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The Social Cost of Contract

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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.

This Essay builds on that observation in making two contributions. Theoretically, it characterizes contracts as bargains that always 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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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 Association* 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 of the community; and by reason of said facts it was contrary to public policy to hold a baby show of the nature."[5] 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 2020, the court disagreed. It would neither:

> require the performance, [n]or award damages for a breach, of a contract in which the public have so great an interest as the

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[1] Hanford v. Conn. Fair Ass'n, 103 A. 838 (Conn. 1918). *Hanford* is a case that used to appear in many contract casebooks, but today is rarely studied or taught. Patterson (1935), Corbin (1921), Shepherd (1957), Patterson (1941) all include the case, but only Murray of the modern books currently does.

[2] 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* IRVINGTON GAZETTE (June 23, 1933), *available at* https://news.hrvh.org/veridian/?a=d&d=firv19330623.1.5&.

[3] In those pre-War years, contract law was formalist, and advocated straight-ahead interpretative doctrines with few excuses. Samuel Williston, 2 THE LAW OF CONTRACTS, CHAPTER XXI: GENERAL RULES FOR THE INTERPRETATION OR CONSTRUCTION OF CONTRACTS AND THE PAROL EVIDENCE RULE, 1157-1278 (1920); Jennifer Camero, *Mission Impracticable: The Impossibility of Commercial Impracticability*, 13 U. N.H. L. REV. 1, 2-4 (2015) (reviewing limited origins of impracticability doctrine for commercial parties).

[4] *Whatever Happened to Polio*, SMITHSONIAN NAT'L MUSEUM OF AM. HIST. BEHRING CTR., https://amhistory.si.edu/polio/americanepi/communities.htm (last visited June 22, 2020).

[5] Hanford, 103 A. 838.

> preservation of health, if the health is in fact endangered, any more than it would require one to be performed the tendency of which was immoral or one 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.[6]

There is no general public health exception to contract enforcement—but the court found one.[7] And while the cases on how to adjudicate excuse based on public health risks are rare,[8] *Hanford* is not the only example of its kind. Cases considering public health distortions of ordinary contractual doctrine have resulted from nearly every epidemic of the last two centuries.[9]

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, to lease an apartment, to host a family reunion, or to merge two companies into one. And while seats at the contract-

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[6] *Hanford*, 103 A. at 839.

[7] To be sure, there are many cases in which sickness was held to discharge performance of a personal services contract. *See, e.g.*, Green v. Gilbert, 21 Wis. 395, 400 (1867) ("[s]ickness is sufficient to excuse delay, or . . . nonperformance of contracts for personal services, and is regarded as [an] act of God."); Wolfe v. Howes, 20 N.Y. 197 (1859) (quantum meruit available for work performed); Ryan v. Dayton, 25 Conn. 188 (1856) (excuse for missing work). There are also cases where market 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 (1879) (setting the contract set when price was set during 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.

[8] In discussing a set of cases requiring schools to pay teachers who were displaced by various diseases that had closed schools, Corbin comments that 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." ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, 14 CORBIN ON CONTRACTS § 77.7 (Rev. ed. 1993).

[9] *See, e.g.,* Lakeman v. Pollard, 43 Me. 463 (1856) (quantum meruit for laborer who left work during cholera outbreak); *Kirkland*, 57 Miss. 316 (yellow fever)); Sullivan v. Knauth, 115 N.E. 460 (N.Y. 1917) (holding the possibility of forgery was a defense when a bank cashed lost travelers checks while traveler was quarantined during a yellow fever outbreak); Tong Chi Ying v Shum Ping Kuen Benson, [2010] HKEC 1479 (no extra damages for breach of lease contract during SARS, though parties were urged to compromise); Dynamic Mach. Works, Inc. v. Mach. & Elec. Consultants, Inc., 352 F. Supp. 2d 83 (D. Mass.), certified question answered, 444 Mass. 768, 831 N.E.2d 875 (2005) (finding no excusable delay despite SARS epidemic).

negotiation table are primarily occupied by the contracting parties themselves, one place is always implicitly reserved for another party: the public.

Others have written compellingly about the impact of the public on private contracts.[10] Scholars have described divorce as a "bargain in the shadow of the law," for instance, and a corporate acquisition as a deal with "three parties at the table: the buyer, the seller, and the government."[11] 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.[12] The government monitors that acceptability through three main mechanisms: limits on the subject of 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 superficial review: courts almost always enforce contracts even when the contracts create third-party harms.[13]

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.[14] 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

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[10] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (describing the role that laws, regulations, and courts play in private divorce settlements); Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010) (describing how private parties to acquisition agreements modify their deals to account for regulatory treatment); Cathy Hwang & Matthew Jennejohn, *Contractual Depth* (June 20, 2020 draft) (manuscript on file with author) (describing how contracts between private parties are written with regulators as in intended audience).

[11] Mnookin, *supra* note 10; Fleischer, *supra* note 10.

[12] 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 (1960)

[13] Courts rarely 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.

[14] Law firm guidance has become so voluminous at the Stanford University's Rock Center for Corporate Governance has collected all the law firm guidance in a searchable database. Since the end of January 2020, law firms have produced 95 memos addressing contract breach, renegotiation, and other issues related to the pandemic. *See* STANFORD LAW SCHOOL COVID-19 MEMO DATABASE, https://covidmemo.law.stanford.edu (last visited Apr. 16, 2020).

contracts using force majeure clauses.[15] Law firms Sidley Austin and White & Case offered similar advice.[16] Meanwhile, other major law firms have also advised their clients that the increased cost of performing a contract does not excuse contract performance,[17] some noting that pandemics may not be considered unforeseeable.[18] In other words, the coronavirus pandemic poses no special problems for contract law, at least according to its most sophisticated practitioners.

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

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[15] Tariq Mundiya et al., *Precedent in Unprecedented Times: Contractual Performance and Defenses in the Age of COVID-19*, WILLKIE FARR & GALLAGHER LLP (March 16, 2020), https://www.willkie.com/-/media/files/publications/2020/03/precedent-in-unprecedented-times.pdf (defining force majeure as "a contract provision that excuses a party's nonperformance when an 'act of God' or some other extraordinary event prevents a party from fulfilling its obligations").

