

# INTRODUCTION: COVID, CONTRACT, AND CRISES

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## INTRODUCTION

The COVID-19 (“COVID”)<sup>1</sup> pandemic disrupted most social and legal institutions, and contract was no exception. Sometimes, the disruptions were localized and personal: venue-rental contracts were not honored because weddings or birthday parties were cancelled or delayed. Other times, the disruptions were national or international in scope: mergers and acquisitions were deferred or abandoned; the orders that feed global supply chains for clothing and other consumer goods became unpredictable. These disruptions were an occasion to consider foundational questions about contract law and what, concretely, should the legal system do in a world where “COVID rendered many contracts in or near breach,” as one of us recently observed.<sup>2</sup>

The COVID pandemic meant, among other things, that parties would need to make the choice whether to renegotiate or litigate their contracts. Any choice would be made especially difficult given the uncertain trajectory of the pandemic: while we might not come “roaring back,” the economy could certainly rebound, as it did after the pandemic of 1918-19. To litigate or to go into bankruptcy would be to terminate or impair relationships, which may be problematic during and after the pandemic. But reconfiguring contractual arrangements (or simply doing nothing) was also a fraught choice, especially in an environment where governments’ responses to both the public-health and economic challenges of COVID became heavily politicized. Contract parties could neither ignore their agreements nor expect that ordinary public responses—whether through judicial intercession or fiscal largesse—were likely to be reliable or effective. This left a

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1. More fully known as “severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).” Steven Sanche, Yen Ting Lin, Chonggang Xu, Ethan Romero-Severson, Nick Hengartner & Ruian Ke, *High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2*, 26 EMERGING INFECTIOUS DISEASES 1470, 1470 (2020).

2. Jonathan C. Lipson & Norman M. Powell, *Contracting COVID: Private Order and Public Good (Standstills)*, 76 BUS. LAW. 437, 440 (2021).

large, if new and uncertain, role for private ordering through contract.

COVID was also an invitation to consider whether leading theoretical frameworks—utilitarian or deontological, for instance—will continue to pack the same analytic punch. The global pandemic challenged the dominant conception of contract law and theory as a microeconomic puzzle, sealed off from larger social and political (and public-health) concerns. At the same time, assessing promissory duty in this setting without delimiting a proper role for economic gain and loss seems dangerously naïve. COVID will not lead us to solve these core questions about contract jurisprudence, but the pandemic destabilized both the institution of contract and the ways that we think about it.

There are thus larger lessons to learn here than just those pertaining to COVID. Contract is, among other things, a mechanism to shape and articulate expectations, and to define and distribute losses when those expectations are disappointed. A pandemic presents profound challenges to, and opportunities for, contract because contract law will always seek to anticipate and achieve those goals, even as it will always be an imperfect means for doing so.

In the early days of the pandemic, unsure of almost everything about it, a group of us created a remote monthly workshop to discuss our early and developing thoughts on the problems that COVID created for contract. We called the workshop “K-COVID,” after the convention among U.S. legal academics to abbreviate “contract” with the letter K. There, authors presented early versions of much of the work that appears in this symposium Issue of *Law and Contemporary Problems*, “Contract in Crisis.”

This Issue reflects and expands on the K-COVID workshop in order to better understand the reciprocal interactions of contract and COVID, and what those interactions might tell us about future crises. As one might expect, the group comes to no single, clear consensus on the underlying questions (or their answers). Those questions include:

1. Do existing doctrine and theory provide adequate guidance to reallocate losses in light of the pandemic?
2. To what extent do the relationships of the parties—that is, relational contracting—supplement or supplant contract doctrine in this sort of crisis?
3. How does contract affect underlying, preexisting social inequities exacerbated by the pandemic?
4. Does the pandemic invite or induce innovative ways to think about contract which might provide greater resilience to economic and contractual relationships in the next crisis?

To understand each other’s thinking on these themes, we conducted a two-day workshop in July 2021. Rather than undertaking the traditional format of twenty-minute presentations, followed by questions and discussion, we asked contributors to limit their presentations to five minutes of key points (an “elevator pitch”), after which an invited commentator provided brief reflections. The result was a dynamic and fast-paced exchange that distilled each contribution

to its core themes.

