

A R T I C L E

Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements

by Patience A. Crowder

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I. Introduction

“Impact transaction” is a term I coined to describe a strategy of transactional advocacy in the public interest that, like impact litigation, has the potential for making large-scale social change.¹ Community leaders interested in large-scale social change are seeking innovative approaches by which to effectuate change against the reality of shrunken public sector resources, the limitations of judicial remedies, and the political nature of public policy.

“Collective impact” is a relatively new terminology emerging out of the philanthropic community for describing structured collaboration among parties who are focused on alleviating a particular social ill.² Branded as “a way to better utilize resources and identify effective practices,”³ a collective impact initiative (CII) intentionally recruits actors from diverse industries and with diverse perspectives to focus on a specific social ill.⁴ In many respects, collective impact participants “agree to agree” over the course of an ongoing relationship. This approach raises important questions about authority and responsibility, such as “[h]ow and by whom are strategic goals determined? Who gets to par-

ticipate and what are the requirements for participation? How are initiatives held accountable and by whom?”⁵

Collective impact is in early stages, and barriers to effectiveness are emerging, such as the absence of a contractual framework. Typical CIIs are managed through the strength of the parties’ relationships, not through a written agreement. This Article argues that critical questions such as those asked above and the collective impact process are best understood through a relational contract context—a contract law theory that looks beyond the parties’ privity to consider the intent and relationships among the parties. More specifically, this Article lays the groundwork for impact transaction—large-scale social change by agreement—by building a framework for drafting relational contracts to enhance the likelihood of the sustainability of CIIIs and impact transaction strategies, generally.

II. Promoting Social Change Through Impact Transaction

Impact litigation is the legal tool traditionally associated with public interest or social change lawyering.⁶ Impact litigation is a familiar term: judicial adjudication of cases that have the potential to impact conditions broadly for many similarly situated people or to highlight a particular issue. Impact litigation works to reform institutions, including both public governmental agencies, such as those agencies involved with education or environmental protection, and private entities, such as corporate employers.⁷ Impact litigation protects the interests of individuals in the suit while hoping those actions eventually advance the public good. But as with all litigation, private adjudica-

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1. I thank my University of Denver colleague and civil rights advocate, Prof. Nantiya Ruan, who helped me coin this phrase through our discussions on impact litigation, transactional work, and public interest law. I intend for this Article to be the first of several forthcoming articles that will: detail specific contract law issues inherent in the collective impact process; propose a system for papering these initiatives by presenting a form term sheet and collective impact agreement; explore ideas of corporate governance and community participation in collective impact; and determine whether collective impact can be scaled up as a tool in the regional equity movement.
2. See COLLECTIVE IMPACT F., <http://collectiveimpactforum.org> [https://perma.cc/D4HZ-XET9] (last visited Feb. 28, 2016).
3. KARA BIXBY, COLLECTIVE IMPACT: HOW BACKBONE ORGANIZATIONS INFLUENCE CHANGE WITHOUT FORMAL AUTHORITY (2014), <http://web.augsburg.edu/sabo/CollectiveImpactBixby.pdf> [https://perma.cc/9GWK-7ES7].
4. *Id.*

5. *Id.*

6. ALAN CHEN & SCOTT CUMMINGS, PUBLIC INTEREST LAWYERING 201 (Wolters Kluwer 2012).

7. See, e.g., Lori Turner, *Using Impact Litigation as a Tool for Social Change: Jimmy Doe: A Case Study*, HARV. C.R.-C.L. L. REV. (Aug. 10, 2010), <http://harvardcrcl.org/using-impact-litigation-as-a-tool-for-social-change-jimmy-doe-a-case-study-by-lori-turner> [https://perma.cc/5F9W-CB65].

tion comes with high costs and risks and may take years to come to fruition.⁸

Legal commentators have aptly and thoroughly described the risks associated with litigation and presented alternate dispute resolution (ADR) choices such as negotiation, mediation, and arbitration as alternatives to address them.⁹ This Article builds upon the ADR critique of litigation to demonstrate the value of agreement to build relationships. What if the core of ADR—agreement—was able to promote social change—the core of impact litigation? Impact transaction is that answer.