[16] Sidley Austin LLP, *COVID-19 and the Impact on English Law Governed Contracts – Force Majeure and Frustration* (March 16, 2020), https://www.sidley.com/en/insights/newsupdates/2020/03/covid-19-and-the-impact-on-english-law-governed-contracts--force-majeure-and-frustration (advising clients that both force majeure clauses and common law defenses "have a high bar to success"); Mark Clarke et al., *Suspending Contractual Performance in Response to the Coronavirus Outbreak*, WHITE & CASE LLP (Feb. 18, 2020), https://www.whitecase.com/publications/alert/suspending-contractual-performance-response-coronavirus-outbreak (warning clients not to simply cease performance because an incorrect assertion of force majeure "may amount to a breach (or anticipatory breach) of the contract" and "depending upon the severity of that breach, the aggrieved counterparty could be entitled to claim damages or even to terminate the contract.").

[17] WILMER CUTLER PICKERING HALE AND DORR LLP, *Revisiting Force Majeure and Dispute Resolution Clauses in Light of the Recent Outbreak of the Coronavirus* (Feb. 27, 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 (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 et al., *Can Companies Invoke the Force Majeure Clause in the Context of COVID-19?*, MORGAN, LEWIS & BOCKIUS LLP (Feb. 26, 2020), https://www.morganlewis.com/pubs/can-companies-invoke-the-force-majeure-clause-in-the-context-of-covid19 (reminding clients that they generally will not be excused from performance "simply because performing . . . contractual obligations has now become more expensive, onerous, or time-consuming").

[18] *Id.*

have sometimes reformed contracts to ensure that the burden borne by society is acceptable.

The coronavirus pandemic is another moment when ordinary contracts may become extraordinarily risky for the public.[19] 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,[20] a funeral and subsequent birthday party in Chicago,[21] a church service in a suburb of Seoul,[22] and a choir practice in Washington state,[23] 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 today—would bring people together into close proximity and could spread disease.

This Essay makes two contributions to the literature.[24] 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

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[19] For other works in the rapidly growing tradition of "Covid and Contract," see Jonathan Lipson, Essay, *Contracting Covid: Private Order and Public Good* (June 2020 draft on file with authors); [Add]

[20] Farah Stockman & Kim Barker, *How a Premier U.S. Drug Company Became a Virus 'Super Spreader'*, N.Y. TIMES (Apr. 12, 2020), https://www.nytimes.com/2020/04/12/us/coronavirus-biogen-boston-superspreader.html.

[21] Robin Goist, *'Super-Spreader' Attending Funeral, Party in Chicago Resulted in 16 Coronavirus Cases, and Three Deaths, CDC Says*, CLEVELAND.COM (Apr. 9, 2020), https://www.cleveland.com/coronavirus/2020/04/super-spreader-attending-funeral-party-in-chicago-resulted-in-16-coronavirus-cases-and-three-deaths-cdc-says.html.

[22] Youjin Shin, Bonnie Berkowitz, & Min Joo Kim, *How a South Korean Church Helped Fuel the Spread of the Coronavirus*, WASH. POST (March 25, 2020), https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/.

[23] Richard Read, *A Choir Decided to Go Ahead with Rehearsal. Now Dozens of Members Have COVID-19 and Two Are Dead*, L.A. TIMES (March 29, 2020), https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak.

[24] For other examples of Covid-19 and contract papers, *see* Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail: From Rose 2d to COVID-19* (June 9, 2020), https://ssrn.com/abstract=3605411; Ian Ayres, *Corona and Contract*, BALKINIZATION BLOG (March 23, 2020, 11:40 AM), https://balkin.blogspot.com/2020/03/corona-and-contract.html (arguing that consumers should pay some cancellation costs in light of public health benefits that might accrue).

particularly on the final gatekeeping function of courts, which usually enforce—but can reform—contracts.

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: defining legal subject matter, 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 non-traditional 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, too: occupancy limits, damages for early ease termination, notice of lead paint, and eviction rules are obvious examples.[25]

[25] *See e.g.*, N.Y. REAL PROP. LAW § 235-f(3)–(4) (McKinney 1983) (establishing occupancy limits for residential leases and rental agreements); § 227(E) (establishing a landlord's duty to mitigate damages if a tenant vacates an apartment in violation of the lease).

When laws set the boundaries of what parties can agree to, parties are said to "bargain in the shadow of the law."[26] 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.[27]

This Part explores how the public influences private contracts. Part I.A. show 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. Part I.B. explores the ways that the public gets involved. Although the public's reach is tentacular, this Article focuses 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.

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.[28]

These impacts—or externalities—can, of course, be positive.[29] A few years ago, American humorist Dave Sedaris, like many, developed a drive to meet the daily step goals set by his Fitbit pedometer.[30] 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, were so pleased by the cleanliness that they named a trash truck for Sedaris.[31]

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

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[26] Mnookin & Kornhauser, *supra* note 10, at 968.

[27] RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

[28] James M. Buchanan & William Craig Stubblebine, *Externality*, 29 ECONOMICA 371 (1962).

[29] *Id.*

[30] David Sedaris, *Stepping Out*, THE NEW YORKER (June 23, 2014), https://www.newyorker.com/magazine/2014/06/30/stepping-out-3.

[31] Tim Dowling, *David Sedaris? Who? Oh, You Mean the Local Litter-Picker*, THE GUARDIAN (July 31, 2014), https://www.theguardian.com/books/shortcuts/2014/jul/31/david-sedaris-litter-picker-rubbish-waste-vehicle-pig-pen-west-sussex; Brett M. Frischmann & Mark A. Lamley, *Spillovers*, 107 COLUM. L. REV. 257 (2008).

impact of one person's actions can also cause negative externalities. Pollution, cigarette smoke, and construction are ready examples.[32]

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.[33] We are not the first to notice that contracts create externalities, nor the first to notice that the public exerts influence on private party contract. 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.

