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**Impact Transaction: Using Collective Impact Relational Contracts to Redefine
Social Change in the Urban Core**

Patience A. Crowder©

INTRODUCTION

Money, we make it
Fore we see it you take it
Oh, make you wanna holler
The way they do my life
Make me wanna holler
The way they do my life
This ain't livin'
This ain't livin'
No, no baby, this ain't livin'
No, no, no¹

Called a “protest anthem” for urban America, *Inner City Blues*, the final single from R&B artist Marvin Gaye’s award-winning album *What’s Going On*, documents American urban life by detailing the systemic barriers to economic independence and social equality that plagued urban residents and the impact of these barriers on their daily lives. The song (and album) were released in 1971 as Gaye’s journalistic exploration of the poverty-induced challenges and frustrations of urban life. Almost fifty years later, unfortunately, not much has changed. This is because the operation of law in urban communities historically not been designed to work for the benefit of poor urban residents but, instead, for the benefit of other interests, such as private developers and business interests. Why? Because urban residents are frequently viewed as the “problem” of the urban core. America has attempted to “fix the problems” of its cities since cities first began appearing on the American landscape a couple of hundred years before the release of *What’s Going On*.

Rightly or wrongly, any list of urban problems will typically include challenges such as traffic congestion, crime, gang violence, underperforming public schools, and high rates of poverty. State and local governments have implemented an assortment of programs, including development tax incentives such as tax increment financing, to cure these problems.² The majority of these initiatives, however, rarely are designed to meet the actual challenges endured by poor urban residents.³ Instead, these programs focus on creating enticements to lure a new “type” of urban resident—one who is not poor.⁴ In other words, the “fixes” are designed to displace poor black urban residents instead of engaging directly with the source of the problems.⁵ As such, proposed fixes have been largely mismatched to the problems in the urban core.⁶ For example, disparities in educational opportunities, limited access to quality affordable housing and healthcare, high unemployment rates, and the biased execution of policing practices are urban realities that

¹ MARVIN GAYE, *Inner City Blues (Make Me Wanna Holler)*, on WHAT’S GOING ON? (Motown Records 1971).

² See Audrey McFarlane, *Redevelopment and the Four Dimensions of Class in Land Use*, 22 J. L. & POL. 33 (2006).

³ *Id.* at 45.

⁴ *Id.* at 33.

⁵ Interview by Kenneth Clark of James Baldwin (1963) (available at <https://www.youtube.com/watch?v=T8Abhj17kYU>) (describing urban renewal programs as “Negro removal”).

⁶ *Id.* at 45.

cannot be cured by the construction of new highways, sports stadiums, luxury high-rise apartments and condos, or the opening of craft breweries.⁷ This ongoing mismatch of strategy to “perceived problem” calls for reimagining the application of law in the urban core to address the urgency of poverty.

The origins of the mismatch lie in the industrialization and urbanization of America. During WWI, African American migrants began moving from the oppressive Jim Crow laws in the South to the rapidly industrializing cities in the North and other parts of the country for jobs and some sense of personal safety, dramatically changing the demographics of their destination cities.⁸ In many instances these migrants traded the formal segregationist laws of the South for informal, but, in many ways equally destructive discriminatory practices in other areas of the country. Given the limited opportunities for African Americans to build and accumulate wealth in the South, many of the migrants arriving in these other states were quite poor.⁹ Even those with the financial means to move were confined to these urban spaces by discriminatory practices such as racial covenants and redlining.¹⁰ As a result, poverty and urbanized life became racialized concepts—equating urban life with African American culture and poverty.¹¹ This notion became compounded as poor African Americans were displaced from their neighborhoods and concentrated into high rise public housing projects to accommodate urban renewal projects¹² As such, African Americans became the urban “problem” to be fixed and many approaches to the operation of law in the urban core are inappropriately designed around this flawed notion and, as a result, fail.¹³

The urban core, of course, has never only been inhabited by African Americans. The urban core has and continues to be home for diverse communities, including many low-income whites and immigrants.¹⁴ The growth of immigrant communities in the urban core has reinforced the perception that the urban core is a place defined by poor people of color. When the problems of the urban core became synonymous with the characteristics of the poor people living in the urban core, displacement of urban residents through redevelopment became a strategy for curing “urban blight.”¹⁵ To effectuate lasting social change in the urban core, the role of law must address the *causes of the urban problems*—instead of interacting with poor urban residents *as if they are the problem*. This essay offers a non-litigation alternative for disrupting the practice of mismatched urban development policies while making meaningful social change in the

⁷ See generally *id.*

⁸ See, e.g., THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 23–24, 33–34 (2005) The date range for the Great Migration is typically reported as from 1910–1970. However, that date range has been divided into two segments: 1910–1930 and 1940–1970.

⁹ *Id.* at 24.

¹⁰ See generally DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

¹¹ *Id.* at 56.

¹² *Id.* at 55–56.

¹³ *Id.* at 56.

¹⁴ See Faye Hipsman & Doris Meissner, *Immigration in the United States: New Economic, Social, Political Landscapes with Legislative Reform on the Horizon*, MIGRATION POL’Y INST. (Apr. 16, 2013), <https://www.migrationpolicy.org/article/immigration-united-states-new-economic-social-political-landscapes-legislative-reform>.

¹⁵ *Id.* at 56.

urban core and throughout a metropolitan region: impact transaction through the relational contracts of collective impact initiatives.

While urban communities each have their own unique geographic footprint, there are certain common challenges that poor urban residents face as a consequence of systemic race and class discrimination in areas such as affordable housing, healthcare, the application of criminal justice, access to fair lending practices, and equitably resourced public education. Legal recourse to these forms of systemic injustice typically is addressed through impact litigation.¹⁶ Impact litigation is a powerful legal tool traditionally associated with public interest or social change lawyering in the pursuit of large scale social change through class action law suits.¹⁷ These law suits have been brought to bar housing discrimination, segregation in public schools, discrimination in hiring, and myriad other discriminatory practices. While these law suits brought significant victories that secured important rights through the creation of new laws, the suits did not eradicate the discriminatory behavior in actual practice. For example, despite the Supreme Court's decision to desegregate public schools, school segregation remains a significant challenge for the majority of students in America's public schools.¹⁸ Thus, reexamination of the application of law in the urban core is critical, and transactional law is an effective lens for this reexamination.

Transactional law is centered on value creation, and transactional practice seeks to create value for all of the parties to a transaction.¹⁹ It does this by being a forward-looking practice designed to effectuate parties' common goals while simultaneously identifying and accounting for preventative mechanisms to prevent disharmony among the parties.²⁰ Unlike impact litigation, impact transaction is not the pursuit of social change through judicial adjudication.²¹ Instead, impact transaction is "a transactional, non-litigation strategy for social change"²²—a social change strategy based on voluntary actions and agreements among parties interested in pursuing large-scale social change.²³ Impact litigation successes have occurred through a range of methodologies and strategies.²⁴ Like impact litigation, impact transaction can materialize through different methodologies.²⁵ Collective impact is an impact transaction strategy.²⁶

Collective impact is an emerging framework for large-scale social change.²⁷ As a "commitment of a group of important actors from different sectors to a common agenda for solving a specific social problem,"²⁸ collective impact is not just a new term "for collaboration, but [it] represents a fundamentally different, more disciplined, and higher-

¹⁶ See, e.g., ALAN CHEN & SCOTT CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 624 (2012).

¹⁷ See generally *id.*

¹⁸ See *infra* notes 32 – 36 and accompanying text.

¹⁹ ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 4 (2013).

²⁰ *Id.*

²¹ *Id.* at 5.

²² Patience A. Crowder, *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, 49 IND. L. REV. 621, 623 (2016).

²³ See *Id.*

²⁴ *Id.* at 625.

²⁵ *Id.* at 628.

²⁶ *Id.* at 633.

