

A COMMENT ON CASEY & NIBLETT, *THE LIMITS OF PUBLIC CONTRACT LAW*

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In May of 2020, my friends were supposed to get married. Like all organized people, they had a contract for a venue, for catering, for a cake, and for everything else. When they postponed their wedding due to the pandemic, my more humanoid friends went ahead and sent those Instant Pots and Le Creusets. I, however, sent the couple a quick text: “What happened to your deposits? Did you get them back?”

In their excellent article, *The Limits of Public Contract Law*, Professors Anthony Casey and Anthony Niblett (or as I like to call them, “Anthony²”) tackle the question of what to do about contracts and obligations that have been breached as a result of the pandemic.¹ They argue that although courts sometimes reform and reinterpret contracts to limit negative externalities to the public, “the costs inherent in adapting contract law to this new public role outweigh any likely benefits.”² It is a true pleasure to comment on this article, which is both well-reasoned and a pleasure to read—even though it does disagree with my own article on this topic.

In *The Social Cost of Contract*,³ my article on this topic written with Dave Hoffman, we argue that every contract between private parties has a public cost, and every private contract proceeds only when the public acquiesces to the costs it must bear. The public has three ways to intervene in a contract: (1) through legislation, which sets the boundaries for contractable subject matter; (2) by having a seat at the negotiating table directly, usually though some of kind of regulatory body;⁴ and/or (3) post-hoc contract reformation by the courts.

Through old cases from previous pandemics, we show how this third type of

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

2. *Id.*

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

4. For example, in the United States, an interagency committee called the Committee on Foreign Investment in the United States (CFIUS) has the authority to review transactions involving foreign investment in critical U.S. industries. In some cases, CFIUS needs to pre-clear a deal before the parties can close it; otherwise, CFIUS can order divestment. A similar process occurs in the antitrust context. See The Committee on Foreign Investment in the United States (CFIUS), U.S. DEPT. OF TREAS., <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> [<https://perma.cc/6UEH-JK74>]. See also Kristen Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions* (unpublished manuscript) (on file with author).

public intervention works: specifically, by reforming contracts at the litigation stage so that parties in future similar situations are not incentivized to perform contracts that we expect will create severe negative externalities for the public. To riff on an example from Anthony²'s paper,⁵ suppose that in March 2020, two parents had planned a birthday party for their teenaged son at a party venue. With the pandemic looming, the parents canceled the party, hoping to do their part to slow the spread of the pandemic. Should the parents be on the hook for the party cancellation fee?

To understand this question better, it makes sense to take a step back. By the time the parents breached this contract, the public already had two bites at the regulatory apple: ways (1) and (2), above. In most cases, the public would have no other opportunities to intervene—most contracts do not proceed to litigation,⁶ and even if they do, the public's share of the contract's burden has not changed materially over time, so there is no reason for the public to change its stance. In pandemic situations, however, there *is* a material change in the public's burden over time. Months ago, when the parents booked the venue, the public's share of the burden was acceptable: perhaps some increased traffic to the streets near the venue, perhaps some evening screeches of happy, over-sugared teenagers to punctuate a usually quiet neighborhood. But when the pandemic occurred, the burden became much higher—as we now all well know, early gatherings such as conferences, weddings, and funerals had large ripple effects that contributed to sickness, death, and hospital capacity issues.⁷

Our paper argues that, based on other pandemic precedent, courts may not enforce the contract exactly as written; instead, they might reform it by splitting the baby, in part to reward the parents for trying to take into account the changed (and more significant) public externalities. This also has the side benefit of sending a message to future parties in similar situations: go ahead and cancel that birthday party, because it's the right thing to do and, as a result, the court is (maybe) not going to punish you for it. Against this anticipated backdrop, we urge parties to renegotiate, rather than litigate, contracts breached during the pandemic.

Anthony² argue that courts are not the best place for making these kinds of post-hoc determinations. Instead, they advance several compelling arguments against this kind of reformation.

One argument discusses institutional choice: in a nutshell, they argue that legislators and regulators have better information and are better suited than courts and parties to make these kind of judgment calls. I am quite sympathetic

5. Casey & Niblett, *supra* note 1, at 59.

6. See Cathy Hwang, *Faux Contracts*, 105 VA. L. REV. 1025, 1032 (2019) (noting that onerous litigation and arbitration costs, especially when paired with the risk of disclosing "sensitive information" during discovery, have led parties to increasingly select settlement or renegotiation as their preferred contract enforcement mechanism(s)).

7. See Hoffman & Hwang, *supra* note 3, at 998 (describing how these events, which functioned as COVID-19 "superspreaders," imposed an "outsized . . . burden" on the public in comparison to typical private gatherings).

to this institutional choice argument. But there is also a practical overlay to this argument that is worth noting. In particular, some states never had a lockdown, and instituted very slow pandemic-mitigation measures. As a result, the public lost the opportunity to intervene through methods (1) or (2), leaving only method (3) available. In those cases, I argue that (3) is an appropriate remedy for the public. Although it is the second-best (or even third best) choice, it is also the public's best, last, and, realistically, only chance at having a say in these events.

Another insightful point from Anthony²: they argue that even if courts have the best information and can make appropriate contract adjustments with that information, the court-adjusted result is so random that parties cannot and will not make the necessary behavioral changes *ex ante* in anticipation.⁸ In other words, the prospect of contract reformation is so remote that it will not incentivize contracting parties to “do the right thing” by, say, canceling their events during the pandemic.

I also agree with part of this argument: Court behavior on reformation might end up being a bit random. But in this case, randomness is the point. Usually, as we argue in *The Social Cost of Contract*, courts enforcing contracts as written is a feature, not a bug, of American law.⁹ Adding randomness, however, has two potential advantages in these scenarios. First, it might incentivize the party-planning parents of the hypothetical to consider canceling the event, because there is hope that a court could find in their favor. Second, it might incentivize *both parties* to consider renegotiation outside of the court system. In short, inserting a bit of randomness nudges parties toward the results we want in unexpected pandemic situations.

When Tony (Casey) first sent me an early (and excellent) draft of *The Limits of Public Contract Law*, the subject of his email was “Disagreement Among Friends.” I agree that this is a disagreement among friends, and I am honored to have had this opportunity to comment on their thoughtful, interesting, and well-argued paper. In this comment, I attempted to briefly address some of our areas of disagreement. I must admit that word limits leave me a bit constrained; but I hope that soon, this pandemic will be over, and we can meet in person to hash out the rest of our disagreements over some drinks.

8. See generally Casey & Niblett, *supra* note 1 (detailing courts' difficulty with assessing their contract interpretations' social costs and the potential for inconsistencies between courts' *ex post* rulings and parties' *ex ante* expectations).

9. See Hoffman & Hwang, *supra* note 3, at 995 (recognizing that predictable enforcement enables parties to initiate “deals with . . . confidence that” courts will not “try[] to change the contract after the fact to meet other goals”).