Title: Contracting COVID: Private Order and Public Good

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CONTRACTING COVID: PRIVATE ORDER AND PUBLIC GOOD

JONATHAN C. LIPSON*

The novel Coronavirus (2019) (COVID) has created a dilemma: Open the economy and spread disease; quarantine and choke the economy. Thus far, the response has looked to government for health-safety standards and financial subsidies. Although these are necessary steps, they have become politicized, thereby exacerbating severe uncertainties created by the pandemic. While we will surely halt it, we do not know how, when, or what comes next.

Many writers are exploring litigation that will flow from COVID. This Article considers the flip side: the important but under-appreciated role that ex ante *contracting plays in addressing the COVID dilemma. Liability waivers, for example, will be ubiquitous, but might be misused to shelter poor risk management. This essay argues that these waivers should be enforceable only when coupled with reasonable health-safety precautions, which may appear in contracts such as workplace rules or supply chain agreements. Without such balance—or worse, when imposed by fiat, as President Trump did in the meat processing industry—they can inflame the public health crisis.*

At the same time, the COVID-induced shutdown has caused most contracts to be in or near breach. This has resulted in responses such as litigation, bankruptcy, and bailouts. While these may be inevitable, second-order contracts such as standstill agreements provide certainty that enables parties to adjust commercial relationships in ways that may preserve more value at lower cost than public interventions.

Contract in this context is thus doing more than creating private order; it is also producing public good. This hearkens to Depression-era scholarship which argued that contract had public ramifications. Although modern writers have largely abandoned that view, it reflected a change in mindset that cleared the way for sweeping New Deal reforms. While we do not yet know whether COVID will be as disruptive as the Depression, the uses of contract described here may signal a comparably dramatic realignment of private and public.

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Essay

CONTRACTING COVID: PRIVATE ORDER AND PUBLIC GOOD

JONATHAN C. LIPSON

> "*We do have a biological challenge in this [COVID] problem, but the economic problem is growing and is much larger. . . . [I]t's always the American government's position to say in the choice between the loss of our way of life as Americans and the loss of life of Americans, we have to always choose the latter.*"
>
> Trey Hollingsworth, U.S. Rep., R-Ind.[*]

Introduction

When Jonathan Corpina returned to work on the floor of the New York Stock Exchange in late May 2020, he was "met with temperature screenings, hand sanitizer stations, plexiglass barriers—and a liability waiver."[1] Like many market actors, the Stock Exchange faced a dilemma: it might spread disease if it was not careful (and might be sued even if it was); but it could not remain closed indefinitely, even as the novel Coronavirus (2019) (COVID)[2] continued to spread rapidly in the United States and abroad. How to manage the conflicting demands of public health safety and economic viability?

Thus far, the response has been organized largely around government. State and federal legislatures and executives have attempted to set health-safety standards; to spur the development of vaccines and treatments; and to provide financial support during the massive economic shutdown that has ensued. While government is obviously a critical institutional actor, the pandemic has become politicized; politics have, in turn, exacerbated severe uncertainty about how to address the pandemic, how long it will last, and what comes next.

Scholars are already considering the effect of COVID on contract, but that work focuses mostly on litigating defenses such as *force majeure* or concerns that the pandemic is a moment when "ordinary contracts may become extraordinarily risky for the public."[3] This essay takes the

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[*] Quoted in Poppy Noor, *The US Politicians Volunteering Other People's Lives to Fight Covid-19*, GUARDIAN, (July 22, 2020), https://www.theguardian.com/world/2020/jul/22/us-reopening-politicians-volunteering-peoples-lives-coronavirus?CMP=Share_iOSApp_Other.

[1] Ana Swanson & Alan Rappeport, *Businesses Want Virus Legal Protection. Workers Are Worried*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/business/economy/coronavirus-liability-shield.html?searchResultPosition=1.

[2] More fully known as "severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)." Steven Sanche et al., *High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2*, 26 EMERGING INFECTIOUS DISEASES 1470, 1470 (2020).

[3] *See* David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, working paper draft of June 25, 2020, at 7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635128. *See also* Ian Ayres, *Corona and Contract*, BALKINIZATION BLOG (March 23, 2020, 11:40 AM), https://balkin.blogspot.com/2020/03/corona-and-contract.html; Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail: From Rose 2d to COVID-19* (June 9, 2020), available at https://ssrn.com/abstract=3605411; Matthew Jennejohn, Julian Nyarko, Eric L. Talley, *COVID-19 as a Force Majeure in Corporate Transactions* (April 1, 2020), available at SSRN: https://ssrn.com/abstract=3577701. An important and interesting exception that focuses on sovereign debt, and is thus

flip side, and considers ways in which contract can affirmatively address the public health and economic dilemma created by COVID, in two ways: (i) by linking liability waivers to health-safety precautions; and (ii) through the use of standstill or forbearance agreements. Both provide greater certainty than can government efforts, especially those tainted by politics.

Part 1 summarizes the problems of politics and uncertainty that hamper public efforts to address the pandemic. That the pandemic has become politically controversial is not necessarily surprising, because it pits the commands of public health against demands for personal and economic liberty. Political motivations have, however, exacerbated the crisis, as when President Trump used the Defense Production Act to limit meat processors' liability for exposing workers to unsafe conditions, increasing spread of the disease.[4]

Part 2 focuses on contract and public health. As the Stock Exchange example indicates, COVID liability releases will be ubiquitous. They should not, however, be imposed by government fiat, as in meat processing, but instead agreed to (or not) as part of the ordinary contracting process. Given the risk of asymptomatic spread, such terms should only be enforceable if coupled with reasonable health-safety precautions in workplace rules and supply chain agreements, which are also contractual in nature. By matching risk and precautions, contract can provide greater certainty—and perhaps better standards and practices—than can government.

Part 3 shifts to the economic crisis, and considers the role that standstill and forbearance agreements play in managing commercial uncertainty created by the shutdown. These second-order agreements forestall litigation or bankruptcy in order to enable the parties to determine whether conditions will permit them to resume their original relationship or change it. Because the current shutdown is not like ordinary recessions, parties may need to scale back up as quickly as they shut down. Stabilizing otherwise viable relationships through contract will be critical to recovery.

Part 4 considers the implications of these uses of contract. I argue that they have public ramifications that resonate with a vision of contract articulated by certain writers in the depths of the Depression.[5] This vision has been abandoned by modern theorists, who view contract instead as strictly "private ordering." This leaves them unattuned to the public implications of the contracting identified here. While some public-law scholars have studied the use of contract to advance certain regulatory goals, such as environmental law, they do not consider the contractual implications of deploying contract in this way.[6]

The net effect is that neither private-law nor public-law scholars speak much to one another, which leaves both ill-equipped to spot and assess the role of contract in COVID. While it is too early to know whether COVID will produce legal changes as sweeping as the New Deal did in the Depression, it presents an important moment for scholars across disciplines to think more broadly about the connections between their typically segmented spheres.

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tangential to the claim here, appears in Patrick Bolton, et al., *Born Out of Necessity: A Debt Standstill for COVID-19* 103 POLICY INSIGHT, CENTER FOR ECON. POL. RES. (April 2020).

[4] *See* Part 1.1.2, *infra.*

[5] *See* Part 4.2, *infra*.

[6] *See* Part 4.3, *infra*.

Public law scholars worry that the Administration's politicized response to COVID-19 has produced a kind of "executive underreach" that has "left the legal community flat-footed."[7] While that may be true for the public-law community, this paper shows that it is not for those who work in the real world of commercial contracting.

1. *COVID: Public Health, Politicization and Uncertainty*

1.1 *COVID and the Crisis in Public Health*

COVID is first and foremost a public health crisis.[8] It has led to the economic crisis that creates the current dilemma.

Public health has been defined as "what we, as a society, do collectively to assure the conditions for people to be healthy."[9] Quarantine and isolation are, according to Jessica Berg, the "'classic' expressions of the state's public health powers: they have been used since the Middle Ages and "are often thought of as fundamental public health powers."[10] In *Jacobson v. Massachusetts*, perhaps the Supreme Court's leading public health case, the Court upheld a mandatory vaccination law because "[t]here are manifold restraints to which every person is necessarily subject for the common good."[11] Not surprisingly, these sorts of restraints have been an important, but contested, response to COVID.[12]

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[7] David Pozen & Kim Lane Schepple, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. _ (forthcoming Oct. 2020).

[8] On January 31, 2020, Alex Azar, Secretary of the U.S. Department of Health and Human Services, declared COVID a public health emergency. Press Release from Health and Human services Secretary Alex M. Azar II, *Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus*, U.S. DEP'T HEALTH & HUM. SERVS. (Jan. 31, 2020), https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html. On March 11, 2020, the World Health Organization declared COVID-19 a "pandemic." *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORG., https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/novel-coronavirus-2019-ncov (last visited June 24, 2020). On March 13, 2020, President Trump proclaimed that "the COVID-19 outbreak in the United States constitutes a national emergency . . . ." Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak from Donald J. Trump President of the United States (Mar. 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

[9] Wendy E. Parmet, *Population-Based Legal Analysis: Bridging the Interdisciplinary Chasm Through Public Health in Law*, 66 J. LEGAL EDUC. 100, 105 (2016) (quoting INST. OF MED., COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, THE FUTURE OF PUBLIC HEALTH 19 (1988)). This remains a common definition. *See, e.g.,* Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1291 (2018); PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE, 180 (Hatchette Book Group 1982).

[10] Jessica Berg, *All for One and One for All: Informed Consent and Public Health*, 50 HOUS. L. REV. 1, 16 (2012).

[11] 197 U.S. 11, 26 (1905).

[12] *See, e.g.,* Matteo Chinazzi, et al., *The Effect of Travel Restrictions on the Spread of the 2019 Novel Coronavirus (COVID-19) Outbreak*, SCIENCE (Apr. 24, 2020), https://science.sciencemag.org/content/368/6489/395.

These efforts appear to have "flattened the curve," meaning that they have prevented hospitals from being overwhelmed.[13] But they are costly.[14] In the first quarter of 2020, the U.S. gross domestic product (GDP) declined 4.8 percent, the economic indicator's first decline since 2014;[15] in the second quarter it appears to have decreased at an annual rate of 32.9 percent.[16] In April 2020, the U.S. retail sector posted a 17.1 percent unemployment rate, totaling 3.2 million people; the hospitality unemployment rate was 39.3 percent, totaling 4.8 million people.[17] Even before the pandemic, the federal budget deficit was at its highest since World War II, and is now projected to exceed 18 percent of GDP.[18] There are thus strong incentives to "reopen" the economy, which sharpen the tension at the heart of the crisis.[19]

So far, the responses to the public-health and economic crises have been organized largely around government. But these responses have been politicized which has, in turn, needlessly increased uncertainty.

1.2 *The Politics and Policy of COVID*

Some public officials have viewed the pandemic in political terms, sometimes at the expense of public health goals. Early on, for example, President Trump apparently ignored warnings in daily briefings that COVID presented a serious threat.[20] For some time, Trump and

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[13] *See e.g.*, Laura Matrajt & Tiffany Leung, *Evaluating the Effectiveness of Social Distancing Interventions to Delay or Flatten the Epidemic Curve of Coronavirus Disease*, 26 EMERGING INFECTIOUS DISEASES (2020), https://wwwnc.cdc.gov/eid/article/26/8/20-1093_article.

[14] Molly Kinder and Martha Ross, *Reopening America: Low Wage Workers Have Suffered Badly from COVID-19 so Policymakers Should Focus on Equity*, BROOKINGS (June 23, 2020),

https://www.brookings.edu/research/reopening-america-low-wage-workers-have-suffered-badly-from-covid-19-so-policymakers-should-focus-on-equity/.

[15] Ben Casselman, *Worst Economy in a Decade. What's Next? 'Worst in Our Lifetime.'*, N.Y. TIMES (Apr. 29, 2020), https://www.nytimes.com/2020/04/29/business/economy/us-gdp.html (updated June 30, 2020) ("There is much worse to come. Widespread layoffs and business closings didn't hit until late March in most of the country. Economists expect figures from the current quarter, which will capture the shutdown's impact more fully, to show that G.D.P. contracted at an annual rate of 30 percent or more, a scale not seen since the Great Depression.").

[16] Bureau of Economic Affairs, *Gross Domestic Product, 2nd Quarter 2020 (Advance Estimate) and Annual Update*, (July 30, 2020, 8:30 AM), https://www.bea.gov/news/2020/gross-domestic-product-2nd-quarter-2020-advance-estimate-and-annual-update#:~:text=Real%20gross%20domestic%20product%20(GDP,real%20GDP%20decreased%205.0%20percent.

[17] *Id.*

[18] David Wessel, *How Worried Should You Be About the Federal Deficit and Debt*, BROOKINGS (July 8, 2020), https://www.brookings.edu/policy2020/votervital/how-worried-should-you-be-about-the-federal-deficit-and-debt/ (citing Congressional Budget Office, *An Update to the Budget and Economic Outlook: 2019-2029* (Aug. 2019).

[19] Zachary Karabell, *How to Avoid the Shutdown "Kill Switch"*, POLITICO (June 16, 2020), https://www.politico.com/news/magazine/2020/06/16/coronavirus-shutdown-kill-switch-320497.