²⁷ *Id.*

²⁸ John Kania et al., *Essential Mindset Shifts for Collective Impact*, STAN. SOC. INNOVATION REV. 2, 2 (2014).

performing approach to achieving large-scale social impact.”²⁹ Reflective of transactional practice, collective impact seeks to create value for all of the various parties involved in a given initiative using means that do not involve litigation, but a social action deal-making strategy. It is a more engaged method of collaboration with its defining features being “a centralized infrastructure, a dedicated staff, and a structured process”³⁰ but with no formal contracting process. Much of the value generated through transaction, however, is through contract. While entities may be parties to contracts, people operate entities and their relationships with others drive deals and other transactions. There’s a name for that: relational contract theory. This essay presents collective impact initiatives as relational contracts and explains why the practice of collective impact needs a written form agreement that reflects relational contract principles to enhance the collective impact framework and facilitate impact transaction to address urban poverty.

I. Exploring Impact Transaction as a Tool for Large-Scale Social Change

Many lawyers dedicate their careers to using the rule of law to secure systemic relief for subordinated and marginalized individuals and communities. Impact transaction emerges from this tradition, as an additional strategic tool for the social advocacy toolbox – presented here as a framework for changing interrupting the cycle of urban poverty.

Impact litigation is the legal tool traditionally associated with public interest or social change lawyering seeking large scale social change in areas such as housing, public education, and health care. Impact litigation is “[p]lanning, preparing, and filing or defending law suits focused on changing laws or the rights of specific groups of people.”³¹ Even if only one individual is involved in the litigation, impact litigation is judicial adjudication of cases that have the potential to impact conditions broadly for many similarly-situated people or to highlight a particular issue. To pursue impact litigation, advocates employ legal strategies to vindicate rights and address injustice through judicial opinion, while, in turn, hoping that such judicial opinions would promote more expansive legal and social changes through legislative action. Impact transaction is not offered as a replacement of impact litigation as a tool for social change, but as a complementary strategy. Like impact litigation, impact transaction is a legal strategy for social change. Impact transaction, however, is not a strategy seeking a judicial remedy. Courts facilitate impact litigation, whereas impact transaction is facilitated by voluntary acts among parties seeking to achieve a social outcome through transactional means, such as an agreement.

While this essay does not purport to replace impact litigation as a strategy for social change, it does assert that there are two scenarios where transaction is the preferred approach to problem-solving. First, where impact litigation has pushed an issue as far as it can go through the judicial system, but without producing a framework for implementing the social change sought. For example, one of the most renowned instances of a successful impact litigation strategies is the National Association for the Advancement of Colored People’s (NAACP) campaign to abolish segregation in public education by bringing *Brown*

²⁹ Fay Hanleybrown et al., *Channeling Change: Making Collective Impact Work*, Stan. Soc. Innovation Rev. 1, 2 (2012).

³⁰ John Kania & Mark Kramer, *Collective Impact*, STAN. SOC. INNOVATION REV. 36, 38 (2011).

³¹ *Litigation: Impact*, HARVARD LAW SCHOOL, <http://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-interest-work-types/impact-litigation/> (last visited March 14, 2019).

v. Board of Education.³² *Brown* was decided in 1954 and despite its calling for the desegregation of America's public schools, the majority of students in our public school system today attend segregated schools in 2019.³³ This is because the Court's decision left the implementation of desegregation to the states, and many, if not the majority of states with segregated public school systems failed to implement any meaningful strategies for desegregation.³⁴ Thus, a judicial win, while crucially important, does not always guarantee an actual sustainable social change outcome.³⁵ Impact transaction is an alternative to impact litigation as a tool for large-scale social change where a social justice outcome is predicated upon an infrastructure for implementation that cannot be achieved by a judicial decision, but may be achieved through a transactional strategy, such as agreement through relational contract.³⁶

The second scenario occurs where impact litigation is ill-equipped, as a practical matter, to achieve social change because of its focus on securing individual rights. Impact litigation pursues large-scale social change through class action law suits, however, the effects of the law suit are not limited to the members of the class. For example, one of the most recent examples of an impact litigation case, *Obergefell v. Hodges*, legalized same sex marriage throughout the United States for all citizens—not just those participating in the lawsuit.³⁷ Unlike impact litigation, impact transaction is not triggered by infringement on an individual's rights or the commission of an actionable harm. Impact transaction is a strategy to address a social ill where the eradication of that ill is not intended to produce new legal rights for individuals that fit a class but, instead, systemic change. However, again, this essay does not question the import of impact litigation. Instead, it offers impact transaction as a complementary non-litigation strategy for pursuing social change in the urban core.

Social change advocates understand that there is a distinction between “equality” and “equity.”³⁸ Equality ensures that everyone can participate in the same process and that the process, itself, does not bar certain groups of people from participation.³⁹ Equity, however, understands that everyone needs access to the same opportunities while recognizing that “access” is a dynamic concept that must change in accordance with individual circumstances and needs.⁴⁰ Impact litigation is designed to pursue equality, impact transaction, on the other hand is designed to promote equity. Both, of course, are important strategies for social change through legal reform. Conceptually, these two strategies share the same goal of effectuating large-scale social change. The question explored in this essay is how to do that through *written* agreement, and, more specifically, whether relational contract theory can inform the construction of a framework for collective impact agreements to facilitate impact transaction. In addition to outlining the

³² See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³³ See, e.g., Kristina Rizga, *A Witness to the Desegregation-and Resegregation- of America's Schools*, ATLANTIC (May 1, 2018), <https://www.theatlantic.com/education/archive/2018/05/on-teaching-rebecca-palacios/559322/> (discussing segregation in Corpus Christie schools).

³⁴ See, e.g., Sarah Garland, *Was 'Brown v. Board' a Failure?*, ATLANTIC (Dec. 5, 2012), <https://www.theatlantic.com/national/archive/2012/12/was-brown-v-board-a-failure/265939/>.

³⁵ *Id.*

³⁶ See *id.*

³⁷ See 135 S. Ct. 2584 (2015).

³⁸ See Vu Le, *Why Equality Is Actively Harmful to Equity*, NONPROFIT AF (Nov. 9, 2015), <https://nonprofitaf.com/2015/11/why-equality-is-actively-harmful-to-equity/>.

³⁹ *Id.*

⁴⁰ See *id.*

collective impact framework, the next section presents examples of current collective impact initiatives and explains their potential for impact transaction.

II. The Collective Impact Infrastructure and Framework

Originating in the philanthropic community, the collective impact framework holds potential for promoting and sustaining impact transaction. Collective impact initiatives run the gamut of transactional activities across the globe⁴¹, including affordable housing development, economic development and workforce development, K-12 education, and health and nutrition.⁴² For example, the Opportunity Chicago collective impact initiative organized around the common agenda of helping public housing residents find, train for, and obtain quality jobs.⁴³ The Road Map Project collective impact initiative works to close the K-12 achievement gap in Seattle, Washington.⁴⁴ And, the Fresno Food Security Network collective impact initiative is focused on eliminating food insecurity.⁴⁵ These three collective impact initiatives work to improve the conditions of affordable housing, equity in public education, and community health outcome through nutrition through non-litigation, transactional collaborative arrangements—all examples of systemic change through impact transaction. The success of each of these initiatives is linked to the participants' incorporation of and adherence to the collective impact structure outlined below.

The collective impact framework is built around the following five hallmarks: (1) a common agenda; (2) shared measurement; (3) mutually reinforcing activities; (4) continuous communication among the parties; (5) and the implementation of backbone support organizations.⁴⁶ First, fundamental to the framework, all parties to collective impact initiatives must agree on a common agenda that reflects “a common understanding of the problem and a joint approach to solving it through agreed upon actions.”⁴⁷ The desired outcome of the common agenda is what brings the parties to the collective impact in the first place.⁴⁸ Second, the parties must agree to a methodology of shared measurement for data collection that provides a framework for measuring and reporting the initiative's successes and failures, while acting as a check to keep the individual efforts of each member of the initiative aligned with the common agenda.⁴⁹ Third, each party must contribute distinct, but mutually reinforcing, activities to advance the initiative and avoid

⁴¹ In addition to the United States, collective impact initiatives are ongoing in Canada and Australia. For Canada see *Collective Impact*, TAMARACK INST., <http://www.tamarackcommunity.ca/collectiveimpact> (last visited Apr. 19, 2019). For Australia see *Collective Impact*, SOC. OUTCOMES, <https://socialoutcomes.com.au/toolkit/collective-impact/> (last visited Apr. 19, 2019).

