governance dominates over *ex post* methods, for all of the obvious reasons of efficiency and predictability. But our focus in this Essay is on a set of contracts that appear benign when they are formed and consequently escape boundary setting and regulatory guardians. When risks increase sharply postformation, policing through court decisions—in a sense the least appealing and effective constraint on risk taking—is the least bad option available. The next section focuses on these emergently risky deals, which, having escaped the usual guardrails, land before courts in unusual circumstances.

## II. PUBLIC HEALTH AND THE ANTICANON

The public generally allows contracts to be performed when they entail a tolerable amount of social risk. Routine enforcement of deals makes up the canon of contract law, and it is vigorously supported by scholars and practitioners alike.<sup>104</sup> But what happens when the public's burden increases exponentially between the contract's signing and its performance?

We argue that courts, standing in for the public, have a chance to reform contracts when the public's burden changes materially and unexpectedly. Courts can reform contracts by excusing performance, interpreting broad carve-outs, and changing contractual burdens to discourage performance.<sup>105</sup> This Part discusses performance and interpretation in the

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102. Moreover, courts may seek to avoid being seen as intervening in contracts—they “interpret” rather than “reform” deals.

103. See, e.g., Neil K. Komisar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 28 & n.22 (1994) (discussing the importance of “sophisticated comparative institutional analysis” to a “good law and economics” approach to contract remedies); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 *Ga. L. Rev.* 1167, 1239–46 (2003) (stating that “no selection among the judiciary, legislatures, or the markets” in regulating lawyers is completely satisfactory); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *Harv. L. Rev.* 1393, 1424–33 (1996) (illustrating the complexity in institutional choice by presenting a new framework to analyze institutional behavior).

104. See *supra* notes 14–15 and accompanying text; cf. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963, 1018–19 (1998) (describing the canon of constitutional law, or those cases that theories of constitutional interpretation must grapple with).

105. Already, commentators urge courts to consider systemic consequences (to the insurance system, to the economy, etc.) in deciding the meaning of insurance contracts. See, e.g., James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 *Ariz. St. L.J.* 995, 998–1000 (1992) (outlining

context of contracts that, when performed, produce outsized public burden. We leave the discussion of remedies to Part III.

The analysis here is particularly salient in the current time, when the COVID-19 pandemic has made performing many contracts a public health hazard. Weddings, funerals, and corporate conferences have become superspreader events—but groups can come under pressure to hold them so as not to lose valuable, nonrefundable venue deposits.<sup>106</sup> In the next cycles of the virus, more parties will enter into like contracts, now forewarned about the possibility of pandemic, but still not fully appreciating the social costs of performance. Indeed, for all of the reasons that motivate most tort scholarship, parties will discount externalities in making their private choices. But these risks matter to courts, which have, in the past, reformed contract terms to avoid enforcing contracts that, if performed, would cause outsized public harms.<sup>107</sup>

What we describe here is an anticanon of other-regarding contract cases: a set of disfavored and odd cases that result from extraordinary facts. Although these anticanon cases are bad guides for ordinary contract dispositions, they are good law in bad times. Together, they suggest how public health might matter to contract enforcement—and how we might expect courts, in the wake of the current pandemic, to interpret contracts that have the potential to endanger public health.<sup>108</sup>

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various systemic considerations offered in support of interpreting insurance contracts in particular ways). It would seem no great step to further pull in health effects in interpreting terms (just as courts have long considered other social policies in interpretation, like making markets more settled). Contractual interpretation is, of course, highly contingent and factually dependent, and even a few decisions interpreting key clauses might have large effects. See John F. Coyle, *Interpreting Forum Selection Clauses*, 104 *Iowa L. Rev.* 1791, 1797 & n.17 (2019) (“To speak of the ‘butterfly effect’ in boilerplate contract interpretation . . . is to describe the effect that a single interpretive decision can have on the interests of far-flung parties not involved in the litigation at hand.”).

106. For instance, Professor Caprice Roberts’s description of negotiations around the canceling of a recent law conference explained why the conference sought to keep registration fees: “SEALS is offering full refunds with extended deadline. Hotel pressed attrition clause; negotiating still. Community wants all workshops to remain intact for broader audience participation by any who want go online. SEALS made a good-faith determination to ensure some recoupment.” Caprice Roberts (@capricelroberts), Twitter (June 6, 2020), <https://twitter.com/capricelroberts/status/1269328516920868865> (on file with the *Columbia Law Review*).

107. Cf. Margaret Rosso Grossman & Gregg A. Scoggins, *The Legal Implications of Covenants Not to Compete in Veterinary Contracts*, 71 *Neb. L. Rev.* 826, 845 (1992) (arguing that considerations of public health should inform enforcement of noncompetes in veterinary contracts); Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 *Cornell L. Rev.* 707, 717 (1978) (listing “public health” as a reason to make a common law decision, but without specific application to contracts); Leon E. Trakman, *Public Responsibilities Beyond Consent: Rethinking Contract Theory*, 45 *Hofstra L. Rev.* 217, 217 (2016) (arguing that contract law should incorporate concerns of public responsibility to promote the public good).

108. In constitutional law, the anticanon was described by Professor Jamal Greene as those cases which “embod[y] a set of propositions that all legitimate constitutional decisions

A. *Performance*

Courts have sometimes excused contract performance when it poses public hazards. And, although these cases are few, they provide an important example of how contract and health risks have interacted in the past—and perhaps provide a roadmap for how courts can excuse performance in the current climate.

A visceral example comes from the nondisclosure context, in the case of *Giannecchini v. Hospital of St. Raphael*.<sup>109</sup> In the case, a nurse was fired for serious errors. The hospital agreed not to disclose the fact of his involuntary termination to any new employer, but later disclosed the underlying facts when a new employer called for a reference check.<sup>110</sup> The nurse sued for breach, arguing that nondisclosure clauses are ordinarily enforceable.<sup>111</sup> But the court had concerns. Whereas performance

may be advantageous to the parties to the contract . . . the contract affects a third interest unrepresented at the bargaining table. That interest is the interest of the patient . . . . If contractual provisions like this are judicially enforceable, some of the most vulnerable citizens in our society—patients in hospitals—will inevitably be exposed to a risk of physical harm.<sup>112</sup>

Although the court ultimately upheld the contract, it did so “[u]nhappily,” noting that its upholding was because of the legislatively provided privacy right in employment records.<sup>113</sup>

*Bowman v. Parma Board of Education* was a similar case.<sup>114</sup> In *Bowman*, a teacher molested his charges, but his settlement with the school district included a confidentiality clause.<sup>115</sup> Later, a member of the school board called the teacher’s new employer and disclosed the teacher’s past.<sup>116</sup> After his death, the teacher’s estate sued for violation of the confidentiality agreement.<sup>117</sup> Noting that the teacher was “entirely unsuited for the teaching profession,” the court went on to hold:

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must be prepared to refute.” Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011). Greene focuses on wrongness in his definition. We, though borrowing the term, would rather focus on a set of cases which run counter to the normal trend, and which (though not necessarily wrong in their eras) are bad law in good times. See Mary Anne Case, “The Very Stereotype the Law Condemns”: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 Cornell L. Rev. 1447, 1469 n.112 (2000) (“anti-precedents”).