[20] Michael Poznansky, *Apparently, Trump Ignored Early Coronavirus Warnings. That Has Consequences.*, WASH. POST (Mar. 23, 2020, 5:00 AM), https://www.washingtonpost.com/politics/2020/03/23/apparently-trump-ignored-early-coronavirus-warnings-that-has-consequences/.

his political allies declared the pandemic a "hoax."[21] Since then, his views have evolved from "unfounded optimism to attacking his foes"[22] to the claim that he "knew all along" how serious it was.[23]

At the same time, politicians undermined public health authorities, such as the Centers for Disease Prevention and Control[24] and Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases.[25] International non-governmental organizations traditionally seen as authorities, such as the World Health Organization, have also had their credibility impaired, often for political reasons, diluting their capacity to persuade those that they cannot command.[26]

The politics of the pandemic are part of a deeper pattern of treating the public health system as a second-class citizen. In the United States, this system has long suffered from severe under-funding.[27] This reflects a political preference for the private world of the doctor-patient

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[21] *See* Oliver Milman, *Seven of Donald Trump's Most Misleading Coronavirus Claims*, GUARDIAN (Mar 31, 2020, 4:24 PM), https://www.theguardian.com/us-news/2020/mar/28/trump-coronavirus-misleading-claims

[22] *The Politics of* Pandemics, ECONOMIST, Mar. 14, 2020, at 7, https://www.economist.com/leaders/2020/03/12/the-politics-of-pandemics.

[23] *See* Oliver Milman, *Seven of Donald Trump's Most Misleading Coronavirus Claims*, GUARDIAN (Mar 31, 2020, 4:24 PM), https://www.theguardian.com/us-news/2020/mar/28/trump-coronavirus-misleading-claims.

[24] The Centers for Disease Control and Prevention (CDC) has published guidelines to reduce the spread of COVID. *General Business Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTIONS, https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html#Reducing-the-Spread-of-COVID-19-in-Workplaces (last visited June 11, 2020). As is well known, President Trump has famously disavowed these guidelines, as have the governors of a number of states. *See* Michael Scherer, *Trump's Mockery of Wearing Masks Divides Republicans*, WASH. POST (May 27, 2020, 6:00 AM), https://www.washingtonpost.com/politics/trumps-mockery-of-wearing-masks-divides-republicans/2020/05/26/2c2bdc02-9f61-11ea-81bb-c2f70f01034b_story.html; Matthew A. Baum, Katherine Ognyanova, & David Laser, *These Three Governors are Reopening Their States Faster than Their Voters Want*, WASH. POST (Apr. 29, 2020, 7:00 AM) , https://www.washingtonpost.com/politics/2020/04/29/these-three-governors-are-reopening-their-states-faster-than-their-voters-want/ (finding Republican governors in Florida, Georgia, and Tennessee opening before showing downward trends in virus).

[25] Katherine Faulders & John Santucci, *White House Seeks to Discredit Fauci in Memo Leaked to Reporters*, ABC NEWS (July 13, 2020, 4:16 AM), https://abcnews.go.com/US/white-house-seeks-discredit-fauci-memo-leaked-reporters/story?id=71745265. *See also* Kevin Liptak & Nick Valencia, *Trump Now in Open Dispute With Health Officials As Virus Rages*, CNN (July 8, 2020, 5:09 PM), https://www.cnn.com/2020/07/08/politics/trump-fauci-cdc-redfield-experts-coronavirus/index.html; Brian Bennett, *Trump Is Waging a Losing War Against the Bad News of COVID-19*, TIME (July 15, 2020, 9:04 PM), https://time.com/5867511/trump-coronavirus-bad-news/.

[26] Paul LeBlanc, *Fauci Voices Support for the World Health Organization after Trump terminates US relationship,* CNN (June 11, 2020, 6:09 PM), https://www.cnn.com/2020/06/11/politics/fauci-world-health-organization-coronavirus/index.html; Jon Gambrell, *WHO Director Warns World Leaders Not to 'Politicize' Coronavirus Pandemic,* TIME (June 22, 2020, 10:42 AM), https://time.com/5857077/who-politicize-coronavirus-pandemic/ (describing how criticism of WHO stems from 'excessive praise' of Chinese response to virus and that WHO director cites politicization of virus result as inhibitive to fighting the virus).

[27] *See, e.g.,* Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 663 (2019) ("[P]ublic health at both the federal and state level remains chronically underfunded.") (citing *A Funding Crisis for Public Health and Safety*, TRUST FOR AMERICAN'S HEALTH (2018), https://www.tfah.org/report-details/a-funding-crisis-for-public-health-and-safety-state-by-state-and-federal-public-health-funding-facts-and-recommendations).

relationship.[28] In 2018, President Trump dismantled the Obama-era National Security Council Directorate for Global Health Security and Biodefense, a public-health group aimed at spotting and addressing pandemics.[29] By the time of COVID, "decades of near-total neglect had left the entire public-health apparatus too weak and uncoordinated to mount even a fraction" of the response seen in more developed nations that successfully contained the pandemic.[30]

Politicians may be motivated to take advantage of the complexities inherent in a healthcare system that operates against the backdrop of bifurcated, state-federal government. The *New York Times* reported that, beginning in April 2020, the President sought to shift responsibility for the crisis to the States, even though this would become "at once a catastrophic policy blunder and an attempt to escape blame for a crisis that had engulfed the country — perhaps one of the greatest failures of presidential leadership in generations."[31] This has been problematic because public health guidance can vary at the state and local levels; officials have gone back and forth on whether to require, encourage or discourage masking and similar health-safety measures.[32]

These political motives are not necessarily cynical. Masking has been especially contentious. "You can't pick and choose what freedoms you are going to give people," Governor Kevin Stitt of Oklahoma said, declining to impose a mask order even as he was the first governor known to have contracted COVID.[33] Forcing citizens to wear masks offends notions of liberty that some take quite seriously.[34] "With a uniformity that has defied rising death tolls in their own backyards," *The New York Times* recently reported, "Republicans at the federal, state and local levels have adopted a [] tone of skepticism and defiance, rejecting the advice of public health

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[28] See Micah Hartman et al., *National Health Care Spending in 2016: Spending and Enrollment Growth Slow After Initial Coverage Expansions*, 37 HEALTH AFF. 150, 150 (2018).

[29] Beth Cameron, *I Ran the White House Pandemic Office. Trump Closed It.*, WASH. POST (Mar. 13, 2020, 9:32 AM), https://www.washingtonpost.com/outlook/nsc-pandemic-office-trump-closed/2020/03/13/a70de09c-6491-11ea-acca-80c22bbee96f_story.html.

[30] Jeneen Interlandi, *Why We're Losing the Battle With COVID-19,* N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/magazine/covid-19-public-health-texas.html.

[31] Michael D. Shear, Noah Weiland, Eric Lipton, Maggie Haberman & David E. Sanger, *Inside Trump's Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES (July 18, 2020), https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-response-failure-leadership.html?referringSource=articleShare.

[32] In Las Vegas, for example, the union that represents food-service workers created a website showing differences in health-safety precautions among commercial kitchens. *Cleaning Vegas to Safety*, available at https://culinaryunion226.org/culinary-clean. A recent opinion piece in the *New York Times* argued that, while the Nevada Gaming Control Board "does require casinos to submit "adequate" Covid-19 mitigation plans as a prerequisite for reopening . . . safety precautions aren't standardized enough." Brittany Bronson, *When Pandemic Precautions and Vegas' Hedonism Collide*, N.Y. TIMES (June 21, 2020), https://www.nytimes.com/2020/06/21/opinion/coronavirus-reopening-vegas.html?referringSource=articleShare.

[33] Sarah Mervosh et al., *Mask Rules Expand Across U.S. as Clashes Over the Mandates Intensify*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/us/coronavirus-masks.html (updated July 21, 2020, 3:15 PM).

[34] Will Bunch, *America Is Drunk on a Warped Idea of Freedom, And Now It's Killing People*, PHILA. INQUIRER (June 28, 2020, 1:09 PM), https://www.inquirer.com/opinion/commentary/why-americans-dont-wear-masks-coronavirus-freedom-20200628.html.

officials and deferring instead to principles they said were equally important: conservative values of economic freedom and personal liberty."[35]

But, of course, politicians can be cynical, and may engage in favoritism that can inflame the pandemic. Take the example of meat processing. John Tyson, Chairman of Tyson Foods, one of the nation's largest meatpackers, claimed in a recent company blog that "most of all I care about the[] health and safety" of Tyson employees.[36] One might think that regulation of health-safety in meat production would protect workers in this instance. But government appears to have been the problem, not the solution.

Shortly after Tyson posted his blog, President Trump issued an executive order which declared that meat in the food supply chain was "critical infrastructure" under the Defense Production Act (DPA).[37] The executive order gave the Secretary of Agriculture the authority to direct, as a matter of national defense, contracts relating to the food supply chain.[38] The DPA provides a defense against potential liability for those subject to DPA orders.[39] While the Secretary's orders governing meat processing would have to be "consistent with the guidance for the operations of meat and poultry processing facilities jointly issued by the CDC and OSHA," this meant little because, as noted above, the CDC's authority has been impaired by political actors, and OSHA (the Occupational Safety and Health Administration) has been criticized for failing to

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[35] Jeremy W. Peters, *Will Herman Cain's Death Change Republican Views on the Virus and Masks?* N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/us/politics/herman-cain-gop-coronavirus.html?action=click&module=Top%20Stories&pgtype=Homepage *See also* Donald G. McNeil Jr., *Your Ancestors Knew Death in Ways You Never Will*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/2020/07/15/sunday-review/coronavirus-history-pandemics.html?referringSource=articleShare. Historically, "[l]ibertarians battled almost every step" to create public-health infrastructure. Id. "Some fought sewers and water mains being dug through their properties, arguing that they owned perfectly good wells and cesspools. Some refused smallpox vaccines until the Supreme Court put an end to that in 1905, in Jacobson v. Massachusetts." *Id.*

[36] John Tyson, *Feeding the Nation and Keeping our Team Members Healthy*, TYSON FOODS BLOG (Apr. 26, 2020), https://thefeed.blog/2020/04/26/feeding-the-nation-and-keeping-our-employees-healthy/.

[37] *Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19* (Apr. 28, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/ ("Under the delegation of authority provided in this order, the Secretary of Agriculture shall take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA."); *see also* 50 U.S.C. § 4501 *et seq*.

[38] *Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19*, *supra* note 37.

[39] 50 U.S.C. § 4557 ("No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this chapter, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under subchapter I of this chapter or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.").

protect even its own inspectors from COVID exposure.[40] In any case, the Department of Labor agreed to have an official testify for these companies if they were later sued.[41]

The number of COVID cases related to meat processing plants more than doubled shortly after President Trump's executive order.[42] As of June 8, 2020, more than 20,400 cases across 216 plants and 33 states had been reported.[43] At least 74 people have died.[44] Before the DPA was invoked, Tyson had seen outbreaks at only five of its plants.[45] COVID has since been rampant at meat processing plants in the U.S.[46]

Although Trump's executive order was justified as a way to protect the U.S. food supply, it appears that workers in this industry were forced to work in unsafe conditions to feed those in other nations—and to increase the profits of an industry with important political connections.[47] While China blocked imports of meat from Tyson,[48] exports of poultry to other nations apparently rose significantly after it went into effect.[49]

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[40] Eric Schlosser, *America's Slaughterhouses Aren't Just Killing Animals,* ATLANTIC (May 12, 2020), https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpeacking-coronavirus/611437/.

[41] *Id.*

[42] Rachel Axon et al., *Coronavirus Outbreaks Climb at U.S. Meatpacking Plants Despite Protections, Trump Order*, USA TODAY (June 6, 2020), https://www.usatoday.com/story/news/investigations/2020/06/06/meatpacking-plants-cant-shake-covid-19-cases-despite-trump-order/3137400001/ (updated June 8, 2020).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] A subsequent CDC report found that, consistent with other congregate settings, meat-processing plants have had high levels of COVID. *See* J.W. Dyal, M.P. Grant, K. Broadwater, et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities — 19 States*, 69 MMWR MORB MORTAL WKLY REP 2020 557 (May 8, 2020) http://dx.doi.org/10.15585/mmwr.mm6918e3 (finding that "among approximately 130,000 workers at these facilities, 4,913 cases and 20 deaths occurred").

[47] Eric Schlosser, *America's Slaughterhouses Aren't Just Killing Animals,* ATLANTIC (May 12, 2020) https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpeacking-coronavirus/611437/.

[48] Marion Dakers & Michael Hirtzer, *Beijing's Latest Virus Outbreak Disrupts Tyson Foods and PepsiCo*, BLOOMBERG (June 22, 2020), https://www.bloomberg.com/news/articles/2020-06-21/tyson-pepsi-among-companies-hit-by-fallout-of-beijing-outbreak.

[49] Jane Mayer, *How Trump Is Helping Tycoons Exploit the Pandemic*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/how-trump-is-helping-tycoons-exploit-the-pandemic.

