

THE LIMITS OF PUBLIC CONTRACT LAW

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I

INTRODUCTION

Private transactions often create externalities that impose costs on the public generally. The conventional set of tools for managing those externalities is broad and includes various forms of ex ante regulation and ex post tort liability. While contract law is not often included in that set, some scholars have recently suggested that it should be. Most prominent is the suggestion that courts should—in some circumstances—reform and reinterpret contracts to discourage behavior that creates negative public externalities. This Article argues that the costs inherent in adapting contract law to this new public role outweigh any likely benefits.

In part, the argument responds to a provocative and important recent essay by Professors David Hoffman and Cathy Hwang on the social cost of contracts in light of the COVID-19 pandemic.¹ Hoffman and Hwang point out that—despite common views to the contrary—courts do sometimes consider the social costs of private transactions when interpreting and enforcing a contract in times of crisis. Those courts sometimes go as far as reforming or refusing to enforce a contract in an effort to minimize unforeseen social costs. Hoffman and Hwang then go further and present a theoretical justification for the idea that courts should infuse their contract interpretation with considerations of social costs and public policy, an idea this Article refers to as “public contract law.” Hoffman and Hwang conclude that there is a set of cases where public contract law is appropriate as the “least bad option available.”²

As a descriptive matter, their article is an important reminder to scholars and practitioners alike that black-letter doctrines found in hornbooks are only as

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1. David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979 (2021).

2. *Id.* at 997.

reliable as the judges who apply them. Their citations to forgotten cases from the last century's pandemics provide a counterbalance to today's confident law firm memos stating that the risk of judges deviating from the text of the contracts is almost nil.

As to their theoretical and normative conclusion, Hoffman and Hwang are more tentative. While they note the difficulty in knowing when judicial reformation is the appropriate tool, they recognize that the universe of cases should be small. They have in mind cases arising during a rare and severe crisis such as the COVID-19 pandemic.

This Article's analysis suggests that the set of cases to which this exception applies should be empty. The judicial administration of contract law is a particularly ill-suited tool for addressing systemic problems. Its use will not only fail to accomplish the intended social goals, but also distort public policy through conflicting and unequal enforcement and unnecessarily interfere with private parties' ability to transact, especially with regard to their desired allocation of risk.

Compared to other legal institutions, a court deciding a contract dispute is at a disadvantage in developing and implementing public policy. This is especially true in times of systemic or public crisis. The deficiencies of courts in this context include:

1. A limited ability to gather relevant information, which leads to errors in measuring social costs and developing public policies;
2. A limited scope of enforcement power, which leads to incomplete, slow, and inequitable administration and enforcement of public policies; and
3. Unpredictable effects of the available remedies, which make it difficult to implement public policies.

In addition to failing at its core purpose, the development of public policy through court decisions in contract disputes will distort the implementation of conventional contract law. The inclination of courts with incomplete information to infuse contract interpretation with ex post and ad hoc public policy reasoning is likely to frustrate private transactions that are both publicly and privately desirable. In particular, courts will frustrate private attempts to allocate known risks associated with a crisis. In some cases, this might even backfire and undermine the very public policy that the court is trying to support.

In presenting this analysis, this Article proceeds in three parts. Part II briefly reviews the calls for expanding contract law to address the social costs of private behavior in a crisis. Part III discusses the costs of doing so. Part IV connects our analysis to existing doctrines of contract law.

II

THE PUBLIC LAW TOOLSET

In times of crisis, calls often arise for legal tools to be adapted to address the crisis. Just as a medical laboratory might be repurposed to produce a new vaccine in a pandemic, legal doctrines are expected to be repurposed to mitigate the pandemic's social costs. Thus, to address the COVID-19 pandemic, many have advocated changes to the laws of intellectual property, bankruptcy, antitrust, and the like.³

This is a particularly novel role for contract law, which is fundamentally a set of doctrines for ordering private transactions. This Part explores this proposed role. First, it reviews the conventional set of tools for regulating the public costs of private behavior, and then briefly introduces the prominent arguments for adding public contract law to that set.

A. The Conventional Toolset

The conventional approaches for regulating private behavior for the social good usually involve ex ante regulation or ex post tort liability.⁴ The most direct and extreme tool for regulating private behavior is a prohibition backed by a criminal sanction. The lesser version of this is a directive backed by civil penalties. With these tools, the law identifies what behavior is allowed or disallowed and provides penalties for noncompliance. The law may take the form of a specific rule or a vague standard. It may be a prescription or a prohibition. It may be promulgated by a legislature or a regulatory agency (or perhaps by judicial pronouncement). The key feature is an ex ante directive coupled with a penalty.

An alternative is the imposition of ex post liability through tort law.⁵ Again, tort law can take the form of a rule or a standard and can be promulgated by legislatures, regulatory agencies, or courts. The key feature is that liability is only triggered if the behavior in fact causes identifiable harm.

Beyond these conventional tools, there are some supplemental tools. One option involves a narrow doctrine of contract law. Some contracts are per se invalid because they involve matters that the law deems illegal. For example, courts will not enforce contracts related to the sale of illegal drugs or those

3. See, e.g., Priti Krishtel & Rohit Malpani, *Suspend Intellectual Property Rights for COVID-19 Vaccines*, 373 B.M.J. 1344 (2021) (describing the connection between IP rights waivers and vaccine equity); *A Patent Waiver on COVID Vaccines is Right and Fair*, 593 NATURE 478 (2021) (discussing how less restrictive IP rights could benefit the global response to COVID-19); Adam Levitin, *Op-ed: Reform Our Bankruptcy Laws Before a Tsunami of COVID Debt Comes Due*, CNBC (Jan. 11, 2021, 9:04 AM), <https://www.cnbc.com/2021/01/11/op-ed-reform-bankruptcy-laws-before-covid-debt-comes-due.html> [<https://perma.cc/HZ44-94SQ>] (detailing the need for bankruptcy reform in light of COVID-19 moratoria expiration); Maurice E. Stucke & Ariel Ezrachi, *COVID-19 and Competition—Aspiring for More than Our Old Normality?*, 8 J. ANTITRUST ENF'T 313 (2020) (discussing how COVID-19 might lead to changes in antitrust law).

4. See Charles D. Kolstad, Thomas S. Ulen & Gary V. Johnson, *Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888 (1990).

5. *Id.*

involving illegal gambling.⁶ Importantly, the illegality doctrine does not stand alone. It is merely an add-on to other regulatory tools, such as ex ante prohibitions on selling drugs or gambling.