⁴² See generally Initiative Directory, COLLECTIVE IMPACT F., <https://www.collectiveimpactforum.org/initiatives> (last visited Apr. 19, 2019).

⁴³ See generally FSG, COLLECTIVE IMPACT CASE STUDY: OPPORTUNITY CHICAGO (2012) (available at <https://www.fsg.org/publications/opportunity-chicago>).

⁴⁴ *About the Road Map Project*, ROAD MAP PROJECT, <https://roadmapproject.org/about-the-road-map-project/> (last visited Apr. 19, 2019).

⁴⁵ See generally GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA, FOOD TO SHARE AS A HEALTHY COMMUNITY AND ENVIRONMENTAL JUSTICE CASE STUDY (2018) (available at <http://www.opr.ca.gov/docs/20180305-FoodToShare-Case-Study.pdf>).

⁴⁶ See Kania et. al, *supra* note 28, at 2.

⁴⁷ See Kania & Kramer, *supra* note 30, at 39.

⁴⁸ *Id.*

⁴⁹ See *id.* at 40.

duplication of the services contributed to the collective impact.⁵⁰ Fourth, members of collective impact initiatives must participate in ongoing communication systems, which may include the creation of a common vocabulary and other mechanisms to ensure that all of the parties are continuously working towards the common agenda.⁵¹ Continuous communication reinforces levels of trust among the participants, which is essential to the initiative's success.⁵² Lastly, and arguably, most essentially, collective impact initiatives are managed by backbone agencies that are supposed to ensure the other four hallmarks are being advanced within a collective impact initiative.⁵³ Backbone agencies are the project managers who manage the daily functions of their initiatives by working with a collective impact network to "build consensus around a common goal, agree on how progress will be measured, and coordinate activities to maximize results."⁵⁴ Backbone agencies do not directly provide any program-related services to a collective impact network,⁵⁵ but, instead, focus "on the relationships between organizations and the progress toward shared objectives"⁵⁶ by coordinating the activities of the other stakeholders in the collective impact network.⁵⁷ The success of collective impact initiatives is linked to the effectiveness of the backbone agency, and ineffective backbone support is the number one reason collective impact initiatives fail.⁵⁸

It is not only the structured framework that distinguishes collective impact from other collaborative processes. Two other unique characteristics of collective impact initiatives are (i) the diverse range of parties in each collective impact networks, and (ii) the expectation that each specific party is supposed to contribute a very distinct role.⁵⁹ Collective impact rosters typically include one or more backbone agencies; one or more funders to provide technical or financial support; a collective impact consultant; and an assortment of organizational members.⁶⁰ A collective impact initiative may consist of organizational members such as universities, nonprofit organizations, government and public agencies, and business interests.⁶¹ Once the network roster is finalized, the members are assigned to participate on steering committees and/or thematic working groups.⁶² Each member is expected to provide "specialized assistance and resources specific to their ability."⁶³ For example, "[b]usiness organizations are taking on strong roles [in collective impact initiatives] . . . serving as a founding partner or backbone organization, to represent

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ Kara Bixby, LINKEDIN (Aug. 1, 2014), <https://www.linkedin.com/in/kara-bixby-19483288>.

⁵⁵ See Kania & Kramer, *supra* note 30, at 40.

⁵⁶ See *id.* at 39.

⁵⁷ See *id.* at 40.

⁵⁸ See generally Shiloh Turner et al., [Understanding the Value of Backbone Organizations in Collective Impact: Part 3](https://ssir.org/articles/entry/understanding_the_value_of_backbone_organizations_in_collective_impact_3), STAN. SOC. INNOVATION REV. (Jul 19, 2012), https://ssir.org/articles/entry/understanding_the_value_of_backbone_organizations_in_collective_impact_3

⁵⁹ Kania & Kramer, *supra* note 30, at 39.

⁶⁰ *Id.*

⁶¹ *Id.* at 40.

⁶² *Id.*

⁶³ FEDERAL RESERVE BANK OF RICHMOND, RESERVE BANK COLLABORATION IN RURAL AREAS THROUGH THE COLLECTIVE IMPACT MODEL (2015), https://www.richmondfed.org/-/media/richmondfedorg/publications/community_development/marketwise_community/2015/issue_1/pdf/vol5_issue1.pdf.

the collective voice of the business community.”⁶⁴ The collective impact framework also sets expectations for the level of involvement from each participant by requiring representatives of each network members to reflect organizational leadership, such as university presidents, school district superintendents, and business, nonprofit, and government officers. These requirements for diversity in organizational membership and the commitment of organizational leaders should be viewed as indirect tools for enhancing equity through collective impact by demonstrating a replicable model for inclusive design, thinking, and planning in the public’s interest. These are the sorts of mechanisms that will facilitate impact transaction.

So, why would collective impact initiatives work where other types of initiatives have failed? Why aren’t collective impact initiatives another proposed mismatch for addressing urban poverty? The answer is because collective impact’s influence is not limited to the production of a new form of collaboration but also has generated several paradigm shifts within the ideologies of philanthropic and social advocacy networks.⁶⁵ The most significant of these paradigm shifts is a more deliberative approach to identifying and working to solve “adaptive” social problems instead of focusing on “technical” social problems.⁶⁶ Adaptive problems 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.”⁶⁷ Urban poverty, for example, is an adaptive problem, because, despite decades of effort, there is no singular quantifiable “fix” or “cure” for urban poverty.⁶⁸ Urban poverty is not a social problem that can be managed by a single organization. Technical social problems, in contrast, are well defined and capable of being managed by a single organization.⁶⁹ A shelter that provides temporary housing to women and children escaping domestic violence demonstrates the management of a technical problem, an important and fixed intervention in individual family crises. The adaptive iteration of that example would focus on the systemic issues and social norms that contribute to incidents of domestic violence. Technical social problems are single-dimensional, causing them to be ill-suited for collective impact initiatives. Collective impact is, instead, designed for multidimensional problem solving, where there is a breadth of issues and the different perspectives on those issues held by a diverse group of stakeholders.⁷⁰ With this paradigm shift, collective impact initiatives avoid making isolated impacts in social problems because “[b]y their very nature, individual nonprofit services are fragmented and dispersed, with each organization typically serving a limited population with specific interventions.”⁷¹

⁶⁴ Collective Impact for Education and Workforce Development, ASS’N CHAMBER COM. EXECUTIVES, <http://www.acce.org/wiki/collective-impact-for-education-and-workforce-development/> (last visited Apr. 3, 2019) (discussing the increasing role of chambers of commerce as backbone support organizations in collective impact initiatives).

⁶⁵ Kania & Kramer, *supra* note 30, at 39.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Practitioner Insights: Federal Reserve Bank of San Francisco, COLLECTIVE IMPACT FORUM, <http://www.collectiveimpactforum.org/resources/practitioner-insights-federal-reserve-bank-san-francisco>

⁶⁹ *See id.*

⁷⁰ *See, 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).

⁷¹ *See generally* Kania et al., *supra* note 28. Michele Jolin et al., *Needle-Moving Community Collaboratives: A Promising Approach to Addressing America’s Biggest Challenges*, BRIDGESPAN GROUP 1, 2 (2012), <https://www.bridgespan.org/bridgespan/Images/articles/needle-moving-community-collaboratives/needle-moving-community-collaboratives.pdf?ext=.pdf>.

