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# THE MANY FUTURES OF CONTRACTS

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I am indebted throughout to many people for insights received in informal ways not lending themselves to footnotes. As is typical in relations, neither they nor I know exactly what the debt is, how big it is or how it should be repaid. The roots of this Article go too far back to try to single out names of everyone who has made significant contributions of ideas and insights. Theodore Caplow, Ernest A. Gellhorn, and Robert F. Patton read a late draft with far more thoughtfulness and care than any colleague or friend could reasonably ask; their comments were invaluable and resulted in a number of changes. Margaret Wilson, Barry Taylor, and John Sanders, students at University of Virginia Law School, were very helpful at different stages. Nancy C. Macneil, as always, contributed on all fronts.

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*A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.*<sup>1</sup>

The future in contract under this Restatement definition is promise ("manifestation of intention to act or refrain from acting in a specified way"<sup>2</sup>) and law.<sup>3</sup> A long and unsuccessful struggle to reconcile this pure and simple concept with what seems to me the real life of contractual behavior has led to this essay.

The purity and simplicity of the traditional tenet arises from its presupposition that a contract is a discrete transaction. A transaction is an event sensibly viewable separately from events preceding and following it, indeed from other events accompanying it temporally—one engaging only small segments of the total personal beings of the participants.<sup>4</sup> Only this separability permits such a clean and clear definition of contract as that of the Restatement, and with it the singular future of contract based only on promise-with-law.<sup>5</sup>

1. RESTATEMENT OF CONTRACTS § 1 (1932) and RESTATEMENT (SECOND) OF CONTRACTS § 1 (Tent. Drafts Nos. 1-7, 1973).

2. RESTATEMENT (SECOND) OF CONTRACTS § 2 (Tent. Drafts Nos. 1-7, 1973). The whole definition is:

A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

The first Restatement definition was:

A promise is an undertaking, however expressed, either that something shall happen or that something shall not happen, in the future.

3. Formal, sovereign-provided, remedial "law" as that term is surely meant in the Restatement definition.

4. The adjective "transactional" is used throughout to describe behavior, social patterns, etc., divided into transactions in this discrete sense. The verb "transactionize" is used to describe conversion of behavior, social patterns, etc., into discrete transactional patterns, with "transactionizing" being the consequences of such conversion. "Transactionism" is a doctrine, theory or prevailing spirit favoring transactionizing.

5. On this singular future rests the superstructure of traditional contract law, the law of the 19th and early 20th centuries which reached its intellectual apex in 1920 with the publication of the first edition of Williston's great text. On it also rests the general design of the superstructure of neo-traditional contract law such as Article 2 of the Uniform Commercial Code and the Restatement of Contracts (Second). Unlike traditional contract doctrine, however, neo-traditional contract law quite openly denies in many of its more specific analyses the notion of a totally promise-based future. See UCC §§ 2-305 and 2-311 for two among countless possible examples. See also the discussion in Macneil, *Commentary: Restatement of Contracts (Second) and Presentation*, 60 VA. L. REV. — (1974). (Traditional doctrine was forced to accommodate itself to non-promissory futures of contract also, but the accommodation tended to be more covert than is the case with neo-traditional contract, an effort always being made in the former to force the accommodation into the mode of initial consent. See, e.g., Williston's discussion of offers and agreements

But is the world of contract a world of discrete transactions so defined? Or is it a world of relation,<sup>6</sup> an ongoing dynamic state, no segment of which—past, present or future—can sensibly be viewed independently from other segments? Is it a world entirely of segmental personal engagements, or is it one tending to engage many aspects of the total personal beings of the participants?

The major premise of this essay is the prevalence of relation in the post-industrial socioeconomic world. Its dominance seems constantly to be increasing, in spite of declines over the past 50 years in certain specific relational patterns, *e.g.*, family farming, household master-servant, some aspects of family life. Outweighing declines in these particular relations are the constantly increasing service share of the GNP (services are inherently more relational than the transfer of goods); the development of franchising and other relational techniques for distributing and producing goods and services;<sup>7</sup> the increas-

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indefinite as to time. 1 S. WILLISTON, CONTRACTS § 38 (1920). [References hereafter to Williston are to this first edition unless otherwise noted.] But the thrust of this Article is against neither traditional nor neo-traditional contract law; rather it aims at the foundation upon which they, especially the former, are so heavily based: the idea that the *only* future in contract is that of promise-with-law. Little effort is, therefore, expended on them, except in a postscript suggesting some of the possible legal significance of the analysis made herein and outlining some possible future lines of investigation of the theoretical analysis contained in this Article.

The inclusion within the Restatement definition of contracts of a "set of promises" as well as a single promise fails to create additional futures of contracts. The sole future remains promise-plus-law. Conceivably, however, under the definition the *whole* interlocking web of promises to be found in an ongoing relation, for example employment, could be deemed a "set of promises" thereby countering the presupposition of discreteness I ascribe to the definition. There would be little sense in such an analysis, however, without its going on to an explicit definitional recognition of the non-promissory aspects of such relations. (These are discussed in Sections II(B) and (C) below.) As a base for any kind of analysis or decisional process the web of *all* promises over, say, a 10-year period of employment, would lack both the efficiency of a discrete analysis and the completeness of a relational analysis founded on all, not just the promissory, pertinent aspects of the relation. In short, it would serve the goals of neither a transactional nor a relational analysis. As might be expected, neither traditional contract doctrines nor relational contract law has moved in that direction.

6. The same kinds of suffixes added to "transaction," *see* note 4 *supra*, are, where appropriate, added to "relation" with similar grammatical effect.

7. Franchising may be the most public and notorious such technique, but is by no means the only one. Deutsch, for example, cites

the growing trend towards "systems selling" [in industry]—a sales approach whereby the supplier not only sells his product, but an entire system for its use. . . .

. . . . The advantages of such total-systems selling to both sides are evident. The supplier stands a far greater chance of capturing the lion's share of the business when he offers ongoing services that keep him in touch with his customer well beyond the initial order placement. And purchasing and

ing dominance of corporate and ongoing intercorporate methods of doing business; the increase in white collar salaried employment relative to blue collar wage employment; the increasing intervention of all levels of government in the economy, usually in relational ways; the increasing leasing rather than selling of durables, including consumer durables; the increase in durables themselves (a complex durable tends to create relations in the form of servicing, complaint handling and credit);<sup>8</sup> patterns such as the development among the relatively well-to-do of closed residential communities with numerous kinds of communal services and affiliations;<sup>9</sup> the increasing proportion of the aged in the population.<sup>10</sup> All of these and many more suggest that relational economic behavior is on the increase.<sup>11</sup> But the validity of the major premise set out at the beginning of this paragraph does not depend upon the accuracy of the assessment of current trends. Whatever the trend, no one can deny the existence of significant relational patterns in modern economic society. It is that existence which

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plant operating management derive the benefit of specialized expertise along with the necessary item being bought.

Deutsch, *Systems Selling: The Suppliers' Answer to Maintenance Headaches*, 73 PURCHASING, No. 4, 1972, at 19-20.

8. Cf. J. BURNHAM, BEYOND MODERN SCULPTURE 11 (1968):

When we buy an automobile we no longer buy an object in the old sense of the word, but instead we purchase a three-to-five year lease for participation in the state-recognized private transportation system, a highway system, a traffic safety system, an industrial parts-replacement system, a costly insurance system. . . .

Daniel Bell comments on the Burnham statement:

If one asks what a sculptor is doing in discussing the automobile system, his argument is cast in the context of the disappearance of "objects" in contemporary society and its replacement by "systems."

Bell, *The Corporation and Society in the 1970s*, 24 PUBLIC INTEREST, Summer, 1971, at 20 n.7.

9. At the other end of the socioeconomic spectrum is the paternalistic relationship of the day-to-day management of public housing.

10. The aged tend to lead more relational consumer lives than younger people, congregating in places specially designed for their needs. This is not to suggest that present types of relational living among the old are adequately available or financed or prevent unnecessary loneliness or provide a sense of worth or produce the kinds of returns only old people can provide a society. See Simone de Beauvoir's *The Coming of Age* (1972) and S. Curtin's stinging, *Nobody Ever Died of Old Age* (1972). Nevertheless, a large part of the older population is unable for many reasons to survive outside of relational consumer structures as successfully as are younger citizens. Whether these structures are bureaucratic, e.g., nursing homes, or non-bureaucratic, e.g., the family, does not affect the fact that an old population inevitably creates relational consumption patterns.

11. This list does not touch on less tangible and more controversial relational phenomena like the modern communications media and their impact both in directions of social tribalization and in developing relations in more narrowly economic ways such as promoting brand loyalty among consumers.

justifies examination of the many futures of contracts in relations and their contrast with the singular future of contract in discrete transactions.

Upon cutting loose from "promise" or "promise-with-law" as the sole source of the future of contract (as one must in contractual relations), the inquirer is driven to seek the nature of non-promissory as well as promissory futures of contracts. That search leads backwards into history and prehistory, and Part I therefore deals with what I believe to be the primal roots of contract. A substantial amount of space is devoted to these primal roots in view of the need to overcome the effect on perceptions of literally hundreds of years of history—economic, social and legal—which have led us to equate exchange with discrete transactions and contract with promise. The thrust of Part I is an attack on those limited equations: exchange is not limited to discrete transaction, nor contract to promise (even promise-with-law).

Part II explores various ways of projecting exchange into the future,<sup>12</sup> both promise, familiar to us as a technique for creating future exchanges, and non-promissory processes of which we are fully aware, but which we often fail to recognize as creators of future exchange. This examination of both promissory and non-promissory projections lays a basis for the theoretical structure proposed in Part III. This theoretical structure is an analysis of contracts in terms of a series of behavioral axes, each with two poles; at one pole is the behavior associated with discrete transactions and at the other is the behavior associated with relations.<sup>13</sup>

Finally, there is a postscript dealing briefly with basic contract legal norms and their relation to the primal roots and to transactional-relational analyses.

## I. THE PRIMAL ROOTS OF CONTRACT

### A. SPECIALIZATION OF LABOR AND EXCHANGE

Specialization of labor<sup>14</sup> presupposes exchange, since only exchange

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12. Projection of exchange into the future means no more than the occurrence of present acts (including refraining from acting) tending to effect (and affect) exchange at some future time.

13. A reader wishing to get a sense of these before proceeding into the Article will find a chart summarizing them on pp. 738-40.