There is a relatively nascent literature on the externalities of contracts.[34] Aditi Bagchi's *Other People's Contracts* provides a general overview.[35] 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.[36] She proposes that when a contract is ambiguous, courts should interpret the contract with an eye toward

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[32] Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135 (2014).

[33] Alternatively, contract law seeks to maintain efficient level of externalities.

[34] *See generally* Kishanthi Parella*, Protecting Contract's Hidden Parties*, (July 2020 draft on file with authors) (proposing a new form of liability for contract externalities that cause third -parties physical harm); Jonathan Lipson, Essay, *Contracting Covid: Private Order and Public Good* (June 2020 draft on file with authors)*;* FARSHAD GHODOOSI, INTERNATIONAL DISPUTE RESOLUTION AND THE PUBLIC POLICY EXCEPTION (2017); Jan Smits, *The Expanding Circle of Contract Law*, 27 STELLENBOSCH L. REV. 227, 237 (2016) (arguing that courts should enjoin contracts with socially destructive effects on third-parties); Aditi Bagchi, *Other People's Contracts*, 32 YALE J. REG. 211, 243 (2015); Benjamin Porat, *Contracts to the Detriment of a Third Party: Developing a Model Inspired by Jewish Law*, 62 U. TORONTO L.J. 347 (2012) (focusing on third party business harms); Adam Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV. 2 (2009); Note, *A Law and Economics Look at Contracts against Public Policy,* 119 Harv. L. Rev. 1445 (Mar. 2006); F.H. Buckley, *Perfectionism*, 13 SUP. CT. ECON. REV. 133, 143 (2005); James Rooks, *Let the Sun Shine In,* TRIAL (June 2003); Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115 (1988); Ryan M. Philp, Comment, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL. L. REV. 845, 857 (2003) (arguing that courts should refuse to enforce NDAs that threaten the public welfare); Carol M. Best, *At What Price Silence: Are Confidentiality Agreements Enforceable?,* 25 WM. MITCHELL L. REV. 627, 672 (1999) (arguing for whistleblower protection in the case of public hazards). Notably, as Professor Jonathan Lipson pointed out to us, bankruptcy scholars have focused on the externalities created by contract in considering issues such as creditor priority for decades.

[35] Bagchi, *supra* note 34, at 193.

[36] *Id.* at 215.

protecting third-party interests, particularly when harms are discrete and previously recognized by law.[37]

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 consider only "the rights and duties of litigants toward each other" when resolving disputes.[38] Contract economists also embrace a version of this: they argue that judges should "consider only the contractual intentions of those party to an agreement."[39] 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.[40]

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.[41] This work argues that "hush contracts"—non-disclosure agreements that suppress information about sexual wrongdoing—harm society by, for instance, allowing society to believe it has remedied issues of sexual harassment and abuse, insulating perpetrators from accountability, and allowing perpetrators to continuing harming new victims.[42] Thus, even when private parties mutually assent to them, courts should be leery of enforcing them because the costs of hush contracts expand beyond the signatories themselves.[43]

Similarly, Jonathan Lipson argues that lessons from supply chain agreements ought to be employed to understand the public health consequences of contracting.[44] In the supply chain context, as he has explored,[45] 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

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[37] *Id.* at 212.

[38] *Id.* at 219.

[39] *Id.* at 220.

[40] *Id.* at 219–220.

[41] David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019).

[42] *Id.* at 175–77.

[43] *Id.* at 169–70.

[44] Lipson, *supra* note 34.

[45] Jonathan C. Lipson, *Promising Justice: Contract (As) Social Responsibility*, 2019 WIS. L. REV. 1109 (2019).

guidelines as the grist for enforceable Covid-19 waivers.[46] Lipson argues that such waivers should be enforceable only if they comply with protocols which make the spread of disease less likely.

Another important literature focuses on the interaction between private bargaining and public influence. Perhaps the most influential paper in this tradition is Robert Mnookin and Lewis Kornhauser's *Bargaining in the Shadow of the Law*.[47] In it, they describe how the law creates the boundaries of acceptable bargaining in a divorce.[48] 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 dispute settlement. The state also has a responsibility for child protection."[49] 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.

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." [50] 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.[51] 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, "the politically well-connected can bargain more effectively . . . over the regulatory treatment of a deal."[52] Because of this, the relationship between the parties to the contract and

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[46] Lipson, *supra* note 32, at 14.

[47] Mnookin & Kornhauser, *supra* note 10.

[48] *Id.* at 950.

[49] Mnookin & Kornhauser, *supra* note 10, at 957.

[50] Fleischer, *supra* note 10, at 238; see also Michael P. Vandenbergh, *The Private Life of Public Law*, 105 Colum. L. Rev. 2029 (2005).

[51] *Id.*

[52] *Id.* at 230.

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 Matthew Jennejohn—have explored the ways in which regulators influence contract terms, sometimes directly influencing what parties put into their contracts.[53]

The argument in this Essay depends on an interweaving of these two literatures—on contract's externalities and on the public/private interplay in contracting. 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 than when the magnitude of externality changes between the time of the contract's signing (which as 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 various ways, this Part focuses only on three common ways: 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.[54]

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[53] *See* Aditi Bagchi, *Interpreting Contracts in a Regulatory State*, 54 U.S.CF. L. REV. 35, 41 (2020) (noting that "our modern regulatory state can, and sometimes does, directly regulate those terms"); Hwang & Jennejohn, *supra* note 10, at 30.

[54] There are other ways in which "publicness" infuses into private contracting. For example, as Professor Jonathan Lipson points out to us, reputation and notoriety are plausibly "public" phenomenon that constrain private behavior. So too is the bankruptcy system.

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.

Through public law, the government prescribes the allowable subject-matter for private bargains. For example, parties cannot strike a deal to kill for hire,[55] they cannot contract for the sale and distribution of illegal substances,[56] and they cannot agree to buy and sell human organs.[57] There are also less striking examples: parties cannot contract to fix prices,[58] landlords cannot make tenants pay liquidated damages in many states,[59] employers cannot ask employees to agree to non-competition clauses with long durations,[60] and many retailers cannot sell alcohol to residents of the states of Utah or Pennsylvania.[61]

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.[62]

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.[63] This process is overseen by the Federal Trade Commission or the Department of Justice and gives the relevant regulator a seat squarely at the table. For example, not only do the parties have to provide relevant information

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[55] 18 U.S.C. § 1958 (2004).