Despite its potential, like with any emerging movement, collective impact has to overcome challenges to its structure and implementation. In the context of confronting urban poverty, there are two significant challenges to the sustained effectiveness of collective impact as impact transaction: (i) the need for collective impact to develop a deeper engagement with principles of equity and inclusivity, and (ii) the need for the construction of a framework for working with written agreements.⁷²

It is important for the collective impact framework to explicitly reflect principles of equity so that an equity framework is in place at the founding of a collective impact initiative.⁷³ Fair critiques of the collective impact framework argue that collective impact initiatives rely on a “grasstops”⁷⁴ orientation instead of promoting “grassroots” organizing, which leads to critiques that collective impact initiatives make decisions about the communities in which they are attempting to promote large-social change without first meaningfully engaging that community.⁷⁵ That would be a waste that can be thoughtfully avoided. Advocates of equity and inclusivity who see the potential of collective impact have started the work of developing an equity lens for collective impact initiatives,⁷⁶ as well as formulating strategies for ensuring that equity principles are built into the collective impact framework at the initial planning phases.⁷⁷ Understanding “‘context’ . . . [as] a broad concept best perceived comprehensively,”⁷⁸ relationists argue that “[c]ontract law, which orders bargaining relationships and transactions, should always be tempered by the facts of particular contexts.”⁷⁹ “Context is the substance of the deal, the circumstances under which the deal was made, the course of dealing between the parties, the industry(ies) in which the parties operate, and ‘the asymmetrical information or power disparities’⁸⁰ present in the transaction.” But, in collective impact agreements, context could and should be broader. “The lack of acknowledgment of cultural, class, and racial factors in the interpretation and enforcement of contracts—bias and discrimination issues aside—relates partially to contract law’s egalitarian underpinnings.”⁸¹ Impact transaction can occur through collective impact initiatives executed through written relational contracts that reflect principles of equity.

The second significant challenge to the long-term success of collective impact is the lack of any sort of formalized contracting process for collective impact agreements. Members of collective impact initiatives “agree to agree,” while participating in numerous

⁷² See, e.g., Michael McAfee et al., *Equity: The Soul of Collective Impact*, POLICYLINK 1, 3, http://www.policylink.org/sites/default/files/Collective_Impact_10-21-15f_0.pdf

⁷³ See, e.g., Sarah Stachowiak & Lauren Gase, *Does Collective Impact Really Make and Impact?*, STAN. SOC. INNOVATION REV. (Aug. 9, 2018), https://ssir.org/articles/entry/does_collective_impact_really_make_an_impact.

⁷⁴ See Melody Barnes et al., *Roundtable on Community Engagement and Collective Impact in Collective Insights on Collective Impact*, STAN. SOC. INNOVATION REV. 12, 14 (2014).

⁷⁵ See *id.*

⁷⁶ See generally *Seeing Collective Impact Efforts with a Racial Justice Lens*, INTERACTION INST. FOR SOC. CHANGE (June 7, 2017), <http://interactioninstitute.org/seeing-collective-impact-efforts-with-a-racial-justice-lens/>.

⁷⁷ See, e.g., Juan Sebastian Arias & Sherl Brady, *3 Steps for Advancing Equity through Collective Impact*, COLLECTIVE IMPACT FORUM (Apr. 15, 2015), <http://collectiveimpactforum.org/blogs/11421/3-steps-advancing-equity-through-collective-impact>.

⁷⁸ *Id.* at 662.

⁷⁹ *Id.* at 662 (citing Larry A. DiMatteo & Blake D. Morant, *Contracts in Context and Contracts as Context*, 45 WAKE FOREST L. REV. 549, 561 (2010)).

⁸⁰ Arias & Brady, *supra* note 77, at 662 (citing DiMatteo & Morant, *supra* note 79, at 557).

⁸¹ *Id.* at 658 (citing DiMatteo & Morant, *supra* note 79, at 569).

planning processes to build trust and work toward a common agenda.⁸² The complexity of attempting to solve adaptive problems through the efforts of multiple and distinct parties necessitates a more formalized collective impact agreement to ensure that all parties' expectations are memorialized, increasing the likelihood that those expectations will be met.⁸³ A typical bank finance transaction presents an interesting conceptual analog for demonstrating the value of written agreements. For example, when a bank syndicate makes a loan to a borrower, the relationship among the various banks and the borrower is governed by a credit agreement or some other type of loan agreement. That credit agreement documents each of the party's obligations, including the total loan amount, the amount of each individual bank's participation in the loan, the conditions precedent to closing the loan, the rate of interest applied to the loan, the loan term, affirmative covenants (things the borrower must do to stay in compliance with the agreement), negative covenants (things the borrower should not do while under the agreement), events of default (things the borrower might do to default under the agreement), the various representations and warranties that the borrower must make about its capacity to participate in and repay the loan, the required steps the borrower must draw from the loan, and the obligations of each of the lenders to participate in the loan. This transaction, and similar transactions, are accomplished using a myriad of form agreements that have been proven for the type of transaction and, ideally, tailored for the particular transaction.⁸⁴ While loan agreements are a markedly different type of transaction from collective impact initiatives, they operate under a similar structure of relationship but without any form agreement frameworks.⁸⁵ Loan agreements are shaped and governed by contract law. As explained below, collective impact initiatives should be shaped and governed by relational contract theory because collective impact agreements drafted using relational contract principles could be the appropriate match for confronting poverty in the urban core as impact transaction.

III. Impact Transaction in The Urban Core Through Collective Impact Initiatives and Relational Contract Theory

This essay opened by explaining the mismatch between the challenges in the urban core and the solutions typically proposed to address those challenges. Linking the mismatch to historic practices of race and class discrimination, this essay promotes the idea of private agreement as a means for creating large-scale social change in the urban core. More specifically, this essay seeks to counter the mismatches by presenting the potential of written relational collective impact agreements to address the urgency of poverty. In other scholarship, I have discussed the value of voluntary agreement.⁸⁶ Here, in particular, the value of agreement between parties committed to social change can be striking when compared to the social and economic gaps created by government failures in mismatched responses to urban poverty. Transactional practice seeks value creation for all the parties

⁸² This essay argues for the value of a written agreement to effectuate collective impact initiatives. While courts generally treat "agreements to agree" as unenforceable, there are a number of legal scholars who have suggested this distinction between a contract and negotiations preceding contract formation is overly formalistic and should be reconsidered. *See, e.g.,* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 871 (2001) (citing Ian R. Macneil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627 (1975)).

⁸³ *Id.*

⁸⁴ Crowder, *supra* note 22, at 654.

⁸⁵ *Id.* at 637.

⁸⁶ *See id.*

to a transaction,⁸⁷ collective impact is the latest iteration of transactional advocacy in the public interest.

Before collective impact initiatives, transactional efforts at social change occurred through transactions such as memorandums of understanding (MOUs), the creation of social enterprise structures, or by engaging in the most well-known space for transactions for the public good, and community economic development (CED).⁸⁸ While each of these types of “public good transactions” assist underserved communities in the urban core, each also has certain limitations that work against its ability to promote large-scale social change through impact transaction.

Nonprofit organizations and public sector agencies regularly use MOUs to memorialize their strategic partnerships.⁸⁹ MOUs, however, are typically nonbinding agreements that document the parties’ aspirational goals without identifying specific rights and obligations of the parties or outcomes.⁹⁰ Similarly, the majority of social enterprises are generally either for-profit businesses that pursue “the methods and disciplines of business and the power of the marketplace to advance their social, environmental and human justice agendas”⁹¹ or nonprofit corporations undertaking revenue generating business.⁹² The pursuit of social change through social enterprise is growing in popularity in terms of both increasing numbers of social enterprise start-ups and consumers seeking to support social enterprises with their dollars.⁹³ While consistently making significant interventions in their chosen social fields, as independent and unrelated entities, social enterprises are ill-suited for promoting large-scale social change through collaborative efforts as impact transaction. The social enterprise “movement” facilitates the formation and operation of individual entities. Any collaboration among social enterprises is focused on the growth of the industry through regulatory reform and other operational concerns, not forming cross-sector partnerships focused on systemic social change.⁹⁴ Lastly, CED is both a type of legal practice and a social movement that has been deployed in underserved communities for decades.⁹⁵ CED projects originated to promote community-based economic opportunity in underserved communities through the deployment of different types of transactions, such as community benefits agreements (“CBAs”).⁹⁶ CBAs are private contracts between developers and community groups by which a community (usually through a community association or nonprofit organization) agrees to support a local development project in exchange for certain benefits that should meet the needs of the local community, such as workforce development and local hiring preferences for

⁸⁷ See generally Ronald J. Gilson, *Lawyers as Transaction Cost Engineers* (Aug. 1997).