109. 780 A.2d. 1006 (Conn. Super. Ct. 2000).

110. *Id.* at 1008–09. *Giannecchini*, and like nondisclosure cases, are explored in Hoffman & Lampmann, *supra* note 47, at 192–95.

111. *Giannecchini*, 780 A.2d. at 1009.

112. *Id.* at 1010.

113. *Id.* at 1010–13.

114. 542 N.E.2d 663 (Ohio Ct. App. 1988).

115. *Id.* at 664–66.

116. *Id.* at 665–66. Bafflingly, the second district continued to employ the teacher. The teacher continued his criminal behavior and was eventually investigated again. He then resigned and entered into another settlement agreement. *Id.* at 666.

117. *Id.* at 664.

The only possible conclusion . . . is that the non-disclosure clause is void and unenforceable and no cause of action will lie for its breach.

. . . This court will not countenance an action for breach of such a clause . . . , for to do so would be to expose our most vulnerable citizens to a completely unacceptable risk of physical, mental and emotional harm.<sup>118</sup>

There are other like cases. In *Living Rivers Council v. City of St. Helena*, the court denied enforcement of a contract that would have slowed the mitigation of the potential flooding of a local town.<sup>119</sup> The court ruled in favor of the city,<sup>120</sup> which had written in its brief: “Where a promisor reasonably apprehends impossibility or serious danger to life or health of third persons, the promisor may be excused from commencing performance, and in some situations may be wholly discharged from the obligation to perform.”<sup>121</sup>

Similarly, in *Northern Corp. v. Chugach Electric Ass’n*, a contractor walked away from a job hauling rocks across an iced-over lake after two drivers fell through the ice and died.<sup>122</sup> When the contractor was sued for breach, the court noted that in light of the risks to life and limb, performance was impracticable.<sup>123</sup>

As Professor Arthur Corbin points out, *Hanford*, the baby-fair case, can also be read as a case that forbids contracts that create a public nuisance.<sup>124</sup> The Association’s performance was, strictly speaking, neither impractical nor frustrated.<sup>125</sup> Rather, it was against the public’s weal to perform, and, as such, there was no breach to forgive.<sup>126</sup>

This collection notwithstanding, there are relatively few cases in this line, which is itself noteworthy. COVID-19 is not the first viral epidemic in the country’s history, let alone in the storied past of the common law. One reason might be that, as in many situations, contracting parties preferred to hash out their differences privately, rather than sue in court.<sup>127</sup> In the context of an epidemic, many contracting parties may also have given up

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118. *Id.* at 666–67.

119. No. A116344, 2008 WL 217996, at \*1 (Cal. Ct. App. Jan. 28, 2008).

120. *Id.*

121. Respondents’ Opposition Brief at 40, *Living Rivers Council*, No. A116344, 2007 WL 2312564.

122. 518 P.2d 76, 77–79 (Alaska 1974).

123. *Id.* at 80.

124. Corbin & Perillo, *supra* note 9, § 75.3.

125. See *Hanford v. Conn. Fair Ass’n*, 103 A. 838, 838 (Conn. 1918). That said, the *Restatement on Contracts* does state that the impracticability rule proposed had *Hanford* partially in mind. John D. Wladis, *Impracticability as Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods*, 22 Ga. L. Rev. 503, 582–83 & n.313 (1988).

126. *Hanford*, 103 A. at 839.

127. Cathy Hwang, *Deal Momentum*, 65 UCLA L. Rev. 376, 423 (2018) (noting that many contracts cases are not litigated to opinion).

their contractual rights if enforcing them would cause death and destruction—perhaps because they were not literal comic book villains bent on world destruction. They might also have believed that courts would not allow them to enforce their rights.

But we might also see so few cases like *Hanford* because courts sometimes *do* enforce contracts that create public hazards.<sup>128</sup> Particularly in a past where death from epidemic and hazard was common, some courts seem quite blithely accepting of third-party risks. In one old case, for example, a contractor refused to build a grandstand when he believed, with good reason, that it would harm anyone who sat on it.<sup>129</sup> But the court found that fear for the public was not a valid excuse to performance—and an engineer’s statement that the building was a death trap was consequently inadmissible!<sup>130</sup>

Or consider Judge Beach’s pithy dissent in *Hanford*. Beach denied that private parties could vindicate public health interests, or at least that juries should sanction (through rough justice) self-help as an exercise of a private contracting regime, writing:

I dissent from the broad proposition that whenever an otherwise lawful act becomes dangerous to the public health it automatically becomes contrary to public policy and therefore unlawful, without any statute or order intervening to make it so.

. . . It is our public policy, I think, that a determination of the preliminary question whether the public health is endangered should be left to the responsible medical experts appointed for that purpose, and not to the *judicium rusticum* of a jury; also that these official experts should determine in advance what, if any, preventive measures ought to be taken, instead of leaving that question to be determined after the event, by a jury.<sup>131</sup>

Judge Beach’s dissent represents the normal contract law of public policy, which is closely aligned to legislative or regulatory rules that demonstrate the ill repute of a contract’s subject.<sup>132</sup> In the context of the pandemic, courts adjudicating contractual disputes may have many executive orders (not to mention legislative acts) from which to infer that the contract’s

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128. See, e.g., *Kohn v. Geist*, 168 N.Y.S. 21, 22 (App. Term 1918) (stating that where polio broke out at the plaintiff’s boarding house, “It was not seriously urged on the trial that the fact that there had developed in the house an infectious or contagious disease constituted a defense to plaintiff’s demand”).

129. *N.J. Magnam Co. v. Fuller*, 111 N.E. 399, 399 (Mass. 1916).

130. *Id.* at 400; see also *Kohn*, 168 N.Y.S. at 22. Like the court in *Kohn*, this court seemed to show little regard for the effect that contract performance would have on public health or safety. See *N.J. Magnam Co.*, 111 N.E. at 400.

131. *Hanford*, 103 A. at 839 (Beach, J., dissenting).

132. David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 Fla. St. U. L. Rev. 563, 581 & tbl.1 (2012) (showing that many public policy cases involved attacks on contracts for contravention of a statute or regulation, and that these attacks were nearly twice as successful as those rooted in general appeals to public policy).

subject harmed the public's health.<sup>133</sup> But they may not, and it's not obvious that courts are always willing to wait for the sanction of other branches of government before declaring contracts to be hazardous. This tension between cases with purely litigation-based policing of externalities and ones sounding in public policy recurs in the context of interpretation.

#### B. *Interpretation*

Another way for courts to intervene is by interpreting existing contract provisions broadly. For example, contracts both big and small often have a "force majeure" clause, excusing performance in the event of certain unforeseen catastrophes—and although pandemic coronaviruses are rarely specified within those clauses,<sup>134</sup> it would not be out of the realm of possibility for courts to consider a pandemic a force majeure. To the extent that such clauses expand beyond ordinary impracticability doctrine (which is at best unclear<sup>135</sup>) courts might avoid textualist readings to excuse breach.