[56] 21 U.S.C. § 841 (2018).

[57] Kimberly D. Krawiec, Wenhao Liu, & Marc L. Melcher, *Contract Development in a Matching Market: The Case of Kidney Exchange*, 80 L. & CONTEMP. PROBS. 11, 14 (2017).

[58] UNITED STATES FEDERAL TRADE COMMISSION, *Price Fixing*, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing (describing price-fixing as "almost always illegal).

[59] TENANT RESOURCE CENTER*, Fees and Liquidated Damages* (Jul. 19, 2018), *available at* https://www.tenantresourcecenter.org/liquidated_damages.

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

[61] A miserable fate for both authors, who, at the time of this writing, were residents of Utah and Pennsylvania. 47 PA. CONS. STAT. § 4-491-99 (West 2017); UTAH CODE ANN. §32B-4-401-24 (West 1953).

[62] Fleischer, *supra* note 10, at 238–39.

[63] Fed. Trade Comm'n, *FTC Announces Annual Update of Size of Transaction Thresholds for Premerger Notification Filings and Interlocking Directories* (Jan. 28, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-announces-annual-update-size-transaction-thresholds-premerger.

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.

For instance, in the 2010 merger between travel behemoths United Airlines and Continental Airlines, the deal parties engaged in just such a back-and-forth with regulators.[64] Among the Department of Justice's concerns was the fact that, post-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 Department of Justice—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 Securities and Exchange Commission to the Environmental Protection Agency to a joint committee on national security, can play a role in deal-making, 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.[65] The result is often one contract trying to speak to too many audiences at once—the parties themselves, courts, and regulators.

Finally, 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.[66] And while Bagchi's argument certainly makes sense—courts certainly could consider those interests more explicitly—courts also already consider the interests of third parties, and not just third

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[64] Chris Davis, *U.S. OKs Continental, United Merger, Southwest To Take Newark Slots*, BUSINESS TRAVEL NEWS (Aug. 27, 2010), https://www.businesstravelnews.com/2010/US-OKs-Continental-United-Merger-Southwest-To-Take-Newark-Slots/13945.

[65] Hwang & Jennejohn, supra note 10.

[66] Bagchi, supra note 34.

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 30-day period are subject to a special 12% tax, which the landlord is supposed to collect.[67] This local ordinance is an ex ante boundary, as described by Mnookin and Kornhauser. However, 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, and the matter goes before a judge, the judge, 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 12% tax is included.

Through contract interpretation and enforcement in courts, the general public always has the last say in a contract.[68] 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, as Bagchi would urge, consider the rights of third parties, the public's interests are always the backdrop against with 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.[69]

Reformation is an equitable remedy that applies most commonly in cases of mistake or fraud.[70] 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.[71] The idea of reformation is to adjust the contract, so that

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[67] Berkeley Mun. Code § 7.36.030 (2020).

[68] Our bankruptcy friends think their word is last, of course, and indeed bankruptcy and its shadow does 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).

[69] 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.

[70] Richard A. Lord, 27 *Williston on Contracts* § 70:25 (4th ed. 2020); RESTATEMENT (SECOND) OF CONTRACTS § 155 (AM. LAW INST. 1981).

[71] JOHN E. MURRAY, JR. & TIMOTHY MURRAY, 1 CORBIN ON CONTRACTS DESK EDITION § 70:20 (2019).

the written agreement can better align with the substantive ("real") mutual understanding of the contracting parties.[72]

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.[73] Leading treatises call reformation an "extraordinary equitable remedy" that "should be granted with great caution,"[74] note that it should not be used to fix immaterial mistakes,[75] and speak sternly of the need to prove several onerous elements with clear and convincing evidence before a court can reform a contract.[76]

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 odd-seeming omissions are the result of considered and thoughtful drafting.[77]

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.[78] In addition to individual

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[72] *Id.* at § 70:19.

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

[74] Lord, *supra*, note 70 at § 70:25.

[75] *Id.* at § 70:31.

[76] *Id.* at § 70:25.

[77] *See* Robert E. Scott & George Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (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); Robert E. Scott & George Triantis, *Strategic Vagueness in Contract Design*, 119 YALE L.J. 848 (2010) (arguing the same in the context of material adverse change clauses in mergers and acquisitions).

[78] Jensen v. Miller, 570 P.2d 375 (Or. 1977) (reforming a contract where both parties were mistaken about the location of a land boundary); Twin Forks Ranch, Inc. v. Brooks, 964 P.2d 838 (N.M. App. Ct. 1998) (reforming a contract where parties failed to convey water taps that both parties agreed were supposed to be conveyed); Mathis v. Wendling, 962 P.2d 160 (Wyo. 1998) (reforming a contract where a mathematical mistake led to one party not fully paying a debt to another). *See also* Providence Square Ass'n, Inc. v. Biancardi, 507 So.2d 1366 (Fla. 1987) (reforming a

reformations, courts have also engaged in large-scale reformation of contracts, typically in litigations that follow systemic crises. After both the post-2008 Great Recession and during 1920s hyperinflation, for example, even usually formalist courts were willing to reform contracts where the parties' fundamental agreement had been eroded by a sudden turn of events.[79] Moreover, Delaware state courts, easily the most influential court for business contract disputes, has long decided cases using equitable principles that amount to reformation.[80]

It is worth noting that ex ante boundary-setting, regulatory intervention, and the court's role as a final checkpoint are not the only way that the public interacts with contracts. 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 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 under-inclusive. 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.[81] Regulatory intervention introduces considerable uncertainty to contracts, slows down the pace of deals, and can impede bargaining and economic growth. 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

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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); Trip-Tenn, Inc. v. Schultz, 656 N.W.2d 747 (S.D. 2003) (reforming a contract that contained incorrect amortization calculations).