Impact transaction cannot replace impact litigation as a strategy for social change. However, notwithstanding the nuances inherent in transactional or litigation practice, some social problems may be more effectively challenged through transactional practice than litigation. Four major disadvantages of impact litigation can be countered with corresponding benefits of impact transaction:

- (1) Judicial decisions do not guarantee desired outcomes, do not ensure implementation of any programs, and may be narrow in scope—applicable only to a specific litigated issue. Impact transaction, however, can promote social change where individual rights are not necessarily implicated.¹⁰
- (2) Impact litigation is costly. Transaction, by contrast, alleviates many of litigation's resource drains, such as the attendant costs of trial fees.¹¹ Transaction costs include the time spent coming to an agreement, which itself is part of the justice-seeking outcome.¹²
- (3) Litigation determines winners and losers, while transaction is grounded in collaboration.¹³ In order for impact litigation to have lasting social change, judges must recognize the policy implications at play in their decisions and be willing to address those issues head-on by providing guidance for implementation.¹⁴ On the other hand, transaction is the process of formalizing the outcome that the parties themselves determine from engaging in negotiation or mediation. Instead of a "higher" power passing judgment, the parties self-determine their destiny.¹⁵

- (4) Attorneys control litigation by making decisions with little client input¹⁶ and by often strategically identifying the right plaintiff(s) to bring the "right test-case" to the exclusion of otherwise worthy clients.¹⁷ These power imbalances are largely absent in transactional practice.¹⁸ Impact litigation is largely initiated by lawyers seeking to effectuate social change through judicial remedies, while impact transaction is initiated by clients seeking to effectuate social change through agreement.

III. Collective Impact as Impact Transaction

Collective impact has quickly evolved as a process and is gaining national attention.¹⁹ After the term "collective impact" was first published in a 2011 *Stanford Social Innovation Review* article, a series of milestone events in the evolution of collective impact occurred. For example, in 2012, the White House Council for Community Solutions recognized the "collective impact" framework as one of two designated strategies for advancing communities throughout the nation.²⁰ "This term shows the power of a good buzzword to compel an idea."²¹

A. Collective Impact Defined

Collective impact is generally defined as a "[c]ommitment of a group of important actors from different sectors to a common agenda for solving a specific social problem," using a structured form of collaboration.²² One example would be a local neighborhood association, private business interests, and a governmental agency joining to clean up a local water source. The defining feature of the collective impact framework is its structured infrastructure built around five characteristics²³: (1) a common agenda that attracts participants to a given CII²⁴; (2) shared measurement of success and (3) mutually reinforcing activi-

8. See *id.*

9. See, e.g., CARRIE J. MENKEL-MEADOW, *MEDIATION: PRACTICE, POLICY, AND ETHICS* (2d ed. 2013).

10. See generally Patience A. Crowder, *Interest Convergence as Transaction?*, 75 U. PITT. L. REV. 693 (2014).

11. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91-92 (1983).

12. *Id.* at 91.

13. See, e.g., Christine Liyanto, *The Discrete, the Rational, the Selfish, and the Societal: Elements Present in All Transactions*, 4 HASTINGS BUS. L.J. 315, 331 (2008).

14. See JOEL HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 1 (Acad. Press 1978).

15. But see Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 715 (1974).

16. See, e.g., John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 21 (1998).

17. See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 14-17 (1st ed. 1992).

18. See, e.g., ALICIA ALVAREZ & PAUL R. TREMBLAY, *INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE* (1st ed. 2013).

19. John Kania & Mark Kramer, *Collective Impact*, STAN. SOC. INNOVATION REV., Winter 2011, at 36 (2011), https://ssir.org/articles/entry/collective_impact [<https://perma.cc/DLX2-587D>].

20. MICHELE JOLIN ET AL., *NEEDLE-MOVING COMMUNITY COLLABORATIVES: A PROMISING APPROACH TO ADDRESSING AMERICA'S BIGGEST CHALLENGES* (2012), <https://www.bridgespan.org/bridgespan/Images/articles/needle-moving-community-collaboratives/needle-moving-community-collaboratives.pdf?ext=.pdf> [<https://perma.cc/6MTP-G2YN>]; see also *White House Council for Community Services, UNITED WE SERVE*, <http://www.sserve.gov/?q=site-page/white-house-council-community-services> [<https://perma.cc/K46A-U8JJ>] (last visited Feb. 28, 2016).