14. Specialization of labor and division of labor are used interchangeably throughout.

can achieve the distribution of rewards necessary to sustain specialization. Direct bilateral exchange is, however, by no means essential. Exchange can equally well support specialization when it occurs in cycles in which no benefactor ever receives return benefits from the one upon whom he confers benefits; the first beneficiary may confer benefits on a different beneficiary, who in turn confers benefits on another, and so on until the original benefactor receives a "return" from someone in the cycle, but not a return directly traceable to the original beneficiary.<sup>15</sup>

The social phenomenon<sup>16</sup> of the interplay of specialization and exchange is illustrated by reproductive differentiation among all animal species with separate male and female members. The same thing occurs, however, with non-reproductive specialization in non-human species, including the social insects.<sup>17</sup> Respecting the insects we may, perhaps, speak only of an analog to much vertebrate specialization and exchange, since insect behavior generally depends upon genetically "programmed divisions of behavior among castes"<sup>18</sup> and not upon "personal recognition among the members of the group"<sup>19</sup> which is vital to so much of vertebrate social behavior. But among non-human vertebrates we also find specialization and resulting exchange not apparently dependent mechanistically upon genetically programmed mor-

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15. In spite of the apparent dominance of direct exchange in the post-industrial state, e.g., salary for services, indirect cyclical exchange is in a very real sense the almost totally dominant type. The existence of money both permits cyclical exchange and obscures its existence. A car buyer, for example, is in a huge indirect cycle of exchange with the auto assembly worker if one looks only at goods and services and not at the flow of money. Only when one follows money flow does the exchange appear to be direct in the sense that one can trace the reciprocity directly from the car buyer to the assembly line worker and back again.

The varying nature of particular cycles has important impacts on the way people behave in labor and in making exchanges, particularly with reference to desires to gain from exchange, a notion treated below. See Section III(C)(12)(a) *infra*.

16. It is also a physiological phenomenon, as will be seen upon examining any living organism with physiologically differentiated processes. The line between physiological and social may be difficult to draw: on which side is a colony of social insects made up of several morphologically different castes, each highly dependent on the others for survival?

17. See generally E. WILSON, *THE INSECT SOCIETIES* (1971) [hereinafter cited as WILSON].

18. *Id.* at 460. Wilson deals with insect learning; it can be quite extensive, although restricted to immediate adaptive value and of limited transferability to new situations. *Id.* at 215-24. Scott suggests as evidence of a process of insect learning the care a captured species of slaves confers on the progeny of its masters, a progeny the captives would promptly eat had they not been captured and somehow "trained." J.P. SCOTT, *ANIMAL BEHAVIOR* 179 (2d rev. ed. 1972).

19. WILSON, *supra* note 17, at 459.



phological differences among individuals. This is true not only among primates, but also among some non-primates such as African hunting dogs.<sup>20</sup>

With the development of the consciousness of an advanced species such as homo sapiens, dependence upon specialization of labor and exchange takes quantum leaps forward.<sup>21</sup> A simplistic example: the village pottery maker will soon either starve or take to working in the fields instead of making pottery if those who use the pottery fail to share the food from the fields. On this score it matters not one whit whether he receives the food in transactions of measured reciprocal amounts (money<sup>22</sup> or grain enough to fill the utensil being exchanged), or by gift exchange,<sup>23</sup> or by silent barter with strangers from outside the village, or by virtue of the pottery maker's traditional share of the harvest, or by sharing at communal feasts with or without

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20. G. SCHALLER, *THE SERENGETI LION—A STUDY OF PREDATOR-PREY RELATIONS* (1972), and *SERENGETI—A KINGDOM OF PREDATORS* (1972). Of course, differentiation is by no means the only basis for animal (including human) social behavior; simple aggregation of likes also has its rewards, as in the hunting techniques of the spotted hyena which kill large prey by swarming all over it, H. KRUK, *THE SPOTTED HYENA: A STUDY OF PREDATION AND SOCIAL BEHAVIOR* (1972). (Even here there is some specialization of tasks. *Id.* at 149.) These are biological parallels to Durkheim's social concepts of organic solidarity (differentiated, division of labor and exchange) and mechanical solidarity (aggregate), the structure of division of labor among hunting dogs being analogous to the former, the social mass of hyena predation being analogous to the latter. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (G. Simpson transl. 1933) [hereinafter cited as *DURKHEIM*].

21. Except for some sex-based differentiations, human specialization of labor is not based on the mechanistic genetically programmed morphological differences characteristic of insect specialization. Certainly, however, genetic programming plays some role—boys with very large and husky parents are less likely to end up as split-ends in the National Football League than those whose parents are wiry and rangy.

22. The course of economic development is often represented as if an exchange economy, with direct exchange but without money, preceded the money economy, which is then represented as if it were essentially different, and on an independent, higher plane of development. This view, . . . receives no support from historical fact. On the contrary, a more careful inquiry shows that the development of money has always been parallel to that of the exchange economy; that the exchange of goods and the use of money have mutually aided each other at every stage; and that the development of a co-ordinated monetary system of the modern type is approximately coincident with the effective establishment of the general exchange economy. Furthermore, there has never been an exchange economy of any degree of development—one with an organized exchange of products between independent economic units—without money.

G. CASSEL, *THE THEORY OF SOCIAL ECONOMY* 47-48 (Rev. ed. S.L. Barron transl. 1932).

23. See E. MANDEL, *MARXIST ECONOMIC THEORY* 50-53 (B. Pearce transl. 1968) [hereinafter cited as *MANDEL*]; Schechter, *The Law and Morals of Primitive Trade*, in *LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY* 565, 567-69 (M. Radin & A. Kidd ed. 1935) [hereinafter cited as *Schechter*].

ceremonial and ritualistic overtones. What does matter is that he cannot continue as a full-time pottery maker unless exchange occurs. So long as labor occurs and is differentiated within the society this exchange will occur, irrespective of social or economic structures, irrespective of religious, social or political dogma. It occurred and occurs in primitive societies;<sup>24</sup> the children in the woolen mills on the Merrimack participated in it, as do the workers in Castro's Cuba;<sup>25</sup> it will occur in any counterculture commune to whatever degree the production in the commune depends upon specialization of labor among its members.<sup>26</sup> Advocates of non-capitalist philosophies, as well as advocates of non-bureaucratic philosophies, may see pernicious social results from excessive exchange, but reduction of its total level in society can be accomplished only by a reduction in the extent of specialization of labor; no other change will do.<sup>27</sup> Other changes may alter

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24. For extensive accounts of exchange in primitive societies, see *ECONOMIC ANTHROPOLOGY* (E. Le Clair & H. Schneider ed. 1968) [hereinafter cited as *ECONOMIC ANTHROPOLOGY*]; M. HERSKOVITS, *ECONOMIC ANTHROPOLOGY: A STUDY IN COMPARATIVE ECONOMICS* (1952) [hereinafter cited as *HERSKOVITS*]; MANDEL, *supra* note 23, at chs. 1-2; Schechter, *supra* note 23; and see sources cited in L. MAIR, *AN INTRODUCTION TO SOCIAL ANTHROPOLOGY* chs. 10-11 (2d ed. 1972) [hereinafter cited as *MAIR*]; Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 *COLUM. L. REV.* 576 (1969) [hereinafter cited as *Farnsworth*].

25. Even respecting sugar no one Cuban participates in all the processes from planting the cane to eating the refined sugar; most of the labor in producing the bowl of sugar on the Havana dinner table is supplied by someone else, even though the family loyally spent many unpaid hours in the fields harvesting the cane.

26. People in a society who somehow manage to get something for nothing—by theft, exploitation, parasitism, or what have you—fall at least in part outside exchange cycles. Any society may also have members who give less in return than an observer thinks they should or thinks they would in a freer or otherwise different situation, e.g., lords in a feudal system compared with capitalists in a capitalist system or managers in a socialist system. Such possibilities are not only the source of Marxist theories of exploitation, but the source of many efforts to make changes within a capitalist structure or to develop new social structures along other lines. The society may also have members whose return contributions are small or nonexistent, but who are accepted as deserving of support (with varying degrees of enthusiasm), e.g., the poor and the maimed. Into which category fits Senator Eastland and his heavily subsidized farm seems to be a source of debate in America today. The political or social value questions raised in such cases can be analyzed in terms of how oriented toward exchange the society should be vis-à-vis such individuals.

27. Many Cuban and Chinese socioeconomic patterns can be viewed as efforts both to cut down on specialization of labor and with it total exchange, and as efforts to change the social impact of such exchange as does occur. See generally R. BERNARDO, *THE THEORY OF MORAL INCENTIVES IN CUBA* (1971); MAN AND SOCIALISM IN CUBA—THE GREAT DEBATE (B. Silverman ed. 1971); Hoffman, *The Maoist Economic Model*, 5 *J. ECON. ISSUES*, No. 3, 1971, at 12.

In these paragraphs I have given no attention to the utopian possibility of a technological cornucopia in which the whole notion of labor undergoes a transformation

the impact that a given level of exchange has on the behavior and outlook of individuals and the society they comprise, but they cannot reduce the level of exchange. Both this irreducibility of amount and the possibility of affecting its impact in ways other than reduction are of significance to the analysis in this essay since exchange coupled with specialization is one of the four key foundations upon which contract is based.

To ensure that the foregoing is not misunderstood, particularly by anyone familiar with Marxist writings on exchange, let me emphasize that "exchange" as used here is most certainly not "measured reciprocal payment," a common usage of the term by both Marxist and non-Marxist writers.<sup>28</sup> "Exchange" here encompasses much more. In particular it does not necessarily require measurement of reciprocity or individual consciousness of reciprocity or conscious desires to gain by exchange, all of which are patent or latent elements of "measured reciprocal payment." Nor is payment necessarily involved, if that word implies the use of money. Finally, as already noted, exchange need not be bilateral or direct, but may be cyclical, a pattern likely to be not entirely in harmony with the term "measured reciprocal payment."<sup>29</sup>

Examination of a leading Marxist text, Mandel's *Marxist Economic Theory*,<sup>30</sup> reveals a treatment of primitive social structures entirely in harmony with the notions expressed here of the inevitability of economic exchange as an integral part of specialization of labor. Mandel might, however, quarrel with the use of the word "exchange" in such a broad manner, because he would prefer to reserve it for "measured reciprocity";<sup>31</sup> nevertheless, exchange seems entirely too dominating

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and with it the socioeconomic bases for distribution. The dogmatic absolute statements in the text should, therefore, be taken as applying only so long as social production and distribution take place because of the input of significant amounts of human labor. See generally F. HERZBERG, *WORK AND THE NATURE OF MAN* (1966).

28. MANDEL, *supra* note 23, at 49: "[A] measured reciprocal payment is what constitutes the essential characteristic of exchange." (Emphasis omitted).