Notably, Tyson and other meat producers are large Republican donors.[50] Despite the public health risks of mandated waivers, some in Congress have demanded that they be expanded to all businesses in connection with economic bailouts.[51]

1.3 *The Special Uncertainty of COVID*

Whether the motives are benign or cynical, the net effect of politicizing COVID has been an "immense scope for mixed messages and inconsistent instructions about testing and when to stay isolated at home," among other things.[52] Even if politicians checked their more partisan impulses, however, government would face the hard reality that COVID presents extraordinary uncertainty. At least at this point, as economist Frank Knight might have said, "there is no scientific basis on which to form any calculable probability whatever"[53] regarding the scope and duration of the pandemic.[54]

It appears that some health-safety precautions are becoming well understood and widely accepted as efficacious, such as social-distancing and hand-washing.[55] Much remains unknown, however. How much "social distance" is enough? Should we remain six feet part, as the CDC recommends—or 4.5 feet, as the European authorities recommend?[56] Should everyone have their temperature taken? If so, at what intervals? If someone potentially presents symptoms, how long

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[50] Tyson Foods has contributed about twice as much to Republican as Democratic candidates. *See* Tyson Foods, FOLLOWTHEMONEY.ORG, https://www.followthemoney.org/entity-details?eid=2670 (last visited July 27, 2020). In 2016, Ronald Cameron, the owner of privately-held Mountaire Corporation one of the country's largest purveyors of chicken," gave three million dollars to organizations supporting Trump's campaign. Jane Mayer, *How Trump Is Helping Tycoons Exploit the Pandemic*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/how-trump-is-helping-tycoons-exploit-the-pandemic

[51] Erica Werner et al., *McConnell Calls for Five-Year Lawsuit Shield for Businesses As Part of Next Coronavirus Bill*, WASH. POST (July 6, 2020, 3:41 PM), https://www.washingtonpost.com/us-policy/2020/07/06/congress-departed-two-week-recess-without-addressing-coronavirus-spikes-economic-strains/.

[52] *The Politics of Pandemics,* ECONOMIST, Mar. 14, 2020, at 7, https://www.economist.com/leaders/2020/03/12/the-politics-of-pandemics.

[53] FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT, 19-21 (1921).

[54] *Id.* "We simply do not know." *Id.* It was, in his view, analogous to attempting to predict a war in Europe or "the price of copper and the rate of interest twenty years hence, or the obsolescence of a new invention, or the position of private wealth owners in the social system in 1970." *Id.* He famously characterized uncertainty as distinct from "risk," which he thought was calculable. Uncertainty of this form can present challenges for Bayesian decision-making because it is difficult to quantify and model. *See* John C. Harsanyi, *Bayesian Decision Theory and Utilitarian Ethics*, 68 AM. ECON. REV. 223, 223 (1978). One could say that there is a Bayesian prior for COVID, Singapore's experience with SARs in 2003. "Thanks to an efficient bureaucracy in a single small territory, world-class universal health care and the well-learned lessons of SARS . . . Singapore acted early. It has been able to make difficult trade-offs with public consent because its message has been consistent, science-based and trusted." *The Politics of Pandemics,* ECONOMIST, Mar. 14, 2020, at 7, https://www.economist.com/leaders/2020/03/12/the-politics-of-pandemics.

[55] CENTERS FOR DISEASE CONTROL AND PREVENTION, *How to Protect Yourself & Others,* CDC (Apr. 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html

[56] *Id. See also* William Booth, *Two meters? One meter plus? Social distancing rules prompt fierce debate in U.K.,* WASH. POST (June 22, 2020, 3:52 PM), https://www.washingtonpost.com/world/europe/covid-social-distancing-one-meter-plus/2020/06/22/7614418a-afe0-11ea-98b5-279a6479a1e4_story.html.

should quarantine last? Do antibodies signal immunity—or contagion?[57] How many strains are there?[58] Which tests work, and what do the results signal—assuming you can get the results in a reasonable period of time?[59]

Exacerbating all of this is the problem of asymptomatic transmission.[60] Although COVID has been modeled as a network,[61] persons who are infected but have no symptoms may shed virus, thus unwittingly spreading the disease.[62] "By the time testing detects cases in one place it will be spreading in many others," as was the case in Italy, Iran and South Korea in the early months of 2020.[63] Any given person's exposure has the potential to infect a number of other persons that will be difficult to determine. The problem of asymptomatic transmission is thus the "Achilles' Heel" of COVID, leading medical experts to conclude that overreaction may be the safest course.[64]

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[57] James Hamblin, *Should You Get an Antibody Test? A user's guide to the immune system*, ATLANTIC (May 1, 2020), https://www.theatlantic.com/health/archive/2020/05/coronavirus-antibody-test-immunity/611005/ ("But having antibodies doesn't necessarily mean you'll be able to fight off a second infection. For that, you'll need sufficient numbers of antibodies, and they need to be effective antibodies. We don't yet know the degree to which people with coronavirus antibodies are protected from getting COVID-19 a second or third time.").

[58] *See* Sean Fleming, COVID-19: *Could your earliest symptoms predict how ill you'll get?* WORLD ECON. FORUM, https://www.weforum.org/agenda/2020/07/covid-19-study-6-strains-severity-kings-college-london/ ("There could be six distinct types of COVID-19, according to a study from the UK's King's College London. Each type could be distinguished by its own cluster of symptoms, the researchers say.").

[59] Sheryl Gay Stolberg and Katherine J. Wu, *Trump's Coronavirus Testing Chief Concedes a Lag in Test Results*, N.Y. TIMES, July 31, 2020, https://www.nytimes.com/2020/07/31/us/politics/trump-coronavirus-testing.html?searchResultPosition=1 ("the Trump administration's testing czar told Congress on Friday that getting test results within two to three days 'is not a possible benchmark we can achieve today.'").

[60] Monica Gandhi, *Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control COVID-19*, N. ENGL. J. MED. (Apr. 24, 2020), https://www.nejm.org/doi/full/10.1056/NEJMe2009758 ("Although the investigators were not able to retrospectively elucidate specific person-to-person transmission events and although symptom ascertainment may be unreliable in a group in which more than half the residents had cognitive impairment, these results indicate that asymptomatic persons are playing a major role in the transmission of SARS-CoV-2. Symptom-based screening alone failed to detect a high proportion of infectious cases and was not enough to control transmission in this setting.").

[61] Xingguang Li, et al., *Transmission Dynamics and Evolutionary History of 2019-nCov*, 92 J. MED. VIROLOGY 501 (2020).

[62] Monica Gandhi, *Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control COVID-19*, N. ENGL. J. MED. (Apr. 24, 2020), https://www.nejm.org/doi/full/10.1056/NEJMe2009758 ("Although the investigators were not able to retrospectively elucidate specific person-to-person transmission events and although symptom ascertainment may be unreliable in a group in which more than half the residents had cognitive impairment, these results indicate that asymptomatic persons are playing a major role in the transmission of SARS-CoV-2. Symptom-based screening alone failed to detect a high proportion of infectious cases and was not enough to control transmission in this setting.").

[63] *The Politics of Pandemics,* ECONOMIST, Mar. 14, 2020, at 7, https://www.economist.com/leaders/2020/03/12/the-politics-of-pandemics.

[64] Monica Gandhi, *Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control COVID-19*, THE N. ENGL. J. MED. (Apr. 24, 2020), https://www.nejm.org/doi/full/10.1056/NEJMe2009758 ("Although the investigators were not able to retrospectively elucidate specific person-to-person transmission events and although symptom ascertainment may be unreliable in a group in which more than half the residents had cognitive impairment, these results indicate that asymptomatic persons are playing a major role in the transmission of SARS-CoV-2.

But overreaction has its own costs, mostly of an economic nature. The problem is not only that shutdown has caused a rapid contraction in growth, but also that we do not know how long it will last, or what comes next. If the stock market's elevated performance is any indication, however, there is a belief that the economy will come back sooner rather than later. This is not necessarily irrational exuberance, because it is what happened after the influenza pandemic of 1918-19.[65] There are thus serious costs not only to shutting down, but also to doing so in ways that make it harder to scale back up.

Although nearly every aspect of the pandemic has been debated vigorously, there has been almost no consideration of the ameliorative role that contract might play. In part, this may be because contract is not typically considered a public-health tool.[66] True, some have argued that public health interventions can be justified on a "social contract" theory. For example, Edmund Pellegrino has observed, "an obligation of a good society [is] to provide some measure of health for its citizens, and a duty of a good citizen [is] to contribute to the health of society."[67] But the predicate to any theory of social contract is some kind of "consent," which must either be implied or found in conduct. Express consent certainly justifies state power, "but it is almost never present" in public health interventions.[68] Yet, what we see in practice is the use of contract in ways that have implications for both the public health and economic crises we face. The next two Parts discuss those in turn. The final Part considers the implications of this trend.

Symptom-based screening alone failed to detect a high proportion of infectious cases and was not enough to control transmission in this setting.").

[65] Thomas A. Garrett, *Economic Effects of the 1918 Influenza Pandemic*, at 21 (Nov. 2007), available at https://www.stlouisfed.org/~/media/files/pdfs/community-development/research-reports/pandemic_flu_report.pdf ("Most of the evidence indicates that the economic effects of the 1918 influenza pandemic were short-term."). The longer-term effects may have been more problematic, as there is evidence that children born in the wake of that pandemic suffered various developmental and physical debilities. *See id*. at 20-21 (citing Douglas Almond, *Is the 1918 Influenza Pandemic Over? Long-term Effect of In Utero Influenza Exposure in the Post-1940 U.S. Population*." 114 J. POL. ECON. 672 (2006)).

[66] One of the few papers to consider the public health implications of contracting practices finds that health information technology providers' efforts to limit liability might have public health effects. Kenneth W. Goodman, et al., *Challenges in Ethics, Safety, Best Practices, and Oversight Regarding HIT Vendors, their Customers, and Patients: A Report of an AMIA Special Task Force*, 18 J. AM. MED. INFO. ASSN. 77 (2011).

[67] Edmund D. Pellegrino, *Autonomy and Coercion in Disease and Health Promotion*, 5 THEORETICAL MED. & BIOETHICS 83, 87-88 (1984) (noting that personal autonomy is treated differently in curative medicine, which is for the benefit of individual patients, than in preventative medicine, which is for the good of the whole population). The notion of the "social contract" derives from JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 110 (Roger D. Masters ed., Judith R. Masters trans., St. Martin's Press 1978) (1762). *See* David V. Snyder, *The New Social Contracts in International Supply Chains*, 68 AM. U. L. REV. 1869 (2019) (describing recent efforts to adapt social contract theory to actual contracts).

[68] Jessica Berg, *All for One and One for All: Informed Consent and Public Health*, 50 HOUS. L. REV. 1, 24-25 (2012). Alternatively, one may justify public health measures on a utilitarian theory, as did the Court in *Jacobson*, where the "state legislature proceeded upon the theory which recognized vaccination as at least an effective if not the best known way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population." Jacobson v. Massachusetts, 197 U.S. 11, 30-31 (1905).

2. *Contract and Public Health—Liability Waivers and Health-Safety Terms*

As observed in the Introduction, a central role for contract in COVID will be through waivers that exculpate the promisee from liability for spreading disease to or through the promisor. That is, the customer or worker agrees not to sue the merchant or employer. Waivers may be attractive because they provide market actors with freedom to engage in commercial activity without worry of liability for transmitting COVID. In this way, they reduce uncertainty. Yet, as shown by the meat processing example, unconstrained waivers may reduce health-safety precautions to the point where they contribute to the spread of disease, especially given the problem of asymptomatic transmission. This Part argues that COVID liability waivers should only be enforceable if supported by evidence of reasonable health-safety precautions, which will take credible form in contracts internal and external to businesses.

2.1 *Contractual COVID Liability Waivers*

Although theories of COVID liability are not well developed, market actors worry that they may be sued for illness resulting from transmission of the virus on their premises.[69] Various claims could be asserted, including (1) premises liability, [70] (2) negligence,[71] (3) medical monitoring,[72] and (4) misleading advertising or misrepresentation.[73]

Waivers, releases and exculpatory clauses are a standard contractual way to manage these liability concerns.[74] They are already widely used for COVID, having been sought by

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[69] Lisa Kleiner Wood & Ethan C. Geis, *COVID-19 Waivers: Can They Reduce Your Business Risk?*, NAT'L L. REV. (June 18, 2020), https://www.natlawreview.com/article/covid-19-waivers-can-they-reduce-your-business-risk.

[70] Premises liability, a branch of negligence law, arises where a landowner controls property that contains or creates a dangerous conditions that results in injury. *See* Occidental Chem. Corp. v. Jenkins, 478 S.W.3d 640, 644–46 (Tex. 2016). Under premises liability, business owners who had notice of an unsafe condition can be held liable for injuries to customers resulting from the dangerous condition. *See* Kelly v. Stop & Shop, Inc., 918 A.2d 249, 261 (Conn. 2007).

[71] When a business breaches its duty to exercise the required standard of care, it can be held liable for negligence. Argo v. Goodstein, 265 A.2d 783, 785 (Pa. 1970).

[72] A recognized path to recovery in toxic tort cases is the cause of action for medical monitoring. Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def. of the U.S., 696 A.2d 137, 143 (Pa. 1997). When an individual is exposed to toxins or hazardous substances, future-dated health assessments, health studies, and costs of response may encompass the remedy of medical monitoring. *Id.* at 142.

[73] Misleading, false, or deceptive advertising is subject to restraint. In re R. M. J., 455 U.S. 191, 200 (1982). Misleading advertisements may be forbidden entirely. *Id.* at 203. Advertisements may be misleading if they contain a material misrepresentation or establish an unjustified expectation. In re Anonymous Member of S.C. Bar, 684 S.E.2d 560, 565 (2009).