In reality, however, courts rarely discuss public health as an explicit factor in interpretation disputes,<sup>136</sup> and past epidemics offer only a murky guide for how courts will interpret contract clauses during a public health

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133. See, e.g., *In re Hitz Rest. Grp.*, 616 B.R. 374, 377 (Bankr. N.D. Ill. 2020) ("Determining whether Governor Pritzker's executive order triggered the force majeure clause in the lease is a matter of contractual interpretation. For that, the Court turns to Illinois state law.").

134. A common variant is "pandemic flu." For example, the University of Vermont's clause states: "In the event that the University of Vermont closes due to a calamity or catastrophe beyond its control that would make continued operation of student housing infeasible, such as a natural disaster, a national security threat, or widespread pandemic flu, room and meal plan fees will not be refunded." Univ. of Vt. Dep't of Residential Life, Housing and Meal Plan Contract Terms & Conditions 2019–2020, at 17 (2019), [https://reslife.uvm.edu/files/2019-2020\\_reslife\\_contract.pdf](https://reslife.uvm.edu/files/2019-2020_reslife_contract.pdf) [<https://perma.cc/H4XQ-XJBF>]. The coronavirus is not, as we all know, an influenza virus. See Coronavirus Disease (COVID-19): Similarities and Differences with Influenza, WHO (Mar. 17, 2020), <https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-similarities-and-differences-with-influenza> [<https://perma.cc/WN8P-GG7F>]. But only hyperliteral courts would fail to excuse obligation on this ground.

135. Gideon Parchomovsky, Peter Siegelman & Steve Thiel, *Of Equal Wrongs and Half Rights*, 82 N.Y.U. L. Rev. 738, 786 (2007) (finding, based on a sample of clauses, that force majeure clauses do not expand beyond ordinary impracticability doctrine).

136. For an analogous example, consider the promissory estoppel cases where they shade meaning of promises to create enforceable obligations. See, e.g., *Cutter v. Hamlen*, 18 N.E. 397, 399 (Mass. 1888) (finding, on the basis of "some evidence that the plaintiff was misled by specific statements as to the condition of the drainage," that death resulting from diphtheria following sale of a house was actionable even though a plain language reading of the contract would seem to have prevented recovery). But see *Charter Township of Ypsilanti v. Gen. Motors Corp.*, 506 N.W.2d 556, 559 (Mich. Ct. App. 1993) (finding that "hyperbole and puffery" from a manufacturer did not create an enforceable promise to keep the manufacturing plant in the township).

crisis.<sup>137</sup> In the 1800s and early 1900s, for instance, epidemics caused numerous local school closures. Teachers, locked out of their workplaces, sued for salaries for periods when their schools were closed.<sup>138</sup> These cases usually focused on one of two questions: If there was no specific contract provision, did schools have to pay salaries when closed? And, if there was a provision requiring payment regardless of disease, would the school have to pay it?

In some cases, when schools closed due to public health orders, courts found performance impossible and consequently held that the teachers were owed nothing.<sup>139</sup> One way to think about the courts' reasoning in these cases is through the language of externalities borne by the public: If schools stayed open in defiance of health orders during an epidemic, they would be performing their contracts with their employees, but increasing the harm to the public to unacceptable levels. But in many cases, when schools were more proactive about reducing harms to the public, courts still found them on the hook for teacher salaries.

In cases where there were no provisions denying the right of payment,<sup>140</sup> courts often reasoned that the schools were better risk bearers.<sup>141</sup> An oft-cited case is *Dewey v. Union School District*, which held that “the closing of the schools was a wise and timely expedient; but the defense interposed cannot rest on that. It must appear that observance of the contract by the district was caused to be *impossible* by act of God. It is not enough that great difficulties were encountered . . . .”<sup>142</sup> In the 1894 case

137. See, e.g., 27 Lord, *supra* note 87, § 77:107 (“In several cases where schools have been closed due to epidemics, teachers have recovered without considering . . . whether the teacher was . . . required to remain ready to resume work. . . . Yet, other decisions have denied recovery absent a requirement to stand by ready to teach, where the impracticability of performance is prolonged.”).

138. For scholarly treatments of these cases, see Town Hall, *Rights of a Teacher in the Public Schools When School Is Closed*, 25 Ky. L.J. 261, 261–69 (1937).

139. See, e.g., *Sch. Dist. No. 16 v. Howard*, 98 N.W. 666, 667 (Neb. 1904) (finding that a school district “may not suffer loss from a cause over which it has no control” when considering the early termination of the school janitor’s employment contract).

140. See, e.g., *Goodyear v. Sch. Dist. No. 5*, 21 P. 664, 664 (Or. 1889).

141. See *Libby v. Inhabitants of Douglas*, 175 Mass. 128, 130–31 (1900) (“The contingency was not expressly provided for in the contract . . . . It is no defense that he did not teach, because the failure was not due to his fault, but to the action of the committee.”); *Bd. of Educ. v. Couch*, 162 P. 485, 486 (Okla. 1917) (“[T]he board of education might have stipulated that the [teacher] should have no compensation during the time the schools were closed . . . but, not having done so . . . it cannot deny him compensation for the time lost on account of the temporary suspension from duty.”); *McKay v. Barnett*, 60 P. 1100, 1102–03 (Utah 1900) (holding that the closing of the school by the Board of Education because of smallpox did not release the Board from its obligation to pay the teacher because the Board failed to contract for such a release); see also *Montgomery v. Bd. of Educ.*, 131 N.E. 497, 498 (Ohio 1921) (holding that the same reasoning on the failure to contract for a release that required schools to pay teachers during public health closures also applied to contracts regarding the transportation of students); *Crane v. Sch. Dist. No. 14*, 188 P. 712, 716 (Or. 1920) (same).

142. *Dewey v. Union Sch. Dist.*, 5 N.W. 646, 647 (Mich. 1880) (emphasis added).

of *Gear v. Gray*, too, a teacher sought lost wages from a district that had closed due to a local health board's order during an epidemic.<sup>143</sup> The court found that the school closure could not establish legal impossibility, "however prudent and necessary it may have been."<sup>144</sup> More importantly, the court said, the district had an alternative available to them that would have enabled it to mitigate its loss by adding teaching days at the end of the school year.<sup>145</sup>

Courts often ignored even contract provisions that allowed schools not to pay salaries during closures. In *Randolph v. Sanders*, for instance, a Texas teacher held herself ready to perform during a smallpox epidemic.<sup>146</sup> Her contract stated that she would only be paid at the end of each month and reserved the right for the city board to cancel the contract and close the school.<sup>147</sup> Nevertheless, when the school closed, the plaintiff was able to recover—the court stretched, broadly interpreting "the services" to include holding oneself ready to perform.<sup>148</sup>

If there is a common thread that runs through these cases, it is the court's interest in finding equitable solutions. Whether the trigger for the school closure was the school's choice or a public health official's, and whether or not there was a contract provision speaking to the issue, courts appeared interested in protecting the *weaker party*—that is, individual teachers—from bearing the entire economic cost. And these pandemic courts were willing to reach to those solutions: suggesting (atextual) time-shifting solutions or reading clauses out of contracts that would have excused salary payments, for example.