29. Except to the extent that money is ignored, and the cyclical nature of exchange of goods and services in a modern economy is recognized. See note 15 *supra*. But in such economies there is "measured reciprocal payment" in monetary terms, and that fact can hardly be ignored since money is, in terms of power to command them, virtually the same as goods and services.

30. MANDEL, *supra* note 23, at ch. 1.

31. He describes as rudimentary not only exchange involving part-time specialists, e.g., arrowhead makers who are primarily hunters, but also the annual support in food, clothing and ornamentation supplied by primitive villages to full-time craftsmen. "In neither case have we here exchange in the strict sense." *Id.* at 55. Mandel thus

a phenomenon to run the risk of its being lost to sight through substitution of words like "interchange" or of its being depreciated by modifications such as "rudimentary."<sup>32</sup>

Specialization of labor and exchange form the first primal root of the notion of contract.

## B. SENSE OF CHOICE

Much biological behavior seems to be absolutely determined by the chemical and electrical processes making up the organism and its environment. As our eyes travel up the evolutionary scale, however, we see many animals acting in ways appearing to us to be the conscious exercise of choice among alternatives. They *do* the same things we *do* when we are exercising what appears to us to be conscious choice. We do not know, of course, whether these observed actions of either the animals or ourselves are entirely predetermined.<sup>33</sup> What we do know is that humans have a concept of choice, of freedom of will, and that this concept is applied regularly to human actions. Whether similar animal behavior really is analogous to our apparent exercise of choice, or to the stage at which we recognized the power to make conscious choice—*homo sapiens*, earlier hominids, protohominids, earlier apes, or earlier yet—does not affect the fact that in terms of history we have had it for a very long time.

The concept of some freedom to elect among a range of behaviors is one of the four primal roots of contract. In its absence, speaking of even rudimentary contract is futile despite the presence of the first root—specialization of labor and exchange. Without freedom of will (real, imagined or postulated) contract becomes conceptually indistinguishable from any other mechanistically imposed phenomenon

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rejects in his definition of exchange the cyclical exchange discussed earlier. For a discussion of full- and part-time specialization see MAIR, *supra* note 24.

Somewhat analogous definitional borderlines develop among economic anthropologists concerning types of exchange (*e.g.*, gift barter, pure barter, money barter) and types of money (*i.e.*, for all purposes or for limited purposes). See Melitz, *The Polanyi School of Anthropology of Money: An Economist's View*, 72 AM. ANTHR. 1020 (1970).

32. Use of the plain word "exchange" tends to emphasize the continuum from physiological "exchange" through the ranges of primitive socioeconomic "exchange" to the most transactionalized "measured reciprocal payments" and on into modern relational "exchange" patterns. Marxist theory would emphasize the differences along the continuum (as would I and shall), and hence a Marxist theorist like Mandel may prefer not to emphasize that it is a continuum.

33. Apart from the impact of chance, if there is such a thing.

such as the exchange of positive and negative charges through a cell membrane.

It is, however, singularly unimportant to the practical impact of that *concept* of human behavior to determine how much, if any, of the exercise of conscious choice is "real" as distinguished from being acted upon as if real.<sup>34</sup> What matters in terms of effected human behavior is that we think it is real and act accordingly. Thus it is not, for present purposes, the existence of a free will which counts, but our behaving as if it existed. Clearly we do behave as if it existed, and have done so for a long time, whatever may be the outer philosophical bounds and the outer acceptable practical bounds of the concept.<sup>35</sup>

If physiological (genetic and environmental, both internal and external) determinism would make meaningless the notion of contract, what then is the effect of social limits on choice? This second form of limitation may be extremely drastic, as is seen repeatedly in the age of every tyrant.<sup>36</sup> Is it in any way useful to apply the label "contractual" to behavior very strongly determined by existing social structures (*e.g.*, kinship patterns), or internalization of "oughts" (*e.g.*, Uncle Tom's loyal rendering of service), or coercive pressures (*e.g.*, the galley master's chains and lash), or all three? Are those social behavioral determinants sufficiently different from physiological determinants to leave useful a definition of contract encompassing highly coercive situations?

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34. Obviously, if "real" choice is occurring, the specific outcome may be very different from that resulting from predetermined behavior occurring in a delusion of illusory choice, and in that sense, of course, the kinds of issues raised by B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971), become very important indeed, not only in terms of day to day actions, but also in terms of ultimate philosophical questions and analysis.

Weisskopf attributes the existence of choice—indeed the inevitability of its exercise—to the existential alienation of man and his transcendence of reality through consciousness:

Man could not choose if he could not transcend the given situation and envision alternative possibilities. With such consciousness and transcendence he can envision alternatives between which he can and has to choose. By transcending the given situation through his consciousness, man frees himself—within certain limits—from the necessities of this situation; he can choose between the alternatives grasped by transcending consciousness.

W. WEISSKOPF, *ALIENATION AND ECONOMICS* 22 (1971) [hereinafter cited as WEISSKOPF].

For recent discussions of some of the logical issues and reference to both old and recent authorities see D. O'CONNOR, *FREE WILL* (1971) and Glossop, *Beneath the Surface of the Free-Will Problem*, 5 J. VALUE INQUIRY 24 (1970).

35. *E.g.*, our unwillingness to apply criminal sanctions to certain individuals whose ability to exercise choice is believed to be impaired.

36. Whether the tyrant be Caligula or the masses or somewhere in between.

Clearly enough we perceive something different between exercising a choice even under the most draconian pressures (e.g., "Your money or your child's life") and being impelled by some irresistible physical force (e.g., an epileptic seizure, or being hurled from a crashing automobile). One pressure acts through our will and the other against or in spite of it. Because we perceive such a difference, bringing within the scope of contract socially pressured behavior does not make contract the totally useless concept that complete physiological determinism would. The question remains, however, whether an understanding of the nature of contract is aided or hindered by locating the definitional boundary to include even highly pressured exercises of free will. For several reasons I believe that such understanding is aided by encompassing within the scope of contract even heavily coerced choices. Some of the reasons for this will become more evident in later parts of this Article, particularly Part II. At this point, however, three closely related reasons should be mentioned.

First, seldom is it possible to find a situation in which social pressures are so great as to leave no realm whatever for the apparent exercise of some only moderately pressured or even perhaps unpressured choice. A discrete transaction such as an armed holdup comes the closest, and I readily concede that not much is served by including such a transaction within the scope of contract. But as we move from the holdup to primitive patterns of raid-or-trade (where the price paid in trade, if any, is strongly affected by the military situation)<sup>37</sup> to the contract of adhesion in the oligopolistic market, there is no point at which it is clear that we have passed from the realm of noncontract to the realm of contract. This is a spectrum, and however inutile it may be to include the extreme coercive end—the holdup—it will be more inutile to draw an artificial boundary line or area somewhere along the way towards the non-coercive end. Moreover, turning from discrete transactions to ongoing relations we find even stronger reasons for including within the scope of the term "contract" extremes of social

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37. Since none of the Kapauku shell money is produced by the people themselves, but has to be acquired through trade from the coastal lowland Papuans, the amount in circulation is limited. Indeed, the trade relations with Kapauku lowlanders were, prior to the white man's pacification of the area, very irregular because of the dangers involved in this enterprise, since the lowland Papuans were not only keen traders but also expert headhunters and cannibals. Exchanges occasionally ended in unexpected ways, with the Kapauku traders themselves taken as a commodity for which no price was paid.

L. POSPISIL, *THE KAPAUKU PAPUANS OF WEST GUINEA* 19 (1963), *partially reprinted in ECONOMIC ANTHROPOLOGY*, *supra* note 24, at 382.

coercion. Even slave labor camps tend to leave some room for the exercise of choice of allocation of time and effort and rewards.<sup>38</sup> Indeed, the class structure which tends to grow up among prisoners and guards almost guarantees such a result. There simply is no complete analog to the holdup when we move from discrete transactions to ongoing relations.<sup>39</sup> As we move from slave labor camp to plantation slavery to household servant slavery to serfdom (of varying degrees of liberality) to indentured service to employment contracts of American athletes containing reserve clauses, at no point is it clear that we have just moved from noncontract to contract. And once again, although it may seem bizarre to include the operation of Stalin's labor camps as within the realm of contract, it would be more distorting to try to eliminate them.

A second reason for including strongly pressured circumstances within the realm of contract lies in the presence of some pressure in all contracts. Any insistence on exchange itself can be analyzed as a form of coercion since (always in microeconomic theory and often in practice) each party would rather get what is sought free than to give up something for it.<sup>40</sup> While that particular analysis is not free from defects, it is true that such factors as unequal power, unequal knowledge, and other unequal circumstances lend an element of pressure to virtually every contract. In reality, vast numbers of the contracts forming the web of modern life are significantly coercive in this sense. Since pressure is always actually or potentially present, considerable virtue resides in including *all* pressure situations within the realm of contract, even when the pressure is so great that it overwhelms or distorts all the other elements.

The third reason for including highly pressured situations within

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38. See A. SOLZHENITSYN, *ONE DAY IN THE LIFE OF IVAN DENISOVICH* (1963), especially at 32, 180. This happens even in prison camps whose primary function is the termination of life rather than slave labor. See generally V. FRANKL, *MAN'S SEARCH FOR MEANING* (Lasch transl. 1962).

39. O. Henry's *The Ransom of Red Chief* reveals humorously the kinds of choice exercise that can occur in highly coercive relations; similar (in terms of choice) but humorless and commonly tragic patterns often evolve in real life abduction and hostage holding situations.

40. Professor Armen Alchian, an economist, started his lectures at the 1973 Summer Economics Institute for Law Professors at the University of Rochester with the comment that economics should be considered part of the discipline of law since scarcity and social response to it are inevitably coercive; economics is therefore at least as much a discipline of coercion as law in its more narrow coercive sense. This view of a determined defender of the market has surprising affinity with some of the views expressed by Pashukanis.

the domain of contract lies in the existence of differences in kinds of pressures. Where, for example, in the line from extreme prison slavery to the long term employment contract would one place communal labor within a strong traditional kinship structure? Such a structure is truly coercive if one defines coercion as any human behavior or social structure precluding the exercise of individual choice (and in this case, group choice). But the "coercion" is an internalized one for the individuals and the group as a whole. And in a sense glacially changing traditional structures do not deprive people of choices they would like to make as does prison, but deprive them of effective knowledge that such situations could exist at all. While we may have trouble integrating such patterns into our notions of contract, it is plain that they often exist side by side (and integrated with) highly choice-oriented patterns which are clearly contractual in nature.<sup>41</sup> Moreover, if we exclude such "coercive" patterns from the scope of contract, what do we do with modern corporate employment involving pensions not vesting until 20 or 30 years or more of employment have occurred?