[74] Courts use a variety of terms to describe written documents by which parties seek to excuse themselves from liability. Examples of such terms include, (1) waiver, (2) exculpatory agreement, (3) covenant not to sue, (4) anticipatory release, and (5) general liability release. *See* Mary Ann Connell & Frederick G. Savage, *Releases: Is There Still A Place for Their Use by Colleges and Universities?*, 29 J.C. & U.L. 579, 579 (2003). There are subtle distinctions between these various mechanisms, found in both the language that may be used and the doctrinal evaluation. Releases, for example, effectively "extinguish the cause of action" and constitute a waiver. 2 ANN TAYLOR SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES § 42:1 (2d ed.).

restaurants,[75] hair salons,[76] those who administer bar exams,[77] and President Trump's Tulsa, Oklahoma campaign rally,[78] among many others.

Courts may not enforce liability waivers if they offend "public policy." The Restatement (Second) of Contracts provides that "[a] term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."[79] The "most influential public policy test in waiver law to date"[80] is that in *Tunkl v. Regents of the University of California*, where the Supreme Court of California acknowledged that an exculpatory provision "may stand only if it does not involve 'the public interest,'"[81] and will be struck down when "contrary to public policy."[82]

This, of course, begs the question: What constitutes the public interest? [83] The *Tunkl* court offered a laundry list of factors, including that the party seeking the waiver "holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards." The *Tunkl* court concluded that the hospital-patient contract at issue there was within the class of contracts that affect public interest.[84] Years later, relying on *Tunkl*, a California court did not hesitate to conclude that an exculpatory clause, as part of a transaction providing managed health care, also affects the public interest.[85]

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[75] Mike Shoro, *Restaurant, Fearing Coronavirus Lawsuit, Creates Liability Waiver*, LAS VEGAS REV.-J. (May 12, 2020, 6:48 PM), https://www.reviewjournal.com/business/restaurant-fearing-coronavirus-lawsuit-creates-liability-waiver-2026613/.

[76] Dana Hunsinger Benbow, *Mani, Pedi, Liability Waiver: Salons look very Different as they Reopen Amid Pandemic*, INDIANAPOLIS STAR (May 15, 2020, 6:12 PM), https://www.indystar.com/story/news/2020/05/15/salons-reopen-new-rules-and-restrictions-amid-coronavirus/5187527002/.

[77] In re: Emergency Order Related to Coronavirus (Covid-19), No. 2020-AD-00001-SCT (Miss. May 14, 2020).

[78] *Coronavirus Live Updates: Trump Rally Attendees Cannot Sue if They Get Covid-19, Campaign Says*, N.Y. TIMES (June 11, 2020, 7:44 PM), https://www.nytimes.com/2020/06/11/world/coronavirus-live-updates.html.

[79] RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981). Such a term is unenforceable on public policy grounds if:

(a) the term exempts an employer from liability to an employee for injury in the course of his employment;

(b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty, or

(c) the other party is similarly a member of a class protected against the class to which the first party belongs.

As of June 25, 2020 only eight reported cases have cited this section of the Restatement.

[80] Ryan Martins et. al., *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265, 1268 (2020).

[81] Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 443 (Cal. 1963).

[82] *Id.* at 444.

[83] *Id.* (reasoning that court must "ascertain those factors or characteristics which constitute that public interest").

[84] *Id.* at 447.

[85] Health Net of California, Inc. v. Dep't of Health Servs., 6 Cal. Rptr. 3d 235, 245 (2003).

Some courts, however, have "simply rejected *Tunkl* and its offspring."[86] In general, the "broad anticontract reading of *Tunkl* . . . to limit the scope of acceptable negligence waivers has not been realized."[87] In 2015, the Supreme Court of Florida "followed the pro-contract trend"[88] and held that a pre-injury exculpatory clause, although it lacked express language releasing a party of liability for its own negligence, was enforceable to bar a negligence action.[89] Thus, perhaps consistent with a move toward privatization generally, courts have begun to give such waivers greater force, a position advocated by the Restatement (Third) of Torts: "When permitted by contract law, a contract . . . absolving [a] person from liability for future harm bars the plaintiff's recovery from that person for the harm."[90]

COVID waivers may have real bite if they appear in adhesion contracts and are coupled with an arbitration clause and/or class-action-lawsuit waiver.[91] Adhesion contracts are presumptively enforceable without bargaining (or even reading[92]), and the Supreme Court has expressed a strong preference for arbitration clauses and class-action waivers.[93] In aggregate, these could be analogous to imposing waivers by fiat, as President Trump did in the meat-processing industry, because the promisee would benefit from terms that the party granting the release would not have negotiated or understood, ex ante, and would have virtually no ability to challenge, ex post.

But the use of arbitration and class-action waivers should not change the analysis. Notwithstanding a strong federal policy in favor of arbitration, courts should determine whether such terms violate public policy. Contract terms in violation of public policy are generally

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[86] Ryan Martins et. al., *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265, 1291 (2020).

[87] *Id.* at 1292-93.

[88] *Id.* at 1297.

[89] Sanislo v. Give Kids the World, Inc., 157 So. 3d 256, 260 (Fla. 2015).

[90] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 (2000); *see* Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481, 487 (2002).

[91] Adhesion contracts are "standard-form contract[s] prepared by one party, to be signed by another party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms." *Adhesion Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[92] *See, e.g.,* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). *Compare* Stewart Macaulay, *Private Legislation and the Duty to Read--Business Run by IBM Machine, The Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966).

[93] The Federal Arbitration Act provides that "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has held that terms in such agreements waiving the right to arbitrate on a class basis are enforceable. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011). The Federal Arbitration Act was, according to the Court, enacted in part to express a public policy favoring arbitration to end "the judicial hostility towards arbitration that ... had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy". *Id.* at 342. The Court has held that the FAA will preempt state law which treats arbitration clauses as unenforceable on grounds of public policy. Kindred Nursing Centers L. P. v. Clark, 137 S. Ct. 1421 (2017); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532 (2012) *rev'g* Brown v. Genesis Healthcare Corp., —— S.E.2d ——, No. 35494, 2011 WL 2611327 (W.Va., June 29, 2011).

unenforceable across a range of doctrinal categories and factual settings, and arbitration clauses and class-action waivers should be no exception. Indeed, aggregate litigation may be especially important in challenging problematic transmissions of COVID because "super-spreader" events may infect large numbers of individuals. The unconstrained and essentially unilateral use of such waivers might violate public policy because asymptomatic transmission is a plausible threat to public health.

2.2 *Contracts and Health-Safety Precautions*

But market actors understandably want the certainty that a waiver provides, so the answer is not to declare them per se unenforceable, any more than is the equal and opposite move to impose them by executive order. Rather, courts should enforce such waivers if the promisee shows that it took reasonable health-safety precautions.

Because government has made a mess of this, however, a promisee should make this showing through health-safety commitments in its contracting practices, internally and externally. Among other things, this would have the virtues of aligning incentives, tailoring precautions, and standardizing conduct through networks that may cross national borders.

2.2.1 *Internal Rules—Workplace Safety and the At-will Employment Contract*

Internally, the key question will often involve health-safety rules in the workplace. In addition to, or in lieu of, government intervention market actors are likely to try to implement health-safety precautions through the implied-in-fact contract that forms the basis for many employer-employee relationships.

Employees in the United States presumptively work "at-will," meaning employer and employee are free to terminate their relationship at any point.[94] Many worry that employment at-will ensures that "the employee's relation to the enterprise would be precarious," in Jay Feinman's words.[95] This doctrine instantiates a power-imbalance that many decry, but few have had the political will to change. Employers who take health-safety seriously can use their market power over employees to induce health-safety precautions that are better than those suggested or required by government.

As with tort waivers, "public policy" plays an important role in judicial assessments of at-will employment.[96] Terminating an employee for failing to follow health-safety precautions may offend public policy because the asymptomatic spread of COVID is, itself, a public health crisis. By a parity of reasoning, terminating an at-will employee for demanding reasonable health-safety precautions should also violate public policy.

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[94] The classic, but generally applicable, statement of the rule comes from Wood:

> With us the rule is inflexible that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a da even, but only at the rate fixed for whatever time the party may serve.

H.G. WOOD, MASTER AND SERVANT (1877).

[95] Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 133 (1976).

[96] McLaughlin v. Gastrointestinal Specialists, Inc., 750 A.2d 283, 284 (Pa. 2000).

That said, as a practical matter, courts rarely find that terminating an at-will employee violates public policy.[97] So the question becomes, Why would market actors ever choose to impose health-safety terms on employees? The answer may also be found in contract: in-bound terms which require the business to maintain health-safety standards more exacting than those prescribed by government.

2.2.2 *External Rules—Contracts as Networks*

Every business, no matter how small, will be party to contracts with external businesses. Those contracts may be formal and elaborate, or informal and simple. Each contract is an opportunity not only to exchange goods, services and capital, but also to introduce health-safety standards and practices that supplement or supplant those provided by government.

This may be most pronounced in network contracts, such as supply chain agreements (SCAs). In an SCA, buyer (B) purchases from seller (S); S is able to perform its contract with B because its suppliers, S2 and S3, perform, and so on through the chain. Buyers with sufficient market power, such as multinational corporations (MNCs), are able to use that leverage to embed standard terms in SCAs that are then transmitted through the chain. Michael Klausner has analogized the use of standardized contract terms throughout contracting groups to the relationship that exists in "network" industries, such as personal computer manufacturers.[98]

Market actors increasingly use network contracts to address problems of human rights, and social and environmental responsibility, in addition to problems of economic exchange.[99] A contract term may be considered "socially responsible" if "it is an element of an instrument that purports to be an enforceable contract and that seeks explicitly to achieve social, economic, or environmental goals through the performance of such terms."[100] General Motors-North America, for example, began in the 1990s to require that its suppliers (and sub-suppliers) agree not to use "child, slave, prisoner or any other form of forced or involuntary labor,"[101] and many companies have undertaken similar contracting practices with respect to environmental protection, human rights and so on.

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[97] *Id.* (finding that termination of at-will employee did not violate public policy because plaintiff referred "to no statute, constitutional premise, or decision . . . to support the proposition that federal administrative regulations, standing alone, can comprise the public policy of [Pennsylvania].").

[98] Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 762–63 (1995).

[99] *See* David V. Snyder & Susan A. Maslow, *Human Rights Protections in International Supply Chains-Protecting Workers and Managing Company Risk*, 73 BUS. LAW. 1093 (2018); Jennifer S. Martin, *Private Law Remedies, Human Rights, and Supply Contracts*, 68 AM. U. L. REV. 1781, 1782–83 (2019); Jonathan C. Lipson, *Something Else: Specific Relief for Breach of Human Rights Terms in Supply Chain Agreements*, 68 AM. U. L. REV. 1751, 1752 (2019) (discussing "new and potentially significant" use of supply chain agreements: "implementing human rights reforms.").

[100] Jonathan C. Lipson, *Promising Justice: Contract (As) Social Responsibility,* 2019 WIS. L. REV. 1109, 1116 (2019).

[101] This language derives from a term developed by General Motors. *See Anti-Slavery and Human Trafficking Statement*, GEN. MOTORS CO., https://www.gm.com/content/dam/company/archive/docs/legal/General_Motors_Company_Anti_Slavery_And_Human_Trafficking_Statement.pdf (last visited June 1, 2019) (emphasis omitted) ("Seller further represents that neither it nor any of its subcontractors, vendors, agents or other associated third parties will utilize child, slave, prisoner or any other form of forced or involuntary labor, or engage in abusive employment or corrupt business practices, in the supply of goods or provision of services under this Contract." (emphasis omitted)).

At first glance, these terms may seem puzzling. Why should multinational corporations care about the labor practices of their sellers (or sub-sellers)? So long as the goods or services conform to the contract, the MNC-buyer should be indifferent to the manner of production. Indeed, requiring sellers to improve their workers' lot might increase costs which would, in turn, be passed on to the buyer. What buyer wants to pay more for goods in order to better the lives of the seller's employees?

It turns out MNCs do care, for at least three reasons which apply by analogy to health-safety. First, social-responsibility terms can manage reputational risk. Perhaps the most notorious example of reputational concerns in this context arose from the 2013 Rana Plaza disaster in Bangladesh, where a building collapse killed 1133 garment workers.[102] Name-brand labels such as J.C. Penney and Zara were found in the wreckage.[103] This quickly led to reputational pressures which, in turn produced changes in supply-chain contracting practices in the ready-to-wear garment industry, through the Accord on Fire and Building Safety.[104]

The analogy to health-safety terms is straightforward. While no company wants to be legally liable for transmitting the spread of COVID—and may thus want liability waivers—no company wants to appear indifferent to it, either. Thus, Starbucks has announced that it "continues to put the health and safety of its partners (employees) and customers at the very centre of its recovery planning."[105] American Airlines' "clean commitment" touts the steps the carrier takes to assure that its planes do not transmit COVID.[106] Amazon's "top concern is ensuring the health and safety of our employees," and the consumer-products giant "expect[s] to invest approximately $4 billion through June on COVID-related initiatives getting products to customers and keeping

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[102] Gillian B. White, *What's Changed Since More than 1,110 People Died in Bangladesh's Factory Collapse?,* ATLANTIC: BUSINESS (May 3, 2017), https://www.theatlantic.com/business/archive/2017/05/rana-plaza-four-years-later/525252/ [https://perma.cc/PA4V-TGRB].