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Epidemic diseases are wildly disruptive and have tragically recurred in Anglo-American history.<sup>149</sup> And yet courts appear to have only rarely discussed how to relate such events to contractual obligations. To be sure, excuse based on a party's illness or fear of illness is common, and many law firm circulars cite the granddaddy of such cases, *Lakeman v. Pollard*, where the court forgave breach given the local prevalence of cholera.<sup>150</sup>

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143. 37 N.E. 1059, 1059–60 (Ind. App. 1894).

144. *Id.* at 1061.

145. *Id.*

146. 54 S.W. 621, 623 (Tex. Civ. App. 1899).

147. *Id.* at 622.

148. *Id.* at 623.

149. For a useful bibliography, see David Schorr, *The Legal History of Epidemics—Selected Secondary Sources, Env't, L. & Hist.*, [https://environmentlawhistory.blogspot.com/p/legal-history-of-epidemics-selected\\_20.html](https://environmentlawhistory.blogspot.com/p/legal-history-of-epidemics-selected_20.html) [<https://perma.cc/5K3R-GZ7Z>] (last updated Mar. 2, 2021).

150. The *Lakeman* court noted that:

The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence . . . would have been justified

But the cases in this vein are few, and that is strange, given that both leading contract law treatises emphasize courts' interest in sharing losses and protecting the public during times of epidemic risk.<sup>151</sup> As alluded to earlier, it is unclear why there are so few cases explicitly discussing disease risks and contracting. The next Part discusses the consequence of this lack of case law and the dangers of being too certain about what comes next.

### III. ROUGH JUSTICE

Contract litigation generated during the Great Pause<sup>152</sup> will persist long after a cure arrives. Thus far, this Essay has suggested that in this future mass of cases, judges are likely to at least consider how private contract performance affects public health risk. COVID-19, an unanticipated event that vastly increased the public harm of some contract performances,<sup>153</sup> may spur courts to refuse to enforce, or reinterpret, contracts in ways the parties have not contemplated.

Or not. The case law discussed here is sparse: At most, parties seeking to enforce contracts that cause substantial public-health harm *might* face skeptical receptions. Our prediction is far from bankable: Many factors, including the proximity of the pandemic's spread to the court decision, the parties' relative fault, the actions and signaling by public health authorities, and the specificity of contract terms about risk will influence courts' dispositions of COVID-19 cases. Judges' appetites for ignoring contractual language is highly contingent.

This concluding Part seeks to suggest even more reasons to doubt that we can surely know how courts will adjudicate COVID-related cases. Many cases involving pandemic-related contract breaches will be roughly

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in leaving by reason of it . . . . The propriety of his conduct in leaving his work at that time must be determined by examining the state of facts as *then* existing.

Lakeman v. Pollard, 43 Me. 463, 467 (1857). For just two of the many law firm circulars citing *Lakeman*, see, for example, Does Your Contract Protect You from the Coronavirus?, McCarter & English, LLP (Mar. 17, 2020), <https://www.mccarter.com/insights/whats-in-your-contracts-important-force-majeure-and-business-interruption-and-event-cancellation-insurance-provisions> [<https://perma.cc/8LR2-FZC3>]; Joseph E. Tierney IV, Impact of COVID-19 on Supply Chain Contracts and Responding to Force Majeure Claims, Davis & Keulthau (Mar. 13, 2020), <https://www.dkattorneys.com/publications/impact-of-covid-19-on-supply-chain-contracts-and-responding-to-force-majeure-claims> [<https://perma.cc/ZS9L-PYPU>].

151. See Corbin & Perillo, *supra* note 9, § 77.7; 6 Lord, *supra* note 87, § 13:12 (“Bargains which require a performance likely to jeopardize unreasonably the life or health of either or both parties, or of a third person, are illegal even though the party whose life or health is jeopardized has voluntarily assumed the risk.”).

152. Amanda Janoo & Gemma Bone Dodds, The Great Pause, OpenDemocracy (Apr. 3, 2020), <https://www.opendemocracy.net/en/oureconomy/great-pause> [<https://perma.cc/TE2L-9VZM>] (describing the economic impact of the COVID-19 pandemic as “a ‘Great Pause’”).

153. See *supra* notes 23–28 and accompanying text.

hewn—bad facts making bad law. And, although reformation and other post hoc adjustments have been historically disfavored, their reemergence in the 2020s is highly possible and poses no existential threat to our scheme of ordered liberty.

A. *Expected Areas of Friction*

Contract deposits will be a major point of contract contention in the coming months and years. Many contracts require parties to prepay non-refundable deposits or to agree to pay liquidated damages if an event is canceled. If a court excuses contract performance due to public health risk, what happens to prepaid deposits? Are deposits refundable? Should they be?

Generally speaking, when a court excuses contract performance, parties may seek either reliance or restitution for prepaid deposits.<sup>154</sup> This rule applies even when deposits are explicitly said to be nonrefundable, as it rests on the equitable rules of restitution.<sup>155</sup> And yet cases applying such restitution rules are quite rare,<sup>156</sup> and the decisions that exist are exceedingly hard to generalize from, difficult to predict, and routinely attacked ex post by efficiency-minded scholars.<sup>157</sup>

Many have claimed that—contrary to the black letter rule—courts should honor nonrefundable deposit clauses.<sup>158</sup> Such commitments motivate promisors to securely invest in performance in a world where post-

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154. See U.C.C. § 2-615 cmt. 6 (Am. L. Inst. & Unif. L. Comm'n 2019) (noting that where “neither sense nor justice is served by either answer when the issue is posed in flat terms of ‘excuse’ or ‘no excuse,’” courts should make appropriate adjustments); Restatement (Second) of Contracts § 272 cmt. c (Am. L. Inst. 1981) (inviting courts to ignore stated rules when those rules “will not avoid injustice”); Parchomovsky et al., *supra* note 135, at 784–87 (arguing for equal division of windfalls and noting that force majeure language only rarely deals with allocation of losses and gains).

155. See Mark P. Gergen, *A Defense of Judicial Reconstruction of Contracts*, 71 *Ind. L.J.* 45, 46 (1995) (“The principle of loss alignment relieves a party from a significant and unexpected loss under a contract when such relief would leave the other party in a position no worse than she would have been in had the contract not been made.”).

156. Victor P. Goldberg, *After Frustration: Three Cheers for Chandler v. Webster*, 68 *Wash. & Lee L. Rev.* 1133, 1165 (2011) (positing that there are few cites to the restatement because most parties have contracted around it). In one case, little discussed, a railway worker quit his job early because of the threats of violence in a strike. The court held he could recover his quantum meruit, set off by the liquidated damages that the employer was owed for the time he did not perform. *Fisher v. Walsh*, 78 *N.W.* 437, 438–39 (Wis. 1899).