As we describe the contributions of this volume's authors below, we are reminded of our gratitude to the commentators who participated in the July workshop.<sup>3</sup> Several of them have published their comments in this collection.<sup>4</sup> To provide a roadmap for the essays and commentaries that follow, we organize this Introduction according to the authors' responses to the following themes that weave through so many of this symposium's contributions.

### 1. Doctrinal & Theoretical Challenges Presented by COVID

In *Retrospective Risk Allocation*, Professor Aditi Bagchi opens (alphabetically and analytically) by focusing on two questions that the recent pandemic makes especially salient. First, "should courts consider some facts unavailable to parties at the time of contract but which plausibly would have altered their contract design?"<sup>5</sup> Second, "[s]hould courts consider public policy pursued by regulators during or after an unforeseen contingency like the pandemic?"<sup>6</sup>

Drawing on her expertise in contract interpretation, Bagchi argues that the answer to the first should be "yes" and the second "maybe," but "only sparingly."<sup>7</sup> While courts should obviously enforce pandemic-induced regulation and legislation, in gaps, "courts should be more attentive to public policy *predating* the crisis" because, she argues, "[i]t is more appropriate for courts to flexibly decipher regulatory norms drafted without specific knowledge of the relevant contingency because regulators could not have enacted rules more clearly on point."<sup>8</sup>

Several contributors were concerned about the capacity of contract law to provide guidance under these conditions of a global pandemic. Professor Robert Hillman, for example, argues in *Health Crises and the Limited Role of Contract Law*, that "current contract law's many and varied, sometimes even contradictory, rules and principles relevant to shaping a response to a health crisis

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3. The commentators were Susan Block-Lieb, Fordham University School of Law; Miriam Cherry, Saint Louis University School of Law; Christine Hurt, Brigham Young University School of Law; Cathy Hwang, University of Virginia School of Law; Larry Garvin, Ohio State University Moritz College of Law; Juliet Kostritsky, Case Western Reserve University School of Law; Jennifer Lee, Temple University-Beasley School of Law; Kish Parella, Washington and Lee University School of Law; Rachel Rebouché, Temple University School of Law; Jeremy Telman, Oklahoma City University School of Law; Tess Wilkinson-Ryan, University of Pennsylvania School of Law.

4. See Susan Block-Lieb, *A Comment on Foohey et al.*, Steering Loan Modifications Post-Pandemic, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 225; Larry T. Garvin, *A Comment on Snyder*, Contracting for Process, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 277; David A. Hoffman, *A Comment on Hillman*, Health Crises, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 33; Cathy Hwang, *A Comment on Casey & Niblett*, The Limits of Public Contract Law, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 73; Tess Wilkinson-Ryan, *A Comment on Colla and Gulati*, Cheeky Contracting, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 127.

5. Aditi Bagchi, *Retrospective Risk Allocation*, 85 LAW & CONTEMP. PROBS., no. 2, 2022 at 1, 2.

6. *Id.*

7. *Id.*

8. *Id.* at 3.

can offer only limited guidance to courts and lawyers in challenging cases.”<sup>9</sup> Indeed, Hillman suggests that “there may be no better example of the limits of contract law, as administered by courts, than its response to contract disputes during a public health crisis.”<sup>10</sup> Professor David Hoffman, in his commentary, identifies “three original analytical contributions” of Professor Hillman’s essay, including, “how courts weighing diffuse public health interests might conflict with contractual arrangements.”<sup>11</sup>

Consistent with this, Professor Brian Bix observes a degree of caution among courts asked to exercise equitable powers under changed circumstances doctrines, such as impossibility and frustration of purpose.<sup>12</sup> In *COVID Concerns: Some Realism About Equitable Relief*, Professor Bix contrasts contemporary court decisions with prior crises (in particular, the closing of the Suez Canal in 1956-57). He finds that, given the need for predictability in commercial relations, “[w]here equitable doctrines like frustration of purpose and impracticability might seem, by their terms, to apply to a broad range of cases, it is not surprising that the courts will find ways to read them narrowly, such that relief is in fact granted in only a small fraction of the cases litigated.”<sup>13</sup>