[103] Rahaman v. J.C. Penney Corp., No. N15C-07-174MMJ, 2016 WL 2616375, at *9 (Del. Super. May 4, 2016).

[104] The Rana Plaza disaster did lead to the creation of the Accord on Fire and Building Safety in Bangladesh. Accord on Fire and Building Safety in Bangladesh (May 13, 2013), http://www.laborrights.org/sites/default/files/publications-and-resources/Accord_on_Fire_and_Building_Safety_in_Bangladesh_2013-05-13.pdf [https://perma.cc/EMW4-5DUZ]. Although that has been characterized as an enforceable contract—and if so, would be an interesting example of KSR—it is in structure quite different from the facially bilateral contracts studied here because, among other things, the parties to it include both the buyers (brands) as well as trade unions and the International Labor Organization. *Id.* For a discussion of the Bangladesh Accord, see Jaakko Salminen, *The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?*, 66 AM. J. COMP. L. 411, 412 (2018).

[105] *Starbucks Response to COVID-19 Across EMEA: Prioritising the Health and Safety of Our Partners and Customers*, STARBUCKS COFFEE, https://stories.starbucks.com/emea/stories/2020/starbucks-emea-response-to-covid-19-prioritising-the-health-and-safety-of-our-partners-and-customers/ (last visited June 30, 2020).

[106] *Our Clean Commitment*, AMERICAN AIRLINES, https://www.aa.com/i18n/travel-info/travel-with-confidence.jsp?anchorLocation=HomePageHero1&reportedTitle=How%20we%27re%20committed%20to%20clean%20at%20every%20step.&reportedPosition=0&url=undefined&_locale=en_US&repositoryName=undefined&repositoryId=undefined (last visited June 30, 2020).

employees safe."[107] While we should always take these statements with a grain of salt, they are not necessarily false.

Second, because reputation is valuable and reputational harm is hard to quantify, contract can specify remedies for breach, which may be a concrete way to align incentives. In matters of social responsibility, parties may use conventional mechanisms such as indemnification, liquidated damages or even specific performance.[108] These stipulated remedies can overcome problems of calculation and capability that may be especially acute for courts asked to remedy a breach of promises involving social responsibility, as distinct from straight economic exchange.

Again, the analogy to COVID is straightforward. If a buyer worries that its suppliers will be caught spreading disease, and this discovery harms the buyer's reputation, the SCA can include a liquidated damages term that estimates the dollar value of the harm. While such estimates are not guaranteed to be enforceable or accurate—they must, after all, be "reasonable" approximations of actual damage—they can nevertheless reify the risk of loss in ways that catch the seller's attention.

Lisa Bernstein has also observed that network contracts may use "interior" remedies, systems within the contract to incentivize compliance without resorting to conventional remedies or contract termination.[109] If, for example, a buyer discovers a violation of its supplier code of conduct, it may not seek traditional contract remedies at all, but instead "develop and implement a corrective action plan."[110] Such plans bespeak a willingness to experiment and adapt that may be a distinct advantage of private ordering over government intervention, especially given rapid changes in infection rates and developments in thinking about how to address disease transmission.

Third, contract terms can "flow through" MNCs' networks, so they can standardize precautions throughout the supply chain. That is, B can require not only that S agrees to certain health-safety precautions, but also that S requires its suppliers and sub-suppliers to do the same.[111]

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[107] *Amazon's COVID-19 Blog: Daily Updates on How We're Responding to the Crisis*, AMAZON.COM (June 29, 2020), https://blog.aboutamazon.com/company-news/amazons-actions-to-help-employees-communities-and-customers-affected-by-covid-19.

[108] Jonathan C. Lipson, *Something Else: Specific Relief for Breach of Human Rights Terms in Supply Chain Agreements*, 68 AM. U. L. REV. 1751, 1754 (2019) (but specific relief is also problematic, especially under U.S. law, which tends to view it as "an extraordinary remedy never awarded as of right.") (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008)).

[109] *See, e.g.*, Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561, 571 (2015) (observing that most master supply agreements she studied "contain a self-help damage remedy that enables buyers to obtain some monetary compensation without ending a relationship," which she characterizes as "interior remedies").

[110] *Starbucks Disclosure in Compliance with California Transparency in Supply Chains Act of 2010 (SB 657)*, STARBUCKS, https://globalassets.starbucks.com/assets/2994ceff517a44aca17df6f1237c4c13.pdf [https://perma.cc/FJP9-G93H] (last visited June 30, 2020).

[111] David V. Snyder (chair), Susan A. Maslow (vice chair), *Human Rights Protections in International Supply Chains-Protecting Workers and Managing Company Risk 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply*, 73 BUS. LAW. 1093, 1098 (2018) ("each [supplier] Representative shall require each of its Representatives' compliance so that such obligations are required at each step of the supply chain.").

Notably, contract terms can cross legal borders. "Legal transplantation" usually studies the implications of imposing the public law of a developed nation on a developing nation. But Le-Wen Lin has begun to explore the ways in which contract can have similar effect.[112] Fabrizio Cafaggi has argued that "[t]ransnational commercial contracts have . . . become vehicles of implementation of public international regulation."[113] While there is no reason to expect market actors to have greater health-safety expertise than public officials, the uncertainty created by a fragmented public response may leave little choice but to use contract.

In short, because markets and market actors are deeply interconnected, there are both collective and individual benefits to introducing health-safety standards in network contracts. MNCs such as Apple[114] and Tesla[115] have reportedly modified their supply chain agreements and practices to do just this. They do so not exclusively to achieve social good—they are not philanthropies—but instead because such terms may prevent their supply chains from "snapping" due to COVID.[116] They may have no choice but to contractualize health-safety standards when government fails to provide them.

The goal, then, is to construct contracting portfolios that match incentives to take health-safety precautions with limitations of liability when things go awry. Waivers are carrots; precautions are sticks. Those who draft and negotiate contracts, as well as courts or arbitrators that review them in disputes, should enhance incentives to take these precautions by linking them explicitly. Together, they may address the COVID dilemma by reducing risks of liability, disease and the debilitating uncertainty that has come from politicizing COVID.

3. *Contracting and Economic Disruption—Standstill and Forbearance Agreements*

Contract can also play a pivotal role in more directly addressing the economic and commercial disruptions created by COVID through the use of standstill and forbearance agreements. Like liability waivers and health-safety terms, these agreements supplement or supplant the role of government, whether in the form of judicial intervention (e.g., contract litigation) or bailout (the CARES Act). And, like health-safety, the terms discussed in this Part can often provide greater certainty, and preserve more value, than can litigated outcomes.

3.1 *Contract, COVID and Courts*

The economic shutdown in response to COVID severely disrupted contractual ordering: almost all contracts were rendered in breach, or nearly so. Uncertainty about the duration of the shutdown, or what would come next—or when "next" would come—made it highly likely that

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[112] Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711, 743 (2009).

[113] Fabrizio Cafaggi, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, 36 FORDHAM INT'L L.J. 1557, 1564 (2013).

[114] APPLE, *Supplier Responsibility*, https://www.apple.com/supplier-responsibility/ (last visited June 11, 2020).

[115] TESLA, *Tesla Return to Work Playbook*, https://www.tesla.com/sites/default/files/blog_attachments/Tesla-Return-to-Work-Playbook.pdf (last visited June 11, 2020).

[116] Lizzie O'Leary, *The Supply Chain is Snapping*, ATLANTIC (Mar. 19, 2020), https://www.theatlantic.com/ideas/archive/2020/03/supply-chains-and-coronavirus/608329/.

whatever promises had been made would not be performed as expected, at least in the near term. In these cases, the promisee might seek to enforce the contract; and the promisor might wish to escape liability using doctrines such as *force majeure,* impossibility, commercial impracticability and frustration of purpose.[117]

In *E2W LLC v. Kidzania Operations*, for example, a franchisee invoked the *force majeure* clause in a franchise agreement, claiming that it could not lawfully operate its amusement park during the pandemic, and resulting government shutdown, and therefore could not make payments to Kidzania, the franchisor.[118] Not surprisingly, the franchisor took the position that the *force majeure* clause might excuse non-performance for governmental orders and acts of God, but that did not explain how COVID caused non-payment.[119] In May 2020, the United States District Judge declined to declare the agreement at an end, and instead ordered the parties to freeze the status quo and arbitrate, as provided in the agreement, itself.[120]

It is difficult to estimate the amount of COVID-induced contract litigation, in part because judicial operations have been scaled back and because parties may have taken a wait-and-see approach. Nevertheless, if the economy does not "roar back" as politicians hope,[121] it is reasonable to fear that contract breach litigation will continue to grow. A recent survey by law firm Morrison Foerster found that breach litigation was one of the top worries for corporate general counsels.[122]

But we must concede the futility of contract litigation in these conditions. Judicial responses are often poor and expensive substitutes for performance of the broken promises. The parties in *Kidzania* ended up exactly where they would have been but for litigation—minus the legal fees. And even if one party wins on the merits—for example, the *force majeure* clause does not excuse payment, as the franchisor argued in *Kidzania*[123]—what then? There is no reason to think that a losing defendant will simply wire payment or otherwise comply with the court's

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[117] *See, e.g.*, Pacific Collective LLC v. Exxonmobil Oil Corp., Complaint, No. 20STCV13294 (Cal. Sup. Ct. Filed Apr. 3, 2020) (real estate acquisition); E2W LLC v. Kidzania Operations S.A.R.L., No. 1:20-cv-02866 (S.D.N.Y. Filed Apr. 6, 2020) (franchise fees); Level 4 Yoga LLC v. CorePower Yoga LLC, No. 2020-0249- (Del. Ch. Filed Apr. 2, 2020) (acquisition); LFG Acquisitions LLC v. CSPS Hotel Inc., No. 107048560 (Fla. Cir. Ct. Hillsborough Cty. 2020) (real estate).

[118] Complaint at 15, E2W LLC v. Kidzania Operations S.A.R.L., No. 1:20-cv-02866 (S.D.N.Y. Filed Apr. 6, 2020).

[119] Defendant's Sur-Reply in Opposition to Plaintiff's Application for Preliminary Injunction, E2W LLC v. Kidzania Operations S.A.R.L., No. 1:20-cv-02866 (S.D.N.Y. Filed Apr. 6, 2020).

[120] Order, E2W LLC v. Kidzania Operations S.A.R.L., No. 1:20-cv-02866 (S.D.N.Y. Filed Apr. 6, 2020).

[121] David J. Lynch, *Trump Expects Quick Economic Comeback from Coronavirus, but China's Incomplete Recovery hints at long-lasting problems*, WASH. POST (Apr. 7, 2020, 10:51 AM), https://www.washingtonpost.com/business/2020/04/07/trump-china-economy-coronavirus/; On June 3, 2020, President Trump tweeted, "I feel more and more confident that our economic is in the early stages of coming back very strong." Donald Trump (@realDonaldTrump) TWITTER (June 3, 2020, 9:45 PM), https://twitter.com/realDonaldTrump/status/1268358305170296833.

[122] *Impact Survey: COVID-19 and Easing of Stay-at-Home Orders*, MORRISON FOERSTER (June 15, 2020), https://www.mofo.com/resources/insights/200615-impact-survey-easing-stay-orders.html?utm_source=other_publication&utm_medium=email.

[123] Defendant's Sur-Reply in Opposition to Plaintiff's Application for Preliminary Injunction, E2W LLC v. Kidzania Operations S.A.R.L., No. 1:20-cv-02866 (S.D.N.Y. Filed Apr. 6, 2020).

decision. In many cases, the breach may have been a failure to make timely payment because the debtor did not have the money in the first place. The judgment creditor and judgment debtor may play a game of hide and seek until either the creditor finds assets and recovers, or the debtor goes into bankruptcy.

3.2 *Contract, COVID, and Bankruptcy*

Bankruptcy, then, is an important part of any effort to understand how businesses adjust during COVID. Businesses can use chapter 11 of the Bankruptcy Code to "restructure" debt, rather than liquidate under chapter 7, which often involves quick sales that reduce recoveries for creditors and eliminate jobs. Although restructuring "has no single template," it "typically involves the refinancing and discharge of debt, sale of certain lines of business, entity reconfiguration, and changes in management and personnel and firm governance."[124]

Chapter 11 restructuring is considered preferable to chapter 7 liquidation because it can preserve going concern value and the jobs and potential profit that come with it. Although both chapter 7 liquidation and chapter 11 reorganization are subject to judicial supervision, the latter is intended to be a consensual process, an "invitation to a negotiation."[125] If the debtor is unable to develop a "plan" by which it will reorganize acceptable to most creditors, it will have to liquidate—a result that most stakeholders in most debtors wish to avoid.

COVID has increased pressure to use bankruptcy. Commercial chapter 11 bankruptcies increased 14 percent in the first quarter of 2020 compared to the first quarter of 2019.[126] In May 2020, the number of companies filing for chapter 11 bankruptcies continued to rise with a 48 percent increase compared to May 2019.[127] Even high-profile businesses have been subject to chapter 11 filings due to COVID-induced economic harm. J.Crew became the first major U.S. retailer to succumb, filing for chapter 11 on May 4, 2020;[128] Gold's Gym filed for chapter 11 bankruptcy on May 4, 2020 due to coronavirus lockdowns;[129] and Neiman Marcus filed on May

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[124] Kathleen G. Noonan, et al., *Reforming Institutions: The Judicial Function in Bankruptcy and Public Law Litigation*, 94 IND. L.J. 545, 548 (2019).