21. Lucy Bernholz, *Philanthropy Buzzwords of 2011*, CHRON. PHILANTHROPY (Dec. 27, 2011), <https://philanthropy.com/article/Philanthropy-Buzzwords-of-2011/157395> [<https://perma.cc/ZM45-S42X>].

22. Kania & Kramer, *supra* note 19, at 36-41.

23. See *id.* at 39-40.

24. See *id.* at 39.

ties to promote interdependence among the participants to advance the initiative outcome²⁵; (4) continuous communication among the parties to reinforce levels of trust among the participants²⁶; and (5) the implementation of backbone support organizations to ensure the other conditions are advanced by serving as a project manager.²⁷ CII members “agre[e] to agree,”²⁸ as they begin an intensive planning process to build trust and an appreciation for each other’s perspectives.²⁹

CIIIs have generally fallen into one of the following categories: youth development; educational reform; environmental protection; health and welfare; and economic development. An example of an environmental protection CII is one of the earliest identified CIIIs, the Elizabeth River Project,³⁰ founded in 1991 to clean up the Elizabeth River in Portsmouth, Virginia.³¹ The river had long been used as an industrial waste dump.³² Still active today, the project has more than 100 stakeholders, including representatives from government, science, business, and citizen interests.³³

Collective impact is not the first iteration of transaction for the public good. However, several prior types of “public good transactions” have limitations that inhibit impact transaction. Memorandums of understanding are less encompassing in scope than collective impact agreements are intended to be. Questions remain about the substance and enforceability of community benefits agreements³⁴ as tools for large-scale social change, including the identification of the appropriate “community” that such an agreement should govern.³⁵ Social enterprises are not as well suited to create and sustain large-scale social change as impact transaction because they do not typically act in concert with each other through networks.³⁶ Although community economic development (CED)³⁷ projects originally were founded in order to increase eco-

nomic opportunity in underserved communities, today’s CED projects have strong market connections.³⁸ CEDs may also be too localized to address the large-scale social problems CIIIs address.³⁹

B. Standard Parties to CIIIs

An important characteristic of CIIIs is their diverse range of typical parties,⁴⁰ which can include nonprofit organizations, public entities, educational institutions, the private sector, and representatives of the targeted community.⁴¹

Backbone agencies—independent entities with their own dedicated staff and physical space⁴²—coordinate the activities of the other stakeholders.⁴³ They must foster changed behavior and attitudes but lack inherent authority over the other participants.⁴⁴ The number one reason CIIIs fail is ineffective backbone support.⁴⁵

Organizational participants in CIIIs provide “specialized assistance and resources specific to their ability.”⁴⁶ Representatives of the network members should include CEO-level leadership of each participant to demonstrate a serious commitment to participate. Funders play significant roles⁴⁷ of infrastructure support,⁴⁸ problem-solving around an issue,⁴⁹ and expertise such as data collection, professional development, and skills related to the scope of the initiative.⁵⁰ CIIIs also receive nonmonetary support from public institutions and consultants. Federal Reserve banks, for example,⁵¹ support and facilitate data collection, such as poverty metrics.⁵² Collective impact consultants work to facilitate strategic decisionmaking within a CII.⁵³

25. See *id.* at 40–41.

26. *Id.*

27. *Id.* at 39–40.

28. See Ian R. Macneil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627, 662, 662 n.10, 684 (1975); see also Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831 (2001).

29. Kania & Kramer, *supra* note 19, at 40.

30. ELIZABETH RIVER PROJECT, <http://www.elizabethriver.org/> [https://perma.cc/B8NK-YT79] (last visited Apr. 4, 2016).

31. ELIZABETH RIVER PROJECT, EXPLORE THE ELIZABETH’S LAUDED PAST 2, <https://elizabethriver.org/sites/default/files/ERP-elizabethsplauded-past.pdf> [https://perma.cc/P3QW-U7ZR] (last visited Feb. 28, 2016).