A related doctrine of contract law voids certain private contract provisions that violate public policy. Unlike with illegal contracts, there is no separate and distinct ex ante directive prohibiting the underlying subject matter. Under this doctrine, the court reserves the ultimate power to decide when the values favoring enforceability are outweighed by values that society holds to be more important.

This is a narrow doctrine that rarely addresses emerging public crises. Instead, it focuses on longstanding policies that are usually static and well-defined at the time of contract formation.⁷ Moreover, the doctrine has been rendered moot in some instances by subsequent regulation of the underlying behavior. In those cases, the relevant doctrine becomes the nonenforcement of illegal contracts. Prohibitions on restraints of trade, for example, were judicially created, but became codified in antitrust legislation.⁸

B. Public Contract Law

Recently, in response to the COVID-19 pandemic, some have suggested a broader role for contract law in creating and implementing emerging public policy to regulate social costs of otherwise legal private transactions in times of crisis and change. In particular, this role would involve courts in rewriting contracts to account for public policies that arise after a contract is formed. This new view of public contract law would transform the static and largely contained public policy doctrine into a malleable doctrine, one where courts adopt new and evolving policies of ex post and ad hoc contract interpretation and reformation to manage new social costs of private behavior as they arise.

Professors Hoffman and Hwang have provided a provocative and important analysis of this new public contract law.⁹ Their work makes two major

6. For a discussion of the doctrine of illegality in Canada, see generally M. P. Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267 (1966).

7. Contracts that restrain activity that public policy seeks to promote, like trade and marriage, are classic examples of courts declining to enforce contracts on public policy grounds. Contract clauses that shift liability for injury are also sometimes struck down on public policy grounds, as are those that are viewed as threatening national security. See David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563 (2012) (discussing cases and categories in which the public policy defense is successful); Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 689 (2015) (discussing the history of the public policy doctrine and categorizing its typical forms).

8. Restraints of trade are codified in legislation such as the Competition Act, R.S.C. 1985, c C-34 in Canada and the Sherman Act, 15 U.S.C. § 1 in the United States (among others), but the doctrine originates from English common law. See, e.g., *Dyer's Case*, Y.B. 2 Hen. 5, fol. 5, Michaelmas, pl. 26 (Eng. 1414).

9. Hoffman and Hwang go further in their vision of contract law than others who have considered smaller changes to incorporate third-party interests into the interpretation of contracts. See, e.g., Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REG. 211 (2015) (suggesting that courts consider third-party interests when interpreting ambiguous provisions); Jonathan C. Lipson & Norman M.

contributions, one descriptive and the other normative.

On the descriptive side, they point out that—despite commentary suggesting otherwise—judges on occasion do take unforeseen social costs into account when interpreting and reforming contracts.¹⁰ This is an important and useful observation and, in making it, Hoffman and Hwang remind readers of forgotten case law from earlier pandemics.¹¹

On the normative side, they provide a justification for this form of public contract law. To be sure, they note that cases where courts alter the outcome based on newly discovered social costs of a contract should be few, and they recognize the challenges in identifying those cases.¹² But they do conclude that there is a set of cases where *ex post* and *ad hoc* intervention by courts regulating the systemic and social costs of contracts is “the least bad option available.”¹³

One should be skeptical that such a set exists. The analysis presented in the next Part suggests this expansion of the role of contract law in setting public policy would be a mistake, and it may even suggest that the existing public policy doctrine should be narrowed further.

III

PROBLEMS WITH PUBLIC CONTRACT LAW

While the reallocation of tools designed for one purpose towards another can be beneficial, it can also create problems when those tools are ill-suited to the new purpose. For several reasons, mostly related to institutional competence, contract law is particularly ill-suited to developing and implementing public policy to manage social costs.¹⁴ This Part explores three major reasons.

To be clear, the analysis in this Part and throughout this Article is specifically about the competence of courts to develop and implement public policy *when those courts are adjudicating private contract disputes*. The analysis is different

Powell, *Contracting COVID: Private Order and Public Good (Standstills)*, 76 BUS. LAW. 437, 441 (2021) (“Litigation involving doctrines such as force majeure, impossibility, and so on is fraught and expensive. Courts may have difficulty allocating losses in a principled way in light of the COVID dilemma.”).

10. See Hoffman & Hwang, *supra* note 1, at 993–99, 1002–05.

11. See also John P. Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 B.U. L. REV. 1039, 1040 (1983) (explaining how German courts rewrote private contracts disrupted by the “great inflation”); Emily Strauss, *Crisis Construction in Contract Boilerplate*, 82 LAW & CONTEMP. PROBS., no. 4, 2019, at 163–64 (arguing that courts have interpreted boilerplate clauses contrary to their plain meaning to produce decisions that restore investor confidence in the markets).

12. Hoffman & Hwang, *supra* note 1, at 1005.

13. *Id.* at 997.

14. Similar debates are occurring with regard to other areas of law. See, e.g., Kristin van Zwieten, Horst Eidenmueller, & Oren Sussman, *Bail-outs and Bail-ins are Better than Bankruptcy: A Comparative Assessment of Public Policy Responses to COVID-19 Distress* (Eur. Corp. Governance Inst. L. Working Paper, Paper No. 535, 2020), <https://ssrn.com/abstract=3669541> [<https://perma.cc/HMY8-JVHT>]; Anthony J. Casey, *Bankruptcy & Bailouts; Subsidies & Stimulus: The Government Toolset for Responding to Market Distress* (Eur. Corp. Governance Inst. L. Working Paper, Paper No. 578, 2021), <https://ssrn.com/abstract=3783422> [<https://perma.cc/TE55-RU7R>] (examining the call for adopting bankruptcy as a tool to address systemic economic costs related to the COVID-19 pandemic).

when the government is litigating the validity of a law or regulation in court. In those cases, the parties are different, the remedies available to the court are different, and the information provided to the court is more robust.

A. Courts Adjudicating Contract Disputes Are at an Informational Disadvantage

Contract disputes are resolved by individual courts that are at an informational disadvantage when it comes to assessing social costs, especially during a public crisis. Legislatures and regulatory agencies can hold public hearings, employ experts in fields like public health, consider varied proposals, coordinate across jurisdictions, and design holistic and multifaceted regulations. A court, on the other hand, is usually limited to deciding the case before it based on the arguments and evidence put forth by the litigants. As a result, a court interpreting a private contract will find it difficult to obtain the information necessary to know how its ruling will advance public policy or inhibit the systemic response to a crisis.