[79] Emily Strauss, *Crisis Construction in Contract Boilerplate*, 82 L. & CONTEMP. PROBS. 163 (2019) (arguing that courts often engage in "crisis construction" to interpret contracts in a way that is directly at odds with its plain language); John Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 B. U. L. REV. 1039 (1983) (same). 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 Julia Arato, *The Private Law Critique of International Investment Law*, 113 A.J.I.L. 1 (2019).

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

[81] *See, e.g.*, Cathy Hwang, *The New Corporate Migration*, 80 BROOK. L. REV. 852 (2015) (describing how U.S-based companies use mergers to thwart federal tax laws that otherwise prohibit them from reincorporating in lower-tax jurisdictions).

to be meaningless.[82] And ex-post policing 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.

These challenges give rise to a familiar problem of institutional choice: when is it best to use which method of mitigating risky contracts?[83] 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 post-formation, policing through court decisions, in a sense the least appealing and effective constraint on risk-taking, is the least bad option available.

We focus in the next section on these emergently risky deals, which, having escaped the usual guardrails, land before courts in unusual circumstances.

II. PUBLIC HEALTH AND THE ANTI-CANON

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.[84] 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.[85]

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[82] Hwang & Jenenjohn, *Contractual Depth*, supra note 10 (discussing how parties insert boilerplate into contracts to meet regulators' requirements, rather than because the parties themselves want them).

[83] *See, e.g.,* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1231–46 (2003); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institution*s, 109 HARV. L. REV. 1393, 1424–33 (1996).

[84] *Cf.* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV.. 963, 1018–19 (1998).

[85] Already commentators urge courts to consider systemic consequences (to the insurance system, to the economy, etc.) in deciding the meaning of insurance contracts. 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

This Part discusses performance and interpretation in the 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 super-spreader events—but groups can come under pressure to hold them so as not to lose valuable non-refundable venue deposits.[86] 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. [87]

What we describe here is an anti-canon: a set of disfavored and odd cases that result from extraordinary facts. Although these anti-canon cases are bad guides for ordinary contract dispositions, they are still nominally good law. Together, they suggest how public health might matter to contract enforcement—and how we might expect courts, in the wake of the current

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factually dependent, and even a few decisions interpreting key clauses might have large effects. 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.").

[86] *See* Prof. Caprice Roberts' description of negotiations around the cancelling of a recent law conference, which 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" *available at* https://twitter.com/capricelroberts/status/1269328516920868865 (last visited June 23, 2020).

[87] *Cf.* Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification,* 63 CORNELL L. REV. 707, 717 (1978) (listing "public health" as a reason to make common law decision, but without specific application to contracts); Leon E Trakman, *Public Responsibilities Beyond Consent: Rethinking Contract Theory,* 45 HOFSTRA L. REV. 217, 217 (2016); Margaret Rosso Grossman & Gregg A. Scoggins, *The Legal Implications of Covenants Not To Compete in Veterinary Contracts*, 71 NEB. L. REV. 826, 845 (1992) (arguing that considerations of public health should inform enforcement of non-competes in veterinary contracts).

pandemic, to interpret contracts that have the potential to endanger public health.[88]

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.*[89] 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.[90]

The nurse sued for breach, arguing that nondisclosure clauses are ordinarily enforceable. But the court had concerns. While performance

> "[m]ay 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."[91]

Although the court ultimately upheld the contract, it did so "unhappily," noting that its upholding was because of the legislatively-provided privacy right in employment records.[92]

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[88] In constitutional law, the anti-canon was described by Green as those cases which "embod[y] a set of propositions that all legitimate constitutional decisions must be prepared to refute." Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011). Green 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 also* 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").

[89] Giannecchini v. Hospital of St. Raphael, 780 A.2d. 1006 (Conn. Super. 2000).

[90] *Giannecchini*, and like nondisclosure cases, are explored in Hoffman & Lampmann, *supra* note 39, at 192–95.

[91] *Id.* at 1008.

[92] *Id.* at 1010–11.

Bowman v. Parma Board of Education was a similar case.[93] In *Bowman*, a teacher molested his charges, but his settlement with the school district included a confidentiality clause.[94] Later, a member of the school board called the teacher's *new* employer and disclosed the teacher's past.[95]

After his death, the teacher's estate sued for violation of the confidentiality agreement. Noting that the teacher was "entirely unsuited for the teacher profession," the court went on to hold:

> The only possible conclusion . . . is that the non-disclosure clause is void and unenforceable and no cause of action will lie for its breach. . . . The 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.[96]

There are other like cases. In *Living Rivers Council v. City of St. Helena*,[97] the court denied enforcement of a contract that would have slowed the mitigation of the potential flooding of a local town. It wrote:

> 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.[98]

Similarly, in *Northern Corp. v. Chugach Elec. 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. When the contractor was sued for breach, the court noted that in light of the risks to life and limb, performance was impracticable.[99]

As Corbin points out, *Hanford*, the baby-fair case, can also be read as a case that forbids contracts that create a public nuisance.[100] The Association's performance was neither strictly speaking impractical nor frustrated.[101] Rather,

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[93] Bowman v. Parma Bd. of Educ., 542 N.E.2d 663 (Ohio Ct. App. 1988).

[94] *Id.* at 664–66.

[95] Bafflingly, the second district continued to employ the teacher. The teacher continued his criminal behavior and was eventually investigated again, resigned, and entered into another settlement agreement. *Id.* at 666.

[96] *Id.* at 666–67.

[97] 2007 Ca App. Ct. Briefs Lexis 5413 (Ct. of App. CA 2007)

[98] *Id.* (citing Spangenberg v. Spangenberg, 126 P. 379 (Cal. Ct. App. 1912)).

[99] 518 P.2d 76.

[100] 14 Corbin on Contracts § 75.3.

[101] That said, the Restatement on Contracts 454, Explanatory Notes (Mar. 28, 1932), does state that the impracticability rule proposed had Hanford partially in mind.

it was against the public's weal to perform, and, as such, there was no breach to forgive.