32. *Id.* at 1–2.

33. ELIZABETH RIVER PROJECT, TWENTIETH CENTURY WATERSHED ACTION PLAN FOR THE ELIZABETH RIVER 24 (2016), <http://www.elizabethriver.org/#watershed-action-plan/c118m> [https://perma.cc/3FM8-CVWY].

34. See, e.g., Sandy Gerber, *Community Benefits Agreements: A Tool for More Equitable Development?*, FED. RES. BANK MINNEAPOLIS (Nov. 1, 2007), <https://minneapolisfed.org/publications/community-dividend/community-benefits-agreements-a-tool-for-more-equitable-development> [https://perma.cc/DZB6-BPQ8].

35. See Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010).

36. But see SOC. ENTERPRISE ALLIANCE, <https://socialenterprise.us/> [https://perma.cc/4JHN-95U7] (last visited Feb. 28, 2016).

37. See, e.g., *Community Economic Development (CED)*, ADMIN. FOR CHILD. & FAMILIES: OFF. COMMUNITY SERVICES, <http://www.acf.hhs.gov/programs/ocs/programs/ced> [https://perma.cc/CJJ5-E9FM] (last visited Feb. 28, 2016).

38. See Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001).

39. Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131, 144–45 (2004).

40. See *What Is Collective Impact*, COLLECTIVE IMPACT F., <http://collectiveimpactforum.org/what-collective-impact> [https://perma.cc/ENQ5-EZN3] (last visited Feb. 28, 2016).

41. See Kania & Kramer, *supra* note 19, at 40.

42. *Id.*

43. *Id.*

44. BIXBY, *supra* note 3, at 2.

45. Shiloh Turner et al., *Understanding the Value of Backbone Organizations in Collective Impact: Part 3*, STAN. SOC. INNOVATION REV. (July 19, 2012), http://ssir.org/articles/entry/understanding_the_value_of_backbone_organizations_in_collective_impact_3 [https://perma.cc/DV75-8UBC].

46. See *Collective Impact Model*, 5 MARKETWISE COMMUNITY 1, 5 (2015), https://www.richmondfed.org/publications/community_development/marketwise_community/2015/issue_1/mwc_vol5-issue1_p3_collective_impact [https://perma.cc/FQM2-HC4B].

47. See Eric Nee & Michele Jolin, *Roundtable on Collective Impact*, STAN. SOC. INNOVATION REV., Fall 2012, at 25, http://ssir.org/articles/entry/roundtable_on_collective_impact [https://perma.cc/Z4AA-5J62].

48. *Id.* at 28.

49. See *id.*

50. See *id.*

51. See, e.g., Emily Mitchell, *The Power of Collective Impact*, FED. RES. BANK ATLANTA, <https://www.frbatlanta.org/community-development/publications/partners-update/2014/03/140516-power-of-collective-impact.aspx> [https://perma.cc/MPR2-QKFL] (last visited Feb. 28, 2016).

52. See *Collective Impact Model*, *supra* note 46, at 7.

53. See, e.g., SPARK POL’Y INST., <http://www.sparkpolicy.com/about.htm> [https://perma.cc/8JP8-9PZB] (last visited Feb. 28, 2016).

C. *The Unquantifiable Value and Manageable Risks of Collective Impact*

As a strategy for social change, collective impact houses an unquantifiable and unique value yet to be fully realized. Collective impact is causing three paradigm shifts in the way governments and nonprofits collaborate to deliver social and public services.

- (1) CIIs move beyond isolated impact and technical problems to identify and embrace adaptive problems in social service delivery.⁵⁴ Technical social problems are well defined and able to be addressed by one organization. Adaptive problems, in contrast, are complex problems with unknown or yet-to-be-discovered answers and, even if an answer is identified, for which no single entity “has the resources or authority to bring about the necessary change.”⁵⁵ This shift in focus engages larger-scale interventions, designed for multidimensional problem solving.⁵⁶
- (2) Funders of CIIs increasingly are willing to fund a grantee’s broad operational and planning needs, rather than solely funding specific programs.⁵⁷ In contrast to the traditional model, funders who invest in creating large-scale change through collective impact follow four recognizable practices: “take responsibility for assembling the elements of a solution; create a movement for change; include solutions from outside the nonprofit sector; and use actionable knowledge to influence behavior and improve performance.”⁵⁸
- (3) A third paradigm shift implicates the role of business and commercial interests.⁵⁹ The private sector is gaining new appreciation for social issues, and nonprofits are gaining deeper awareness of potential business partnerships.⁶⁰