Courts are good venues for the administration of law when private parties have better information about relevant circumstances and harms. The litigation process incentivizes them to bring that information to the court. But with public contract law, the court would need information about external harms about which the parties might know very little. Further, the litigants would have weak incentives to advocate for, or produce information on behalf of, the external parties and society as a whole.

Public regulators and legislators, on the other hand, have the power to hold hearings, consult independent experts, and collect information more broadly. This is why such institutions as school boards, city councils, the Environmental Protection Agency, and public health departments exist and why courts do not decide all policies in one-off civil suits. When functioning properly, those authorities weigh the risks and benefits on both sides of a decision to determine the appropriate public policy.

Public contract law would turn this system on its head. Where regulators and legislatures have failed to act and risky private behavior remains legal, public contract law would ask courts to add their own measures to deter that behavior.

In the COVID-19 context, public contract law would thus require a court to add its own public policy views about whether certain behavior should or should not be deterred. The court would second guess the public health authorities that are much better positioned to determine whether certain types of events, like weddings, should proceed.

Consider, for example, a recently litigated case in Canada. In *Fu v. Note Photography*,¹⁵ a couple hired a photographer for a wedding. Under the terms of the contract, the couple paid a deposit of \$1,900 before the day of the wedding.

15. *Fu v. Note Photography*, 2020 C.R.T. 963 (Can. B.C. Civ. Resol. Tribunal).

Shortly before the date of the planned wedding, the government restricted the size of gatherings to fifty people due to the COVID-19 pandemic. The couple was willing to reduce the size of the gathering to fall in line with the government's restrictions. But the photographer insisted on additional safety measures beyond the government restrictions. The photographer demanded that photographs be taken outside and refused to take photos of the indoor wedding as the original contract stipulated. The plaintiff couple sued for the return of the deposit.

Public contract law would frame the question here as whether the court should impose safety restrictions that go above and beyond those handed down by the government. The defendant photographer, in essence, invoked public contract law to argue that the government's restrictions did not go far enough. It asked the court to incorporate new terms in the contract in excess of the government's health and safety guidelines.

Under the photographer's views, the court had to decide whether the government's health and safety guidelines fell short in protecting the public and reducing social harm. But a court resolving this private contractual dispute will be in a worse position to make that call than the relevant public health officials. While public health authorities do make mistakes, there is no reason to think that courts would have better information when deciding private cases where the propriety of the policy decision is not being fully litigated and the relevant government authority is not represented before the court to defend its position.¹⁶

A final information problem with public contract law arises when one considers which courts will be deciding these cases. A contract governed by Florida law and selecting Florida as the proper forum for disputes might still impose social costs in New York and other states. Public contract law would imply that the Florida state court hearing the case should announce and implement public policy concerning social costs in New York.

And even though a New York court would be more qualified for the task, there is no mechanism to force the question into a New York court. Similarly, it may be impossible to get the case into federal court. Federal question jurisdiction

16. For discussion of *Fu*'s outcome, see *infra* pp. 22–23. Courts do have a role in reviewing the propriety of executive and legislative actions and policies. But that review looks very different from private contract litigation. And it is worth noting that court intervention in public health policy determinations is controversial even in those cases. In the pandemic context, the criticism of the Supreme Court's intervention with public health regulation has been strong. See, e.g., Curtis Doebbler, *Testing the Faith: Supreme Court, COVID-19 and Religion*, JURIST (Dec. 10, 2020, 9:00 AM), <https://www.jurist.org/commentary/2020/12/curtis-doebbler-covid-cuomo-scotus/> [<https://perma.cc/H2N7-F9XR>]; Jeffrey D. Sachs, *Supreme Court's Scientifically Illiterate Decision Will Cost Lives*, CNN (Nov. 27, 2020, 1:44 PM), <https://www.cnn.com/2020/11/27/opinions/scientifically-illiterate-scotus-covid-decision-sachs/index.html> [<https://perma.cc/NYD2-U9ZW>]; Laurence H. Tribe & Michael C. Dorf, *To this Supreme Court, Religious Freedom Trumps Public Health – Even Amid the COVID-19 Plague*, USA TODAY, (Nov. 29, 2020, 4:38 PM), <https://www.usatoday.com/story/opinion/2020/11/29/religious-rights-trump-covid-illness-deaths-supreme-court-column/6436196002/> [<https://perma.cc/KDH6-KDL2>]; Stephanie Wylie, *The Supreme Court Should Not Politicize Valid Public Health Orders*, CTR. FOR AM. PROGRESS (Sep. 2, 2020, 9:11 AM), <https://www.americanprogress.org/article/supreme-court-not-politicize-valid-public-health-orders/> [<https://perma.cc/25LJ-E6YD>].

would likely be missing,¹⁷ and diversity jurisdiction (if it existed) could be defeated by the forum selection clause. This is a serious concern for public contract law unless one is comfortable with the Florida state court crafting emergency public policy for New York and other states.

B. Courts Adjudicating Contract Disputes Have Limited Scope and Impact

Most socially costly behavior will fall outside of the reach of contract law. Contract law is usually administered in *ex post* case-by-case proceedings targeted at private relationships. A court's power in those proceedings only reaches the behavior of the parties who are litigating before it and rarely binds parties outside of the private relationship.

Contract law is only relevant when there is a dispute—usually related to an alleged breach—followed by litigation. If the parties have no dispute or they are unwilling to litigate, public contract law will provide no means for remediating the social cost.¹⁸ And even for those cases that are litigated, a court's power will only affect a limited scope of behavior and a limited set of parties. In many cases, the remedial power will not achieve the desired objectives.

While legislatures and regulatory agencies can proactively regulate and coordinate private behavior throughout the system, a court interpreting or enforcing a contract can do little to affect behavior at a systemic level. This general limitation of *ex post* litigation creates major problems in the context of a public policy crisis where coordination and swift action are important.

As a result, public contract law will be incomplete in its scope, slow in its implementation, and inequitable in its effects. The remainder of this Part explores these shortcomings, but first, a motivating (real-life) example of those shortcomings.

As Hoffman and Hwang note, litigation surrounding the enforcement of contracts despite COVID risks is uncommon.¹⁹ This might be, as they say, because the parties with a contract right to enforce “were not literal comic book villains”²⁰ or because the parties assume the court will rule against enforcement. It is, however, likely that some parties enforce their rights without any resulting litigation. Many individuals on the other side—those who want out of a contract—will simply pay damages and choose not to litigate. Some will do so because they lack the necessary resources, some because they lack an understanding of the legal system, and some because they are averse to litigation.