The foregoing should not, of course, be taken to suggest that a highly coerced pattern is either the ideal prototype or current stereotype<sup>42</sup> of contract. What is suggested is merely that inclusion of all choice situations, however truncated or twisted the choice may be, within the definition of contract may be useful in developing an understanding of the many futures of contracts. Clearly slavery in an Arabian satrapy is not as "contractual" a relationship as is a contract to work in an American corporation (at whatever level), nor is an adhesion contract for goods sold by a high-pressured door-to-door salesman in the ghetto as "contractual" as a contract to sell a used car between one consumer and another. But all have significant contractual elements. Twisted 18-inch specimens near the final tree line are usefully called trees, just as are their straight 150 foot cousins on the lower slope; so too with twisted little specimens of contract living too close to the harsh winds of tyranny.

To summarize, the second primal root of contract is the existence of a sense of choice and its exercise (apparent or real) unfettered

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41. Similarly, and closely related, patterns of cooperation, competition and individualism often occur in one society. See COOPERATION AND COMPETITION AMONG PRIMITIVE PEOPLES 458 *et seq.* (M. Mead ed. Beacon ed. 1961) [hereinafter cited as COOPERATION].

42. Both prototype and stereotype should undoubtedly be plural, as will become abundantly clear as this Article progresses.



by recognized total physiological determinism,<sup>43</sup> but irrespective of the degree of social control of the will.<sup>44</sup>

### C. CONSCIOUS AWARENESS OF PAST, PRESENT AND FUTURE

The universality of physiological and social specialization of labor precludes exchange from standing alone as the sole root of distinctively human contract. A sense of choice is a further factor in developing a distinctively human concept of contract. It is not, however, until a third especially human element is added that the vague outlines of contract as we know it can be holistically perceived. That third primal root of contract is a conscious awareness of the past, present and future.

As with virtually any human trait, rudimentary, if not more developed, counterparts can be observed in other species.<sup>45</sup> However, in spite of the occasional occurrence of thoughtful futuristic behavior in other species, in massive awareness of past, present and future was and is the quantum jump between humanity and even the most intelligent of other animals.<sup>46</sup> Bergounioux makes a moving, if time-col-

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43. Physiology, of course, affects such choice; we do not start looking for another restaurant along the highway the minute we leave the last one.

44. Should conditioning techniques or chemical or electrical control of the brain eliminate our sense of choice and eliminate choice itself (if it exists) then to that extent contract, as defined here, is gone. Professional selfishness, if nothing else, should make contract teachers deadly enemies of B.F. Skinner. More substantial reasons may be found in M.H. Shapiro's comprehensive and thoughtful article, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974).

45. For example, Jane van Lawick-Goodall describes the behavior of a young chimpanzee with a definite sense of the socioeconomic future. Because older male chimpanzees monopolized the banana supply at the experimental feeding station, van Lawick-Goodall took to hiding some of the supply in trees, rather than in the regular feeding boxes, hoping to give female and young chimps a chance. But the latter ran the risk of arousing the ire of the dominant males if they were observed finding the hidden bananas. This could result not only in their losing the bananas, but also in a good licking. This particular young chimp solved the problem by postponing his gratifications. If he spotted hidden bananas, he moved to where he could no longer observe them. (Had he stayed in his original location he would surely have occasionally glanced at the cache and probably have given the game away to an observant older male; chimpanzees carefully watch eye movements.) Only after the group of dominant males had finished the supply at the regular feeding boxes and moved out of the area would this young chimp go to his bananas and eat them in peace. J. VAN LAWICK-GOODALL, IN *THE SHADOW OF MAN* 96-97 (1971) [hereinafter cited as *SHADOW OF MAN*]. Clearly a primitive capitalist that one: maximizing utilities by balancing the risks and benefits of immediate consumption against those of postponing present gratification...

46. General statements of this kind are dangerous because they are never true;

lapsing and anthropomorphic, effort to recapture the psychological state of the first conscious primates "taking their first hesitating steps in an unknown world."

These were justly called "denatured animals" by Vercors (1952), and the expression is filled with meaning: instead of unconsciously submitting to the oppressive pressure of nature enclosing him on all sides, man felt himself brutally torn from his environment and isolated in the middle of a world whose measure and laws he did not know; he therefore felt obliged to learn, by constant bitter effort and his own mistakes, everything he had to know to survive. The animals surrounding him came and went, indefatigably repeating the same actions: hunting, gathering, searching for water, doubling or fleeing to defend themselves against innumerable enemies; for them, periods of rest and activity succeed each other in an unchanging rhythm fixed by the needs for food or sleep, reproduction or protection. Man detaches himself from

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nevertheless they may be useful. In this instance, for example, what distinguishes man from other animals depends on what the observer thinks is important, as well as how he defines man, e.g., all hominids or just homo sapiens. Moreover, almost anything specific one says about man can be said about at least some other primate, or often some non-primate. Mann lists the following as accepted by one or more anthropologists as "identifiable characteristics distinguishing man from the non-human primates": tool-making, language, a moral code, culture, a family within a more complex social organization, bipedalism, large brains, small anterior teeth, especially canines, smaller faces, year-round sexual activity with loss of estrus, little sexual dimorphism. Mann, *Hominid and Cultural Origins*, 7 MAN 379 (1972). Mann himself concludes that the test is the existence of culture, defined as "a behavioral complex dependent on tools as distinguished from one simply making tools for supplemental use." Or perhaps the reader would prefer Crombie's definition:

The most obvious difference between man and all other animals is his ability to create complex hierarchically structured, relatively isomorphic or homomorphic extracerebral models of his environment using symbols whose meaning is understood by his fellow men.

Crombie, *The Group System of Man and Paedomorphosis*, 12 CURR. ANTHR. 147 (1971). Jane van Lawick-Goodall attributes the "amazing success of man as a species" to the "evolutionary development of his brain which has led, among other things, to tool-using, toolmaking, the ability to solve problems by logical reasoning, thoughtful cooperation, and language." SHADOW OF MAN, *supra* note 45, at 239. While she does not give this as a definition of man, it would be a congenial one, and in harmony with the statement in the text. In deciding what is or is not human, very helpful is Quigley's view of the change from animal to man as a process, not an event, and an ongoing one at that, for at least 15 million years now. He concludes from this

that we must stop viewing the problem in terms of a distinction between "animal" and "man"; . . . . There undoubtedly was a time when our ancestors were wholly animal, but there never has been a time when any of us has been wholly human (or, more accurately, when we ceased to be animal.)

Quigley, *Assumption and Inference on Human Origins*, 12 CURR. ANTHR. 519 (1971) [hereinafter cited as Quigley]. Perhaps we shall become wholly non-animal only when our intelligence evolves into bodiless computers, and then the debate will be how a computer is distinguished from a human.

his surroundings; he feels alone, abandoned, ignorant of everything except that he knows nothing, no longer forced to obey the laws of the clan, from which he feels irremediably cut off. His first feeling thus was existential anxiety, which may even have taken him to the limits of despair. Without previous experience, his consciousness was necessarily rudimentary and rough, yet it was an authentic human consciousness.<sup>47</sup>

Much evidence exists of the gradual development of time consciousness among these, our early forebears. The relationship between the first solid proof of such behavior—the production of tools—and other evidence of extensive conscious futuristic behavior, however, is by no means clear. Intricate social cooperation may, for example, long have antedated tool-making, and with it may have come extensive planning and linguistic conceptualization, and with them the development of a sense of time.<sup>48</sup> Sauer points out that the human family itself with the prolonged childhood of its young, its lasting ties, and the special role of the female, involves “awareness of the past and anticipation of a future and is expressed in a sense of history.”<sup>49</sup>

It is common enough to attribute temporal awareness to development of the brain, particularly the forebrain, but undoubtedly other major physiological contributions developed earlier. For example, Hamburg, after pointing out the anticipatory function of adrenal processes in mobilizing energy sources for the oxidation required in muscle exertion, goes on:

In the long run of mammalian evolution, in the course of dealing with all sorts of harsh environmental contingencies, such a capacity for *anticipatory mobilization* may well have had selective advantage. Indeed, the trend toward increasing anticipatory powers, including the anticipatory regulation of physiologic processes, may be one of the crucial features of primate evolution. The great development of the forebrain in man may in large measure be viewed as an anticipatory network that permits some of the cardinal features of human adaptation.<sup>50</sup>

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47. Bergounioux, *Notes on the Mentality of Primitive Man*, in SOCIAL LIFE OF EARLY MAN 106, 110-11 (S. Washburn ed. 1961) [hereinafter cited as EARLY MAN].

48. See Quigley, *supra* note 46. I am not qualified to assess the originality of Quigley's thinking, but his article is a stimulating one, and it and the comments of 15 experts following appear to constitute a good cross-section of current anthropological thought, at least Western, non-Socialist thought.

49. Sauer, *Sedentary and Mobile Bents in Early Societies*, in EARLY MAN, *supra* note 47, at 256, 260.

50. Hamburg, *The Relevance of Recent Evolutionary Changes to Human Stress Biology*, in *id.* at 278, 284.

Despite these various antecedents, the first clear tangible proof of conscious futuristic behavior is, as noted above, the production of tools. Not the "occasional use of a boulder or a tree branch for attack or defense but the intentional organization of a raw material for the purpose of achieving a specific goal."<sup>51</sup> Such futuristic behavior on a very significant scale antedates modern man himself, having been practiced by his forebears such as Pithecanthropus (*homo erectus*) and, earlier, Australopithecus.<sup>52</sup> From the earliest, *homo sapiens*—modern man—has evidently engaged in futurized behavior of the tool-making type, including the sophisticated and conceptual tools of representational art,<sup>53</sup> and ritual designed to affect the future. An expo-

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51. Bergounioux in *id.* at 109. See also Oakley, *On Man's Use of Fire, with Comments on Tool-Making and Hunting*, in *id.* at 176, 187:

Tool-making requires a higher order of intelligence than does tool-using. Chimpanzees are the only reported animal that *make* tools, . . . In the chimpanzee the mental range seems to be limited to present situations, with little conception of past or future. The power of conceptual thought is basic to tool-making but is only 'incipient' in apes. . . . The range of tool types already present in the oldest industries includes *tools for making other tools* (e.g. hammerstones), illustrating that what we regard as the unique foresight of man was present at a very early stage in his evolution.

Fire, of course, is a tool, and primitive man used it both as a tool towards fairly immediate consumption, e.g., cooking, and as a tool to make tools, e.g., fire hardening of spears.