Several risks are also inherent in collective impact frameworks, but they can best be managed by a written agreement:

- (1) CIIs may be criticized because participating institutions are making decisions without engaging the impacted community until an initiative is well underway, if at all.⁶¹ Thoughtful and innovative collective impact governance structures incorporated in a written collective impact agreement, to which some representation of the community is a signatory, can manage the risk of falling into these historical patterns.
- (2) Although passage of time is the best way to test the durability of collective impact strategy, the risk that work cannot be sustained could be managed through a written collective impact agreement that legislates transparency, sets expectations for participant behavior, manages accountability, and incorporates an evaluation component.
- (3) CIIs also risk forming politically divisive mini-coalitions, or CII parties might hold out for a more authoritative role or greater compensation.⁶² A written collective impact agreement that incorporates covenants prohibiting this behavior can manage these risks.

Promoting written agreement in CIIs runs counter to the culture of trust which is fundamental to collective impact and which is perceived as an opportunity to actualize the value of current paradigm shifts.⁶³ However, there are other important reasons for encouraging written collective impact agreements. For example, the absence of an executed agreement can cause confusion about the parties’ roles and increase their individual liabilities. A written agreement based on relational contract theory is the most effective way to actualize the value and minimize the risk of collective impact.

IV. *Positive Risk: Relational Contract Theory*

According to relational contract theory, contracts involve more than discrete exchanges between parties and “every

54. See John Kania et al., *Essential Mindset Shifts for Collective Impact*, in COLLECTIVE INSIGHTS ON COLLECTIVE IMPACT 2 (Stanford Soc. Innovation Review 2014), http://ssir.org/articles/entry/essential_mindset_shifts_for_collective_impact [https://perma.cc/VUV8-88ZB].

55. Kania & Kramer, *supra* note 19, at 39.

56. *Id.*; see also, e.g., Leonard J. Marcus et al., *The Walk in the Woods: A Step-by-Step Method for Facilitating Interest-Based Negotiation and Conflict Resolution*, 28 NEGOT. J. 337, 339-40 (2012).

57. See, e.g., Jennifer Chambers, *New Detroit Hire Works to Keep Philanthropy Aid Flowing*, DETROIT NEWS (June 9, 2015, 12:14 AM), <http://www.detroitnews.com/story/news/local/detroit-city/2015/06/09/detroit-philanthropy/28721791> [https://perma.cc/JMS8-MWAC].

58. Kania & Kramer, *supra* note 19, at 41; see also Kim Fortunato, *When and How to Engage the Private Sector in Collective Impact*, COLLECTIVE IMPACT F. (July 14, 2015, 9:12 PM), <http://collectiveimpactforum.org/blogs/9406/when-and-how-engage-private-sector-collective-impact> [https://perma.cc/5MAC-ENJK].

59. Fortunato, *supra* note 58.

60. *10 Lessons Learned From Engaging the Business Community in Collective Impact*, COLLECTIVE IMPACT F. (July 14, 2015, 8:49 PM), <http://collectiveimpactforum.org/blogs/1/10-lessons-learned-engaging-business-community-collective-impact> [https://perma.cc/KV4X-V66R].

61. See, e.g., Melody Barnes et al., *Roundtable on Community Engagement and Collective Impact*, in COLLECTIVE INSIGHTS ON COLLECTIVE IMPACT, *supra* note 54, at 14, http://ssir.org/articles/entry/roundtable_on_community_engagement_and_collective_impact [https://perma.cc/Y46P-8E3Q]; see also Patience A. Crowder, *“Ain’t No Sunshine”: Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623 (2007); *Why Communities of Color Are Getting Frustrated With Collective Impact*, NONPROFIT WITH BALLS (Nov. 29, 2015), <http://nonprofitwithballs.com/2015/11/why-communities-of-color-are-getting-frustrated-with-collective-impact/> [https://perma.cc/YM4Q-D4Q5].