17. This is a particularly thorny jurisdictional question without clear answers. *See* Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005) (noting that the expansion of federal question jurisdiction to cases without a federal cause of action should be rare and providing a set of subjective factors to consider in granting such expansions).

18. Adam Badawi makes this point when discussing bounties and penalties: “For a penalty of this sort to have an effect there must be some potential for breach because otherwise the court will not be able to learn about the contract.” Adam Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV. 483, 495 (2009).

19. Hoffman & Hwang, *supra* note 1, at 1000.

20. *Id.* at 1001.

It is also not obvious that all parties who insist on enforcing their contract are villains.

Consider the following scenario. In early 2020, two parents had planned a birthday party for their son who was turning thirteen. The party was scheduled to take place at a party venue in the suburbs of Chicago on March 21 at 4:00 pm. Attendance was expected to be about twenty people. In January, the parents had paid a substantial deposit to reserve the venue. At around 2:00 pm on March 20, the Governor of Illinois announced that a statewide stay-at-home order would go into effect at 5:00 pm on March 21. At that point, the parents—finally realizing how grave the public health situation had become—canceled the party and called the venue. The venue explained that it was not issuing deposit refunds to anyone and noted that because the stay-at-home order did not go into effect until 5:00 pm, this party could start as scheduled at 4:00 pm.

Someone thinking theoretically might predict that contract law and litigation expectations would play a large role in determining how the parents reacted. One might be even more convinced of that conclusion upon learning that the parents were both lawyers who teach private law courses at a law school in Chicago. One would be wrong.

A more practical-minded analysis—recognizing that deposits are often valuable to vendors precisely because people sometimes do not litigate such matters—would be more accurate. For a fraction of a moment, the parents thought about litigation. But they quickly dismissed the idea because it was not worth the trouble. And so, they took the loss, as frustrating as it was.²¹

Additionally, not once did it occur to the parents to *go ahead and have the party* just because they could not get the deposit back. The questions of contract remedies and interpretation were irrelevant to the consideration of having the gathering. Similar scenarios were probably common in the spring and summer of 2020.

It is also worth noting that the vendor enforcing the contract in this scenario might not be a comic book villain. After all, on March 21, 2020, this small business faced an existential threat. Despite its significant investment in preparing and keeping up its facilities, all of its bookings were being canceled indefinitely. This was before any timeline to the shutdown was known and also before any government aid—such as the Paycheck Protection Program—had become available.

So, who was the villain? One can spin all kinds of efficiency or fairness arguments to cut in either direction. It is entirely plausible that the parties would have negotiated for *the parents* to bear the risk of this sort of crisis if they had contemplated it in January. One argument for that view would be that the small business's investments were undiversified and it was therefore less prepared to bear the loss caused by mass cancellations. While losing a deposit on a birthday

21. The ability to usefully recount these events for this Article does provide some consolation to one of the authors (Casey).

party that never happened was inconvenient for the parents, they did not face the risk of going out of business as the vendor did.

There may of course be strong arguments on the other side as well. The point is that—like many problems in the real world—there are no heroes and no villains. There are just incomplete contracts, incomplete regulations, and unforeseen events.

In the perfect world, the Governor of Illinois would have made the stay-at-home order effective sooner so that there was no risk of the party going forward. But things were changing rapidly and emergency orders are disruptive. Allowing twenty-seven hours for adjustment is not unreasonable. In that same perfect world, the parties would have fully explained in their contract who bears the cost of cancellations due to a global pandemic and the contract would be easily enforced. But in the real world, no one can expect such completeness in this type of contract.

The question, then, is how the law should function in this real world. The conventional approach is that in these circumstances the Governor, advised by public health officials, decides whether and when to order the party venue to shut down to minimize social costs. And the parties work out who will bear the private loss on their own. Or, in the rare case that the contract dispute gets litigated, a judge experienced in resolving such disputes applies the standard doctrines of contract law to fill the gaps in the parties' contract and decides who bears the private cost of cancellation. That approach has much to commend it.

The alternative of shifting the responsibility for public health policy from the Governor to a judge hearing a private contract dispute (if there is one) adds no value and does nothing to reduce social costs because the judge's powers are incomplete in scope, slow in implementation, and inequitable in effect.

1. Public Contract Law Solutions Are Incomplete

To the extent any individual contract court attempts to create and implement public policy to regulate private behavior, it is likely to miss large swaths of behavior. Private transactions that do not trigger litigation will remain largely unregulated, resulting in incomplete and inconsistent regulation and enforcement.

Consider the twentieth century baby show case at the center of Hoffman and Hwang's analysis. Hoffman and Hwang note that the Connecticut Supreme Court applied a form of public contract law in *Hanford v. Connecticut Fair Ass'n*, a case involving a baby show that was to be held in 1916 during a polio outbreak.²² In that case, the defendant had originally agreed to promote and manage the baby show. But—fearing the rising public health risk—it ultimately refused to perform and the counterparty sued. The Court refused to award damages on public policy grounds.²³

22. *Hanford v. Conn. Fair Ass'n*, 103 A. 838 (Conn. 1918).

23. A dissent argued, much as we do, that public health policy is best made "by the establishment of a complete system of state, county, and municipal health officials armed with all necessary powers."

That is an example of a public contract law in action. But one must ask, did it achieve its public policy purpose? Not likely. In that time period, one can find numerous reports of baby shows occurring despite the risk of polio throughout the country, and even in Connecticut.²⁴ And the prominent instances of baby shows actually being canceled were done so at the direction of public health officials, not courts deciding contract disputes.²⁵

Similarly, the birthday party example described above demonstrates that contract litigation exerts no influence where one party acquiesces because it is unsophisticated or because litigation is too expensive or burdensome. More importantly, contract litigation will not touch cases where the parties mutually desire to proceed with the problematic behaviors.²⁶ Those cases—not the ones where the parties are litigating—turn out to be where the most troublesome behavior lies.