⁸⁸ Colorado Collaboration Award, *Collaboration Toolkit: Creating an MOU*, 2013, <http://anschutzfamilyfoundation.org/wp-content/uploads/2016/04/MOU-toolkit-MAIN.pdf>.

⁸⁹ See *Written Agreements*, PROJECT FOR PUB. SPACES (Dec. 31, 2008), <https://www.pps.org/article/pppp-chapter4>.

⁹⁰ See, e.g., *id.*

⁹¹ Mark Jordhal, *What Is a Social Enterprise?*, BEAD FOR LIFE (Apr. 5, 2015), <http://www.beadforlife.org/blog/what-is-a-social-enterprise/> [[<https://perma.cc/L4RU-A75S>]; see also Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215 (2013).

⁹² Jordhal, *supra* note 91.

⁹³ Roger A. Clay, Jr. & Susan R. Jones, *A Brief History of Community Economic Development*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 257, 257 (2009).

⁹⁴ *Id.* at 265.

⁹⁵ *Id.* at 258.

⁹⁶ *Id.* at 261.

community residents.⁹⁷ Despite many significant successes throughout the decades, the suitability of CED, generally, and CBAs, specifically, as tools for the type of large-scale social change contemplated by impact transaction, is unsettled. The reasons for this include the ever-present question about the identity of the “community” to be involved in decision-making as well as the idea that CED theories may limit CED’s impact to local neighborhood projects to the exclusion of the possibility of large-scale social change collective impact initiatives, and impact transaction, are designed to promote.⁹⁸

The benefits of these public good transactions are unquestioned by this essay. Like MOUs, social enterprises, and CED transactions, collective impact is a public good transaction, and impact transaction is not presented to eradicate the need for other public good transactions (either those currently in existence or those waiting to be discovered). This essay’s suggestion that these types of public good transactions do not directly advance impact transaction (i.e. large-scale social change) is not an argument against their effectiveness, but recognition that comprehensive large-scale social change in the urban core through impact transaction may be best accomplished through the use of private written collective impact agreements that are grounded in relational contract principles. Where CED is inherently local, collective impact agreements can be regional in scope.⁹⁹ Where the social enterprise movement is focused on the efforts of individual entities, as explained later,¹⁰⁰ collective impact agreements can be the umbrella under which multiple entities work together to advance impact transaction. Where MOUs are an outdated approach to contracting for the public good, collective impact agreements drafted using relational contract theory can properly set the parties’ expectations for both performance and nonperformance under the agreement.

There is inherent value in both contract and an informed process for contracting. Parties enter contracts looking for predictability, risk allocation, and reliability,¹⁰¹ and contracts bring order to transactions by creating frameworks for the parties to transact through. Irrespective of discipline, most contracts exhibit five common elements: (1) cooperation; (2) exchange; (3) mutual planning for the future; (4) potential sanctions; and (5) social control and social manipulation.¹⁰² Contract law, however, is not static. While the elements of most fundamental contract law principles have remained the same since first articulated (think offer, acceptance, and consideration as the elements for formation of a contract), individual concepts do evolve over time to reflect current industry practices, regulatory schemes, legal developments, and new technologies (think of the evolution of the concept of consideration as a necessity for formation, evolving from a significant

⁹⁷ 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>.

⁹⁸ See Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131, 144–45 (2004).

⁹⁹ Focusing on “cradle to career” programing in urban schools in Cincinnati, suburbs in Ohio, and Northern Kentucky, StrivePartnership is one of the first and most renowned regional collective impact initiatives. See *Collective Impact*, STRIVETOGETHER, <https://www.strivetogether.org/our-approach/collective-impact/> (last visited Apr. 19, 2019).

¹⁰⁰ See *infra* notes 106 – 119 and accompanying text discussing relational contract’s ability to consider both “corporate and social” agendas as indicative of collective impact’s ability to have agreements with similar scopes.

¹⁰¹ Symposium, *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 692 (2005).

¹⁰² See, e.g., Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 808-09 (1974) (arguing “status, social role, kinship” and other “internalizations” play a role in contract and discussing the role of the social matrix in contract).

concrete deliverable to the requirement of a “mere peppercorn”). In addition to evolving contractual concepts, different types of contracts emerge to accommodate specific industries and types of parties. For example, e-contracts accommodate virtual exchanges between parties to contracts for new types of services such as shared rides and other services stemming from the “gig economy.” New forms of contracting follow societal trends and innovations. Given the increasing diversity of contracting needs, contract law scholars consistently consider what new mechanisms will “accommodate [the] new world of transactions.”¹⁰³ Collective impact is a new type of transaction, and relational contract theory is the contract law mechanism best suited to accommodate this new transaction.

The evolution of contract law as a discipline is separated into the development of classical and modern contract law theories. Classical legal analysis holds that the definitive contract is an isolated discrete exchange between strangers in a market where the parties are able to “at minimal cost . . . allocate explicitly the risks that future contingencies may cause one or the other to regret having entered into an executory agreement.”¹⁰⁴ Modern contract law, in contrast, holds that formation of a contract may be a dynamic, evolving process, rather than a process located at a fixed moment in time.¹⁰⁵ Relational contract theory is, arguably, modern contract law’s most significant contribution to contract law theory.¹⁰⁶ Lacking a singular definition, relational contracts are typically described as contracts where “the parties are incapable of reducing important terms of the arrangement to well-defined obligations”¹⁰⁷ and where “[s]uch definitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance.”¹⁰⁸ Another definition describes a relational contract as “[a] legally enforceable written contract establishing a commercial partnership within a flexible contractual framework based on social norms and jointly defined objectives, prioritizing a relationship with continuous alignment of interests before the commercial transactions.”¹⁰⁹ Relational contracts govern both the substance of the transaction (i.e. what is being exchanged among the parties) as well as the frameworks for how those exchanges are to occur over time. There are two main approaches to consider in the creation of a relational contract: the substance of what is being exchanged (i.e. the goods and/or services being exchanged) and the types of provisions and mechanisms included in the agreement to govern the exchange. Hallmarks guiding how to approach drafting a relational contract (i.e. the goals for the contract) include focus on the relationship, not just the deal to be transacted; establishing partnerships instead of an arms-length relationships; embedding social norms in the relationship; avoiding and mitigating risk by alignment of interests; and

¹⁰³ *Relational Contracting in a Digital Age*, *supra* note 101, at 698.

¹⁰⁴ Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1089–90 (1981). This narrow conception of contract law led Grant Gilmore to write *The Death of Contract* in which he argued that all contracts are individual and discrete interactions and that, as such, there was little value in continuing to teach contract law as a doctrinal course in the law school curriculum because there was no comprehensive theory of contract law to teach to students. GRANT GILMORE, *THE DEATH OF CONTRACT* (1st ed. 1974).

¹⁰⁵ *Id.* at 1095–96.

¹⁰⁶ See Richard Austen-Baker, *A Relational Law of Contract?*, 20 J. CONT. L. 125 (2004).

¹⁰⁷ Goetz & Scott, *supra* note 104, at 1091.