62. See, e.g., Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 15 (2003).

63. See Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 675-76 (2010).

time a relationship seems properly to enjoy the label ‘contracts’ there is, or has been, some cooperation between or among the people connected with it.”⁶⁴

A. *The Evolution of Relational Contract Theory and the Importance of Context in Contract*

Relational contract theory is a significant contribution to contract law and applies to collective impact.

Classical (or “conventional” or “traditional”) contract law holds very fixed definitions for the dimensions of contract and holds no space for “justifying doctrinal propositions on the basis of social propositions—that is, propositions of morality, policy, and experience.”⁶⁵ As an open, inductive, dynamic, and individualized mechanism of contract interpretation,⁶⁶ relational contract theory responds to two “fundamental weaknesses of classical contract law—its static character, and . . . its . . . empirical premise [and flawed assumption] that most contracts are discrete.”⁶⁷

Relational contracts are typically distinguished by: indefiniteness about duration; informality of language; incompleteness⁶⁸; imprecise performance standards; expectations of roles for social norms; reference to industry standards⁶⁹; and gaps in risk allocation.

Relational contract theory recognizes context-driven distinctions.⁷⁰ Relationists argue that “[c]ontract law, which orders bargaining relationships and transactions, should always be tempered by the facts of particular contexts.”⁷¹ Context is important in the formation of relational contracts, including CIIs. Parties select the common agenda, negotiate the logistics behind the mechanisms for shared measurement and continuous communication, and identify and agree to perform mutually reinforcing activities that advance the initiative.⁷² For example, CII parties enter into relational contracts to try to exploit the “economies” of grant funds managed by the backbone agency. In typical relational contracts, this process is accomplished by specifying the performance standard of each party and then selecting a mechanism to ensure compliance.⁷³

Relational contract theory provides guidance to CII participants (and their lawyers) about how to: navigate collective impact processes, approach drafting collective

impact agreements, approach funders about expectations and requirements, and approach the courts about resolving collective impact disputes.⁷⁴ These concepts are particularly important for the “middle market” local nonprofits that lack those resources but, nonetheless, want to participate in CIIs.

B. *Why Collective Impact Needs a Written Contract*

The written agreement is a valuable tool in collective impact because there are conditions precedent in CIIs that must account for allowing the parties to understand: when their obligations are triggered; when CIIs raise questions about the ownership of intellectual property; and when activities undertaken implicate liability concerns.

Written relational contracts are incomplete contracts “that rely on trust and reciprocity rather than control.”⁷⁵ Collective impact agreements should be encouraged because (1) notions of neoformalism promote the values of efficiency and uniformity and (2) they would give rise to public policy benefits.

C. *Neoformalist Values: Efficiency and Uniformity*

Although relationists prefer standards over rules,⁷⁶ neoformalism, which prefers language and formality,⁷⁷ “recognizes that even parties embedded in a complex relationship may nevertheless prefer to be governed under a formalist system.”⁷⁸ The main argument in favor of neoformalism asserts that it promotes judicial efficiency by providing relational contract interpretive strategies for courts and other decision makers.⁷⁹ The counterargument is that it could be used to alter a relational contract beyond its bounds.⁸⁰

While the use of written agreements in CIIs is not completely absent, the current use of collective impact agreements is too infrequent. Moreover, the types of agreements executed are ill-structured documents for effectuating CIIs. For example, a funder’s grant governs the award and administration of the grant, and there is no privity of contract between the funder and the non-backbone participants or among the participants. Also, partnership agreements are designed to memorialize the legal obligations of parties who have intentionally decided to work in concert together for a for-profit purpose and govern, among other matters, the partners’ ownership interests, levels of liability, and governance rights; they are not contracts for the exchange of services between parties.

64. Ian R. Macneil, *Whither Contracts?*, 21 J. LEGAL EDUC. 403, 404 (1969); see also IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (Yale Univ. Press 1980); Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 877 (2000).

65. See Larry A. DiMatteo & Blake Morant, *Contract in Context and Contract as Context*, 45 WAKE FOREST L. REV. 549, 569 (2010).