Professors Anthony Casey and Anthony Niblett extend this point, to argue that courts are simply not designed to address the kinds of problems presented by pandemics in *The Limits of Public Contract Law*.<sup>14</sup> “The judicial administration of contract law is a particularly ill-suited tool for addressing systemic problems,” they argue, because “[c]ompared to other legal institutions, a court deciding a contract dispute is at a disadvantage in developing and implementing public policy.”<sup>15</sup> Professor Cathy Hwang’s comment on this piece highlights areas of disagreement with Professors Casey and Niblett’s thesis, introducing, for example, the “benefits of randomness,” especially in response to a pandemic: that is, incentivizing parties to consider cancelling an event and negotiating solutions outside of court.<sup>16</sup>

Professor Jeff Lipshaw widens the lens further in *Between Rights and Rites: The Ironies of Crisis and Contract*, using COVID as an occasion to question the efficacy of rights in general, a point sharpened by the conflicting demands and

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9. Robert A. Hillman, *Health Crises and the Limited Role of Contract Law*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 19.

10. *Id.*

11. Hoffman, *supra* note 4, at 35.

12. Brian H. Bix, *COVID Concerns: Some Realism About Equitable Relief*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 37.

13. *Id.* at 49.

14. Anthony J. Casey & Anthony Niblett, *The Limits of Public Contract Law*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 51.

15. *Id.* at 52. In part, Casey and Niblett are challenging an argument for judicial reformation of contracts in light of COVID advanced in David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979 (2021). Hwang responds to Casey and Niblett in this symposium, see Hwang, *supra* note 4, at 73.

16. Hwang, *supra* note 4, at 75.

commands of the pandemic.<sup>17</sup> “A world wholly governed by rights”—including contract rights—would, Lipshaw argues, “be like a machine whose metal parts grind on other metal parts, with no metaphoric grease supplied by things like trust, deference, or discretion.”<sup>18</sup> While rights may matter, so too must “oughts,” norms which may take on heightened salience during a crisis. Rights, Lipshaw argues, risk becoming “rites,” “fraught with fundamentalism, apostasy, and heresy.”<sup>19</sup>

## 2. How the Relationships of the Parties or Relational Contracting Supplement or Supplant Contract Doctrine

Professor Lipshaw is not the only law-skeptic in the group. The richest vein of skepticism in contract scholarship comes from relationalists, who question the primacy of “law” in private (or any social) order. Several authors start from the point thus developed: law has limited reach in a pandemic, especially private law. What else is there? Norms of trust and reciprocity endemic to ongoing relationships.

Professors Paolo Colla and Mitu Gulati see the pandemic as a natural experiment to study the tension between law and social norms embedded in ongoing relationships by studying sovereign bond price movements.<sup>20</sup> In *The Price of Cheeky Contracting*, they present the results of an empirical study of so-called “collective action clauses” in sovereign bonds, in particular those issued by the “perennial ‘bad boy’ of the international debt markets: the Republic of Argentina.”<sup>21</sup> Although the details are complex, their findings are consistent with a market penalty for what they call “cheeky contracting,” a form of opportunistic behavior unconstrained by common relational norms. Commenting on Professors Colla and Gulati’s essay, Professor Tess Wilkinson-Ryan asks “how cheeky is cheeky?” and observes that one “can be sincere and reasonable yet still self-serving.”<sup>22</sup>

Professor Heminway takes aim at a recent *Harvard Business Review* article by Frydlinger et al., *An Innovative Way to Prevent Adversarial Supplier Relationships*, which promotes the use of “formal relational contracts” as a means of reducing contractual opportunism, including during cataclysmic events such as COVID.<sup>23</sup> Heminway finds much to admire in the article’s emphasis on

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17. Jeffrey M. Lipshaw, *Between Rights and Rites: The Ironies of Crisis and Contract*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 77.