The fact that there are relatively few cases in this line 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 simply hashed out their differences privately, rather than sue in court.[102] In the context of an epidemic, many contracting parties may also have given up 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 do create public hazards.[103] 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![104]

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.

Proposed Final Draft No. 11; *reprinted in* A.L.I. ARCHIVES PUBLICATIONS IN MICROFICHE, microfiche 1130, at 189-91 (1985).

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

[103] Kohn v. Geist, 168 N.Y.S. 21, 22 (N.Y. Sup. App. Term 1918) (where plaintiff had let out a boarding house and polio broke out, "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.")

[104] N.J. Magnum Co. v. Fuller, 222 Mass. 530 (1916) (holding that contractor who refused to build a grandstand that if completed would be risky for the public could not use that risk as an excuse); see also Kohn v. Geist, 168 N.Y.S. 21 (N.Y.Sup. 1918) (Where plaintif had let out a boarding house and polio broke out, "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.")

> . . . 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.[105]

Judge Beach's dissent represents the normal contract law of public policy, which is normally closely aligned to legislative or regulatory rules which demonstrate the ill-repute of a contract's subject.[106] 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 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 in the cases between 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,[107] it would not be out of the realm of possibility for courts to consider a pandemic a force majeure. To the extent that such

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[105] Hanford v. Conn. Fair Ass'n, 103 A. 838, 839 (Conn. 1918).

[106] David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FL. ST. UNIV. L. REV. 563 (2012) (showing that many public policy opinions focus on legislative or regulatory prohibitions).

[107] A common variant is "pandemic flu." *See, e.g.,* the University of Vermont's clause: "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. DEPT. OF RESIDENTIAL LIFE, *Housing and Meal Plan Contract Terms & Conditions 2019–2020*, https://reslife.uvm.edu/files/2019-2020_reslife_contract.pdf. The coronavirus is not an influenza virus: it is not, as we all know, the flu. But only hyper-literal courts would fail to excuse obligation on this ground.

clauses expand beyond ordinary impracticability doctrine (which is at best unclear)[108] courts might avoid textualist readings to excuse breach.

In reality, however, courts rarely discuss public health as an explicit factor in interpretation disputes,[109] and past epidemics offer only a murky guide for how courts will interpret contract clauses during a public health crisis.[110]

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.[111] 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.[112] One way to think about the courts' reasoning in these cases is through the parlance 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.

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[108] Gideon Parchomovsky, Peter Siegelman, & Steve Thiel, *Of Equal Wrongs and Half Rights*, 82 N.Y.U. L. REV. 738, 786 (2007) (finding, based on sample of clauses, that they do not).

[109] For an analogous example, consider the promissory estoppel cases where they shade meaning of promises to create enforceable obligations. Ypsilanti Twp. v. Gen. Motors Corp., 506 N.W.2d 556 (Mich. App. 1993). One notable example is 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 disease following sale of a house was actionable though a plain language reading of the contract would seem to have prevented recovery).

[110] Williston on Contracts (4th) 77:107 ("In several cases where schools have been closed due to epidemics, teachers have recovered without considering the probable duration of the closing or whether the teacher was bound or required to remain ready to resume work. Teachers generally work on a school-year contract basis; once the school year has begun, if a school house burns down, a displaced teacher is hard pressed to find an alternate teaching assignment. Yet, other decisions have denied recovery absent a requirement to stand by ready to teach, where the impracticability of performance is prolonged.")

[111] 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 (1937).

[112] See, e.g., Sch. Dist. No. 16 of Sherman Cty. v. Howard, 98 N.W. 666 (Neb. 1904).

In cases where there were no provisions denying the right of payment,[113] courts often reasoned that the schools were better risk bearers.[114] 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 (emphasis added)."[115] In the 1889 case of *Goodyear v. Sch. Dist. No. 5*,[116] too, a teacher sought lost wages from a district that had closed due to a local health board's order during a diphtheria epidemic. The court found that the school closure could not establish legal impossibility, "however prudent and necessary it may be." 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*,[117] 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 at any time. Nevertheless, when the school closed, the plaintiff was able to recover—the court stretched to interpret "the services" broadly to include holding oneself ready to perform.[118]

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

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[113] See, e.g., Goodyear v. Sch. Dist. No. 5, 21 P. 664 (Or. 1889).

[114] Mc KAY v. BARNETT, 21 Utah 239; Bd. of Ed. of City of Hugo, Choctaw Cty. v. Couch, 1917 OK 42, 63 Okla. 65, 162 P. 485**;** Libby v. Douglas, 175 Mass. 128; Gregg School Tp. v. Hinshaw, 76 Ind. App. 503; Crane v. School Dist., 95 Ore. 644; Montgomery v. Board of Educ., 102 Ohio St. 189 (bus driver)**.**

[115] Dewey v. Union School Dist., 5 N.W. 646 (Mich. 1880).

[116] 17 Or. 517, 21 P. 664 (1889)

[117] 54 S.W. 621 (Tex. Civ. App. 1899).

[118] Id. at 623.

Epidemic diseases are wildly disruptive and have tragically recurred in Anglo-American history.[119] And yet courts appear to have only rarely discussed how to relate such events to contractual obligation. 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.[120] 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.[121] As we alluded earlier, it is unclear why there are so few cases explicitly discussing disease risks and contracting.

In the next section, we discuss the consequence of this lack of caselaw and the dangers of being too certain about what comes next.

III. ROUGH JUSTICE

Contract litigation generated during the Great Pause 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, may spur courts to refuse to enforce, or reinterpret, contracts in ways the parties have not contemplated.

Or not. The caselaw discussed here is sparse: at the 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' appetite for ignoring contractual language is highly contingent.

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[119] For a useful bibliography, see https://environmentlawhistory.blogspot.com/p/legal-history-of-epidemics-selected_20.html.

[120] Lakeman, *supra*: "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 in leaving by reason of it . . . . The propriety of his conduct in leaving his work at that time must be determined by examining the state of facts as *then* existing."