66. See Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 812-13 (2000).

67. See *id.* at 821.

68. See Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 862 (2000).

69. But see Leib, *supra* note 63, at 662.

70. DiMatteo & Morant, *supra* note 65, at 557.

71. *Id.* at 561.

72. Kania & Kramer, *supra* note 19, at 5-6.

73. Charles C. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1092 (1981).

74. See *infra* Section V.A-B.

75. See Wendy Netter Epstein, *Facilitating Incomplete Contracts*, 65 CASE W. RES. L. REV. 297, 300 (2014).

76. See Leib, *supra* note 63, at 667.

77. See David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617, 619 (2001).

78. Franklin G. Snyder, *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 677-78.

79. See Scott, *supra* note 68, at 869; see also Scott Baker & Albert Choi, *Contract’s Role in Relational Contract*, 101 VA. L. REV. 559, 559 (2015).

80. See Leib, *supra* note 63, at 715; see also Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

If participants continue to borrow from other disciplines to meet their collective impact needs, it will limit the capacity for strategy study and development.

D. Public Policy

Unlike most private law transactions, CIIs are designed to address a particular social problem for the public good and, thus, collective impact agreements are contracts for the public interest. The seriousness of any potential to harm an underserved community and the amounts of money invested in CIIs⁸¹ warrant the imposition of more formalized collective impact agreement processes to increase the likelihood that social change is advanced with transactional efficiency.

V. Contracting for Complexity: Planning for and Drafting Collective Impact Agreements

Two important considerations when contemplating a CII are the substance of the project and the services to be exchanged among the working group. Relational contract drafting principles employed in a collective impact term sheet should support a shared agenda for social change, provide for accountability, and respect the collective impact mindset.

A. Collective Impact Agreements: Planning and Drafting for Flexibility

Collective impact agreements are (1) multilateral (2) service agreements (3) between participants drafted to memorialize the parties' intent to effect social change for an underserved population through (4) synchronized and phased service delivery coordinated through long-term ongoing planning.

Multilateral agreements require special drafting considerations⁸²—particularly, establishing privity of contract between each party. Services agreements are inherently relational,⁸³ which should be considered in the drafting of provisions such as performance standards and assignment provisions.⁸⁴ Non-legal social enforcement through trust and dispute resolution is a signature characteristic of relational contracts.⁸⁵

Planning is necessary for all contracts, but the unplanned nature of contracts⁸⁶ is particularly true of collective impact, which fundamentally involves the distinc-

tion between performance planning and risk planning.⁸⁷ Performance planning outlines what tasks each party will perform, the timeline for these tasks, and applicable performance standards. Risk planning requires assessing which parties are in the best position to minimize or withstand the risks associated with the transaction.⁸⁸

B. Drafting a Collective Impact Term Sheet

Relational contract theory is underutilized in practice because lawyers are underinformed about its applicability.⁸⁹ A form collective impact term sheet may help to normalize the contract processes.

Term sheets explore the possibility of a transaction⁹⁰ and demonstrate the parties' commitment to contract.⁹¹ They are intentionally vague documents designed to present the framework of a transaction, set forth provisions of the drafting and execution of the main agreement, act as a thermometer for negotiations, forecast the types of provisions that will be in the main agreement, and memorialize the distribution mechanism for compensation.⁹²

Collective impact is a nascent framework, so this discussion about term sheets is important but speculative. To start the conversation about impact transaction contract principles, the following term sheet concepts are the most salient: (1) Recitals and preambles set the tone for the initiative, acting somewhat as a mission statement; ground new members to the initiative; and communicate the initiative to interested nonparties. (2) Identifying binding and nonbinding provisions helps to highlight the parties' expectations of each other's behavior.⁹³ An example appropriate for collective impact agreements would be the obligation that parties negotiate and proceed in good faith with fair dealing. (3) Including provisions on developing standard dispute resolution mechanisms over time would be appropriate for a term sheet, given the collaborative intent of collective impact. (4) Mechanisms for tracking responsibility for performing conditions precedent would allow parties to track projects, including responsibility for existing projects and a willingness to take on new projects that might emerge.