157. For a smattering of approaches, see Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 *Hastings L.J.* 1, 47 (1991) (contract doctrine should do nothing to avoid windfalls); Subha Narashimhan, *Of Expectations, Incomplete Contracting, and the Bargain Principle*, 74 *Calif. L. Rev.* 1123, 1130 (1986) (courts should divide unanticipated surplus); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 *J. Legal Stud.* 271, 292–95 (1992) (restrictive application).

158. Goldberg, *supra* note 156, at 1146 (listing seven reasons why parties make prepaid deposits).

breach litigation will (in the best case) return a fraction of its value. But these arguments do not normally consider the role of public externalities. True, courts rarely discuss public health concerns in their decisions about damages.<sup>159</sup> But that's not to say they won't going forward, especially given the highly salient role such externalities play in discussions about the social spread of COVID-19.

Courts considering contracts whose performance would increase public risks of disease might not permit a party to keep a deposit that tends to motivate socially harmful performance. As professors, one example in particular comes easily to us. In the spring of 2020, many colleges and universities across the country announced that they planned to resume some kind of in-person instruction in the fall semester.<sup>160</sup> As a result, undergraduate and graduate students paid nonrefundable seat deposits to secure a spot in the fall 2020 class. In many cases, as the pandemic continued and spread on campus, those classes were once again conducted online, and many students were sent home from their dorms.<sup>161</sup> Do the nonrefundable deposits really apply in such circumstances?

An economist might read these nonrefundable deposits as merely allocating the burden of risk. Students can spread losses (by, say, staying at home with their parents if they are lucky enough to have that option) and colleges cannot (because most are self-insured and can't easily raise funds during a pandemic<sup>162</sup>). Not requiring schools to refund deposits to students in the event of a last-minute switch to online classes might be socially optimal.

But, of course, the fear of loss spurs behavior, and students are far from fully insured—many actually cannot stay with parents, have

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159. When courts do discuss public externalities, it is most commonly in cases about liquidated damages in doctors' noncompete agreements. In these cases, it is not obvious whether public health exceptions to contract performance really apply to the damages calculus or the underlying restraint on movement. See *Iredell Digestive Disease Clinic v. Petrozza*, 373 S.E.2d 449, 453–55 (N.C. Ct. App. 1988) (finding that a liquidated damages clause was not enforceable).

160. Debevoise & Plimpton, *Reopening Schools in the COVID-19 Climate: Legal Issues to Consider 1* (2020), <https://www.debevoise.com/insights/publications/2020/06/reopening-schools-in-the-covid19-climate> (on file with the *Columbia Law Review*).

161. See Live Updates: Latest News on Coronavirus and Higher Education, *Inside Higher Ed* (Oct. 28, 2020), <https://www.insidehighered.com/news/2020/10/28/live-updates-latest-news-coronavirus-and-higher-education> [<https://perma.cc/5Z2F-NMYA>]; see also Nick Kosko, *College Football Players Start 'We Want to Play' Movement*, *247 Sports* (Aug. 9, 2020), <https://247sports.com/LongFormArticle/Trevor-Lawrence-college-football-players-we-want-to-play-movement-Justin-Fields-Sam-Howell-Ian-Book-COVID-19-season-cancellation-150060638> [<https://perma.cc/4VHN-7L8S>].

162. See Michael Rush, *Protecting Enrollments in Times of Risk and Crisis*, *Inside Higher Ed* (Mar. 5, 2020), <https://www.insidehighered.com/views/2020/03/05/should-institutions-take-out-insurance-response-coronavirus-opinion> [<https://perma.cc/L552-795J>] (noting the University of Illinois's novel purchase of an insurance policy, believed to be the first of its kind, that would provide indemnification in the event of decreased international student enrollment).

circumstances that prevent them from attending school online, and will be making serious sacrifices to afford those nonrefundable deposits. Permitting universities to keep nonrefundable deposits motivates students to push harder for in-person classes in an effort to recoup their losses.<sup>163</sup> They have lobbied administrators through direct action, shamed faculty online for resisting teaching, and generally sought to avoid paying what their contracts state they owe.<sup>164</sup> All of this was the predictable and natural consequence of contractual clauses with such severe consequences.<sup>165</sup> In other words, nonrefundable deposit clauses in these circumstances make the underlying contracts more likely to be performed, even if performance is no longer in the public's interest.

Now, this calculus is slightly more complex than we are making it out to be, because if universities anticipate the rule we have proposed and know that they have to refund part of the deposits if they move to remote instruction, their behavior may shift. This will serve as motivation to *avoid* going online, or at least to consider the financial consequences of doing so as a part of the choice. Thus, at the margin, both enforcing contracts and disregarding them seem to spiral toward a public health catastrophe.

But we think that at equilibrium this pull will be weaker than the distributed push of consumer-side pressure. After all, universities will seek to go remote when they feel pressure to serve the public health, but particularly when they receive calls from their liability insurers. Those

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163. Whether schools are required to provide in-person instruction rests on a variety of implied and explicit contracts, some of which have specific carve-outs stating that schools can move online in various special circumstances. The University of Vermont, for example, has a clause in its room-and-board contract that provides: "In the event that the University of Vermont closes due to a calamity or catastrophe beyond its control that would make continued operation of student housing infeasible, such as a natural disaster, a national security threat, or widespread pandemic flu, room and meal plan fees will not be refunded." Univ. of Vt. Dep't of Residential Life, *supra* note 134, at 17. Nonetheless, a class action lawsuit contended that because the University had not technically closed, the clause was not operative. Class Action Complaint and Demand for Jury Trial at 6, *Patel v. Univ. of Vt. & State Agric. Coll.*, No. 2:20-cv-00061-jmc (D. Vt. filed Apr. 21, 2020).

164. Collin Binkley, *As More Colleges Stay Online, Students Demand Tuition Cuts*, Wash. Post (Aug. 22, 2020), [https://www.washingtonpost.com/health/as-more-colleges-stay-online-students-demand-tuition-cuts/2020/08/22/1626ebb6-e487-11ea-82d8-5e55d47e90ca\\_story.html](https://www.washingtonpost.com/health/as-more-colleges-stay-online-students-demand-tuition-cuts/2020/08/22/1626ebb6-e487-11ea-82d8-5e55d47e90ca_story.html) (on file with the *Columbia Law Review*).

165. Analogously, students who violated contractual compacts to avoid gatherings have been sent home and forfeited their deposits. In one such case, at Northeastern, students facing that consequence disagreed about the fairness of the result. Said sophomore Sofia Hassan, "I think it's fair because there was a strict set of guidelines we have to follow and it clearly says if we are at a party or have more than 10 people we will get suspended or dismissed." But another complained, "I didn't know that was a thing, I feel like they should've made it a little bit more clear. It's put it in some weird contract. I'm not gonna read that." Wale Aliyu, *Northeastern Dismisses 11 Students Caught Partying in Boston Hotel Room, Violating Public Health Protocols*, Bos. 25 News (Sept. 4, 2020), <https://www.boston25news.com/news/local/northeastern-dismisses-11-students-gathering-boston-hotel-room-violating-public-health-protocols/HN7V2PFCX5A3ZAQJNZMKE4NMPQ> [<https://perma.cc/GK9E-UWWG>].

conversations will be direct and intense, and it is unlikely that universities will be able to resist them by pointing to the partial refunds they may have to make due to restitutionary principles we have discussed: The need to pay blood money is an unattractive slogan for even the most cold-blooded university administrator.