Indeed, it is unlikely that many gatherings in 1916 or 2020 were actually prevented by (or occurred because of) an expected judicial interpretation of contract provisions. Individuals are not likely to go forward with behavior they deem to be life-threatening *just because* they stand to lose a deposit in litigation. Those individuals who fear that an event will worsen a deadly pandemic and leave their guests ill or possibly dead are unlikely to change course based on the expected damages resulting from contract litigation.²⁷

In the end, contract disputes likely did not play a large role in public health situations during the COVID-19 pandemic. Indeed, none of the superspreader events that Hoffman and Hwang discuss involve a dispute over contract terms.²⁸ Rather in those instances, *both parties to the contract* appear to have had a mutual desire to go forward with the events. In such cases, public contract law is a powerless tool. The best legal protection against large gatherings is likely to come

Id. at 839. It went on to argue that “these official experts should determine in advance what, if any, preventive measures ought to be taken, instead of leaving that question to be determined, after the event, by a jury.” *Id.*

24. See *Organ Fund Gets Good Start*, THE HARTFORD COURANT, Nov. 15, 1916, at 10 (“The affair was opened yesterday afternoon, and about 200 were in attendance and a baby show was the feature of the afternoon, in which twenty-four children were entered.”); *Baby Show*, THE HARTFORD COURANT, Nov. 9, 1916, at 7 (noting the plans for an upcoming baby show); compare *Suspected Cases of Infantile Paralysis*, THE EVENING HERALD, Sept. 9, 1916, at 11 with *Baby Show*, THE EVENING HERALD, Sept. 9, 1916, at 2 (advertising an upcoming baby show in the same newspaper that was reporting new infantile paralysis cases).

25. See, e.g., *Health Chiefs Order Dropping of Baby Shows*, THE CHI. DAILY TRIB., Aug. 17, 1916, at A2 (the health department noting that “there will be no baby show even if we have to call on the police to prevent it”); *Baby Contests for the Fair are Called Off*, EDWARDSVILLE INTELLIGENCER, Sep. 13, 1916, at 1 (noting that the “state board of health ordered all baby contests called off”); *Disease May Cancel Show*, THE CHAMPAIGN DAILY NEWS, Jul. 24, 1916, at 6 (state public health official considers canceling baby show); *Baby Show at Fair Called Off*, THE TWIN FALLS TIMES, Sep. 14, 1916, at 3 (noting that a baby show was called off by order of the board of county commissioners).

26. Notably, Kish Parella has suggested that contracts should be more open to challenge by non-parties. See generally Kish Parella, *Protecting Third Parties in Contract*, 58 AM. BUS. L.J. 327 (2021).

27. Perhaps some contracts produce damages awards extreme enough to move parties in these circumstances. But the run-of-the-mill venue or vendor deposit provisions are not of that sort.

28. Hoffman & Hwang, *supra* note 1, at 984–85.

instead from *ex ante* regulation in the form of state-law mandates.

Of course, there have been some litigated cases. Throughout, this Article discusses several from British Columbia's Civil Resolution Tribunal where wedding couples sought refunds related to weddings after government restrictions were imposed. Litigation is cheap and fast in that tribunal, which may explain the increased activity and number of resolved cases.²⁹ Those cases provide some sense of how these disputes might play out if they were litigated in other jurisdictions. Interestingly, in the *Fu* case discussed above, it was the wedding couple that wished to go ahead with the wedding, while the vendor sought safety precautions beyond what the government required.

2. Public Contract Law Solutions Are Likely to be Slow in Implementation

Contract law is slow to evolve. To the extent that a judicial decision about a contract has any systemic *ex ante* impact, it is mostly through the “shadow of the law.”³⁰ Parties do arrange their behavior knowing that litigation is one alternative and so they take precedent into account. But precedent takes a long time to develop. First, one court announces a rule. Then, another court may follow that rule or it may not. Only over time does a consensus emerge. That time can impede the implementation of public policy and is not available in a crisis. A legislature can act more quickly, and an executive or regulatory agency can often act immediately. The very nature of a crisis—such as the COVID-19 pandemic—demands swift action, with potent and widespread impact.

3. Public Contract Law Solutions Will Often be Inequitable

Public contract law also creates a system where certain public policies are only enforced in favor of parties who are willing to litigate. Those parties are likely to be wealthier and more sophisticated.

Making a remedy available only to those who litigate will favor repeat players with stronger incentives to litigate and those who are wealthier and more sophisticated. For example, individuals in one-off contracts are less likely to litigate or even understand that their contract can be nullified or reformed, while sophisticated repeat players will have access to the necessary legal advice to take advantage of a one-sided option to get out of a contract.

The *Fu* wedding photography case, discussed earlier, highlights the problem.

29. The Civil Resolution Tribunal was created in an attempt to expedite the resolution of small claims litigation. See Michael McKiernan, *B.C. Unveils Plans for Swift Online Dispute Resolution*, CANADIAN LAW. (May 9, 2012), <https://www.canadianlawyermag.com/news/general/bc-unveils-plans-for-swift-online-dispute-resolution/271382> [<https://perma.cc/BKK3-ZWFK>] (noting the legislature's goal of reducing resolution time to sixty days as opposed to the norm of twelve to eighteen months). It has been successful in achieving this goal. See CIV. RESOL. TRIBUNAL, CIVIL RESOLUTION TRIBUNAL 2020/2021 ANNUAL REPORT 1 (2021), <https://civilresolutionbc.ca/wp-content/uploads/2021/11/CRT-Annual-Report-2020-2021.pdf> [<https://perma.cc/TFQ8-MJBJ>] (reporting a fifty-nine day median time to resolution for all dispute types).

30. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing the impact of judicial decisions on private negotiations).

There, the photographer—who might expect to litigate similar issues with respect to dozens of events over the course of the pandemic—wanted a court to impose its own public health policy and rewrite the contract. Whereas the original contract called for photographs of the wedding ceremony and dinner reception, the photographer now demanded that photographs be taken outside in a secluded area, arguing that these changes were necessary for health and safety reasons. The wedding couple viewed these new terms as unacceptable.

Reading between the lines, it is possible that neither party ever intended to perform the contract and the case did not implicate any public health concerns. Under the terms of the contract, if the couple canceled, the photographer could keep the deposit. Initially, the photographer—likely thinking the couple would cancel—intimated that it was willing to go forward with the event. Only when the couple announced their intention to go forward did the photographer discover its public health concerns.

One gets the sense that the parties were posturing for litigation purposes. Knowing that it would not perform the contract as written under any circumstances, the photographer would have wanted the couple to cancel first. The couple, on the other hand, would have wanted the photographer to cancel.

In this game of chicken, public contract law will favor businesses over individuals. While the individuals in the *Fu* case did sue, that often will not be an option. The *Fu* case was litigated in British Columbia, which has an especially accessible small claims process.³¹ The ability to invoke judicial enforcement is more expensive, more cumbersome, and less available in other North American jurisdictions. In those jurisdictions where litigation is costly, sophisticated repeat players can credibly threaten costly litigation in their attempt to keep a deposit. On the other hand, when individuals want to cancel, they will lose their deposit if they are not willing or able to litigate to take advantage of the new public contract law. Because neither party wants to go forward, the event is canceled (which is good), but the individuals bear the cost of cancelation regardless of what the contract says and regardless of who canceled.