18. *Id.* at 78.

19. *Id.*

20. Paolo Colla & Mitu Gulati, *The Price of Cheeky Contracting*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 99.

21. *Id.* at 102.

22. Wilkinson-Ryan, *supra* note 4, at 127, 129.

23. Joan MacLeod Heminway, *The Potential Legal Value of Relational Contracts in a Time of Crisis or Uncertainty*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 131 (citing David Frydlinger, Oliver Hart & Kate Vitasek, *An Innovative Way to Prevent Adversarial Supplier Relationships*, HARV. BUS. REV., (Oct. 8, 2020) <https://hbr.org/2020/10/an-innovative-way-to-prevent-adversarial-supplier-relationships?ab=hero-subleft-3>) [<https://perma.cc/5VFV-GQZG>].

delineating and sharing risks and benefits under long term contracts, especially supply-chain agreements, which have come to play an especially important role in the pandemic. But she worries that the business-oriented readers of this otherwise influential review may not appreciate the subtle uncertainties of U.S. contract law, including those noted above. Heminway usefully points out, for example, that aspirationally cooperative terms, such as “[w]e will make decisions based on a balanced assessment of needs, risks, and resources” may not in fact be legally enforceable.<sup>24</sup>

Professor Sarah Dadush takes up the issue of global supply chains as well, offering a searing account of the carelessness and selfishness with which buyers have dealt with their suppliers in the apparel sector during, as well as before, the pandemic.<sup>25</sup> Given how bad the “real deal” is for garment manufacturers in the apparel supply chain, relational contract theorists could have predicted that the pandemic would generate a wave of contract “abandonments” by buyers. However, relational contract theory might not offer a means for improving the fairness of those arrangements. Dadush argues that when the potential social costs of poor commercial behavior are potentially high—for workers’ human rights, health, and safety, for example—parties have a shared responsibility to adopt what she calls a prosocial approach to contracting.

### 3. How Contract Affects Underlying, Preexisting Social Inequities Exacerbated by the Pandemic

In addition to considering how relational contracting norms and techniques, such as those considered by Professor Dadush’s discussion of supply-chain agreements, could be invoked and expanded to address the mistreatment of third parties to contracts, other contributors explored the role that contract played in exacerbating social injustices that predated the pandemic.

Professor Mechele Dickerson, for example, documents in *Protecting the Pandemic Essential Worker* that front-line (face-to-face) pandemic workers were disproportionately people of color, receiving relatively meager wages in dangerous conditions. Although called “essential,” Dickerson observes, “these workers were treated like they were expendable.”<sup>26</sup> Dickerson describes the role that contract (in particular, at-will employment agreements) played in creating this state of affairs, and proposes that state and/or federal governments develop default rules that would provide baseline protections for such workers in the next pandemic. She also proposes that businesses that profited significantly during the pandemic, who relied on essential workers, pay an excess profits tax.

Professors Pamela Foohey, Dalié Jiménez, and Christopher Odinet focus on modifications of auto loans, credit cards, unsecured personal loans, and other

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24. *Id.* at 143 (quoting Frydlinger, et al.).

25. Sarah Dadush, *Prosocial Contracts: Making Relational Contracts More Relational*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 153.

26. Mechele Dickerson, *Protecting the Pandemic Essential Worker*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 177, 178.

installment or revolving loans.<sup>27</sup> Some lenders may “use people’s desperation and lack of specific knowledge to place borrowers in unaffordable loan modifications” or “hastily offer a modification that does not consider the borrower’s ability to successfully repay the modified loan.”<sup>28</sup> They argue that the federal Consumer Financial Protection Bureau should “issue a compliance bulletin which directs loan servicers to make a reasonable determination whether a borrower has the ability to make all required, scheduled payments in connection with any loan modification.”<sup>29</sup> Such a regulatory intervention would help sort consumers whose loans can successfully be modified from those who do not qualify for loan modifications, and thus for whom bankruptcy may be the best option. In her commentary, Professor Susan Block-Lieb asks whether the authors’ proposed reform should occur through consumer-protection regulation and questions why an ability-to-repay regulatory format should be preferred.<sup>30</sup>