[125] *See* In re Arnold, 471 B.R. 578, 592 (Bankr. C.D. Cal. 2012) (quoting Elizabeth Warren & Jay Westbrook, *The Law of Debtors and Creditors* 397 (6th ed. 2009)).

[126] *Commercial Chapter 11 Bankruptcies Increase 14 Percent in the First Quarter of 2020, Total filings down 5 Percent before COVID-19 Financial Distress Fully Reflected in Filings*, AM. BANKR. INST. (Apr. 6, 2020), https://www.abi.org/newsroom/press-releases/commercial-chapter-11-bankruptcies-increase-14-percent-in-the-first-quarter.

[127] Khristopher J. Brooks, *Bracing for the Next Phase of the Coronavirus Recession: Bankruptcies*, CBS NEWS (June 9, 2020, 3:30 PM), https://www.cbsnews.com/news/bankruptcy-coronavirus-recession-2020/.

[128] *Our Announcement*, J.CREW, https://jcrewgrouprestructuring.com/our-announcement/ (last visited June 24, 2020).

[129] *Information about the Gold's Gym Chapter 11 Restructuring*, GOLD'S GYM, https://www.goldsgym.com/restructure/ (last visited June 24, 2020).

7, 2020 due to financial struggles caused by COVID shutdowns.[130] The Hertz car rental company may be the largest and most notable of the chapter 11 filings thus far.[131]

Although chapter 11 is a negotiated process, it still depends on courts, and judicial resources are likely to be taxed heavily as a result of the pandemic.[132] While bankruptcy can cast a broader remedial net than traditional civil litigation—the bankruptcy stay and estate are collectivizing mechanisms that can force all of a debtor's stakeholders to adjust—it remains an expensive approach, one that may be out of reach for many small and medium-sized firms, even as Congress sought to make chapter 11 more attractive for such businesses shortly before COVID.[133] Even large businesses may resist. Brian Summers, CEO of United Airlines, which has already been through chapter 11 once, has declared that "we are not going to file for bankruptcy [because] . . . it's worse for shareholders, for creditors, for employees. It's worse for every constituent that we have."[134]

3.3 *Contract, COVID, and Bailout*

To say that bankruptcy is "worse" than something is to invite a comparison. Chapter 11 may be bad, but it is almost surely better than shutting United Airlines down via a chapter 7 liquidation. Those are not the only options, however. Chapter 11 may not be as good as a bailout, which is what Congress has so far delivered to businesses and individuals alike, chiefly in the CARES Act and Payroll Protection Program (PPP).

Bailouts are not axiomatically problematic—interest rates are low and there isn't much alternative in the near term—but government subsidies offer little in the way of certainty. They may temporarily enable some recipients to pay some bills, but that will last only as long as Congress and the President remain ready, willing and able to borrow and spend more. With a politically divided Congress—and a federal deficit likely to exceed 18% of GDP[135]—it is difficult

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[130] *Neiman Marcus Group Enters into a Restructuring Support Agreement with a Significant Majority of its Creditors to Substantially Reduce Debt and Position the Company for long-term Growth*, Neiman Marcus Group, http://neiman.gcs-web.com/static-files/2749e148-82d3-42d5-976e-f8fe331b4866 (last visited June 24, 2020).

[131] Chapter 11 Voluntary Petition, In re The Hertz Corp., Case No. 20-11218 (Bankr. D. Del. May 22, 2020).

[132] Benjamin Iverson, et al., *Estimating the Need for Additional Bankruptcy Judges in Light of the COVID-19 Pandemic*, Forthcoming 11 HBLR (2020). The Judiciary asked Congress for $36.6 million in supplemental funding and legislative reforms to help federal courts respond to COVID. Letter from John W. Lungstrum, Chair, Committee on the Budget & James C. Duff, Secretary to Honorable Nita Lowey, Chairwomen, et al., leaders of the House and Senate Appropriations Committees (Apr. 28, 2020), https://www.uscourts.gov/sites/default/files/judiciary_covid-19_supplemental_request_to_house_and_senate_judiciary_and_approps_committees.4.28.2020_0.pdf.

[133] Small Business Reorganization Act of 2019 H.R. 331, 116th Cong. (2019). Section 1113 of Coronavirus Aid, Relief and Economic Security Act, S. 3548, 116th Cong. (2020) at Sec. 4003(a) amends this Act by increasing the debt limit to $7.5 million.

[134] Brian Sumers, *New United Airlines CEO Says No To Bankruptcy and Mandating Blocked Middle Seats*, YAHOO FINANCE (May 28, 2020), https://finance.yahoo.com/news/united-airlines-ceo-says-no-212639883.html.

[135] David Wessel, *How Worried Should You Be About the Federal Deficit and Debt*, BROOKINGS (July 8, 2020) (citing Congressional Budget Office, *An Update to the Budget and Economic Outlook: 2019-2029* (Aug. 2019), https://www.brookings.edu/policy2020/votervital/how-worried-should-you-be-about-the-federal-deficit-and-debt/. The Congressional Budget Office estimated that the federal budget deficit was $2.7 trillion in the first nine months of

to predict how much, or for how long, federal funds will flow. Bailouts are at best a brief and incomplete fix.

One might think that President Trump would want to encourage parties to renegotiate their contracts in bankruptcy. His casinos did so in chapter 11 a record four times.[136] But that is not how the bail out works in practice. The Small Business Administration (SBA), which runs the PPP, has taken the position that companies restructuring under chapter 11 are ineligible to borrow under this program,[137] even though neither the statutory nor regulatory criteria create this limitation.[138] The SBA has stated that companies in bankruptcy cannot apply for PPP funds under the CARES Act because the Bankruptcy Code "does not require any person to make a loan or a financial accommodation to a debtor in bankruptcy."[139] The SBA based this opinion upon a determination that "providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans."[140]

Although not a politicized decision, here too we see government making things worse, not better. The SBA's position is irrational. Corporate debtors in a chapter 11 case understandably need to finance their operations, which can require them to borrow more, which they can do pursuant to section 364 of the Bankruptcy Code.[141] Chapter 11 debtors can only borrow while in chapter 11 under this provision, and this provision creates a significant amount of oversight authority in, among others, bankruptcy judges and creditors. In other words, chapter 11 borrowing is likely to be less risky than borrowing outside of bankruptcy.

In any case, the whole point of the PPP program is to help businesses that are in financial trouble. Being under judicial supervision should hardly be a disqualifier. The SBA's position is thus surprising because it was assumed PPP lending to chapter 11 debtors would advance the

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fiscal year 2020, $2.0 trillion more than the deficit recorded during the same period last year. Congressional Budget Office, *Monthly Budget Review for June 2020,* July 8, 2020, available at https://www.cbo.gov/publication/56458.

[136] Three times under his command. The casinos owned and operated by President Trump appear to hold the record for repeat filings, with four sets of Chapter 11 cases, in 1991–92, 2004, 2009, and 2014, respectively. *See* Jonathan C. Lipson, *Making America Worse: Jobs and Money at Trump Casinos, 1997-2010* (Temple University Beasley School of Law, Working Paper No. 2016-47, 2016) (empirical study of employment and revenue patterns at Atlantic City casinos in connection with Trump casino bankruptcies).

[137] Dykema Gossett, *Are Debtors Eligible to Receive PPP Loans? Bankrupt Companies and the SBA Wage War over Critical CARES Act Program Eligibility*, LEXOLOGY (May 5, 2020), https://www.lexology.com/library/detail.aspx?g=2d07536f-467d-46d5-9be6-89cd6043d1da.

[138] *See* Coronavirus Aid, Relief and Economic Security Act, S. 3548, 116th Cong. (2020) at Sec. 4003(a). The SBA believes in order to obtain a PPP loan a company must meet the requirements of section 7(a) and this cannot be done if a borrower is a debtor in a bankruptcy proceeding. [138] Dykema Gossett, *Are Debtors Eligible to Receive PPP Loans? Bankrupt Companies and the SBA Wage War over Critical CARES Act Program Eligibility*, LEXOLOGY (May 5, 2020), https://www.lexology.com/library/detail.aspx?g=2d07536f-467d-46d5-9be6-89cd6043d1da.

[139] Interim Final Rule, 13 CFR120 and 121, RIN 3245-AH37.

[140] The SBA stated, in its Interim Final Rule issued on April 24, 2020, that "[i]f the applicant . . . is the debtor in a bankruptcy proceeding, either at the time it submits the applications or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan." *Id.*

[141] 11 U.S.C. § 364.

CARES Act's broad remedial goals.[142] The SBA has, however, refused, which has become the subject of litigation in chapter 11 cases, thus increasing the uncertainty of this path. Courts have gone different ways. Some have deferred to the SBA's decision.[143] One held that special provisions in the Bankruptcy Code precluded discrimination against debtors apply here, which unsurprisingly led to an appeal.[144]

Although both chapter 11 reorganization and bailouts are important parts of the commercial response to COVID, both have important limits, in some cases self-imposed. Chapter 11 is expensive, and the CARES Act bailout may deter companies from using it. In any case, both suffer from uncertainties that may make economic recovery more difficult.

If neither judicial nor government intervention fully address the contracting crisis induced by the COVID shutdown, what remains? More private ordering. An important and under-appreciated solution to commercial challenges created by COVID will involve extra-judicial renegotiation through a second-order agreement known as a "standstill" or "forbearance" agreement.[145]

3.4 *Standing Still*

In a standstill, two contract parties (broadly speaking, a debtor and creditor) recognize that the debtor is or soon may be in breach.[146] The creditor could commence suit, and the debtor may or may not have a viable defense (e.g., *force majeure*). For a range of reasons, the parties may nevertheless prefer to refrain from taking action that would severely damage the relationship. In the case of the creditor, that action may be commencing a lawsuit or exercising certain self-help remedies (e.g., foreclosure under Article 9 of the Uniform Commercial Code). In the case of the debtor, that action may be conveying all assets to a trusted relative or off-shore entity, out of the creditor's reach.

A standstill can help address these concerns. Under such agreements, both parties refrain

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[142] *See* Danielle Mashburn-Myrick & Patrick M. Shelby, *SBA: No, Bankrupt Companies are not Eligible to Receive PPP Loans*, PHELPS (April 28, 2020), https://www.phelps.com/sba-no-bankrupt-companies-are-not-eligible-to-receive-ppp-loans-4-28-2020.

[143] *See, e.g.*, Bench Ruling Cosi, Inc. v. Small Bus. Admin., Bankr. D. Del., No. 1:20-ap-50591 (Apr. 30, 2020).

[144] In re Hidalgo County Emergency Service Foundation, Case No. 19-20497, Adv. P. No. 20-2006 (Bankr. S.D. Tex. 2020). In *Hidalgo*, the judge applied section 525(a) of the Bankruptcy Code, which says a government unit cannot "deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . a person that is or has been a debtor under this title . . . solely because such bankrupt or debtor is or has been a debtor under this title." 11 U.S.C. § 525. On appeal, the Fifth Circuit "found one issue dispositive: under 15 U.S.C. § 634(b)(1), injunctions directed toward the SBA are absolutely prohibited." John T. Baxter, *The Fifth Circuit Sides with SBA on PPP Loan Issue, Dealing Blow to Debtors*, NELSON MULLINS (June 29, 2020), https://www.nelsonmullins.com/idea_exchange/blogs/the_bankruptcy_protector/bankruptcy-rules/the-fifth-circuit-sides-with-sba-on-ppp-loan-issue-dealing-blow-to-debtors.

[145] The nomenclature of local cultures of practice seem to recognize a difference between a "standstill" and "forbearance" agreement. The former is more often associated with hostile takeovers of corporations, while the latter is more often associated with debt default and work out. *Compare* Brian K. Kidd, *The Need for Stricter Scrutiny: Application of the Revlon Standard to the Use of Standstill Agreements*, 24 CARDOZO L. REV. 2517, 2522 (2003), *with* 42 No. 4 UCC L. J.

[146] RESTATEMENT (SECOND) OF CONTRACTS § 71(3)(b).

from exercising legal rights that they may otherwise have, in the hope that the relationship may be adjusted or that conditions will otherwise improve. Under a model recently published by the American Bar Association (ABA) that has attracted attention, the creditor agrees to take no "legal action" during the agreed standstill period, which would include commencing a law suit or exercising self-help rights, while the debtor agrees not to sell its assets outside the ordinary course of business or otherwise fundamentally change its structure so as to disturb the creditor's basic expectations.[147]

In all but a small number of cases, standstills are likely to be better for the parties than any form of judicial intervention, whether litigation or bankruptcy. Either of those paths is likely to be costly in terms of professional fees and managerial energy. While reorganization under chapter 11 may preserve some relationships, it will terminate others. Straight contract litigation is likely to kill most relationships. In that case, the parties will be faced with equally difficult decisions, such as whether to switch to other contract counterparts or simply to do without. Switching costs are often high, and the uncertainties of the pandemic would seem to exacerbate that. Establishing new relationships in a pandemic may be fraught because the parties may have had little pre-pandemic experience with one another, and little reference for how to assess performance going forward, due both to the inherent uncertainty of the situation and the fact that most market actors and their relationships are strained.