¹⁰⁸ *Id.*

¹⁰⁹ David Frydlinger et al., *Unpacking Relational Contracts: The Practitioner’s Go-To Guide for Understanding Relational Contracts*, U. OF TENN. C. OF BUS., at 5.

creating fair and flexible framework in which to execute the relational contract.¹¹⁰ Hallmarks of types of provisions included in relational contracts include indefiniteness in duration; informality; incompleteness;¹¹¹ impreciseness with performance standards; intentionality about identifying roles for social norms and social control; representation of industry standards;¹¹² and tolerance of gaps in risk allocation. Each of these hallmarks is also a collective impact value,¹¹³ which further underscores the appropriateness of relational contract theory to execute collective impact agreements. For the purposes of contemplating use of collective impact agreements to counter urban poverty, this essay focuses on three of the most significant common themes between the hallmarks of relational contract theory and the collective impact framework: (i) the importance of the relationship among the parties; (ii) the role of social norms and social capital; and (iii) incompleteness of contact.

As relational contracts steer incomplete, long-term relationships,¹¹⁴ the importance of the context of those relationships is supreme. Relational contract theory recognizes that “relationships are not just person to person, but also organization to organization.”¹¹⁵ The importance of the underlying relationships among the parties broadens the scope of the traditional contract to include “the framework for the relationship—the forums, behaviors and mechanisms within which interactions will occur.”¹¹⁶ The scope of relational contracts exceeds beyond the goods or services being exchanged to include governing the mechanisms in the relationships designed to “not only foster mutual trust, but also facilitate the sharing of knowledge and information to generate innovation and value for the parties to the relationship.”¹¹⁷ Considering this scope, it is not surprising that “[a] key goal of relational contract is to create a continuous alignment of interests throughout the contract term,”¹¹⁸ meaning that “the influential elements of relational contracting that assume greater significance are co-operation and dependency.”¹¹⁹

The construction industry is the paradigmatic example of relational contract because construction contracts typically involve long-term projects with multiple parties, such as property owners, general contractors, subcontractors, architects, and engineers. These projects generally are completed in phases, with many projects remaining incomplete until other phases are first completed. A fundamental principle in construction is that the primary function of a construction contract “is not to predict or control all contingencies that may arise in the future but to create a workable framework for managing successful relationships.”¹²⁰ In construction, relationships are paramount, and

¹¹⁰ *Id.* at 21.

¹¹¹ See Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 852, 862 (2000).

¹¹² But see Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 662 (2010) (discussing the importance of applying “loose standards [rather] than formalistic rules” to relational contracts).

¹¹³ See Kania et. al, *supra* note 28, at 2 (discussing the five hallmarks of collective impact).

¹¹⁴ Morten Hviid, *Long Term Contracts and Relational Contracts*, in THE ENCYCLOPEDIA OF LAW AND ECONOMICS 46, 58 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000)

¹¹⁵ Frydlinger et al., *supra* note 109, at 4.

¹¹⁶ *Id.*

¹¹⁷ Barbara Colledge, *Relational Contracting – Creating Value Beyond the Project*, 2 LEAN CONSTRUCTION J. 30, 32 (2005).

¹¹⁸ *Id.* at 20.

¹¹⁹ “This greater connectivity between the various professions and stakeholders, greater partnership working, greater sharing of knowledge and ideas or knowledge capital and greater capacity for creativity, to identify creative, effective solutions is a feature of relational approaches.” *Id.* at 39.

¹²⁰ Frydlinger et al., *supra* note 109, at 20.

“[e]xperienced owners and contractors, and their seasoned lawyers, often observe that a project’s success depends more on establishing and managing the relationships between the participants than on the contracts they execute.”¹²¹ The concept of relationality is so inherent in the construction industry that it is embedded in the industry’s standard form documents, which are largely produced by industry trade associations.¹²² The construction industry’s respect for and use of relational contracts is the right model for collective impact practitioners,¹²³ because relationships also drive collective impact agreements.¹²⁴

To manage the scopes of the relationships among the parties to a transaction, relational contracts incorporate rules for the development and operation of social norms. A signature characteristic of relational contracts is the institution of social norms as an enforcement mechanism.¹²⁵ Relational contract theory is an ideal framework for collective impact because relational contract theory allows for the creation of social norms to govern both commercial and social transactions, and collective impact initiatives have both commercial and social contexts.¹²⁶ The construction industry standards discussed earlier are an example of commercial implications of relational contract theory.¹²⁷ The social implications of relational contract theory manifest as both the real impact that relational contracts can actually have on the ground in communities and the types of social norms that may be memorialized in relational contracts to sustain the relationships among the parties.¹²⁸ Relational contracts can be a tool for community development working against urban poverty where the “alignment of both the commercial and social corporate agendas . . . is important in the creation of sustainable communities.”¹²⁹ When employed in a public interest context, relational contracts can strengthen the social capital of those suffering from poverty in the urban core.¹³⁰ “[S]ocial capital refers to connections among individuals – social networks and the norms of reciprocity and trustworthiness that arise from them.”¹³¹ “[P]arties [to relational contracts]. . . have learned to behave under two sets of rules: a strict set of rules for legal enforcement and a more flexible set of rules for social enforcement.”¹³² The notion of working together through agreement to continuously align the interests of the multiple parties to a relational contract in the pursuit of a common agenda completely mirrors the collective impact framework. For example, the comprehensive planning processes discussed previously¹³³ fosters the social norm of trust and creates important decision-making mechanisms such as frameworks for dispute

¹²¹ Carl J. Circo, *The Evolving Role of Relational Contract in Construction Law*, 32 CONSTRUCTION L. 16, 16 (2012).

¹²² *See id.*

¹²³ *See Colledge supra* note 117, at 34.

¹²⁴ *See id.* at 31.

¹²⁵ *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).

¹²⁶ *See id.*

¹²⁷ The construction industry’s adoption of relational contract theory is an example of the commercial application. *See id.* at 32.

¹²⁸ *See id.* at 34.

¹²⁹ *Id.* at 33.

¹³⁰ “The adoption of relational contracting approaches can make a significant contribution to the development of sustainable communities through the building of “social capital.” *Id.* at 31.

¹³¹ Colledge, *supra* note 117, at 34 (quoting ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000)).

¹³² Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 615 (1990).

¹³³ *See, e.g.,* Macneil, *supra* note 102.

resolution.¹³⁴ Examples of other social norms for managing relational contracts include communication; problem-solving; establishing and fostering “no-blame” culture; creating mechanisms to foster “joint working” among the parties; establishing and being clear about mutual objectives; and developing benchmarks for performance measurements and monitoring for continuous improvements.¹³⁵ These guiding principles are almost identical, conceptually, to the five hallmarks of collective impact.¹³⁶ Relational contract theory social norms are developed and best implemented from the parties’ “dedication to the philosophy of collective work, commitment to the common agenda, and willingness to leave . . . ego at the door.”¹³⁷ Members of collective impact networks are bound by a shared desire for large-scale social change and an abiding trust in the collective impact process.¹³⁸

Every contract is partially unplanned¹³⁹ and incomplete. While relational contracts are, by definition, incomplete, that “incompleteness” does not mean relational contracts are substantively flawed.¹⁴⁰ Incomplete contracts are “[l]ess-complete contracts that rely on trust and reciprocity rather than control.”¹⁴¹ Parties enter incomplete contracts for numerous strategic reasons.¹⁴² Two of the most common of these are (i) potential high transaction costs are difficult to estimate in light of an unknown or unpredictable future, and (ii) asymmetric information between the parties that one or both parties is unwilling to

¹³⁴ “The termination of relational contracts engenders closer scrutiny. The duty to adjust or renegotiate, along with the norms of good faith and fair dealing, play more important roles, often non-legally induced.” DiMatteo & Morant, *supra* note 70, at 562 (2010) (citing Larry A. DiMatteo, *Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 317–19 (1999)) (discussing the norms of good faith and fair dealing in contract law).

¹³⁵ See, e.g., JIM BERGMAN ET AL., UNPACKING RELATIONAL CONTRACTS: THE PRACTITIONER’S GO-TO GUIDE FOR UNDERSTANDING RELATIONAL CONTRACTS 5–6, 44 (2016). While relational contract is not a new legal theory, it is an emerging field of interdisciplinary and international study as a business practice with research and scholarship coming from non-law other types of academics, practicing attorneys, and industry experts.