Professor Martha Ertman connects racial inequity and debt in *Reparations for Racial Wealth Disparities as Remedy for Social Contract Breach*, arguing that the “racial allocation of resources breaches the social contract that political theory teaches provides a foundation for law.”<sup>31</sup> After summarizing “the outrageous racial disparities in the impact of COVID-19, as well as broader wealth disparities,” she identifies various ways in which debt contracting has created and exacerbated racial disparities.<sup>32</sup> She proposes a variety of forms of reparations, based in principles of unjust enrichment and restitution.

#### 4. Innovative Ways to Think About Contract Which Might Provide Greater Resilience in the Next Crisis

All contributors offered various views about innovation in contract in anticipation of future crises. Some, of course, are skeptical of the virtues of or need for innovation. Others, however, explicitly embraced the pandemic as a moment to offer different ways to think about contract.

Professor David Snyder, for example, uses the occasion of the pandemic to identify and describe what he calls “contracting for process.”<sup>33</sup> Contracting for process is, Snyder argues, the “steps to be taken even though those steps are not the primary object of the contract.”<sup>34</sup> It is distinct, he argues, from contracting for outcomes. Examples include contracts that protect supply chain resilience through processes such as monitoring, updating, learning, and adjusting; modifying production location; and verifying redundancy, excess capacity, and

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27. Pamela Foohey, Dalié Jiménez & Christopher K. Oinet, *Steering Loan Modifications Post-Pandemic*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 201.

28. *Id.* at 204.

29. *Id.* at 205.

30. Block-Lieb, *supra* note 4, at 225.

31. Martha M. Ertman, *Reparations for Racial Wealth Disparities as Remedy for Social Contract Breach*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 231, 232.

32. *Id.* at 233.

33. David V. Snyder, *Contracting for Process*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 255.

34. *Id.* at 255.

multiple sourcing. Snyder argues that “[c]ontracting for process can help resolve the tension between the reliability that a contract can provide and the flexibility that may be needed in disrupted times.”<sup>35</sup> Professor Larry Garvin, in his commentary, agrees that law should “take account of context and flexibility,” and notes the additional attention that the roles of lawyers, institutions, and norms in inspiring trust could receive.<sup>36</sup>

Professor Matthew Jennejohn connects literatures on relational contracting and the social science of economic shock diffusion to offer an innovative way to understand the networks of contracts involved in the production of complex goods such as pharmaceuticals.<sup>37</sup> He starts from the observation that profound changes in contract design and implementation have placed a premium on assuring market resilience. While there are various policy prescriptions for achieving this goal, “[o]ne of the challenges of calibrating prescriptions for improving market resilience is accurately diagnosing market fragility.”<sup>38</sup> Jennejohn recommends that any policy response to the “wickedly complicated” problem of market contagion requires us to recognize a “diversity of diffusion patterns that may be difficult to anticipate. Market fragility is not uniform across the economy, and so any policy response must be contingent and flexible.”<sup>39</sup> Given that complexity, “improving contract design might be a useful ex ante prophylactic measure that promotes resilience in environments where ex post regulatory intervention may struggle to gain purchase.”<sup>40</sup>

## CONCLUSION

The contributions to this symposium are, at one level, all efforts to improve the design of contracts and the institutions supporting and implementing private ordering, perhaps making contract law and practice more resilient given what we have learned in the COVID pandemic. Some sort of “normal” is clearly possible in the wake of COVID, yet that normal will differ in ways profound and subtle from pre-pandemic times. Although changes in contracting are but a small piece of this larger set of changes, the contributions to *Contract in Crisis* offer important insights into future trajectories for contract theory, doctrine, and policy as we move forward.

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35. *Id.* at 257.

36. Garvin, *supra* note 4, at 277.

37. Matthew Jennejohn, *The Transactional Dynamics of Market Fragility*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 281.

38. *Id.* at 282.

39. *Id.* at 283.

40. *Id.* at 284.