At the same time, standstills may support efforts to obtaining new financing, whether from the government or privately. As noted above, the SBA will not approve lending to companies in chapter 11 and significant litigation may pose even greater risks to private lenders. It will almost certainly be better for a firm to tell a new investor or lender that it is not in default with its major contract counterparts. The fact that it is has entered into a standstill may signal a collaborative capacity and cautious optimism to new sources of capital, which may be a credible source of comfort.

Moreover, because the economic shutdown may be comparatively brief, severing relationships could be doubly costly. As the economy improves, businesses will want to scale back up. The relationships that soured due to litigation in the pandemic may be difficult to resuscitate as the economy improves.

As with health-safety waivers, a key doctrinal question about standstill or forbearance agreements is whether they violate public policy. Bankruptcy courts have stated that "[p]erhaps the most compelling reason for enforcement of a forbearance agreement is to further the public policy in favor of encouraging out of court restructuring and settlements."[148] While it is "against public policy for a debtor to waive the pre-petition protection of the Bankruptcy Code,"[149] waivers

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[147] Jonathan C. Lipson & Norman M. Powell, *Don't Just Do Something—Stand There! A Modest Proposal for a Model Standstill/Tolling Agreement*, BUS. L. TODAY (Apr. 14, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/04/standstill-tolling/. This model was viewed over 3700 in its first three months on the internet. *See* email Jul. 20, 2020, 12:17 PM from Richard Paszkiet, American Bar Ass'n, to author. The ABA does not record the number of times the model was downloaded.

[148] In re Cheeks, 167 B.R. 817, 819 (Bankr. D.S.C. 1994). *See also* In re DB Capital Holdings, LLC, 454 B.R. 804, 814 (Bankr. D. Colo. 2011)(approving stay waiver).

[149] In re Huang, 275 F.3d 1173, 1177 (9th Cir.2002).

of specific protections (such as the automatic stay of foreclosure) may be permissible, again on a public policy analysis. Similarly, in the context of contests for control of publicly-traded corporations, standstill agreements that would eliminate voting rights of shareholders may violate public policy.[150]

The public effects of standstills are straightforward. They can reduce the confusion and uncertainty of the current crisis and the levels of judicial or government intervention. Unlike the Great Recession of 2007-2008,[151] there is reason to believe that the economy was basically sound until the pandemic hit.[152] This heightens uncertainty because terminating otherwise productive commercial relationships through litigation may be shortsighted if the economy recovers as quickly as some hope or expect. As noted above, the economic effects of the 1918-19 pandemic were fairly brief, and the same may be true today. That said, subsequent waves of COVID may require further lockdowns, with concomitant economic fallout.

Standstills produce certainty in the way that contract often does: they align incentives because the parties themselves are in the best position to know what they need from one another as well as their respective time horizons and risk-tolerances. When all market actors experience severe uncertainty, they should want to create space and time within which to learn more and to adjust their relationship as the situation becomes more clear. David Dreisen has observed that contract law "manages change over time,"[153] and this would seem to be especially important in times of pandemic and severe commercial disruption. Contract does not cure the underlying disease, but it can buy the parties time, which may be the best they can do to address the COVID dilemma.

4 *Implications: Contract as Private Order and Public Good*

Parties will agree into liability waivers, health-safety precautions, or standstills because they believe it is in their interest to do so. From this, many contracts scholars would then infer that these are simply examples of "private ordering," and thus an expression of "private law." But this would trade on an artificial distinction between public and private that has never been effectively addressed in contract theory, and which has led us to ignore the public role that contract can play.

The claim in this Part is that the foregoing examples bespeak the use of contract to achieve public good in ways that challenge dominant theoretical conceptions of contract as "private" or even "social" order. It is no accident that doctrinal assessments of waivers, standstills, and the

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[150] Steven A. Baronoff, *The Standstill Agreement: A Case of Illegal Vote Selling and A Breach of Fiduciary Duty*, 93 YALE L.J. 1093, 1099 (1984) ("restrictive voting provisions of typical standstill agreements violate public policy").

[151] *See* Matthew O'Brien, *How the Fed Let the World Blow Up in 2008*, ATLANTIC (Feb. 26, 2014), https://www.theatlantic.com/business/archive/2014/02/how-the-fed-let-the-world-blow-up-in-2008/284054/; Ron Rimkus, *The Financial Crisis of 2008*, CFA INSTITUTE (Aug. 17, 2016), https://www.econcrises.org/2016/08/17/the-financial-crisis-of-2008/.

[152] *See* Paul Davidson, *How Quickly can the Economy Bounce Back from the Coronavirus?*, USA TODAY (Apr. 1, 2020, 1:57 PM), https://www.usatoday.com/story/money/2020/03/31/coronavirus-how-quickly-can-economy-bounce-back-crisis/5090355002/.

[153] David M. Driesen, *Contract Law's Inefficiency*, 6 VA. L. & BUS. REV. 301, 302 (2011).

like, turn on questions of "public policy." Here, contract is achieving public good in the face of a government that cannot.

4.1 *Contract as Private Order—The Dominant Theories*

The idea that contract creates "private order" and "private law" is deeply rooted. Lon Fuller, one of the most influential contract theorists of the 20th Century stated matter-of-factly that "[a]mong the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy."[154] Williston would have agreed, having noted that "it was a corollary of the philosophy of freedom and individualism that the law ought to extend the sphere and enforce the obligation of contract."[155] Contract is, simply put, "private ordering."

But what does that even mean? In part, it means, as James Henderson observes, that contract "grants legal powers primarily to nongovernmental actors to . . . create private law by which to govern their interactions."[156] It is a mechanism by which private individuals[157] can develop plans about future undertakings and conditions through the exchange of promises, performances, or both. Its "dyadic" character[158]—buyer and seller; debtor and creditor—implies a zone of privacy constructed by the parties, which stands distinct from, and perhaps opposed to, the outside world. That outside world may be characterized as "social" or "public," but it is conceptually "other," different from the hermetically-sealed world of contract.[159]

In this way, contract instantiates the private half of the "public-private" distinction in law. William Novak has observed that this distinction "is one of the great dichotomies in Western jurisprudence and politics."[160] Often, it is made to advance a political agenda, or a claim about the allocation of rights and resources. "According to one school," Novak observes, "the key to American history is the supremacy of the private in American life—the predominance of private

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[154] Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806 (1941). Duncan Kennedy has observed that Fuller's "principle of private autonomy' [was] first among equals" of the possible justifications for a regime of private promissory ordering. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, 100 COLUM. L. REV. 94 (2000).

[155] Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 367 (1921).

[156] James A. Henderson, Jr., *Contract's Constitutive Core: Solving Problems by Making Deals*, 2012 U. ILL. L. REV. 89, 93 (2012) (citing ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 2 (2004) (stating that deal makers create "private law").

[157] I exclude for these purposes government contracting. Although that will be important to addressing the crisis, it is sufficiently distinct in dynamics that introducing here would clutter and detain the analysis. *See, e.g.*, Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2200 (2013) (arguing that there are "systematic biases" in public-private contracts that result in "low-quality" service due to the limited competitive market using prison contracts as an example).

[158] *See, e.g.,* Alan Schwartz & Robert E. Scott, *Third-Party Beneficiaries and Contractual Networks*, 7 J. LEGAL ANALYSIS 325, 325 (2015) ("contract is dyadic: it has two parties").

[159] *See* Robert W. Gordon, *"Critical Legal Histories Revisited": A Response*, 37 LAW & SOC. INQUIRY 200, 208 (2012) (observing that, historically "contract (private voluntarily assumed obligation) comes gradually to be separated from tort and quasi-contract (state-imposed obligation), as the "private" sphere of "the market" comes to be distinguished from the "public" sphere of state "regulation").

[160] William J. Novak, *Public-Private Governance: A Historical Introduction,* in GOVERNMENT BY CONTRACT, 23, 25 (Jody Freeman, Martha Mino weds. 2009).

property, individual rights, private interests, civil society, and market forces. In this classical liberal model, the private sphere is the motor of American history, the reason for American prosperity, and the raison d'etre of the American state."[161] An alternative, and perhaps equally powerful, claim is that "the dominant theme of American history . . . is the never-ending struggle to protect the public from powerful and resilient private interests."[162]

Either way, the public-private distinction became "the dominant principle for organizing legal doctrines, from the great principles of constitutional limits on the police power to the minutiae of private-law doctrine (the difference between contracts implied "in law" and "in fact"), in the late-nineteenth century."[163] Although contracts scholars have occasionally called this dichotomy into question, that position is a small minority.[164]

Rather, the dominant theoretical frameworks assume with little analysis that contract is "private," and that private ordering means something quite different from public ordering. Most contemporary contracts scholars subscribe to some form of utilitarian theory of contract, often economic in nature.[165] To the economically-minded, contract law "should facilitate the efforts of contracting parties to maximize the joint gains (the 'contractual surplus') from transactions . . . [and] *nothing else*."[166] This imagines "atomistic contracting agents engaging in maximizing behavior that generally has no significant impact on third parties."[167] The economic analysis of contract rarely considers its public dimensions.

The alternatives to utilitarianism, again broadly speaking, are often "deontological" theories,[168] where the "private" receives its strongest embrace. Charles Fried's famous claim that

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[161] *Id.* at 26.

[162] *Id.*

[163] Robert W. Gordon, *"Critical Legal Histories Revisited": A Response*, 37 LAW & SOC. INQUIRY 200, 207 (2012).

[164] *See, e.g.,* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 616 (1982) ("[W]e no longer have a viable conception of what distinguishes the public from the private.").

[165] "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness." Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 11-12 (J. H. Burns & H. L. A. Hart eds., University of London The Athlone Press 1970) (1780). "Utilitarianism is one of the most powerful and persuasive approaches to normative ethics in the history of philosophy." Julia Driver, The History of Utilitarianism, The Stanford Encyclopedia of Philosophy (Sept. 22, 2014), available at https://plato.stanford.edu/entries/utilitarianism-history/

[166] Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544 (2003); *See also* Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 832 ("Contracts scholars usually assume that individuals do not have preferences regarding the consumption or well-being of other individuals, nor regarding contract doctrine itself—there is not preference for expectation damages, for example. The standard approach assumes that the parties enter a contract in order to secure investment in a jointly beneficial project.").

[167] Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 758 (1995).

[168] Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. 761, 768 (2013). "The word deontology derives from the Greek words for duty (*deon*) and science (or study) of (*logos*). In contemporary moral philosophy, deontology is one of those kinds of normative theories regarding which choices are morally required, forbidden, or permitted."

contract is best understood as "promise," for example, is not coherent without the "first principle" that individuals enjoy freedom from the exploitation of others—unless that exploitation is freely chosen.[169] "Only other persons"—as distinct from material things in the world—"are not available to us," Fried proclaimed.[170] "To use them as if they were merely part of external nature is to poison the source of the moral power we enjoy."[171] Yet, the need to rely on others, to "freely serve each others' purposes," has compelled us to develop mechanisms by which we could trust one another. "The device that gives trust its sharpest, most palpable form is promise."[172] Trust through enforceable promising is the "moral basis of contract law," deontologists like Fried argue, because in a just system "persons may impose [obligations] on themselves . . . where none existed before."[173]

4.2 *Contract as Public Law—the Depression-era Realignment?*

Although utilitarian and moral theories view contract as creating a distinctly private sphere, contract is not and has not always been so limited. A group of Realist writers during and around the Depression of the 1930s questioned the classical view, arguing instead that contract should be understood as a branch of public law itself.

Perhaps the leading claim of this form was made by Morris Cohen in his 1933 Harvard Law Review article, *The Basis of Contract*.[174] Although Cohen admitted that many private theories of contract had deep roots in history and in religion—and remained vital even then—contract could in a large and complex economy no longer be understood in purely private terms, but rather as a "subsidiary branch of public law."[175]

Cohen went further than simply arguing that contract recruited government in service of ex

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Larry Alexander & Michael Moore, Deontological Ethics, The Stanford Encyclopedia of Philosophy (2016), available at https://plato.stanford.edu/entries/ethics-deontological/.

[169] CHARLES FRIED, CONTRACT AS PROMISE 7 (1981).

[170] *Id.* at 8.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 1.

[174] Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933). Others in this vein included Louis Jaffe (Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 211 (1937) (arguing "our inherited state machinery [was] inadequate to determine the content which is currently demanded of law.") and Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923)..

[175] As he argued:

> The law of contract, then, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party. It thus grants a limited sovereignty to the former. In ancient times, indeed, this sovereignty was legally absolute. The creditor acquired dominion over the body of the debtor and could dispose of it as he pleased. But even now, when imprisonment for debt has been, for the most part, abolished, the ability to use the forces of the state to collect damages is still a real sovereign power and the one against whom it can be exercised is in that respect literally a subject. . . . From this point of view the law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction.

Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933).

post enforcement. It was also an ex ante mechanism to implement public power, conceiving of contract law—

> not only as a branch of public law but also as having a function somewhat parallel to that of the criminal law. Both serve to standardize conduct by penalizing departures from the legal norm. Not only by decrees of specific performance or by awards of damages, but also by treating certain contracts as void or voidable and thus withholding its support from those who do not conform to its prescribed forms, does the law of contract in fact impose penalties.[176]

Cohen concluded by introducing what we can now understand as an institutional view of contract, a recognition that contracts inherently and inevitably interact with larger social forces. Although "[c]ontracts are voluntary, fixed, and temporary," and "institutions are socially hereditary, grow, and last longer," contracts, "grow into institutions."[177]

Cohen's claim about the public nature of contract law—that it not only used public law, but also advanced it—was radical at the time, perhaps a response to severe economic disruption in the Depression. It has largely been abandoned because, as Brian Bix has observed, it was perhaps too obvious.[178]

Cohen's public vision of contract has had a mixed legacy. On one hand, as suggested above, it appears to have had little influence on modern writers. Its closest kin are relationalists concerned with the social implications of contract, such as Macaulay,[179] MacNeil,[180] Bernstein,[181] an Ayres.[182] But even they tend to view the "social" as distinct from the "public." "Society" is groupings of persons who share certain common extralegal traits, such as religion;[183] an

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[176] Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 589 (1933).

[177] Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 590 (1933) (citing HAURIOU, PRINCIPES DR DROIT PUBLIC A L'USAGE DES ETUDIANTS EN LICENCE ET AN DOCTORAT ES SCIENCES POLITIQUES, 196-219 (2d ed. 1916)).

[178] Brian H. Bix, *Contract Law and the Common Good*, 9 WM. & MARY BUS. L. REV. 373, 388 (2018) ("Morris Cohen's connection in his earlier article between Contract Law and the public interest seems equally obvious, and perhaps ignored in a similar way *because* of its salience.").

[179] *See* Stewart Macaulay, *The Impact of Contract Law on the Economy: Less Than Meets the Eye?*, Paper given at a Conference on Law and Modernization, Lima Peru (July 1994), available at https://law.wisc.edu/facstaff/macaulay/papers/impact_of_contract_law.pdf ("The legal system . . . supplied a synthetic community based on rights and duties enforced by courts. We can risk acting cooperatively because the law will discipline those who act opportunistically.").

[180] Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 879 (2000)(discussing the "social matrix" of contract).

[181] Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 59–60 (1993) (noting the centrality of social norms in transactional settings and that not all transactions are "discrete").

[182] Ian Ayres & Gregory Klass, *One-Legged Contracting*, 133 HARV. L. REV. F. 1, 12 (2019) (noting that decisions regarding "whether and when to enforce boilerplate text can impact social welfare").

[183] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (Jewish diamond merchants).

industry;[184] or race or sexual preference.[185] The public, by contrast, is everyone. And the only institution that ordinarily shapes the conduct of everyone is government—which, as we have seen, has failed to deliver in COVID.

On the other hand, Depression-era legislation and adjudication fundamentally altered our understanding of the relationship between private order and public good, and appeared in effect to implement or compliment Cohen's claim. In the sphere of corporate law alone, for example, Congress significantly encroached on private order through, among others, the Securities Act of 1933;[186] the Securities Exchange Act of 1934;[187] Section 77B of the Bankruptcy Act[188] and Chapter X of the Chandler Act (the precursors to chapter 11 of the Bankruptcy Code);[189] the Trust Indenture Act of 1939;[190] and the Investment Company Act of 1940.[191] In assessing the legacy of Depression-era legislation over commodities contracts, Roberta Romano has observed that "[i]t took the Great Depression to introduce" major change in regulation, which came as part of a "broad scale intervention of government into all sectors of the economy."[192] These and similar laws indicated a powerful effort by the federal government to adjust the balance of power in certain classes of contracts.[193]

Although initially challenged on substantive due process grounds, the Court ultimately sustained these laws, in part by deciding to rethink its view of the public-private distinction.[194] Today, conservative scholars such as Randy Barnett lament the Constitution that was "lost" or

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[184] Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study,* 28 AM. SOC. REV. 55, 57 (1963) (Wisconsin auto dealers).

[185] Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations,* 104 HARV. L. REV. 817, 819 (1991) (reporting results of study revealing that "white males receive significantly better [automobile] prices than blacks and women").

[186] 48 Stat. 74 (1933), 15 U.S.C. §§ 77a-77aa (1934)

[187] 8 Stat. 881, 15 U. S. C § 78a et seq. (1934).

[188] 48 Stat. 912, 11 U.S.C. § 207 (1934), subsequently revised as 52 Stat. 905 (1938), 11 U.S.C. c. X (Supp. 1939).

[189] 52 Stat. 905 (1938), 11 U.S.C. c. X (Supp. 1939).

[190] 53 S. 1149, 15 U.S.C. § 77aaa et seq. (Supp. 1939).

[191] Pub. L. No. 768, 76th Cong., 3d Sess. (Aug. 22, 1940), 11 U. S. C. A. §§ 72, 107, 15 U.S.C.A. §§ 80a-1 to 80a-S2 (Supp. 1940).

[192] Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 YALE J. ON REG. 279 (1997).

[193] *See* E. Merrick Dodd, Jr., *The Modern Corporation, Private Property, and Recent Federal Legislation*, 54 HARV. L. REV. 917, 931 (1941) (collecting and evaluating legislation).

[194] Protective legislation in this era was ultimately upheld in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). For discussions of the complex history here, see, for example, Eric J. Segall, *The Skeptic's Constitution Remnants of Belief* 44 UCLA L. Rev. 1467, 1495 (1997) (reviewing LOUIS MICHAEL SEIDMAN AND MARK V. TUSHNET, CONTEMPORARY CONSTITUTIONAL ISSUES (Oxford University Press 1996) (discussing the "breakdown of the public-private distinction as a limit on legislative authority during the New Deal"); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 47 (1998); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945 (2000).

"exiled" by the Court in order to uphold New Deal legislation.[195] Whether they persist in this vision in the wake of COVID remains to be seen.

It is obviously too early to know whether COVID will induce a similar change. If it does, it may be because the roots of change were planted before the crisis. Romano's history of commodities legislation, for example, notes that efforts to change the regulation of these contracts began in 1921, but were not implemented until the Depression.[196]

4.3 *Public Governance through Private Order*

While contract theorists have largely forsaken Cohen's public vision of contract, scholars in other sub-disciplines have taken note. Michael Vandenbergh was the first modern writer to argue forcefully that private contracting advances specifically public goals. Vandenbergh collected and studied contracts which evidenced a shift from the use of public law to protect the environment through regulation and administrative law, to private law, through environmental compliance promises in loan and merger agreements. While environmental lawyers working in private practice do not draft public regulations, Vandenbergh found, "they draft private standards that look essentially the same."[197]

The claim that contract performs an explicitly public function is consonant with larger observations about the shift from public to private governance, the outsourcing of public functions to private and quasi private actors. In a host of areas—from securities regulation,[198] to environmental law, to privacy protection,[199] to food purity[200]—private ordering in various forms has either supplanted or supplemented public governance.

The public realignment contemplated by the New Deal has thus gradually given way to a more complex mix of public and private action. Rory Van Loo has observed that, today, "policymakers have enlisted a new class of more powerful third-party enforcers" who act in ways traditionally associated with public regulators, by policing other businesses for legal violations.[201]

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[195] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004). For some, the pre-New Deal constitution has been "exiled." *See* Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, No. 1, 1995, at 83, 84 (reviewing DAVID SCHOENBROD POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)).

[196] Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 YALE J. ON REG. 279 (1997).

[197] Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 183 (2013). *See also* Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 918 (2007); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2051–52 (2005) (analyzing contracts that include environmental provisions).

[198] Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 316 (2005).

[199] Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 469 (2020).

[200] TIMOTHY D. LYTTON, KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD 100–01 (2013).

[201] Rory Van Loo, *The New Gatekeepers: Private Firms As Public Enforcers*, 106 VA. L. REV. 467, 470 (2020).

Indeed, prominent literature on "new governance" is founded on the idea that public and private cooperate in ways unimaginable by traditional theorists.[202]

Unfortunately, work in this vein is largely disconnected from contract theory. It does not take seriously the questions that worry contracts scholars, such as the source and force of private obligation, the types of incentives that flow from one's conception of contract, or whether the distinction between public and private is sustainable in contexts where they deliberately mix. This is a problem because the trajectories of their seemingly distinct subject matters—private order and public good—seem destined to meet, whether in COVID or otherwise.

The uses of contract described above would seem consonant with Cohen's public understanding of contract. They will serve to "standardize conduct" on potentially very broad scales, thereby providing certainty in the face of a public sector that has thus far been caught "underreaching."[203] Like Vandenbergh's environmental terms, incorporating health-safety standards into work-place rules or supply-chain agreements injects into the "private" order of the parties terms that are derived from public authorities or that have public ramifications.

We see contract addressing the COVID dilemma by introducing standards and practices in both health-safety and commerce that appear to be better than those offered by government in many cases. Although hardly a complete substitute for public action, the forms of contracting identified here are an important piece of the puzzle which have largely been overlooked.

4.4 *The Limits of Contract*

While contract can play a vital role in solving the COVID dilemma, we should not ignore its limitations. First, there is the problem of accountability: no one really has to enter into contracts, and promisees do not have to enforce them if they do.[204] The principle of voluntarism, a predicate to all theories of contract, means that there are limited forces to guarantee that parties will do any of the things that may seem laudable in light of COVID. Although reputational and other social sanctions play an important role in channeling private conduct, they are hardly perfect. In the realm of social-responsibility terms in supply chain agreements, for example, companies such as Nike may talk a good game of human rights compliance, but may let their contract counterparts slack off.[205]

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[202] *See, e.g.,* Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the* Administrative *State*, 100 GEO. L.J. 53, 62 (2011); LAW AND NEW GOVERNANCE IN THE EU AND THE US 2 (Grainne de Burca & Joanne Scott eds., 2006); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 508–09 (2009); Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265 (2012).

[203] David Pozen & Kim Lane Schepple, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. _ (forthcoming Oct. 2020).

[204] Harry H. Wellington*, The Nature of Judicial Review*, 91 YALE L.J. 486, 494 (1982) ("The common law, concerned with the principle of voluntarism, had long required assent as a necessary condition of binding contracts").

[205] Jonathan C. Lipson*, Promising Justice: Contract (As) Social Responsibility*, 2019 WIS. L. REV. 1109, 1115 (2019) (observing that including promises of social responsibility in contracts is "no guarantee that KSR promisees would seek to enforce such terms even if they could").

Yet, the voluntary nature of contract may be one of its selling points. It disables claims that the required standards or practices are forced on the parties, as would be the case via public-health commands. They are chosen by those who agree to them. It is perhaps not surprising that the same citizens who resist masks when ordered by governors may grudgingly don them when required to shop at Walmart.[206] Political conservatives have not yet declared freedom of contract to be a veiled form of state control, and so should grudgingly accept through private order that which they resist in public policy.

Second, contract is not transparent. This means that the rules that the parties agree to will not be available for general inspection, for reasons of competitive security or just simple privacy. This may enable companies to talk out of both sides of their mouths when it comes to COVID: their websites may declare a strong commitment to health safety that their operational personnel may ignore. It is not surprising that Walmart says it requires masks, but may be reluctant to enforce the rule. [207]

Third, there is the problem of externalization. "Negative externalities" are "costs an actor imposes on third parties."[208] They are a perennial problem because contract parties may not think it worth their while to consider the effect that their relationship has on others. In the context of COVID, David Hoffman and Cathy Hwang have noted that congregate contracts—those that bring groups of people together—have a dangerous capacity to produce externalities, by spreading disease.[209] These are, as they observe, social costs that contract doctrine struggles to address.

At one level, most contracts that fail to interdict disease may be spreading it, and thus creating negative externalities. Here, however, we see contract may be creating positive externalities. Contracting practices that reduce the spread of disease or the loss of economic value benefit not only the parties to those contracts and the social spheres in which they arise, but everyone in some functional sense. They are a facet of public good needed to solve the COVID dilemma.

Conclusion

In moments of severe disruption, we tend to look to forces larger than ourselves for support and guidance. Often, those forces will be public actors. Today's crisis is different. While we may wish for a sure and steady hand at the head of state, the COVID dilemma has emphasized serious deficiencies in the public sector: public actors have politicized a disease and a situation already

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[206] Walmart announced that as of July 20, 2020 shoppers would have to wear masks while at its stores. Kelly Tyko, *Walmart and Sam's Club to require masks nationwide starting July 20 as COVID-19 cases rise*, USA TODAY, July 15, 2020 6:15 PM, https://www.usatoday.com/story/money/2020/07/15/walmart-masks-required-shoppers-sams-club-covid-19/5442415002/

[207] Reportedly, shoppers who refuse to wear a face mask will still be able to shop at Walmart, CVS and other retailers regardless of the companies' policies. *See* Alexandra Garrett, *Walmart, CVS won't enforce mask rules to avoid conflict with customers*, CNET.COM (July 29, 2020, 8:16 AM), https://www.cnet.com/health/walmart-cvs-wont-enforce-mask-rules-to-avoid-conflict-with-customers/. "The stores are apparently hoping to avoid confrontations between employees and angry customers." *Id.*

[208] Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135, 137 (2014).

[209] David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, working paper draft of June 25, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635128.

uncertain, and made it needlessly confounding. While public action remains crucial, private order is an unusually important supplement to or substitute for whatever government tries to do.

COVID may be a passing moment that has little long-term affect on public or private-ordering. In that case, the use of contract here is important, but its public role may be limited to extraordinary circumstances like these. That said, COVID may also be the moment when we rethink our basic understanding of the relationship between public and private. Crises like COVID may be necessary reminders that the relationship between private order and public good is deeper and more complex than we sometimes think—and that is a good thing.

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