Given this push and pull, courts may intervene and permit students to claw back some of their deposits in the form of restitution. Whether courts couch such decisions in language of externalities, fault,<sup>166</sup> fairness, or social policy, the temptation to award compromise remedies will be strong.

Or consider another law-related example: the contract recent graduates make with their friendly state board to allow them to sit for the bar exam. In some states—such as, apparently, Oklahoma—the Board ordinarily required a fee that is nonrefundable if the candidate “did not take” the exam.<sup>167</sup> In late June of 2020, graduating law students strategized how to ensure that their temperatures did not exceed 100.4 degrees on the day of test administration.<sup>168</sup> Why? Because *if* they ran a fever, then under the rules they would be denied entry and would not have “sat” for the exam, leaving them out of pocket the exam fee.<sup>169</sup> This is a bad equilibrium. If candidates could claw back the fee from the bar, notwithstanding the contract that purported to make it nonrefundable, we might see fewer diseased test takers motivated to hide their symptoms, and thus better public health outcomes.

The practical takeaway, then, is this: Parties to venue contracts, caterer contracts, and other contracts that involve nonrefundable deposits should not behave as though those contracts are rock solid. Rather, they should anticipate that there is a risk that a court will somehow reform, excuse, or ignore nonrefundable deposits clauses, as they have in the past.

### B. *The Impact of Forum*

Questions of remedy are intertwined with ones of forum. Previous pandemic cases played out in state and federal courts, but since then, there have been radical transformations in American dispute resolution. Two relatively novel features of the modern landscape—mass (but not class)

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166. Fault in contract law is its secret vice. See generally George M. Cohen, *The Fault that Lies Within Our Contract Law*, 107 Mich. L. Rev. 1445 (2009) (critiquing the strict liability paradigm).

167. u/amorphousbutnotablob, *Turned Away and Marked “Did Not Take”*, r/Bar\_Prep, Reddit (June 26, 2020), [https://www.reddit.com/r/Bar\\_Prep/comments/hgik77/turned\\_away\\_and\\_marked\\_did\\_not\\_take](https://www.reddit.com/r/Bar_Prep/comments/hgik77/turned_away_and_marked_did_not_take) [<https://perma.cc/Z4H8-E4U7>] (reflecting a Reddit user’s fear that they will be turned away from the bar exam if they have a low-grade fever and responses from other Reddit users noting how to keep one’s temperature low so they can be allowed to sit for the exam).

168. *Id.*

169. *Id.*

arbitration and multidistrict litigation—make it particularly hard to predict the outcomes of individualized contract clauses.

Many contract cases today are shunted to arbitration tribunals, which are famously prone to compromise and half-loaf solutions. While arbitral data is hard to come by, the conventional wisdom is that arbitrators prefer compromise to binary outcomes.<sup>170</sup> In other words, arbitrators are already primed to split the baby during disputes, and in dealing with the special circumstance of COVID-related contract breach, they are even more likely to do so.<sup>171</sup>

Arbitration is also unpredictable because it is private, and parties face the difficult challenge of using past decisions to predict future outcomes.<sup>172</sup> The predictability challenge is compounded by the fact that recent cases have made class arbitration more difficult, thereby creating a smorgasbord of individual cases that is even more impossible to find and summarize.<sup>173</sup> Such cases, prosecuted at scale by technologically aided consumer lawyers,<sup>174</sup> are unlikely to produce single, definitive rulings.

And state and federal courts, too, suffer from modern arbitrations' mix of compromise and haze, even if that mix comes from a different source. In recent decades, Americans have increasingly sought clarity for incredibly complex social problems through litigation rather than through

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170. Klaus Peter Berger & J. Ole Jensen, *The Arbitrator's Mandate to Facilitate Settlement*, 40 *Fordham Int'l L.J.* 887, 903 (2017) (surveying practitioners and noting value of settlement promotion within arbitration); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 *J. Empirical Legal Stud.* 1, 6, 14, 22 (2011) (repeat player effects). See generally David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 *Geo. L.J.* 57, 91–101 (2015) (studying awards and finding a mixed set of results).

171. This assumes that consumer disputes will reach arbitrations instead of facing default judgments, which is not at all certain. See Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *CARES Act Gimmicks: How Not to Give People Money During a Pandemic and What to Do Instead*, 2020 *U. Ill. L. Rev. Online* 81, 89 (noting the likelihood of default for car loans and foreclosures).

172. Alyssa S. King, *Arbitration and the Federal Balance*, 94 *Ind. L.J.* 1447, 1453 (2019) (“With incomplete information from parties and arbitration providers, scholars, advocates, and politicians do not have a clear sense of how closely arbitrators follow the law.”).

173. See generally Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 *Lewis & Clark L. Rev.* 611 (2020) (detailing the difficulty in connecting data about individual outcomes in arbitration).

174. Cf. *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020) (compelling arbitration on behalf of almost 6,000 couriers); Fair Shake, <https://fairshake.com> [<https://perma.cc/JP4R-GB5F>] (last visited Nov. 5, 2020) (internet-based tool for consumers to arbitrate small claims). The *Abernathy* court concluded that “DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.” *Abernathy*, 438 F. Supp. 3d at 1068.

lawmaking.<sup>175</sup> Issues as complex and wide-ranging as asbestos,<sup>176</sup> terrorism,<sup>177</sup> and the opioid epidemic<sup>178</sup> have been dealt with in court, rather than by legislatures.<sup>179</sup>

When courts (and litigators) devise solutions in these mass claims, they only rarely focus on individualized *legal* merits. Rather, the parties and the courts are trying to reach solutions that seem fair and equitable across the board. Judges act like the managers of enormous pools of settlement money, which are divided using formulas that are rarely, if ever, the result of preexisting doctrinal rules.<sup>180</sup> These actions, sometimes organized formally through multidistrict litigation (MDL) proceedings,<sup>181</sup> and sometimes less formally through individualized ad hoc judging,<sup>182</sup> have already come for COVID-19 cases. As the law firm Covington & Burling wrote of attempts to create a national COVID-insurance MDL:

MDL proceedings often settle globally. Resolution of an MDL involving, for example, 100,000 different insurance claims might not result in any meaningful settlement payment for each claimant. Plus, in a global settlement, policyholders with better insurance policy language, better facts, or better documented

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175. See Kathleen G. Noonan, Jonathan C. Lipson & William H. Simon, Reforming Institutions: The Judicial Function in Bankruptcy and Public Law Litigation, 94 Ind. L.J. 545, 546–47 (2019) (arguing that judicial intervention in public and corporate spheres is an appropriate response).

176. See *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986) (noting that at the time, “About 5,000 asbestos-related cases are pending in this circuit”).