Now consider the case where *both* parties want the event to go forward. No one sues and the event happens even if it imposes external social costs because the courts never get involved.

The above analysis suggests that public contract law can do very little to prevent socially costly events. The only situation where public contract law gets things right is the one where the vendor wants to go forward *and* the pandemic-fearing individual would go forward only if she would lose her deposit by canceling *and* that individual is willing and able to litigate to invoke the public

31. The *Fu* case was decided in British Columbia's Civil Resolution Tribunal, Canada's first and only online tribunal. The Tribunal was able to remain fully operational during the pandemic, as it had already been operating remotely previously. See Elizabeth Raymer, *B.C.'s Civil Resolution Tribunal Keeps 'Doors Open' During Pandemic*, CANADIAN LAW. (Mar. 27, 2020), <https://www.canadianlawyermag.com/practice-areas/adr/b.c.s-civil-resolution-tribunal-keeps-doors-open-during-pandemic/328037> [<https://perma.cc/K7V9-WM7V>].

policy *and* the court has figured this all out. This is a dubious scenario. A pandemic-fearing couple is unlikely to invite 100 family members to a superspreader event despite the likelihood of shaming, illness, and possible death *just because they were going to lose their deposit* if they did not.

C. Contract Rules Can Have Unpredictable Effects

Even when parties do litigate their disputes, courts will find it difficult to predict how *ex ante* contract rules will influence private behavior and public policy. Courts may struggle to distinguish between contract interpretations that encourage socially costly behavior, interpretations that discourage it, and interpretations that have no effect at all. Two examples discussed in this context demonstrate this difficulty.

1. Deposits Paid to Wedding Venues

One hypothetical assumes that a wedding is scheduled to occur at a venue and the event will pose a serious health risk. Suppose that, for some reason, the relevant public health authorities have not issued, or are not enforcing, any orders prohibiting the event (if they had and were, contract law would not play a major role). There is a question about contract interpretation and enforcement of damages provisions if one party cancels the event. For example, the parties might dispute whether the business that runs the venue must refund a deposit that the individuals paid when they reserved the venue. The question is how a court can reduce the risk to public health when the parties bring this contract dispute before it.

In the end, the answer is that no *ex ante* rule for the refund of wedding deposits achieves the goal of deterring wedding events that are socially undesirable but privately beneficial. No such rule successfully realigns the parties' private interests with society's interests.

Start with a case where the business wishes to proceed with the event while the individuals prefer to postpone or cancel. In this case, a judge seeking to prevent weddings *might* think her best option is to always order the refund of deposits when weddings are canceled with public health concerns in mind. That way, the business has less leverage to force the individual to perform because the individual can sue for a deposit refund.

On the other hand, a court might think the opposite: the better rule is to never award the refund. With that rule, the business is less likely to oppose cancellation in the first place. Knowing that it keeps the deposit irrespective of whether the wedding proceeds, the business will have less incentive to pressure the individuals to go through with the wedding.

Unfortunately, even these conclusions fall apart when the court factors in litigation costs. For example, the first rule favoring individuals might have no bite to it when the cost and inconvenience of litigation are prohibitive for the individuals. In that case, the business just keeps the deposit and pressures the individuals to go through with the wedding.

But what if we change the hypothetical? What if the business wants to postpone or cancel, and the individuals want to proceed? Can a rule about the return of deposits meaningfully and consistently affect the decision to proceed with the wedding in this case? Probably not. Again, the optimal rule is unclear. Letting the canceling business keep the deposit and refusing any other damages to the individuals might be the optimal approach because the individuals will have less leverage to pressure the business into performing. Or maybe not. Perhaps the court should refund the deposit to individuals and add on an award of large damages in their favor when the business cancels. At some point, that award might be high enough to make the individuals indifferent to (or even in favor of) cancellation. Their incentives would now align with the social good.

The problem of whether courts can effectively achieve the socially desirable outcome through these rules is intractably complicated. Different businesses and different individuals will have different motivations and incentives. The whole enterprise turns on the assumption that litigation outcomes will change or nudge motivations and incentives in consistent and predictable ways. This assumption is unrealistic. Maybe individuals want to cancel *unless* they expect courts to award deposits and damages to the business; and businesses want to cancel *unless* they expect courts to award refunds and damages to the individuals. Or maybe the exact opposite is true. What rule should a court adopt in each of these situations? And even if a court can figure that out, how does it determine which type of individuals and business it has before it?

The facts from two recently litigated cases on wedding deposits and COVID-19—both from British Columbia, Canada—provide insight into how things play out in real life and how difficult it would be to implement public contract law in practice.

First, in *Bal v. Infinite Lighting*,³² a couple hired a DJ for a wedding. The couple paid a deposit of \$1,750. Shortly before the date of the planned wedding, the government restricted the size of gatherings to fifty people due to the COVID-19 pandemic. The couple had invited 450 people. The couple canceled the wedding. Was the couple entitled to the return of the deposit?

Second, recall the facts of *Fu*, where the plaintiff couple paid a deposit of \$1,900 to the defendant photographer. The couple wanted the wedding to go ahead, but the photographer sought to implement health and safety restrictions more stringent than the government's guidelines. The couple objected to the restrictions and the photographer refused to photograph the wedding. Was the plaintiff couple entitled to the return of their deposit?

What rule for providing refunds can best achieve the goal of reducing the social cost of the COVID-19 pandemic in both cases? Favor couples? Favor vendors? Favor the party who cancels?

In the actual cases, courts have simply enforced the terms in the contract. The courts have not voided the contracts on public safety grounds; nor, for the most

32. *Bal v. Infinite Ent. Sound & Lighting Inc.*, 2020 C.R.T. 865 (Can. B.C. Civ. Resol. Tribunal).

part, have the courts found that COVID-19 is a frustrating event that radically changes the purpose for entering the contract where some performance is still possible.³³

In both cases, the courts ruled *against* the party who was reluctant to proceed with the wedding under the government's new guidelines (or, at least, *claimed* to be reluctant to proceed.) In *Bal*, the couple that canceled their wedding was not entitled to recover their deposit from the DJ. The court held that the wedding could have gone ahead, albeit with significantly fewer guests. The contract was not frustrated. Similar reasons are given in at least three other cases in British Columbia where the plaintiff couple failed to recover the deposit with venues after they canceled their wedding.³⁴

In *Fu*, the couple that wanted their wedding to proceed *was able to* recover their deposit, along with their legal costs, from the defendant photographer. There, the court held that the photographer breached the contract by failing to perform the obligations under the contract as allowed by the public health authorities.