An Australian case study, FFG Enterprise, was recognized as one of the world’s best practice in relational contracting and collaboration. The case study’s authors identified the following lessons for successful relational contracting:

- A charter is a powerful tool
- The roadmap (unpacking relational contracts) already exists;
- Leadership is essential;
- Create a shared belief;
- Build trust;
- Culture is a key enabler;
- Contracts are a tool, not a weapon;
- Co-location is an operational multiplier; and
- Continues improvement is indeed continuous;

KATE VITASEK ET AL., THE ROYAL AUSTRALIAN NAVY FFG ENTERPRISE: A JOURNEY FROM ANTAGONISM TO HIGH PERFORMING RELATIONSHIP 2–5 (2018).

¹³⁶ See Kania & Kramer, *supra* note 30, at 38.

¹³⁷ Kim Fortunato, *When and How To Engage the Private Sector in Collective Impact*, COLLECTIVE IMPACT (July 14, 2015 9:21 PM), <http://collectiveimpactforum.org/blogs/9406/when-and-how-engage-private-sector-collective-impact>.

¹³⁸ See Kania & Kramer, *supra* note 30.

¹³⁹ See Macneil, *supra* note 102, at 731.

¹⁴⁰ See Wendy Netter Epstein, *Facilitating Incomplete Contracts*, 65 CASE W. RES. L. REV. 297, 299–01 (2014).

¹⁴¹ See *id.* at 300.

¹⁴² See *id.* at 305–06.

share.¹⁴³

While “incompleteness” is imbedded in the definition of relational contract, the label is also particularly true for collective impact initiatives. The counter to “incompleteness” is planning. Typically, planning around a discrete contract involves determining (1) the parties’ goals, (2) the costs associated with those goals, and (3) the methods for achieving those goals, including timelines.¹⁴⁴ “Parties to a relational contract . . . are likely to view the exchange as an ongoing integration of behavior which will grow and vary with events in a largely unforeseeable future.”¹⁴⁵ Planning is fundamental to the execution of relational contracts.¹⁴⁶ There is a distinction, however, between performance planning and risk planning.¹⁴⁷ Performance planning contemplates what tasks each party must perform, the timeline by when the parties must perform these tasks, and the appropriate performance standards.¹⁴⁸ Relational contract theory’s willingness to tolerate risk is not synonymous with not planning for risk.¹⁴⁹ Planning for risk allocation contemplates the positions of each party and which is best situated to minimize or withstand the risks in the transaction.¹⁵⁰ In collective impact, planning dominates all other activities, as ongoing negotiated brainstorming occurs among the parties about the initiative.¹⁵¹ Collective impact is a relational phenomenon that requires expression in written collective impact agreements to reach its full potential.¹⁵²

The idea of a tailored written agreement is not alien to practitioners of relational contract theory.¹⁵³ The argument for a written collective impact agreement may seem in opposition to the culture of trust that is fundamental to the core, formation, and sustainability of collective impact initiatives.¹⁵⁴ There are, however, methods for approaching a collective impact contracting process that reflect the core values of collective impact.¹⁵⁵ As advocates of written agreements have noted, “using a formal process at the start of the contracting process” can “ensure organizations and individuals feel there has been a fair process for establishing the contract.”¹⁵⁶ In addition, although collective impact initiatives are built around a common agenda, it is important to note that participants are also motivated by their own organizational self-interests and a written

¹⁴³ See Scott, *supra* note 111, at 862–63.

¹⁴⁴ See Allen Grossman et al., *StriveTogether: Reinventing the Local Education Ecosystem*, HARV. BUS. SCH. 5, 5 (2014).

¹⁴⁵ Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL’Y REV. 263, 281 (2006) (quoting Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 823–24 (2000)).

¹⁴⁶ “Relational contract theorists can win over adherents if contracts can be usefully mapped and ordered based on their relational elements” Leib, *supra* note 112, at 661.

¹⁴⁷ See Macneil, *supra* note 102, at 761. Planning an exit strategy from the transaction is equally important.

¹⁴⁸ See *id.*

¹⁴⁹ See Macneil, *supra* note 102, at 729.

¹⁵⁰ See Scott, *supra* note 132, at 602.

¹⁵¹ See *id.*, at 615.

¹⁵² See generally Kania & Kramer, *supra* note 30.

¹⁵³ “Relational contract theorists can win over adherents if contracts can be usefully mapped and ordered based on their relational elements[.]” See Leib, *supra* note 112, at 661. This “mapping” and “ordering” can only occur in a written agreement.

¹⁵⁴ See generally *id.* at 675–76 (“Most often, parties simply cannot allocate risks of their mutual endeavor at the start of a relationship because so much is uncertain, and so much trust-building is necessary to get the relationship off the ground. Indeed, the very incompleteness of the deal between the parties is central in defining what counts as a relational contract[.]”).

¹⁵⁵ See BERGMAN ET AL., *supra* note 135, at 14.

¹⁵⁶ *Id.* at 20.

agreement would, ideally, protect both the achievement of the common agenda as well as the interests of each individual participant by preserving each participant's preferences and expectations. A written agreement would also memorialize the flexibility desired for navigating these ongoing long-term relationships and the work required to address adaptive social problems.¹⁵⁷ Collective impact transactions need written form agreements to better reflect the intent of each collective impact initiative and because the contract frameworks will enhance implementation of collective impact methods.¹⁵⁸

Another reason in support of written collective impact agreements is that the forms of contract used to date for collective impact agreements are a collection of form types that are ill-structured for maximizing collective impact outcomes and, thus, impact transaction.¹⁵⁹ Unlike with the construction industry, there are no standard form agreements in collective impact.¹⁶⁰ Most collective impact initiatives are papered with MOUs, partnership agreements, or grant agreements. While document titles alone are far from demonstrative of the substance of an agreement, there are significant reasons why each of these types of documents is ill-suited for collective impact initiatives.

As previously explained,¹⁶¹ the majority of MOUs are nonbinding agreements. Collective impact initiatives are best served by binding written agreements.¹⁶² This essay does not make this suggestion lightly. While the organizational parties to collective impact agreements can be easily identified, there are myriad intriguing foundational challenges to resolve in order to widely implement these binding written agreements into collective impact practice. These challenges include (i) drafting around the power differentials among the organizational parties, (ii) accounting for appropriate critiques concerning the negative consequences of formality on disenfranchised groups, and (iii) appropriate sanctions for breach. In addition to these challenges, while this essay advocates for the use of private agreement, it recognizes that many of the social ills awaiting large-scale social change involve significant government interventions that will have to be considered (i.e. what is the role of government in collective impact with either the individual organizational members (e.g. as a grant provider or other type of partner) or as a barrier to systemic change).¹⁶³ An equally important question is how lawyers who work in any capacity on collective impact initiatives can be better trained to assist with these projects—again, the construction industry serves as important precedent here.¹⁶⁴

Standard grant agreements are also problematic. Where collective impact agreements are based on the initial grant agreement between the funder and the backbone agency, there could be significant concerns about whether there is privity of contract between the funder and the non-backbone participants who are party to the collective

¹⁵⁷ See Davidson, *supra* note 145, at 289, 300.

¹⁵⁸ *Cf. id.* at 296.

¹⁵⁹ This essay does not present empirical evidence of this fact, but a quick Google search should satisfy any readers' curiosity about the assertion. See generally Steering Committee Governance Agreement, COLLECTIVE IMPACT FORUM, <https://collectiveimpactforum.org/resources/steering-committee-governance-agreement>.

¹⁶⁰ *Cf. Scott, supra* note 132, at 869.

¹⁶¹ See *supra* note 88 and accompanying text (discussing MOUs as public good transactions).

¹⁶² See *supra* pp. 29–30 and notes 154–58.

¹⁶³ See *id.*; see also Davidson, *supra* note 145, at 299–300.

¹⁶⁴ See Circo, *supra* note 121, at 22.

impact initiative.¹⁶⁵ There would be questions about the existence of privity of contract among the other organizational participants in the collective impact initiative.