177. See Benjamin Weiser, Family and United Airlines Settle Last 9/11 Wrongful-Death Lawsuit, N.Y. Times (Sept. 19, 2011), <https://www.nytimes.com/2011/09/20/nyregion/last-911-wrongful-death-suit-is-settled.html> (on file with the *Columbia Law Review*) (describing the litigations that occurred after 9/11, involving such issues as United Airlines’s role in predicting the terrorist attack).

178. See, e.g., *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2019 WL 4686815, at \*1 (N.D. Ohio Sept. 26, 2019).

179. See, e.g., Charlotte Garden, Union Made: Labor’s Litigation for Social Change, 88 Tul. L. Rev. 193, 194 (2013) (describing how labor unions use Supreme Court litigation to lobby for change); Beth Van Schaack, With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change, 57 Vand. L. Rev. 2305, 2308 (2004) (discussing the impact for Alien Tort Claims Act-style litigation on, among other things, the human rights movements and other areas of social change).

180. See Andrew D. Bradt, The Long Arm of Multidistrict Litigation, 59 Wm. & Mary L. Rev. 1165, 1224 (2018) (“In most large MDLs, what actually happens is that a settlement agreement is eventually negotiated by the lead lawyers, and it is likely to be one that leaves the plaintiff little practical choice but to accept.”); David L. Noll, MDL as Public Administration, 118 Mich. L. Rev. 403, 420 (2019) (“The prototypical settlement resolves all the cases collected before a transferee judge by establishing a special-purpose claims facility to process claims according to streamlined procedures negotiated by the defendant and plaintiff’s leadership. These claims facilities are their own ad hoc institutions.”).

181. For a trenchant recent critique of the MDL governance deficit, see Noll, *supra* note 180, at 447–54.

182. See Pamela K. Bookman & David L. Noll, Ad Hoc Procedure, 92 N.Y.U. L. Rev. 767, 787 (2017).

claims may receive no more than policyholders with far weaker claims.<sup>183</sup>

That courts have turned to MDL and like tribunals to adjudicate complex social phenomena is no accident, though it represents a new turn for MDLs, which have historically focused on tort, not contract.<sup>184</sup> It results from a governance failure at the state and federal level to offer regulated solutions to complex social problems. But the result is still one where the millions of parties to future COVID-19 lawsuits—tenants, consumers, commercial insurers, and others—are likely to be grouped together in mass adjudications, with little chance to have a judge make individualized findings about particular contracts.<sup>185</sup>

Even college and graduate students who pay seat deposits can expect to have their claims heard in bulk and to have relief granted based not on close readings of individual contracts but rather through mass adjudication.<sup>186</sup> One might expect, for instance, a large university to agree to a bulk settlement with a class of disgruntled students and a special master to divvy up the pot amongst students who are harmed in various ways. For students to plan based on reading their individual implicit or explicit contracts with the university about the dollars and cents they are entitled to receive in refund from the school gym, or dining hall plans, or tuition for portion of classes online, and many other details would be folly.

Put simply: Modern dispute resolution systems are not built to provide individualized adjudication for the breach of millions of contracts. Instead, even pre-COVID, courts and arbitral tribunals were already primed for compromise and reformation. COVID-19 and contract performance's

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183. See Covington & Burling, *Policyholders Beware: The Risks of Multi-District and Class Action Treatment of COVID-19 Insurance Claims 2–4* (2020), <https://www.cov.com/-/media/files/corporate/publications/2020/05/policyholders-beware-the-risks-of-multidistrict-and-class-action-treatment-of-covid-19-insurance-claims.pdf> [<https://perma.cc/SZA2-NM7B>] (critiquing recent attempts to establish an insurance MDL).

184. See United States Judicial Panel on Multidistrict Litigation *Calendar Year Statistics January Through December 2019*, U.S. Jud. Panel on Multidistrict Litig., [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics-2019\\_1.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2019_1.pdf) [<https://perma.cc/ZW7K-TG9Q>] (last visited Oct. 28, 2020) (showing that only 2.1% of 2019 MDLs considered contract cases).

185. See Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669, 1704 (2017) (“[F]ederal judges acknowledged that state law issues can get ‘mushed’ together by the MDL’s tendency to group similar cases together—cases that may include actions from states with closely related laws. But many judges insisted that they make efforts to apply the different state laws.”).

186. See COVID-19 College Refund 2020 Intake Form, Anastopoulo L. Firm, <https://www.collegerefund2020.com> [<https://perma.cc/C4MQ-X288>] (last visited Oct. 28, 2020) (collecting plaintiffs); Anya Kamenetz, *Colleges Face Student Lawsuits Seeking Refunds After Coronavirus Closures*, NPR (May 29, 2020), <https://www.npr.org/2020/05/29/863804342/colleges-face-student-lawsuits-seeking-refunds-after-coronavirus-closures> [<https://perma.cc/8WMW-EBXW>] (expressing skepticism about the suits).

potential to amplify health risk only further tilts courts and arbitral tribunals toward compromise and reformation.

C. *Some Practical Advice*

Given this uncertainty and the modal decisionmaker's preference for half-loaf solutions, we offer some practical advice. Parties should be more willing to split the difference in COVID-19 contract cases than they would ordinarily be, regardless of the presence of contract clauses that purport to assign unilateral consequences for pandemic risks, provide for non-refundable deposits, or disclaim impracticability and related defenses.<sup>187</sup> That is, we think this is one of the few areas where uncertainty about outcomes should spur more settlement, since it makes it advisable to compromise, at least on the margin.<sup>188</sup>

This counsel is needed on two fronts.

First, we worry that lawyers are insufficiently attentive to contract's public policy-based anticanon. These cases exist and are (apparently) good law, and yet they are often subsumed into doctrines of impracticability, duress, and frustration. This is an analytic error with real-world consequences, yet it persists even in the most sophisticated law firm guidance.

Unlike cessation-based defenses sounding in parties making errors (about the state of the world, or its future), public policy analysis cannot be easily defeated by showing that a party knew what it was getting into, assumed the risks by contract, or was somehow otherwise at fault. That is, unlike, say, impracticability, public policy analysis is not resolved by reference to a well-drafted force majeure clause—it's neither waivable nor disclaimable. The sort of analysis needed to evaluate public policy-based externality claims is unusual in contract doctrine, happens rarely in modern cases, and will seem strange for many modern readers.

*Hanford* is the paradigmatic case—although it was featured in the First Restatement, it is all but forgotten.<sup>189</sup> None of the law firm guidance we've seen in the last few months has even mentioned it as a possible outcome for a pandemic contract dispute. Lawyers have good reasons, of course, for

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187. One easy way to start down the path of compromise for complex deals is to negotiate a standstill agreement. See Jonathan C. Lipson & Norman M. Powell, Don't Just Do Something—Stand There! A Modest Proposal for a Model Standstill/Tolling Agreement, ABA (Apr. 14, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/04/standstill-tolling](https://www.americanbar.org/groups/business_law/publications/blt/2020/04/standstill-tolling) [<https://perma.cc/N3KN-H5H7>].