As a final complication, consider the possibility that parties have asymmetric information about the law and about what courts are likely to do.³⁵ Sophisticated parties might use their information to take advantage of less sophisticated parties when entering into an agreement. If the courts were to adopt a pro-cancellation rule, a business might include a term prohibiting cancellation knowing that a court will not enforce the term, but also knowing that the individuals are unlikely to know what the legal rule is. In this scenario, *ex post* reformation of the contract gives the business a hidden one-sided option and allows it to extract more value from individuals.

2. Deposits Paid to Universities Going Online

Consider also the example of university deposits offered by Hoffman and Hwang.³⁶ The question here is whether a university that opted for remote learning at the last minute must refund student deposits. Hoffman and Hwang posit that when universities that go online to protect public health are required to return deposits to students, those universities are *more likely* to go online.

They reach this counterintuitive result by assuming that universities are making their decisions based only on liability concerns and student demand. Hoffman and Hwang reason as follows: During a public health crisis, the

33. In *Bal*—and the cases cited below, *infra* note 34—the courts ruled that the size of the event was not an essential term of the contract, and, as such, government-imposed restrictions on gathering sizes did not radically change the parties' agreement. *See, e.g., id.* ¶ 19.

34. *See, e.g.,* Van Hoepen v. Chilliwack Golf & Country Club Holdings Ltd., 2020 C.R.T. 1048 (Can. B.C. Civ. Resol. Tribunal); Appelt v. CPM Farms Ltd., 2020 C.R.T. 1378 (Can. B.C. Civ. Resol. Tribunal); Grant v. Waters, 2020 C.R.T. 1148 (Can. B.C. Civ. Resol. Tribunal).

35. *See* Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 760–62 (discussing the impact of asymmetric information about default rules on contractual bargaining).

36. Hoffman & Hwang, *supra* note 1, at 1007–09.

universities will feel pressure to go online from the threat of liability and pressure from their insurers. The monetary impact of the refunds is itself unlikely to overcome that pressure and push the universities to open during a public health crisis.³⁷ On the other side, they suggest that universities will face student pressure to open in-person regardless of the public health risk. But those students are less likely to demand in-person learning if they can get a refund for online learning. And so, the optimal public health rule is to award the refund.

Our intuitions point in the opposite direction. We suspect that (1) the likelihood of tort liability even for an unwise decision to have in-person learning is exceedingly low (especially in the context of COVID-19 where the most serious harm of an unwise opening will not be to the health of students but rather to the health of vulnerable residents in surrounding communities who will have trouble proving causation), (2) student demand for in-person learning is relatively price-inelastic and will not change meaningfully when they are offered an option for a refund, and (3) universities should and do care about revenues on the margin. Thus, the optimal public policy rule, in our view, is to deny the refunds to diminish any monetary incentive that pushes universities toward opening during a public health crisis.

How is a judge to say whose intuitions are correct? Judges Hoffman and Hwang would order refunds while Judges Casey and Niblett would deny them, all in the name of shutting down universities to serve public health.

In these cases, the socially optimal contract interpretation appears to turn on the subjective mindset of each party, their personal welfare functions, the price elasticities of their preferences, the background likelihood of tort liability, the potential role of third parties such as insurers, and other such matters. That is a lot for a court to parse, and before it even gets there it has to weigh the public health risk of in-person learning against the various costs associated with remote learning and conclude that a shutdown is appropriate.

D. Public Contract Law Distorts Private Ordering, Especially with Respect to Risk Allocation

Finally, empowering judges with incomplete information to develop public policy as they decide private contract disputes is likely to frustrate private transactions that are both publicly and privately desirable. This is generally worrisome as it interferes with private ordering without good reason. But especially troubling is the likelihood that courts implementing public policy when deciding private contract disputes will inadvertently frustrate private attempts to allocate known risks associated with a crisis.

Parties may anticipate a crisis—be it financial, public health, or something else—and attempt to write their contract in a way that efficiently allocates the risk of that crisis.³⁸ Those contracts facilitate bargains that would not otherwise

37. *Id.* at 1008–09.

38. For example, through *force majeure* clauses.

happen. A party venue might only be willing to take advance bookings and invest in preparations when it knows that it can keep the deposit if something unexpected happens. Without that provision, it may not take any advance bookings. Or it may refuse to offer any services or customizations that require advance preparations.

On the other hand, a wedding couple may insist that the venue bears the risk of crisis cancellation, thus allowing them to afford a more expensive event. The venue provider might happily bear the tail risk here in order to secure the large event booking. It may even be able to go out and secure insurance for such risk.

Public contract law that allows ad hoc reformation of contracts based on a judge's view of the appropriate public crisis policy disrupts these arrangements. Not knowing whether its contractual allocation of risk will hold up in court, the party venue might cut back on custom offerings, and the wedding couple might cut back on the event they are planning. More broadly, when parties are unable to allocate risks optimally, they will have reduced incentives to efficiently invest in their relationships.

The *Bal* case, above, provides an example. There, the court acknowledged that the DJ had made relationship-specific investments, preparing playlists that were appropriate for the couple's wedding.

Finally, parties may be reluctant to enforce their contract rights in court if they fear that the courts will go beyond the litigation and declare the entire contractual relationship void, potentially extinguishing other rights that are valuable to the parties. Rather than discourage contracts from going forward, this would simply discourage litigation of any terms, even those unrelated to public health.

IV

RELATIONSHIP TO THE DOCTRINES OF ILLEGALITY AND PUBLIC POLICY

A. The Doctrine of Illegality

Public contract law is distinct from the doctrine of not enforcing illegal contracts.³⁹ The doctrine of illegality in contract piggybacks on other areas of law. Essentially, the court will not enforce private contractual arrangements that violate public laws. But contract doctrine is not doing the heavy lifting here.

If the legislature or other regulatory body has acted to prohibit socially harmful behavior, the problems of public contract law discussed above do not arise. Take, for example, illegal gambling contracts. Gambling is illegal because the legislature has made it so. That eliminates the information problem and moots the point about delay. The contract doctrine is simply a supplement to

39. See Brandon Kain & Douglas T. Yoshida, *The Doctrine of Public Policy in Canadian Contract Law*, in ANNUAL REVIEW OF CIVIL LITIGATION 1, 15 (Todd L. Archibald & Randall Scott Echlin eds., 2007) (distinguishing between the contract doctrines of statutory illegality, common law illegality, and public policy).

rules that prohibit gambling more generally, thus mitigating the inconsistent-implementation and scope-of-effectiveness problems. The rule is often announced and known at the time of contract formation and thus, when the law is clear, there is no distortion for private ordering.

