The Social Cost of Contract

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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.

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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.”1 Walter Hanford, who was to have supplied the infants for the show, sued.2

Ordinarily, Hanford v. Connecticut Fair Ass’n would have been a straightforward breach of contract case.3 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.4

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 Commentsaries on the Law of Contracts 479 n.8 (1929); 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.8, 3298 n.70 (1920). But of the modern books, only Murray currently does. See John Edward Murray, Jr., Contracts: Cases and Materials 605 (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 straightforward 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).

of the community, and by reason of said facts it was contrary to public policy to hold a baby show of the nature.” 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.” 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 nor 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.

There is no general public health exception to contract enforcement—but the court found one. And while the cases on how to adjudicate excuse based on public health risks are rare, 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.\(^\text{10}\)

*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.\(^\text{11}\) Scholars have described divorce as a “bargain in the shadow of the law,”\(^\text{12}\) for instance, and a corporate acquisition as a deal with “three parties . . . at the . . . table: the buyer, the seller, and the government.”\(^\text{13}\) 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.\(^\text{14}\) The government monitors that acceptability through three main mechanisms: limits on the subject of

\(^{10}\) 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.\textsuperscript{15}

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.\textsuperscript{16} 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.\textsuperscript{17} Law firms Sidley Austin and White & Case offered similar advice.\textsuperscript{18} Meanwhile, other major law firms have also advised their clients that the increased cost of performing a contract does not excuse contract performance,\textsuperscript{19} with some

\textsuperscript{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.


\textsuperscript{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.\textsuperscript{20} In other words, the COVID-19 pandemic poses no special problems for contract law, at least according to its most sophisticated practitioners.\textsuperscript{21}

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.\textsuperscript{22}

The COVID-19 pandemic is another moment when ordinary contracts have become extraordinarily risky for the public.\textsuperscript{23} 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,\textsuperscript{24} a funeral and subsequent birthday party in Chicago,\textsuperscript{25} a
church service in Daegu, South Korea, and a choir practice in Washington State, 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.

This Essay makes two contributions to the literature. 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


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.30 When laws set the boundaries of what parties can agree to, parties are said to “bargain in the shadow of the law.”31 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.32

This Part explores how the public influences private contracts.33 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.

30. See, e.g., N.Y. Real Prop. Law § 227-c (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).
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. These impacts—or externalities—can, of course, be positive. A few years ago, American humorist Dave Sedaris, like many, developed a drive to meet the daily step goals set by his Fitbit pedometer. 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.

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.

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. 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.

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.”).
39. Alternatively, contract law seeks to maintain an efficient level of externalities.
There is a relatively nascent literature on the externalities of contracts.40 Professor Aditi Bagchi’s *Other People’s Contracts* provides a general overview.41 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.42 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.43

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-
sider only “the rights and duties of litigants toward each other” when re-
solving disputes. 44 Contract economists also embrace a version of this: They argue that judges should “consider only the contractual intentions
of those party to an agreement.” 45 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. 46

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. 47 This work argues
that “hush contracts”—nondisclosure agreements that suppress inform-
ation 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. 48 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. 49

Similarly, Professor Jonathan Lipson argues that lessons from supply
chain agreements ought to be employed to understand the public health
consequences of contracting. 50 In the supply chain context, as he has
explored, 51 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. 52 Lipson argues that such waivers should be enforceable only if
they comply with protocols that make the spread of disease less likely. 53

Another important literature focuses on the interaction between pri-
vate 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. 54 In it, they describe how the law creates

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.
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. 55 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.” 56 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.” 57 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. 58 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.” 59 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. 60

55. Id. at 950.
56. Id. at 957.
58. Fleisher, 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 contracts’ externalities and on the public–private interplay in contracting.61 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:62 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.63

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.64 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,65 they cannot contract for the sale and distribution of illegal substances,66 and they cannot agree to buy and sell human organs.67 There are also less striking examples: Parties cannot contract to fix prices,68 landlords cannot make tenants pay liquidated damages in many states,69 employers cannot ask employees to agree to noncompetition clauses with long durations,70 and many retailers cannot sell alcohol to residents of the states of Utah or Pennsylvania.71

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.72

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.73 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.74

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-I-401 (2016).
72. See Fleischer, supra note 11, at 238–39.
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. 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. 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. 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.

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.

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. 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. This local ordinance is an ex

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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.
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. 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. 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.

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.

Reformation is an equitable remedy that applies most commonly in cases of mistake or fraud. 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. 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.