52. J. CLARK, *THE PREHISTORY OF AFRICA* ch. 2 (1970) [hereinafter cited as CLARK]; S. COLE, *THE PREHISTORY OF EAST AFRICA* 126-31 (1963) [hereinafter cited as COLE]. One should perhaps say "forebears or near cousins" in view of the dispute about the nature of the evolutionary tree, although both the named species are likely forebears rather than cousins. The various possibilities are explored in CLARK, *supra* at 63, with easy-to-follow charts. A very readable popular account of the various disputes is M. EDEY, *THE EMERGENCE OF MAN: THE MISSING LINK* (1972).

No ape, past or present, is known to have engaged in advanced tool-making, although chimpanzees make such tools as twigs with leaves stripped off (to pull termites out of nests) and sponges of chewed leaves (to sop up water from crevices). Even in captivity and with human training they have not yet been observed to use one tool to make another. SHADOW OF MAN, *supra* note 45, at 240-04.

53. The cave drawings of the Upper Paleolithic era, for example, were evidently designed

to promote the success of a future event that obviously had a major importance for the life of the community (a hunt, the increase of births, etc.). Once the event had taken place, the figures that had been engraved, painted, or sculptured lost any importance and purpose, and the same rock surface was used for new art productions.

Blanc, *Some Evidence for the Ideologies of Early Man*, in *EARLY MAN*, *supra* note 47, at 119, 120-21. Marshack attributes an even greater sense of future to Upper Paleolithic art, finding its decorative markings to be notations by which the artists kept track of seasons and the lunar cycles. A. MARSHACK, *THE ROOTS OF CIVILIZATION* 141-45 (1972) [hereinafter cited as MARSHACK].

For a discussion of the issues (and for sources) concerning primitive art as a tool vs. art for art's sake, see Vinnicombe, *Motivation in African Rock Art*, 46 *ANTIQUITY* 124 (1972). Similar issues can arise respecting stone tools; at many sites, e.g., Ismilla in

tential growth of such conscious awareness of time inevitably accompanied the advent of agriculture and domestication of animals.<sup>54</sup> Planting seeds rather than eating them now, and breeding, rather than immediate butchery, reflect a massive awareness of the difference between present and future. Vast changes in the complexity and diversity of ritual and other social patterns dealing with the future emerged with such increased awareness.

Until man (or his forebears) developed this perception of the continuum of past, present and future, it was impossible consciously to project exchange into the future. Thus this awareness, when added to specialization of labor and choice, gave mankind three of the primal roots of contract.

#### D. THE SOCIAL MATRIX

Whether as cause or effect (most likely both), the enhanced temporal awareness accompanying agriculture, domestication and fire supplied fertile ground for the growth of the exercise of conscious choice. Similarly, increased specialization of labor accompanying such new economic activities and related social behavior resulted in increased complexities in exchange. It is upon this combination of increases in choice, temporal awareness and specialization that contract—as distinguished from mere exchange—is founded. But none of this occurred in a social vacuum; all of it occurred in one of countless social matrices,<sup>55</sup> every one with ancient evolutionary origins. Ignoring the always present role of the social matrix in contract is akin to ignoring the role of DNA in the interaction of parts of a living body.<sup>56</sup> With-

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mainland Tanzania, a prolific profusion of tools among a relatively small population suggests production beyond those actually used or expected to be used, indicating perhaps an artistic pride in perfection. See COLE, *supra* note 52, at 134. Or does it indicate merely an early use of quality control? Whichever it is, the sheer abundance of such ancient and fine artifacts, each shaped by some knowing hand, had for this tourist to Ismila an emotional impact of the same nature as did first observing the Parthenon.

54. The use and maintenance of fire very likely had a similar exponential effect. The extensive time sense required therefor is described by MARSHACK, *supra* note 53, at 112.

55. A fact overlooked by those economists who persist in seeing economic inputs as limited solely to land, capital, labor and entrepreneurship. Unless the latter term is broadened unconscionably (in terms of linguistic decency) a key input—the social matrix—is omitted. Without it the other factors are not only useless, they would never come into existence. Cf. generally T. PARSONS & N. SMELSER, *ECONOMY AND SOCIETY: A STUDY IN THE INTEGRATION OF ECONOMIC AND SOCIAL THEORY* (1956) [hereinafter cited as *ECONOMY AND SOCIETY*].

56. Boulding describes the three great “organizers of society” as the threat sys-

out the social matrix all else in contract is not only meaningless, but completely inexplicable.<sup>57</sup>

The scope of exploration of the social matrix of contract in this introduction to the primal roots can be very limited. This is partly because it constitutes a constant theme underlying the discussions in the remainder of this Article. It is also partly because in general the analyses in this Article do not depend upon a deep examination of the fundamental character or characters of diverse human social structures beyond those suggested by the primal roots themselves, the human universality of which I am prepared to postulate.<sup>58</sup>

There is need briefly to mention but one other common feature of all social matrices from which contract has developed: language. The primal role in contract of language, and with it, ultimately, promise<sup>59</sup> is so obvious as hardly to need emphasis.<sup>60</sup> (Indeed, I shall con-

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tem, the exchange system, and the integrative system. K. BOULDING, *BEYOND ECONOMICS: ESSAYS ON SOCIETY, RELIGION, AND ETHICS* 43 *et seq.* (1968). He notes that the integrative system—such things as status, identity, love, hate, benevolence, malevolence, legitimacy—is the necessary matrix of the other two systems. And he points out that “[e]xchange can take place only if there is an atmosphere of trust, confidence, respect and, indeed, equality.” *Id.* at 44. *Cf.* DURKHEIM, *supra* note 20, at 406:

But if the division of labor produces solidarity, it is not only because it makes each individual an *exchangist*, as the economists say; it is because it creates among men an entire system of rights and duties which link them together in a durable way. Just as social similitudes give rise to a law and a morality which protect them, so the division of labor gives rise to rules which assure pacific and regular concourse of divided functions.

57. The statement in the text would be a masterpiece of triteness but for the fact that the social matrix of contract is so regularly overlooked, and nowhere more commonly than in the jurisprudence of traditional contract doctrine. Any human activity is meaningless and inexplicable when taken out of the context of the social matrix in which it occurs; indeed without such a matrix man is not man, but something else.

58. We are thus spared any necessity of choosing grounds on such issues as genetic vs. cultural programming of human behavior patterns, or of exploring such issues in respect of the centripetal forces of social structures, the forces which must exist for contracts to exist. (One often overlooked is money. *See* H. DUNCAN, *COMMUNICATION AND SOCIAL ORDER* 347-69 (1962) [hereinafter cited as DUNCAN]).

59. Intention is essential not only to promise, but to non-promissory contract as well, and language is essential to intention, as pointed out by Hampshire:

The difference here between a human being and an animal lies in the possibility of the human being expressing his intention and putting into words his intention to do so-and-so, for his own benefit or for the benefit of others. The difference is not merely that an animal in fact has no means of communicating, or of recording for itself, its intention, . . . . It is a stronger difference, which is more correctly expressed as the senselessness of attributing intentions to an animal which has not the means to reflect upon, and to announce to itself or to others, its own future behaviour. . . . It is not a fortunate accident, nor a detachable advantage, that men have a language adequate to express their intentions and that that which might otherwise have existed unknown, locked inside them, in fact becomes known. It is another aspect of the fact that they are social animals, capable of that kind of co-

tend that, if anything, it in some respects needs deemphasis, at least insofar as promise is concerned, because promise requires more contextual muting and molding than it now typically receives in abstract contract jurisprudence.<sup>61</sup>) What does require emphasis, however, is the social nature of the language; its availability for use in contractual activity is a *sine qua non* contribution of the social matrix to contract.<sup>62</sup> Only with the development of language and the social patterns it presupposes and develops could the full human capacities for specialization of labor (and hence exchange), exercise of choice, and awareness of the future be realized.

## II. CONTRACT: PROJECTING EXCHANGE INTO THE FUTURE

### A. INTRODUCTION TO PROMISSORY AND NON-PROMISSORY PROJECTION

Contract—as the term is used here—is the projection of exchange into

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operation that is the observance of promulgated rules and of recognition of mistakes in the observance of the rules.

S. HAMPSHIRE, *THOUGHT AND ACTION* 98-99 (Viking ed. 1967).

60. See Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 847 (1964). Language could properly have been set out as another primal root; it was not, in order to emphasize its social nature, and more importantly, to emphasize the importance of the whole input of the social matrix.

61. O. HOLMES, *THE COMMON LAW* 251 (1881) [hereinafter cited as HOLMES]:

[T]o explain how mankind first learned to promise, we must go to metaphysics, and find out how it ever came to frame a future tense.

This characterization neither goes deep enough in time nor, in modern terminology, focuses our attention on the right disciplines. While language is an integral part of the development of a sophisticated awareness of the future, significant conscious awareness of the future can occur without verbal communication, and certainly without the presence of a future tense in such communication. Awareness of the future rather than the relatively *advanced* development of a future linguistic tense is the base point for the beginnings of both promise and contract. (I believe that Holmes was at this point equating promise and contract, an equation this paper rejects, as did Holmes in other contexts.) As to disciplines to be consulted, while metaphysics might have keyed one into the right disciplines in 1881, both disciplines and vocabulary have changed, and now we would turn to archaeology, anthropology, biology, ethology and, of course, linguistics.

Somewhat similar to Holmes, in part, is H. HAVIGHURST, *THE NATURE OF PRIVATE CONTRACT* 12 (1961) [hereinafter cited as HAVIGHURST]:

[A]s soon as man learned to talk, became able to think about the future and acquired a moral sense, he had all of the equipment essential for making and keeping promises.

Holmes might conceivably object that the third facet was not essential.

62. But by no means the only one; specialization of labor, sensible exercise of choice and reliable awareness of the future are all entirely dependent upon the stability provided by social matrices. Section III(C)(3), below, is in part a further exploration of the social matrix root. Cf. generally DUNCAN, *supra* note 58.

the future, a projection emanating from a combining in a social matrix of the three contract roots just discussed. A sense of choice and an awareness of present and future cause people constantly to do<sup>63</sup> things and to make plans knowing that those actions and plans will affect their future. When the actions and plans relate to exchange, a temporal projection of exchange occurs; instead of all elements of exchange occurring immediately, some, and perhaps all, will fall in the future.

The projection of exchange most familiar to us is that accomplished by promise, the "manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."<sup>64</sup> Indeed, promise is so familiar to us on this score that we are very likely to view it as the sole possible projector of exchange into the future. For this reason a bit of dissection of promise is in order before proceeding to an examination of non-promissory projections of exchange less visible to the transactionally educated eye.