[121] See, e.g., Williston on Contracts (4th) § 13:12 ("Bargains which require a performance likely to jeopardize unreasonably the life or health of either or both parties, or of a third person, are illegal even though the party whose life or health is jeopardized has voluntarily assumed the risk."); ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, 14 CORBIN ON CONTRACTS § 77.7 (Rev. ed. 1993).

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 relating to 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, its 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 pre-pay 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 pre-paid deposits.[122] This rule applies even when deposits are explicitly said to be non-refundable, as it rests on the equitable rules of restitution.[123] And yet cases applying such restitution rules are quite rare,[124] and the decisions that exist are exceedingly hard to generalize from, difficult to predict, and routinely attacked ex post by efficiency-minded scholars.[125]

Many have claimed that—contrary to the black letter rule—courts should honor non-refundable deposit clauses. [126] Such commitments motivate

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[122] See U.C.C. §2-615 (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 (inviting courts to ignore stated rules when those rules "will not avoid injustice"); Parchomovsky et al., *supra* note 108, at 784 (arguing for equal division of windfalls and noting that force majeure language only rarely deals with allocation of losses and gains).

[123] Mark P. Gergen, *A Defense of Judicial Reconstruction of Contracts*, 71 IND. L.J. 45, 46 (1995).

[124] Goldberg, at 1166 (positing that there are few cites to the restatement because most parties have contracted around it). In one case, little discussed, a railway worker quit his job early because of the threats of violence in a strike. The court held he could recover his quantum meruit, set off by the liquidated damages that the employer owed for the time he did not perform. Fisher v. Walsh, 102 Wis. 172, 78 N.W. 437 (1899).

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

[126] Goldberg, at 1146 (listing 7 reasons why parties make pre-paid deposits).

promisors to securely invest in performance in a world where post-breach litigation will (in the best case) return a fraction of its value. But these arguments do not fully consider the role of public externalities. True, courts rarely discuss public health concerns in their decisions about damages.[127] But the absence of these types of discussions seems like an artifact of timing. Courts have only recently begun to discuss, explicitly, the relationship between externalities and legal doctrine, and Covid-19 is the first episode that might bring these deposit issues fully into the light.

Courts considering contracts whose performance would increase public risks of disease might not permit one party to keep a deposit that tends to motivate socially-harmful performance. As professors, one example comes easily to us. Many colleges and universities across the country have announced that they plan to resume some kind of in-person instruction in the fall 2020 semester. As a result, undergraduate and graduate students have paid non-refundable seat deposits to secure a spot in the fall 2020 class—but might, if the pandemic worsens, find out shortly before the semester starts that classes will once again be online.

An economist might read these non-refundable 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 cannot stay with parents, have circumstances that prevent them from attending school online, and will be making serious sacrifices to afford those non-refundable deposits. Permitting universities to keep non-refundable deposits will motivate students to push harder for in-person classes in an effort to recoup their losses.[128] They will lobby administrators through

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[127] Where courts to discuss public externalities, it is most commonly in cases about liquidated damages in doctors' non-compete agreements. In these cases, it is not obvious that public health exceptions to contract performance are really applying to the damages calculus or the underlying restraint on movement. *See* Iredell Digestive Disease Clinic v. Petrozza, 373 S.E.2d 449 (N.C. Ct. App. 1988) (finding that a liquidated damages clause was not enforceable).

[128] 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 providing that: "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

direct action, shame faculty online for resisting teaching, and generally seek to avoid paying what their contracts state what they owe. 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 that we are making it out, because if universities anticipate the rule we have proposed, and will know that they have to refund part of the deposits if they move to remote instruction, their behavior may shift. This will be motivated to *avoid* going online. Thus, at the margin, both enforcing contracts and disregarding them both 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 are going to seek to go remote when they feel pressure to serve the public health, but particularly, when they receive calls from their liability insurers. Those 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, or fault,[129] 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 sit." In late June, 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, under the rules they would be denied entry and would not have "sat," leaving them out of pocket the Exam fee.[130] This is a bad

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plan fees will not be refunded." UNIV. OF VT. DEPT. OF RESIDENTIAL LIFE, *Housing and Meal Plan Contract Terms & Conditions 2019–2020*, https://reslife.uvm.edu/files/2019-2020_reslife_contract.pdf. Nonetheless, a class action lawsuit contended that because the University had not technically closed, the clause was not operative. Complaint at 6, Patel v. Univ. of Vt. & State Agric. Coll., No. 2:20 Civ. 61 (D. Vt. Apr. 21, 2020).

[129] Fault in contract law is its secret vice. *See Fault in American Contract Law,* Volume 107 MICH. L. REV. 2009.

[130] u/amorphousbutnotablob, *Turned Away and Marked "Did Not Take,"* REDDIT (Jun. 27, 2020), *available at* https://www.reddit.com/r/Bar_Prep/comments/hgik77

equilibrium. If candidates could claw back the fee from the Bar, notwithstanding the contract that purported to make it non-refundable, 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 non-refundable 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 non-refundable 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.[131] 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.[132]

/turned_away_and_marked_did_not_take/ (Reddit user posts they fear they will be turned away from the bar exam if they have a low-grade fever and other Reddit users are noting how to keep one's temperature low so they can allowed to sit for the exam. Originally posted by Twitter user Sonya Sadovaya at https://twitter.com/sonya_sadovaya/status/1277659151351656450, who has since removed her post).

131 David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015) (studying awards and finding a mixed set of results); Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMP. L. STUD. 1, 2 (2012) (repeat player effects); Klaus Peter Berger & J. Ole Jensen, *The Arbitrator's Mandate to Facilitate Settlement*, 40 FORDHAM INT'L L.J. 887 (2017) (surveying practitioners and noting value of settlement promotion within arbitration).

132 This assumes that consumer disputes will reach arbitrations instead of facing default judgments, which is not at all certain. See Pamela Foohey, Dalié Jiménez, & Christopher K. Odinet, *CARES Act Gimmicks How Not to Give People Money During a Pandemic and What to Do Instead*, 2020 U. ILL. L. REV. ONLINE 81 (Apr. 22, 2020) (noting likelihood of default for car loans and foreclosures).