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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.
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. A leading treatise calls reformation an “extraordinary equitable remedy” that “should be granted with great caution,” notes that it should not be used to fix immaterial mistakes, and speaks sternly of the need to prove several onerous elements with clear and convincing evidence before a court can reform a contract.

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. 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.

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. 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

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.
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. 97 Moreover, Delaware state courts, easily the most influential for business contract disputes, have long decided cases using equitable principles that amount to reformation. 98

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. 99 Regulatory intervention introduces considerable uncertainty to contracts, slows down the pace of deals, and can impede bargaining and economic growth. 100 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. 101 And ex post policing

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 & Jennenjohn, 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.\textsuperscript{102}

These challenges give rise to a familiar problem of institutional choice: When is it best to use which method of mitigating risky contracts?\textsuperscript{103} 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.\textsuperscript{104} 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.\textsuperscript{105} This Part discusses performance and interpretation in the

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


\textsuperscript{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. 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.

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.

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).


108. In constitutional law, the anticanon was described by Professor Jamal Greene as those cases which “embody 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. 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. The nurse sued for breach, arguing that nondisclosure clauses are ordinarily enforceable. 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.

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.

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

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”).

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.
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.118

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.119 The court ruled in favor of the city,120 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."121

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.122 When the contractor was sued for breach, the court noted that in light of the risks to life and limb, performance was impracticable.123

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.124 The Association’s performance was, strictly speaking, neither impractical nor frustrated.125 Rather, it was against the public’s weal to perform, and, as such, there was no breach to forgive.126

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.127 In the context of an epidemic, many contracting parties may also have given up

118. Id. at 666–67.
120. Id.
123. Id. at 80.
124. Corbin & Perillo, supra note 9, § 75.3.
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. 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. 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.

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.

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. 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

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”).


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. 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, 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 courts might avoid textualist readings to excuse breach.

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

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://perma.cc/H4XQ-X]JBF. 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.


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).
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. 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. 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, courts often reasoned that the schools were better risk bearers. 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 . . . .” In the 1894 case

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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).

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. The court found that the school closure could not establish legal impossibility, “however prudent and necessary it may have been.” 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.

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. 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. 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.

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 get 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. 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.

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144. Id. at 1061.
145. Id.
147. Id. at 622.
148. Id. at 623.
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.151 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 Pause152 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,153 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
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. This rule applies even when deposits are explicitly said to be nonrefundable, as it rests on the equitable rules of restitution. And yet cases applying such restitution rules are quite rare, and the decisions that exist are exceedingly hard to generalize from, difficult to predict, and routinely attacked ex post by efficiency-minded scholars.

Many have claimed that—contrary to the black letter rule—courts should honor nonrefundable deposit clauses. 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 threat 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).


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. 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. 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. 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). 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).


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.163 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.164 All of this was the predictable and natural consequence of contractual clauses with such severe consequences.165 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).


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/HN7V2PFCX5A3ZAQINZMK4NMPQ [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, 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. 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. 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. 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)
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.\(^\text{170}\) 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.\(^\text{171}\)

Arbitration is also unpredictable because it is private, and parties face the difficult challenge of using past decisions to predict future outcomes.\(^\text{172}\) 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.\(^\text{173}\) Such cases, prosecuted at scale by technologically aided consumer lawyers,\(^\text{174}\) 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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\(^{171}\) This assumes that consumer disputes will reach arbitrations instead of facing default judgments, which is not at all certain. See Pamela Foohey, Dalíé 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.”).


\(^{174}\) 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.\textsuperscript{175} Issues as complex and wide-ranging as asbestos,\textsuperscript{176} terrorism,\textsuperscript{177} and the opioid epidemic\textsuperscript{178} have been dealt with in court, rather than by legislatures.\textsuperscript{179}

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.\textsuperscript{180} These actions, sometimes organized formally through multidistrict litigation (MDL) proceedings,\textsuperscript{181} and sometimes less formally through individualized ad hoc judging,\textsuperscript{182} 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


\textsuperscript{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”).


\textsuperscript{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.”).

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

claims may receive no more than policyholders with far weaker claims.\textsuperscript{183}

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.\textsuperscript{184} 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.\textsuperscript{185}

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.\textsuperscript{186} 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


\textsuperscript{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.").

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. 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.

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. 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


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, con-
sidering 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.190 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 agree-
ments together, seek equitable solutions that split the difference, and re-
form 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.191

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 Fether, NIH Official Suggests
Large Gatherings Should Be Canceled Due to Coronavirus Outbreak, Stat (Mar. 11, 2020)
hhttps://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:
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. 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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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.