Affirmation of the power of the human will to affect the future<sup>65</sup> is one of the key elements of promise as an exchange-projector. Moreover, this affirmation is that an *individual* will can affect the future at least partially free of *communal* will.<sup>66</sup> Closely related but not identical to this first element is the fact that promise as a part of exchange very clearly individualizes (de-communalizes if you wish) each of the participants, setting each out as separate: I-promisor, thou-promisee, or, I-promisee, thou-promisor, as the case may be, or both, as is the case normally in an exchange. Indeed, this individualization is essential to the very nature of promise; promises made to oneself

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63. Throughout this section any reference to doing includes refraining from doing as well.

64. RESTATEMENT (SECOND) OF CONTRACTS § 2 (Tent. Drafts Nos. 1-7, 1973).

65. A fascinating softening of this concept occurred between Restatement (First) and Restatement (Second). The language quoted in the text at note 58 *supra* is from the latter. The original Restatement Reporter (Williston), however, evidently had no qualms in defining promise as "an undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future." Although the Reporter's Note to this section in Restatement (Second) implies a different reason for the change to the language in the text at note 64 *supra*, it remains that the amended language avoids the brave, almost Canutian, affirmation of the power of the individual will inherent in the old definition.

66. It can be only *partially* free because, as the discussion of social matrix has shown, promise can sensibly be viewed only against its communal backdrop, at the very least against the legal backdrop, and more properly as part of the whole socioeconomic structure in which the promise occurs.



are always a dubious concept.<sup>67</sup> At least two individual wills, subject only to the linkage to a communal will essential to the notion of contract, therefore, form the first two elements of "promise."

A third element is the *doing* of something *now* which affects the future by limiting choices which would otherwise be available to the promisor in the future.<sup>68</sup> The promisor thus presently sets in motion forces which may be destructive of what in the future he would otherwise view as in his self-interest, *e.g.*, causing him to repay money lent him earlier where he would prefer to keep the money. This is part of the notion of commitment to which the Restatement (Second) definition refers. Typically in an exchange this "doing of something now" involves some element of a present exercise of choice; indeed "promise" probably makes little conceptual sense without a modicum of choice whether to make the promise or not.<sup>69</sup>

The last three elements inherent in promise as an exchange-pro-

67. For example, New Year's resolutions and their daily equivalents ("I will give up smoking!") are probably the most broken of all promises.

68. The accuracy of this statement is unaffected by the fact that in an exchange this action typically results in a quid pro quo which the promisor otherwise would not have received. Nor does its accuracy depend necessarily upon there being more than a moral sanction in limiting future choices.

Both the promises which we keep and the promises which we are made to keep are manifestations of self-control. In both the rule of a contrary self-assertive impulse is anticipated and excluded.

R. WEST, *CONSCIENCE AND SOCIETY* 194 (1950).

69. If division of labor and exchange, coupled with a sense of past, present and future, occurred in a truly choiceless society then the projection of exchange would hardly be described as either promissory or contractual. Such a projection does indeed occur among social insects, where, for example, genetic programming results in soldiers being fed by foragers and in soldiers subsequently manning the ramparts and dying in battle. WILSON, *supra* note 17, at 321. There is, so far as we know, nothing in such behavior comparable to our notions of choice. For reasons advanced in the text at notes 36-44 *supra*, in a human context the possibility of such totally choiceless exchange behavior is excluded from consideration in this essay.

The refusal of heavyweight champion Muhammed Ali to take the oath upon his being drafted dramatized the element of choice in the making of promises even when they are ordered with heavy social sanctions. Nor is that element socially unimportant, even in draftees, as Caplow pointed out recently in discussing the Vietnamese War:

[A] war without a national consensus must necessarily be inimical to social confidence, since the social and psychological mechanisms which in a normal war transform the infliction of death, suffering, and wanton damage into morally justified acts are inoperative. The American loss of confidence took a particularly acute form for those men who expected to be conscripted to fight in a war to which they *did not consent*.

Caplow, *Toward Social Hope: I—The Coming of the Era of Protest*, 2 COLUM. F. (new series), Winter, 1973, at 2, 4 (emphasis added). See also the discussion of the function of consent in achieving cooperation in Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 664, 764 (1973) [hereinafter cited as Feller].

jector—specificity, communication, and measured reciprocity—are so tightly knit together that total separation is difficult at best. Moreover, one of them, specificity, is inherent in the first three elements, since no one but a madman claims unlimited power to affect the future, and it is madness compounded to commit oneself to exercise such power. But specificity is also closely linked to communication, since the communication will be meaningless to the promisee if it is totally lacking in specificity. Communication in turn is essential because of the division between “me” and “thee” postulated by the second element.<sup>70</sup> Finally, the separation of selfish “me” from selfish “thee,” and the presence of commitment, of specificity and of communication all go to guarantee that promise-based exchange-projection will indeed be a *measured* reciprocity.

To summarize, the foregoing elements of promise as a projector of exchange can for our purposes be combined into this definition: *Present communication of a commitment to future engagement in a specified reciprocal measured exchange.* This, as we all know, is an extraordinarily powerful mechanism for projecting exchange into the future.

It is, however, a mistake to think that because promise is an extremely effective projector of exchange it is the only one, or even to assume that it is always the most effective or most important. Command, status, social role, kinship, bureaucratic patterns, religious obligation, habit and other internalizations<sup>71</sup> all may and do achieve such projections. And to these must be added what may well be the most important of all:<sup>72</sup> expectations that future exchange and other future motivations arising out of dependence on ongoing exchange relations will, conceivably entirely free of all other coercion or ordering,<sup>73</sup> cause ex-

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70. Communication is also an essential communal link making the separation something less than total, even apart from other communal links mentioned in note 66 *supra*.

71. For a summary of the concept of internalization see L. POSPISIL, *ANTHROPOLOGY OF LAW—A COMPARATIVE THEORY* 197 *et seq.* (1971). As promises become internalized through habit, custom, communalization, etc., the move is towards non-promissory projection and relationizing. For example, how many people signing their Bank Americard think: “I am making a promise.”? If they do consciously think of obligation, what is most likely to come to mind is the vital need to protect their socioeconomic status as a “Good Credit Risk.”

72. This is especially true in post-industrial societies which have passed from (1) feudalism to (2) market-orientation to (3) market allied with much long range contract dominated by transactional theory and then gradually to (4) economic structures dominated by relationizing.

73. Other coercion and ordering of all kinds are likely to be present, reinforcing or sometimes countering the projection value of these expectations.

change to occur in certain patterns, patterns at least partially predictable.<sup>74</sup> One need think only of almost any major Defense Department development project to visualize such expectations. But perhaps the most hidden projector, because most common and obvious, is any production or other securing of goods for future sale in a market. Socio-economic specialization of labor has created circumstances whereby it may be most profitable to engage in such production, even though no one is bound by rule to purchase a thing; the very existence of people and their predictable wants supplies the projection of exchange into the future needed to justify the expenditure of effort in production.<sup>75</sup>

Non-promissory exchange projections may differ from promissory projections with respect to all but one of the elements of promise discussed above. The optimistic notion that human wills can affect the future is by no means essential to non-promissory projection. For example, a poor parent in an impoverished society may feed and clothe a child in the hope of one day receiving support in old age but with no faith whatever in the ability of mere man to affect the dictates of fate. This is even more true of the concept of *individual* ability to affect the future. So too exchange can be projected into the future among different laborers with no clear individualizing or de-communalizing, no clearcut "I-not-you," but at most only "that one" and "that other one," the difference being a command or communal designation of differences of function or status rather than of human individuality.

The last three elements of promise-based projection are specificity, communication and measured reciprocity. How can exchange be projected into the future without these elements? It is here that as

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74. The quotation from DURKHEIM, *supra* note 20, seems to suggest that the organic solidarity he ascribes to the existence of division of labor is attributable only to "rights and duties" founded on "rules" of both law and morality. These rules could, of course, grow out of the operation of division of labor as an ongoing process without the various elements essential to promise discussed in the text accompanying notes 64-70 *supra*, but nevertheless they create a rule type of futurity in their projection of exchange into the future. But I think I perceive, although not expressed precisely in these terms, the same theme running through Durkheim that is suggested in the text: the existence of division of labor creates its own momentum whereby quite predictable exchange projection into the future can and does occur, not because of "rules" but because of exchange or other motivations expected to be generated in the future by the *present* operation of division of labor.

75. Of course it helps if the market is made more predictable by producer and distributor manipulation of purchaser wants, as Galbraith claims is the case in the United States. J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967) [hereinafter cited as GALBRAITH]. The promotional techniques Galbraith describes are important kinds of relational contract techniques.

post-feudalists we face the greatest difficulty in conceptualizing relational contract. The overwhelming dominance of transactionism in post-feudal economic life blinds us to the possibility that economic exchange can be projected into the future without present specificity raised to a level of consciousness whereby communication<sup>76</sup> between parties can be said to have taken place,<sup>77</sup> and with it measured reciprocity.<sup>78</sup> Our difficulty is exacerbated by a reluctance (again a feature of a transactional outlook) to recognize as existent—or at least, as important—anything difficult or impossible to measure, preferably in money.<sup>79</sup> In short, the monetization and quantification of econom-

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76. Communication is here arbitrarily distinguished from uncommunicated basic assumptions below the threshold of mutual consciousness, a limitation on the concept which runs immediately into major trouble as soon as one thinks about the "tacit assumptions" of real life. See L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* 804 (1972) [hereinafter cited as FULLER & EISENBERG]. The difficulty arises, of course, because in many instances the tacit assumptions mold both the future of internalized behavior and the future of promise. See the discussion of tacit assumptions at text accompanying notes 232-35 *infra*.

77. We have no difficulty in viewing futurity, including economic futurity, in non-exchange terms. The difficulty is that as promise fades from a relationship we view exchange as fading equally. This latter view is a false picture of reality respecting exchange, but contains a substantial element of truth respecting consciousness of exchange. See the discussion below of recognition of exchange, Section III(C)(12) (a) *infra*.

78. Blau recognizes that his concepts of social exchange (which create "diffuse future obligations, not precisely specified ones") have a bearing in economic affairs. In a footnote to the statement that the "prototype of an economic transaction rests on a formal contract that stipulates the exact quantities to be exchanged," he says:

This is not completely correct for an employment contract or for the purchase of professional services, since the precise services the employee or professional will be obligated to perform are not specified in detail in advance. Economic transactions that involve services generally are somewhat closer to social exchange than the pure type of economic exchange of commodities or products of services.

P. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 93 n.8 (1964) [hereinafter cited as BLAU]. His footnote is a masterpiece of understatement.