Arbitration is also unpredictable because it is private and parties face difficult in using past decisions to predict future outcomes.[133] 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.[134] Such cases, prosecuted at scale by technologically-aided consumer lawyers,[135] 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 lawmaking.[136] Issues as complex and wide-ranging as asbestos,[137] terrorism,[138] and the opioid epidemic[139] have been dealt with in court, rather than legislatures.[140]

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[133] Alyssa S. King, Arbitration and the Federal Balance, 94 Ind. L.J. 1447 (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.").

[134] *See generally* Judith Resnik, Stephanie Garlock and Annie Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledg*e, 24 LEWIS & CLARK L. REV. 365, 393-423(2020) (detailing difficulty in connecting data about individual outcomes in arbitration).

[135] *Cf.* https://myradvocate.com/ (internet based tool that allows consumers to pursue small claims in arbitration); Abernathy v. DoorDash, 2020 WL 619785 (N.D. Cal. Feb. 10, 2020) (compelling arbitration on behalf of almost 6000 couriers. The Court concluded "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").

[136] Kathleen G. Noonan, Jonathan C. Lipson, William H. Simon, *Reforming Institutions: The Judicial Function in Bankruptcy and Public Law Litigation,* 94 Ind. L.J. 545 (2019).

[137] Jenkins v. Raymark Indus., 782 F.2d 468, 470 (5th Cir. 1986) (noting that at the time, "[a]bout 5,000 asbestos-related cases are pending in this circuit").

[138] Benjamin Weiser, *Family and United Airlines Settle Last 9/11 Wrongful-Death Lawsuit*, N.Y. TIMES (Sept. 19, 2011), https://www.nytimes.com/2011/09/20/nyregion/last-911-wrongful-death-suit-is-settled.html (describing the litigations that occurred after 9/11, involving such issues as United Airlines' role in predicting the terrorist attack).

[139] In re Nat'l Prescription Opiate Litig., Case No. 1:17-MD-2804 (N.D. Ohio Sep. 26, 2019).

[140] *See, e.g.,* Charlotte Garden, *Union Made: Labor's Litigation for Social Change*, 88 TULANE L. REV. 193 (2013) (describing how labor unions use Supreme Court litigation to lobby for change); Beth van Schaak, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305 (2004) (discussing the

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 pre-existing doctrinal rules.[141] These actions, sometimes organized formally through multidistrict litigation (MDL) proceedings,[142] and sometimes less formally through individualized ad hoc judging,[143] have already come for Covid-19 cases. As the law firm Covington 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 claims may receive no more than policyholders with far weaker claims.[144]

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.[145] It results from a

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impact for Alien Tort Statute-style litigation on, among other things, the human rights movements and other areas of social change).

[141] 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 aggregate settlements that many MDLs culminate in are another site of procedural innovation. 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.")

[142] For a trenchant recent critique of the MDL governance deficit, *see* David Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403 (2019).

[143] Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U L. REV 767 (2017).

[144] See Covington, Policyholders Beware: The Risks of Multi-District and Class Action Treatment of COVID-19 Insurance Claims (critiquing recent attempts to establish an insurance MDL), available at https://www.cov.com/-/media/files/corporate/publications/2020/05/policyholders-beware-the-risks-of-multidistrict-and-class-action-treatment-of-covid-19-insurance-claims.pdf.

[145] See United States Judicial Panel on Multidistrict Litigation Calendar Year Statistics 2019, *available at* https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2019_1.pdf (showing that only 2.1% of 2019 MDLs considered contract cases).

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—are likely to be grouped together in mass adjudications, with little chance to have a judge make individualized findings about particular contracts.[146]

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.[147] One might expect, for instance, for a large university to agree to a bulk settlement with a class of disgruntled students and for 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 potential to amplify health risk only further tilts courts and arbitral tribunals toward compromise and reformation.

This leads to 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 nonrefundable deposits, or disclaim impracticability and related defenses.[148]

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[146] *See generally* 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) ("federal 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.")

[147] *See* https://www.collegerefund2020.com/ (collecting plaintiffs); Anya Kamenetz, *Colleges Face Student Lawsuits Seeking Refunds After Coronavirus Closures*, Morning Edition, *available at* https://www.npr.org/2020/05/29/863804342/colleges-face-student-lawsuits-seeking-refunds-after-coronavirus-closures (expressing skepticism about suits).

[148] One easy way to start down the path of compromise for complex deals is to negotiation a standstill agreement. *See* Jonathan C. Lipson & Norman M. Powell, *Don't Just Do Something—Stand There! A Modest Proposal for a Model Standstill/Tolling Agreement,* BUS. LAWYER TODAY (Apr. 14, 2020).

This counsel is needed on two fronts.

First, we worry that lawyers are insufficiently attentive to contract's anti-canon. These cases exist and are good law, and yet they are often subsumed into doctrines of impracticability, duress, and frustration. Unlike those defenses, 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. The sort of analysis called on is therefore profoundly aberrant and will same 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 citing to modern cases. Usually they are the best source for predictive judgment. But, as we've shown, the contract law has been occasionally quite attentive to risky contracts, and welcoming of reformation.

Second, 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. 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.

C. Reformation revisited

Finally, consider the problem of reformation of still-existing contractual relationships. In a way, the problems we've discussed respecting contracts whose obligations have terminated recur in the context of contracts where the parties have long-term and continuing relations. 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, for 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.[149] 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.

CONCLUSION

Ordinarily, risky contracts are managed through ex ante legislation and regulatory intervention. That leaves a vast sphere of private life subject to bargaining, even though most contracts externalize some risk onto the public at large. But sometimes, the risk calculus changes after formation, and society must turn to the less settled, predictable, and arguably 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 burden to acceptable levels. 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.

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[149] *See, e.g.,* Phipps Group, LLC v. KCAKE Acquisition, Inc., et al., C.A. No. 2020-0282-KSJM, transcript (Del. Ch. Apr. 17, 2020; filed Apr. 30, 2020) (declining to expedite case seeking to force buyer to close in light of health risks).