Naturally, it would be difficult to manage these ideas specifically with a term sheet; however, an innovative

87. Leib, *supra* note 63, at 661.

88. See Scott, *supra* note 84, at 597.

89. Symposium, *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 690 (2005).

90. See Vincent R. Martorana, *Letters of Intent: What to Consider Before Your Deal Becomes a "Deal,"* COM. L. WEBAVISOR, <http://www.commerciallaw-webadvisor.com/schedule/detail/letters-of-intent-what-to-consider> [https://perma.cc/APJ7-N93G] (last visited Mar. 4, 2016).

91. *Id.*

92. See BRUCE GIBNEY, FOUNDER'S FUND, WHAT'S IN A TERM SHEET? THE WORLD'S MOST IRRITATING NOT-QUITE-CONTRACT, http://web.archive.org/web/20130303042811/http://www.foundersfund.com/uploads/term_sheet_explained.pdf [https://perma.cc/K6CB-UUG7] (last visited Mar. 6, 2016); see also Richard B. Potter, *The Drafting and Enforcement of Canadian United States Contracts: A Canadian Lawyer's Perspective*, 20 INT'L L. 3, 5 (1986).

93. See Carl J. Circo, *The Evolving Role of Relational Contract in Construction Law*, 32 CONSTRUCTION L. 16, 17 (2012).

81. See, e.g., PROJECT U-TURN, <http://www.projectuturn.net/> [https://perma.cc/PG5G-FQ9V] (last visited Mar. 4, 2016).

82. See Bryce Johnson, *Efficiency Concerns in Breach of Multilateral Contracts*, 44 UCLA L. REV. 1513 (1997).

83. See Macneil, *supra* note 15, at 694.

84. Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 598 (1990).

85. See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1725-28 (2001); DiMatteo & Morant, *supra* note 65, at 562.

86. Macneil, *supra* note 28, at 636.

mechanism may help to preserve them in a term sheet for CIIs.⁹⁴

VI. Conclusion: Concerns, Predictions, and Next Steps

Contract orders social and commercial relationships, functioning as both preference-protecting and preference-enhancing.⁹⁵ This duality is reflected in some of the counterarguments to this Article's proposal. Three of the strongest counterarguments—and responses to them—are:

- (1) Collective impact succeeds where trust among the participants is strong, and therefore a formal agreement might counter this mindset of trust. However, the relational nature of the collective impact agreement would enable the drafting process to be reflective of the collective impact mindset.
- (2) Collective impact might provide direct relief to underserved communities, but it does not necessarily address the larger social and political issues that historically have fostered inequity. Although collec-

tive impact is designed to foster large-scale social change, more research is required to assess how collective impact may be scaled up. Nothing suggests that the framework could not be used to advance public policy if the right parties formed a CII.⁹⁶

- (3) The formalization of the collective impact agreement process does not necessarily improve the opportunities for community engagement. However, histories of exclusion will be repeated unless collective impact innovates with respect to expectations of community involvement.

Collective impact has a lot of potential. The normalization of a form collective impact agreement is essential for the success of collective impact as the first impact transaction strategy. More empirical data is needed to answer other important questions about the appropriateness of impact transaction. The state could deploy or require mechanisms for oversight of CIIs, regulate the substance of form provisions, or create a ratings system for backbone agencies. As the framework continues to grow in popularity, it will be important to create mechanisms for assessment.⁹⁷

94. See, e.g., *id.* at 24.

95. See DiMatteo & Morant, *supra* note 65, at 568.

96. See Thaddeus Ferber & Erin White, *Making Public Policy Collective Impact Friendly*, in COLLECTIVE INSIGHTS ON COLLECTIVE IMPACT, *supra* note 54, at 22-23, http://ssir.org/articles/entry/making_public_policy_collective_impact_friendly [<https://perma.cc/9MHV-ARTH>].

97. See Marcie Parkhurst & Hallie Preskill, *Learning in Action: Evaluating Collective Impact*, in COLLECTIVE INSIGHTS ON COLLECTIVE IMPACT 17, http://ssir.org/articles/entry/learning_in_action_evaluating_collective_impact [<https://perma.cc/X7L3-3XK6>].