79. Galsworthy's description of James Forsyte's response to his niece's comment that she hoped she would never know the value of money neatly summarizes our difficulties:

Engaged for fifty-four years . . . in arranging mortgages, preserving investments at a dead level of high and safe interest, conducting negotiations on the principle of securing the utmost possible out of other people compatible with safety to his clients and himself, in calculations as to the exact pecuniary possibilities of all the relations of life, he had come at last to think purely in terms of money. Money was now his light, his medium for seeing, that without which he was really unable to see, really not cognizant of phenomena; and to have this thing, "I hope I shall never know the value of money!" said to his face, saddened and exasperated him. He knew it to be nonsense, or it would have frightened him.

J. GALSWORTHY, *THE MAN OF PROPERTY* 49 (Ballentine ed. 1972).

Schumpeter described the processes by which the James Forsytes of the western world developed:

[Capitalism] exalts the monetary unit—not itself a creation of capital-

ics and society increasingly accompanying life since the feudal period obscure for us both the existence of a future in non-transactional social patterns and its relation to exchange.

In spite of the barriers to our perception of the fact, exchange can be and is projected into the future even in the absence of some or all the elements of specificity, communication and measured reciprocity. In traditional societies this is accomplished by such projectors as command, status, social role, kinship, habit and other internalizations.<sup>80</sup> Nor are such projectors by any means lacking in the economy of a post-industrial state. But in post-industrial states, with their centuries old transactional histories, perhaps the most important way by which exchange is projected without these three elements is through expectations that exchange motivations and dependence on exchange founded on presently existing ongoing exchange relations will continue in the future. Such relational expectations, if firmly enough grounded in fact, assure "satisfactory" exchanges in the future without need for present specificity, present communication or present measured reciprocity. A vast amount of economic activity is carried on at least partly on this basis.

The firmness of such relational expectations depends in part upon the relations in which they occur; I doubt if outsiders often successfully traded with the Vikings on this basis.<sup>81</sup> Such expectations may,

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ism—into a unit of account. That is to say, capitalist practice turns the unit of money into a tool of rational cost-profit calculations, . . . . [P]rimarily a product of the evolution of economic rationality, the cost-profit calculus in turn reacts upon that rationality; by crystallizing and defining numerically, it powerfully propels the logic of enterprise. And thus defined and quantified for the economic sector, this type of logic or attitude or method then starts upon its conqueror's career subjugating—rationalizing—man's tools and philosophies, his medical practice, his picture of the cosmos, his outlook on life, everything in fact including his concepts of beauty and justice and his spiritual ambitions.

J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 123-24 (3d ed. 1942) [hereinafter cited as *SCHUMPETER*].

80. Command must be communicated, but it may be either specific or non-specific respecting exchange, and hence its patterns may or may not create measured reciprocity. Those who correctly or incorrectly took Henry II seriously in his remarks about Becket undoubtedly anticipated rewards, but what the rewards would be no one could guess at the time of Becket's murder. On the other hand, a king's command to carry out a task, accompanied by promise of a fixed reward for doing so, creates a measured reciprocal exchange. Bureaucratic techniques, another way of projecting exchange into the future, tend to include as major elements not only communication, but also specificity, and with them measured reciprocity.

81. Within the Viking community, of course, such relational projection of exchange occurred. For a lively fictional account see F. BENGTSSON, *THE LONG SHIPS* (Meyer transl. 1954).

however, be so firmly grounded in strong relations that the future of exchange is never specified or communicated (except in the most subtle of ways) and never, at least overtly, measured. From within such a relational structure a perceptive participant could look out at a transactional, promise-oriented market and say: "Promise in transactions is simply specified communication of what for us goes without saying." Nevertheless the dependence, the motivations, and inevitably the obligations, arising from such relations may affect future exchange just as rigorously as any promise.<sup>82</sup>

Although most elements of promise may be dispensed with and a projection of exchange into the future still achieved, one element, the third, must exist even for non-promissory projection: *doing something now* that limits choices which would otherwise be available to the promisor in the future.<sup>83</sup> The "something," however, as the foregoing discussion suggests, may be far different from a "[p]resent communication of a commitment to future engagement in a specified reciprocal measured exchange." The "something" may be almost anything, but in order to project exchange into the future it must be something which fosters such future occurrence, and inevitably that means that it must be something which makes other choices of future action less available, perhaps entirely unavailable. For example, by producing goods for sale in a market a company seriously limits its practical (or even physically possible) choices of action in other directions. It has thereby done a great deal to project into the future the exchange of the goods it is now producing, perhaps in some circumstances even more definitely than would entering a contract to make and sell them.<sup>84</sup>

That exchange can be projected into the future by non-promissory

82. In a sense, the remainder of this essay is an elaboration of this point.

83. See text accompanying note 68 *supra*.

84. A theme much elaborated upon in GALBRAITH, *supra* note 75.

The actual making of goods may commit the firm far more than an executory contract to make, where, for example, it is common practice to cancel contracts if market circumstances change. See *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971). Cf. WEISSKOPF, *supra* note 34, at 22-23:

The finite conditioned nature of man requires choices between alternative possibilities because not all of them can be realized under given conditions. Once a choice is made all other alternatives have become impossible. One hour devoted to work cannot also be devoted to lovemaking. Once a career is chosen it is difficult to change to another one, and even in our flexible society the number of careers that can be realized in a lifetime is limited. Thus, man is free mostly to renounce possibilities.

Finally, consider an example closer to our professional hearts: simply by taking summer employment with a particular law firm a law student affects the availability of future choices, as does the law firm by hiring him, no matter how plainly both communicate that the whole relation is very much a trial run.

techniques does not, of course, mean that the term "contract" should encompass them as well as promises. I believe, however, that very good reasons exist for such definition, reasons which I hope will emerge in the following subsections.<sup>85</sup>

#### B. TRANSACTIONAL AND RELATIONAL CONTRACT; PRIMARY RELATIONS

The notions of transactional and relational socioeconomic structures require explanation beyond the bare definitional one found in the introduction and in the concepts heretofore developed. Consider as illustrative of the former the purchase of gasoline at a service station along a superhighway and of the latter a marriage of the more traditional kind. The gas purchase is a transactional event in the sense that, except for the expectation of the driver that the station would have gasoline available and the expectation of the station that any driver stopping would have some means of paying, the exchange has no past. There are no precedent relations between the parties.<sup>86</sup> Nor will there be any future relations between the parties.<sup>87</sup> As to the present, two general characteristics dominate the transaction: it is short; it is limited in scope. A few minutes measure its duration, and no one, even the most gregarious, enters into anything approaching a total human rela-

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85. A traditional, old fashioned marriage between two kindly and selflessly behaving partners who seldom think in terms of quid pro quo is a contract as that term is used here. The exchanges are economic, husband producing monetary income, wife running and working the household, work which can be monetized by reference to the extramarital market for similar services. Neither industrial nor post-industrial society presents the problem faced by anthropologists dealing with societies in which little monetization is present anywhere in the society, where it is difficult to measure any activity in rationally measured economic terms, and hence not easy to separate economics even theoretically from other aspects of the society. Conceivably such a situation could once again arise even in highly developed societies, *cf.* T. ROSZAK, *WHERE THE WASTELAND ENDS: POLITICS AND TRANSCENDENCE IN POST-INDUSTRIAL SOCIETY* (1972), but that seems most unlikely, or at the very least, far off. My main reason for insistence upon including all projections of exchange within the realm of contract may be summarized as follows: The constant occurrence in post-industrial society of promissory and relational projections of exchange makes utterly useless any concept of contract limiting itself to one type of projection alone; once one casts off from the limitation to promissory projection, there is no sensible anchorage until all exchange projections are included.

86. This is, of course, not strictly true; at least some "brand" relationships are created by earlier purchases and advertising and very likely some prior credit relations. Indeed, whether it was ever possible, it is now nearly impossible in modern America to find transactions free of all past relations.

87. Again this also is not quite true. There is likely to be a credit relation. The driver may stop at this station for gas again. Moreover, a "brand" relation has a future as well as a past and a present.

tionship in such a situation.<sup>88</sup> In such a transaction the measured exchange, gallons/dollars, is what matters. Without it, the pleasantries, the little extras of service and courtesies have no real meaning; with it those immeasurables are an added fillip and no more.<sup>89</sup> Contrast this service station stop with a traditional marriage relation. The latter consists not of a series of discrete transactions, but of what happened before (often long before), of what is happening now ("now" itself often being a very extended period), and of what is expected (in large measure only in the vaguest of ways) to happen in the future.<sup>90</sup> These continua form the relation without a high degree of consciousness of measured transactions.<sup>91</sup> Nonetheless, exchange, both economic and social,<sup>92</sup> takes place in such a relation,<sup>93</sup> even if not in the measured terms of the transaction.

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88. This was written before the gas shortage; some gas station relations now are total.

89. In spite of the focus of oil companies on service in their advertising. Such advertising simply reflects the difficulty posed to advertisers when their product is the same as their competitors' and when specific price competition as a marketing technique is rejected by the industry. The extras tended, of course, to disappear wherever the gas shortage was intense.

90. For short descriptions of the operation of the concepts discussed here in primitive societies see M. SAHLINS, *TRIBESMEN* 81-86 (1968); E. SERVICE, *THE HUNTERS* 14-21 (1966).

91. There is, I believe, nothing in this statement inconsistent with Professor Becker's economic equilibrium analysis of marriage. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813 (1973) [hereinafter cited as *Marriage*].

92. See BLAU, *supra* note 78, at 88-89, 91-97, 314-15; Lempert, *Norm-Making in Social Exchange: A Contract Law Model*, 7 LAW & SOC. REV. 1 (1972) [hereinafter cited as Lempert].

93. This is often overlooked—another manifestation of the overwhelming domination of transactionism in our economic thinking. See, e.g., Farnsworth, *supra* note 24, at 578-79:

But there are societies in which the struggle for survival in an inhospitable environment has bred a self-sufficiency which makes cooperation of minor importance. So among the Ammassalik, Greenland Eskimos who depend on the sea for survival, each couple is an essentially self-reliant unit and there is little division of labor or dependence on others. Tasks that one person can do, such as routine hunting, are usually done alone. . . .

Individual wealth consists largely of tools, weapons, boats, tents, clothing and other necessities, made by the owner or his wife.