Partnership agreements are another type of form agreement misapplied to collective impact initiatives.¹⁶⁶ While it is clear that collective impact participants view their involvement in collective impact initiatives as nonbusiness but strategic partnerships, form partnership agreements are an inappropriate form for collective impact initiatives. Unlike MOUs and grant agreements, partnership agreements are not agreements for an exchange of services, but memorialize the legal obligations of partners who want to work in concert together in a for-profit venture purpose for their pecuniary gain.¹⁶⁷ The partners' ownership interests, levels of liability, governance rights, and partnership agreements are governed by the default rules in individual state statutes. Again, naming a document a "partnership agreement" in the absence of any language that indicates that the parties want to form a partnership, will not automatically create a legal partnership. However, how effective will the collective impact model be for establishing replicable models for large-scale social change if its foundations are built on the use of inappropriate and, thus, potentially ineffective, documents?

In addition to accounting for the uniqueness of the collective impact infrastructure framework in written agreement, there are two important drafting considerations that will impact the drafting of collective impact agreements: (1) the number of parties to the contract, and (2) the substance of the contract (what is being contracted for).¹⁶⁸ Collective impact agreements are service contracts, meaning agreements for the exchange of services as opposed to the sale of goods.¹⁶⁹ Collective impact agreements are multilateral (multi-party) service agreements among cross-sector participants with diverse skill sets that are designed to affect a large-scale social change of an adaptive problem through synchronized and phased service delivery coordinated through long-term ongoing planning.¹⁷⁰ While contracts for services are inherently more relational than contracts for the sale of goods,¹⁷¹ multilateral agreements do require special drafting considerations, such as establishing

¹⁶⁵ See Davidson, *supra* note 145, at 292 (citing *Clenega Gardens v. United States*, 194 F.3d 1231, 1242 (Fed. Circ. 1998)).

¹⁶⁶ *But see* BERGMAN ET AL., *supra* note 135, at 21.

¹⁶⁷ In early writings, Ian Macneil emphasized that humans desire both "solidarity and reciprocity," thus instilling a tendency to prefer relational contracts because a relational contract (1) can entail elements of discrete transactions enhancing independence and embodying choice; and (2) relational business dealings are more valuable for immediate and long-term monetary and social success than most pure discrete contracts with a stranger. Ian R. Macneil, *Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos*, 143 J. INSTITUTIONAL & THEORETICAL ECON. 272, 274 (1987) [hereinafter Macneil, *Relational Contract Theory as Sociology*]. Further, Macneil focused on trade relationships and trade partnerships as examples of "social solidarity" where individuals can have a heightened sense of trust validated through "specialized reciprocity." Ian R. Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567, 569–70 (1986.) [hereinafter Macneil, *Exchange Revisited*]. Macneil focused on trading partnerships at very intricate and very low levels as examples of how humans have a penchant for relational contracts that are "ubiquitous as long as those relations continue." Macneil, *Relational Contract Theory as Sociology*, *supra* note 167, at 284. Partnerships require engaging in "some give and take of information—a give which constitutes a form of mutual planning." Macneil, *The Many Futures of Contracts*, *supra* note 102, at 770.

¹⁶⁸ See Macneil, *supra* note 102, at 758, 792.

¹⁶⁹ See Kania & Kramer, *supra* note 30.

¹⁷⁰ See Crowder, *supra* note 22, at 623.

¹⁷¹ See *id.* at 694.

privity of contract among the appropriate parties.¹⁷²

Other drafting concerns include the most effective way to enforce relational contracts¹⁷³ – this would be true for collective impact agreements too. True to the preventative nature of transactional practice and the collaborative nature of relational contracts in general, and collective impact in particular, approaches to enforcement *do not have to focus on what occurs if a party breaches*, but can, instead, *focus on what parties would need to avoid breaching*.¹⁷⁴ Drafters can accomplish this by creating innovative default rules for the collaborative that are based on linkages between legal rules and underlying social norms.¹⁷⁵ Default rules are typically perceived as “gap fillers” for incompleteness in a contract.¹⁷⁶ In addition, “the default rules of contract law reveal a clear preference for . . . clear, categorical assignments of risk.”¹⁷⁷ Default rules are applicable to drafting both operational provisions such as performance standards and boilerplate provisions such as assignment provisions.¹⁷⁸ Looking at collective impact case studies, drafters can learn where “defaults” have occurred and, using such empirical data, draft default rules that, for example, focus on what type of support the collective impact initiative is required to offer members in threat of default to prevent default as opposed to only sanctions for default.¹⁷⁹

Moving beyond default rules, a well drafted collective impact agreement will document “‘shared accountability and differentiated responsibility’ among stakeholders” where “[e]ach stakeholder ha[s] ‘a defined role in achieving a shared vision of improved outcomes.’”¹⁸⁰ Currently, however, collective impact agreements, if drafted at all, are drafted as largely aspirational and the agreements are not typically structured to identify which parties are responsible for what deliverables at any particular phase of the initiative—an outcome counter to certain fundamentals of contract law.¹⁸¹ “To be clear, clauses about audit rights, indemnification, limitation of liability, termination for convenience etc. are not as such in breach of [relational contract and collective impact] principles.”¹⁸² Relational contracts can and should accommodate standard contract provisions to help ensure the effectiveness of the contract, “[b]ut the intent and wording must be fair and balanced, aligning to the guiding principles.”¹⁸³

¹⁷² See, e.g., Bryce Johnson, *Efficiency Concerns in Breach of Multilateral Contracts*, 44 UCLA L. REV. 1513, 1516 (1997).

¹⁷³ See, e.g., Goetz & Scott, *supra* note 104, at 1115–16.

¹⁷⁴ *Id.* at 1092.

¹⁷⁵ Scott, *supra* note 132, at 600.

¹⁷⁶ See Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1546 (2016).

¹⁷⁷ Scott, *supra* note 132, at 606.

¹⁷⁸ See *id.* at 598. (“The principal task of the law of commercial contracts is to set default rules for commercial actors and other repeat players who, presumably, are quite capable of bargaining for customized alternatives”).

¹⁷⁹ These default rules would have to be more substantive than just offering a “cure period” for curing a default. See *id.* at 602–06.

¹⁸⁰ See Grossman et al., *supra* note 144, at 4 (citing Strive Network, *Commitment to Quality Benchmarks for Building Civic Infrastructure*, STRIVE NETWORK, www.strivenetwork.org/sites/default/files/images/Commitment%20to%20Quality_0.pdf (last visited October 2013)).

¹⁸¹ See Macneil, *supra* note 102, at 712–13 (stating that a contract is “the projection of exchange into the future”).

¹⁸² BERGMAN ET AL., *supra* note 135, at 35.

¹⁸³ *Id.*

In addition to the benefit of efficiency that would come from the uniformity in collective impact practice with the creation of a written form collective impact agreement, there are public policy reasons that support this suggestion. Although collective impact initiatives are generally private law transactions, collective impact initiatives exist to produce large-scale social change for the public good.¹⁸⁴ As such, collective impact agreements are contracts for the public interest, and the public would be harmed in some way if a collective impact initiative failed. While this may seem to be limited to unrecoverable reliance damages, the idea that there could be any potential harm to underserved communities warrants the use of a written form agreement specifically tailored to the collective impact framework.¹⁸⁵ Resident's in poor urban communities should not suffer harm because of an initiative's failure to execute a well-structured agreement.¹⁸⁶

CONCLUSION

As a strategy for combatting urban poverty, impact transaction through relational contract seeks to address the lack of hope present in Marvin Gaye's lyrics at the beginning of this essay. Urban poverty is thriving, and, in many respects, always has. Where past programs and initiatives have failed, collective impact provides not only frameworks for written agreement, but, also, fundamentally, a framework for hope.

¹⁸⁴ See generally Kania & Kramer, *supra* note 30.

¹⁸⁵ Crowder, *supra* note 22, at 668.

¹⁸⁶ *Id.*