In the case of a pandemic, the doctrine of illegality plays a role, but a narrow one. If the legislature, governor, or public health body has declared certain gatherings illegal, then the existing practice of not enforcing illegal contracts would kick in. But the primary public policy work in that instance is being done by the legislative or executive regulation, not by nonenforcement of contract.

B. The Doctrine of Public Policy in Contract Law

The separate idea of contracts being void as against public policy in the absence of illegality is more complicated. When applying the public policy doctrine, courts are identifying certain contracts that they believe should be unenforceable because of externalities.

In many common law jurisdictions, the doctrine of public policy has been the subject of “trenchant criticism.”⁴⁰ Critics argue that this doctrine provides courts with wide discretion not based on any general organizing principle. Indeed, the use of public policy is frequently met with concerns of uncertainty and judicial activism. The famous statement of Judge Burrough in *Richardson v. Mellish* reflects this concern: public policy “is a very unruly horse, and when once you get astride it you never know where it will carry you.”⁴¹

The doctrine of public policy in contract law was reined in, as it were, in the nineteenth century by English courts.⁴² The use of the doctrine was confined to established categories of contractual subject matter, such as restraint of trade, which had been prohibited by the courts since the fifteenth century.⁴³ Some arguments raised in favor of limiting the use of the doctrine mirror our arguments above about comparative institutional competence.⁴⁴ And so, to some degree, our analysis is similar to prior critiques of public policy in contract law.

But, in the context of ad hoc and ex post crisis policy, the arguments against the doctrine of public policy are even stronger. The conventional doctrine tends to identify fairly static and longstanding categories of contracts and provisions that, for the most part, are known to the parties when they enter the contract.⁴⁵

Consider some longstanding examples within the doctrine of public policy.

40. *Id.* at 2.

41. *Richardson v. Mellish* (1824) 130 Eng. Rep. 294, 303 (CP).

42. *See generally* Kain & Yoshida, *supra* note 39, at 7–9 (offering an overview of various English courts’ applications of the doctrine throughout the nineteenth century).

43. *See, e.g.*, *Dyer’s case*, Y.B. 2 Hen. 5, fol. 5, Michaelmas, pl. 26 (Eng. 1414).

44. Kain & Yoshida highlight the evidentiary issues inherent in the public policy doctrine. Because public policy is traditionally viewed as a question of law, courts generally will not admit evidence that purports to show what public policy is, contributing to the informational deficiencies discussed in Part III.A. *See* Kain & Yoshida, *supra* note 39, at 32–33.

45. *See id.* at 16–17 (describing the doctrine’s traditional application to situations well within most parties’ ex ante expectations, rather than to unforeseen events, such as a global pandemic).

Onerous non-compete clauses in employment contracts might be deemed an affront to public policy under conventional doctrine because they restrict the free movement of labor and restrict competition.⁴⁶ Arbitration clauses may be invalidated because they restrict access to justice, above and beyond any unconscionability concerns.⁴⁷ In these examples, the doctrine of public policy is working to prohibit something that violated a standing policy at the time it was written. The doctrine of public policy offers a warning to contract drafters: should you wish to write a non-compete clause or an arbitration clause, they should be drafted very carefully to ensure that the negative effects on society at large are minimized.

The proposed form of public contract law, on the other hand, envisions courts rewriting contracts to account for new public policies in special and unforeseeable contexts that only arise post-formation.⁴⁸

When the public policy at issue is a response to a new and unexpected crisis, the doctrine of public policy would run the risk of devolving into general discretionary equity. There is no standing public policy that suggests that weddings, per se, are problematic or socially harmful. No one was pushing the envelope or acting against public policy when they agreed ex ante to provide a wedding venue.

The creation of these temporary ex post policies by courts exacerbates prior concerns associated with the public policy doctrine. The social harms associated with unforeseeable crises are not known at the time of contract formation. The ex post application of the doctrine of public policy to nullify private arrangements will introduce great uncertainty. And as argued above, the payoff for that uncertainty is small because public policy implemented by courts deciding contract disputes is unlikely to provide meaningful progress toward the desired social outcome more broadly.

Ultimately, public policy in a crisis should be made by those who have better information and the power to implement those policies more promptly. For example, the issue of whether or not a wedding should go ahead in a pandemic should be dealt with through proclamations of a well-informed public health authority, not through the guidance of one judge hearing a private contract dispute.

46. See, e.g., *Shafron v. KRG Ins. Brokers (W.) Inc.*, 2009 SSC 6, [2009] 1 S.C.R. 157 (Can.) (noting that “[a]t common law, restraints of trade are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged and should be free”).

47. See, e.g., *Uber Techs. Inc. v. Heller*, 2020 SSC 16, para. 136, [2020] 447 D.L.R. 4th 179 (Can.) (Brown, J., concurring) (stating that “[t]his form of limitation on legally determined dispute resolution undermines the rule of law and is therefore contrary to public policy”).

48. Hoffman & Hwang, *supra* note 1, at 985, 997.

V

CONCLUSION

Private transactions have the potential to produce external harm. And the recent COVID-19 pandemic has highlighted concerns created by private ordering: the actions of contracting parties may exacerbate the exponential spread of a lethal virus. But the best way to address these externalities is not through public contract law.

Courts resolving contractual disputes are not best positioned to deal with such challenges. In terms of institutional competence when it comes to a global pandemic, public health authorities and the executive branch are both better informed about the social impact and have greater reach than courts hearing private contract disputes. This will be true for most public policy decisions and especially those involving a crisis.

Of course, courts have a role to play in assessing public policy questions when adjudicating cases *directly about the policies in question*. If someone has brought suit to enjoin or otherwise challenge public health measures, the relevant institutional players will be present with the opportunity and incentive to provide the court with information about public policy.

Not so when a court is adjudicating a private contract case about whether a wedding photographer can keep a deposit. In a private case of that nature, the public interest is not directly represented by any party and the court has limited information. Such a court is also limited in its ability to enforce public policy in any meaningful way.

There are better and more direct methods to enforce public policy, which do not suffer the same drawbacks of public contract law. In addressing broad public risks, we typically turn to tort law and ex ante regulation. There are good reasons for this. In a crisis, ex ante regulation in the form of direct prohibitions backed by civil or criminal penalties is a more effective and less disruptive means of implementing public policy.