188. In litigation, at least theoretically, settlement results from parties knowing more about the disposition of their case. See Christina L. Boyd & David A. Hoffman, Litigating Toward Settlement, 29 J.L. Econ. & Org. 898, 925 (2013) (finding that motion practice motivated settlement). Here, our argument is primarily directed at firms who believed their chances of winning approached 100% given contractual clauses, which in the ordinary case would preclude the need to pay a recovery.

189. Restatement (First) of Contracts § 465 illus. 10 (Am. L. Inst. 1932) (describing the facts of *Hanford*).

citing to modern cases. Usually they are the best source for predictive judgment. But, as we've shown, contract law has been occasionally quite attentive to risky contracts and welcoming of reformation.

Second, because lawyers ignore the public policy-based anticanon, parties today may wrongly estimate the likelihood that contractually based rights will stand up to hard usage. We think better-counseled parties, considering the likelihood of *Hanford*-like outcomes, will incorporate more doubt into their decision-tree analyses of what will happen in litigation. The result of that process should motivate them to be more willing to settle on terms that would, in ordinary times, seem generous to parties with weak contractual claims.

This would be a morally and politically correct outcome. Contract law, like politics, is downstream from culture. For much of the spring of 2020, epidemiologists and public health officials overwhelmingly agreed that large gatherings unacceptably increased public health risk.<sup>190</sup> It would be incongruous for courts to interpret contracts to suggest that parties should have gathered large groups of people to perform their contracts despite public health recommendations. We worry that this kind of rift between contract law and social practice would cause individuals, in future pandemics, to ignore public health advice in anticipation of courts' later responses.

#### D. *Reformation Revisited*

One way to think about the anticanon is that courts are acting as if they are adjudicating long-term relational agreements, even though the cases often are situated in one-off deals where relational norms are weakly developed, if at all. Courts sometimes work to hold parties to such agreements together, seek equitable solutions that split the difference, and reform contracts to account for what the parties "really" intended, whatever they actually said. A deep literature on relational contracting seeks to justify this treatment, with mixed results.<sup>191</sup>

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190. See, e.g., Emma Bowman, CDC Recommends Against Gatherings of 50 or More; States Close Bars and Restaurants, NPR (Mar. 15, 2020), <https://www.npr.org/2020/03/15/816245252/cdc-recommends-suspending-gatherings-of-50-or-more-people-for-the-next-8-weeks> [<https://perma.cc/Y3LX-QSDF>]; Lev Fetcher, NIH Official Suggests Large Gatherings Should Be Canceled Due to Coronavirus Outbreak, Stat (Mar. 11, 2020) <https://www.statnews.com/2020/03/11/fauci-recommends-against-large-crowds-coronavirus> [<https://perma.cc/5Y3U-RZQ3>].

191. Many scholars, for instance, have discussed the efficiency gains and challenges of such relational contracting relationships. See, e.g., Jonathan M. Barnett, Hollywood Deals: Soft Contracts for Hard Markets, 64 *Duke L.J.* 605, 608–10 (2015) (proving that "studios and stars (or their representatives) adjust formalization levels to secure parties' commitments to a film project at the lowest transaction-cost burden"); Lisa Bernstein, Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts, 7 *J. Legal Analysis* 561, 562–64 (2015) (describing how relational mechanisms amplify the self-enforcing power of contractual obligations); Robert C. Ellickson, A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry, 5 *J.L. Econ.*

In that light, consider the problem of reformation of still-existing contractual relationships. Contracts ensuring the long-term supply of goods and services, including insurance, may come before courts accompanied by claims that COVID-19 suggests the utility of atextual solutions. Courts will be asked to reform existing obligations, rather than reinterpret those that already came due. As discussed above, courts are often criticized when they reform continuing contracts because requiring parties to perform a new deal, conceived and written in a judge's chambers, is the least legitimate basis for contractual enforcement. Unlike the contracts discussed above, reformation for health reasons of continuing contractual obligations has no obvious precedent in American jurisprudence. Thus, any predictions about such relational agreements must be offered extremely tentatively.

And yet, since reformation often results from moments of paradigm-shifting societal change, it would be unsurprising to see some opinions reforming obligation to make, say, the health risks of particular activities less likely.<sup>192</sup> What would distinguish such reformation from previous episodes is that it could rest on neither fairness nor consent. Rather, reformation of ongoing relationships to minimize external risks would form a new basis for the law of reformation. That foundation would be in some ways self-limiting—a one-pandemic-in-a-century rate, if it holds, won't scare commercial parties away from contracting.

Still, it's hard to know whether the genie of third-party health risks could be easily put back in the bottle. After all, many long-term contracts cause health risks—think of the suppliers of products that are potentially carcinogenic, or sellers of high-caloric foods. Courts will need to be careful to consider limiting principles for health-risk-based reformation of long-term contracts in the COVID-19 era.

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& Org. 83, 94 (1989) (demonstrating how industry norms worked in place of law and litigation to establish property rights in the American whaling industry); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *Stan. L. Rev.* 623, 628, 677 (1986) (finding that residents used relationship mechanisms such as negative gossip to resolve conflict extralegally); Peter T. Leeson, *An-arrgh-chy: The Law and Economics of Pirate Organization*, 115 *J. Pol. Econ.* 1049, 1051 (2007) (investigating how pirates used internal institutions like "piratical checks and balances" and democratic constitutions to minimize conflict).

192. See, e.g., Arthur H. Aufses III, Alan R. Friedman & Daniel Ketani, *Sue First, Talk Later: Lessons from Recent Delaware Court of Chancery Decisions on Expediting Proceedings During the COVID-19 Pandemic*, Kramer Levin (June 3, 2020), <https://www.kramerlevin.com/en/perspectives-search/Sue-First-Talk-Later-Lessons-From-Recent-Delaware-Court-of-Chancery-Decisions-on-Expediting-Proceedings-During-the-COVID-19-Pandemic.html> [<https://perma.cc/4YXE-W92Q>] (describing oral arguments in *Snow Phipps Group, LLC v. KCake Acquisition, Inc.*, C.A. No. 2020-0282-KSJM (Del. Ch. Apr. 17, 2020), in which the Delaware Chancery Court declined to expedite a case seeking to force the buyer to close in light of health risks).

## CONCLUSION

Ordinarily, risky contracts are managed through ex ante legislation and regulatory intervention. That leaves a vast sphere of private life subject to bargaining, even though most contracts externalize some risk onto the public at large. But sometimes, the risk calculus changes after formation, and society must turn to the less settled, less predictable, and arguably less legitimate ex post dispute resolution systems to manage public harms. COVID-19 provides a good example of contracts that cause unexpected risks. Through judicial rescission, reinterpretation, and reformation, we anticipate that courts will recalibrate burdens to acceptable levels. The extent to which courts will and *should* make those recalibrations is a harder question. But because such moves are possible—and, indeed, because modern disputes often see compromise solutions already—parties to contracts today should seek to share the burdens that their agreements would seem to allocate.