Of course, there is a great deal of specialization of labor, and with it, exchange, *within* the Ammassalik marital structure, as Mirsky (Farnsworth's source) makes plain. Mirsky, *The Eskimo of Greenland*, in COOPERATION, *supra* note 41, at 54. But, presumably because it is not transactional, Farnsworth overlooks it, and he goes on to describe the overall situation of the Ammassalik as one in which there is a "minimum of cooperation." The female-male division of labor and resulting intra-family exchange was the earliest and most fundamental human exchange relation, not one to be summarily ignored. For an extensive treatment of sex division of labor see HERSKOVITS, *supra* note 24, at 127-42. This subject has been much debated as a result of increased awareness in feminist literature. See, e.g., Brown, *A Note on the Division of Labor*



The foregoing distinction between transactions and relations is very close to a distinction made by sociologists between nonprimary and primary relations. Three characteristics distinguish primary from nonprimary relations. First, in the former, response is to whole persons rather than to segments:

In the primary relation the participants interact as unique and total individuals. Uniqueness means that response is to a particular person and is not transferable to other persons. Wholeness means (a) that one responds to many aspects of another's character and background, and (b) that one responds spontaneously and freely, as a unified self, permitting feelings to enter the relationship. . . .

Many human relations are not primary because they are highly transferable, readily directed and redirected to many persons, and because they are narrowly circumscribed.<sup>94</sup>

Second, in a primary relation, communication is deep and extensive, "few limits are placed on the range and the mode of communication. In nonprimary relations communication is limited to specific topics . . . . Nonprimary relations are not meant to reveal the deeper layers of personality and tend to be restricted to formal and public modes of interaction."<sup>95</sup>

The third characteristic of primary relations is that personal satisfactions are paramount:

Individuals enter into primary relations because such relations contribute to personal development, security, and well-being. In the primary relation the individual is accepted for himself and not merely as a means to a practical objective.<sup>96</sup>

It will be noted that in their definition of primary relations Broom and Selznick seem to relegate economic (practical as distinguished from personal) objectives to a secondary position. Their doing so reflects once again the dominance of transactionism in our thinking about economics: economics is transactional, ergo primary relations (a sociolog-

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by *Sex*, 72 AM. ANTHR. 1073 (1970), and rejoinders at 73 AM. ANTHR. 805 (1971); 74 AM. ANTHR. 770 (1972). For other discussions see T. CAPLOW, *THE SOCIOLOGY OF WORK* 9-11 (1954); MAIR, *supra* note 24, at ch. 10; MANDEL, *supra* note 23, at ch. 1.

94. L. BROOM & P. SELZNICK, *SOCIOLOGY* 120-21 (4th ed. 1968) [hereinafter cited as *SOCIOLOGY*]. The authors go on to give the clerk-customer as an example of a nonprimary (or secondary) relation.

95. *Id.* at 121.

96. *Id.* at 124.

ical concept) are not primarily economic.<sup>97</sup> That is, I think, unfortunate for sociological analysis, since it helps perpetuate the myth of transactionism at a time when society is moving in primary relational directions on many fronts.<sup>98</sup> But whether or not it is an unfortunate limitation on sociological analysis generally, it is certainly an impossible limitation for analysis of contractual transactions and relations. Primary contractual relations must necessarily include as an integral element the economic, including economic exchange.

To summarize, I would initially distinguish contract transactions from contractual relations by noting that although both involve economic exchange, only the latter include whole person relations, relatively deep and extensive communication by a variety of modes, and significant elements of non-economic personal satisfaction.<sup>99</sup> These are not the only differences, or to put it another way, there are various other ways

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97. At least two other factors are also probably involved. One is the boundary line between the disciplines of sociology and economics, the latter having carved off for itself the "practical," *i.e.*, the transactionized and, above all, the monetized. This division too is a manifestation of the dominance of transactionism in the post-feudal period. Separate disciplines of economics and sociology (and religion) would be far more startling to a medieval thinker suddenly transported to the year 1974 than would be a Boeing 747. The other is the hint of altruism in the third element of primary relations as defined by Broom and Selznick, and if there is one thing that transactionized economics does not tolerate it is altruism in favor of exchange partners. Few things can more quickly mess up economic models than behavior in which market participants fail to maximize transactional utilities. Altruistic behavior *as to other participants in the market* does precisely that, and is likely to be characterized by microeconomic model builders along with all such failures as "irrational" behavior. This term too is a manifestation of the dominance of transactionism. Cf. Weisskopf's discussion of the "demotion" of reason in western civilization. WEISSKOPF, *supra* note 34, at 36 *et seq.*

98. This should not, of course, be read as suggesting that Broom and Selznick exclude primary relations from economic relations. The very next sentence following the excerpt in the text at note 96 *supra* is:

To the extent that a job gives psychological satisfaction, one may expect to find that primary relations have developed in the work situation.

SOCIOLOGY, *supra* note 94, at 124. Moreover, substantial parts of their text deal with the sociological aspects of economic relationships. What seems to be lacking, however, is an overt recognition, at least in their definition of primary relations, of the *integration* of economics, and particularly economic exchange, into primary relations, or, perhaps, more strikingly, of the reverse, the integration of primary relations into economics. Elsewhere, of course, the authors deal with subjects such as the Hawthorne experiment, *id.* at 130-33, and Kibbutz, *id.* at 38-40, where that kind of integration appears vividly.

99. Economic is used here to mean monetizable either directly or indirectly, *e.g.*, measuring how much a "wife is worth" in the dollars it would cost to hire a housekeeper, nursemaid and mistress, although the relation is not monetized by the parties. Indeed in many instances the parties would be highly offended by any such monetized measurement.

to express the differences,<sup>100</sup> but these include enough of the key factors

100. These and other differences are explored extensively in Section III(C) *infra*. Relations, as the term is used here, will evoke a sense of *déjà vu* in readers familiar with concepts such as status, association and institution, with writings by Maine, Spencer, Pound, Llewellyn, Weber, Ehrlich, Selznick and many others. I have deliberately steered clear of trying to relate the concepts in this Article to many closely related concepts developed and explored by others. Effort to do so would hardly have contributed to clarity of exposition. The difficulties of such comparison may be illustrated by a brief examination of two important examples. First, the notion of institution as espoused by Hauriou. It is founded on

- (1) the idea of the work or enterprise to be realized in a social group; (2) the organized power put at the service of this idea for its realization; (3) the manifestations of communion that occur within the social group with respect to the idea and its realization.

Hauriou, *The Theory of the Institution and the Foundation: A Study in Social Vitalism*, in *THE FRENCH INSTITUTIONALISTS* 100-01 (A. Broderick ed. M. Welling transl. 1970). Hauriou rejects the idea that institutions are founded on contract, which he defines in terms of *droit subjectif*, conscious wills. Nevertheless, most of what he calls institutions, I would call relations, and many of them I would call contractual relations. Moreover, Hauriou does recognize that institutions are founded by a process which includes contract, even in the sense he uses the term:

Every time a contract, agreement, or treaty results in the creation of any sort of constituted body, we should recognize that a founding process has been mingled with the contractual process.

*Id.* at 117.

A second example is P. SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969) [hereinafter cited as SELZNICK]. My concepts of relational and transactional contract parallel in many respects his concepts of association (founded on contracts of adherence or submission) and contracts of limited commitment. Selznick takes his concepts down a different road from that taken herein, focusing them on a particular substantive area, industrial justice, after, *inter alia*, an initial exploration of the differences between association and contracts of limited commitment. Nevertheless, his two introductory chapters on legal and social theory, and particularly his section on contract and association, *id.* at 52-62, are themselves important contributions to the general jurisprudence of contracts. In that section he points out the tension between association and contract by examining four "premises of the modern law of contract." (He uses the unadorned word "contract" to mean contract of limited commitment.) 1. *Voluntarism in depth*. ("The premises of voluntarism strain against the reality of human association. Association bespeaks *commitment, open-endedness, and structure*. Whereas contract presumes a world of independent, roughly equal actors who achieve their objectives by making determinate arrangements with predictable outcomes, association undermines predictability and proliferates obligations. Voluntarism is weakened when the true 'transaction' is the creation of a system of cooperation." *Id.* at 55). 2. *Limited commitment*. ("Ideally, contractual commitments are specific rather than diffuse; they are determinate, not open-ended. . . . The obligor knows what he is getting into and can calculate his costs. . . ." *Id.* at 56). 3. *Mutuality*. (" . . . the idea of exchange, with its corollary of mutually dependent duties, is fundamental to the theory of contract. . . . But if the contract creates a pattern of cooperation for the achievement of *common ends*, then an insistence on full reciprocity may be self-defeating. . . . Reciprocity is never completely eliminated, but it tends to be overshadowed by dependency and rational coordination. . . . This aspect of mutuality points to the most important limitation of the contract model as a way of dealing with the reality of sustained cooperation: the ever-present threat of dissolution." *Id.* at 57-59.

to serve as a base for the analysis following.

It will be noted that I have not called all contractual relations, "primary" contractual relations. The reason is that they cover such a wide range of "primariness." In our society, the most primary contractual relation is marriage, with employment relations likely to be next. But some primariness is also to be found in most economic relations, because it is clear that virtually no real life human cooperation will be found entirely transactional and lacking some whole personal relations, some diffuse communication and some non-economic personal satisfactions.<sup>101</sup> Nor will contractual relations be found entirely lacking in transactional discreteness, if such lack of discreteness is indeed humanly possible.<sup>102</sup>

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Selznick is using "exchange" and "reciprocity" in a narrower sense than exchange is used herein; his usage is closer to "measured reciprocal payment." See discussion in text at note 28 *supra*. 4. *Boundedness*. ("The doctrine of privity brings to bear the atomist and subjectivist spirit of the law of contract. . . . It inhibits the recognition of new corporate realities because it overstresses the legal integrity of the *initiating* parties. . . . Sustained cooperation tends to diminish the determinateness of the parties. . . . Over time, the 'true' participants may include other parties, such as trade unions or creditors, who did not share in forming the original agreement." SELZNICK, *supra* at 59-60). Selznick summarizes the foregoing:

To the extent that continuity and concerted effort are prized, each element of the contract model is subject to attrition and distortion. The movement is from limited to diffuse commitment, from reciprocity to interdependence, from mutuality to unilateral obligation, from equality to subordination, from privity to openness, from self-regulation to external constraint. The outcome is that the logic of adherence regains its relevance and vitality.

*Id.* at 60.

To try to explore such matters would, I believe, have much obscured the analysis developed in this essay. The price of not doing so is some degree of perhaps inadequately acknowledged intellectual parasitism, and probably more significant, the ignoring of some thoughtful current work related to mine but not *directly* pertinent to the basic points being developed, *e.g.*, Macaulay's concepts of market vs. non-market goals and generalizing vs. particularizing approaches, Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966); Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941 (1971) [hereinafter cited as Rehbinder]; Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971). Professor Grant Gilmore's *The Death of Contract* is unfortunately being published too late to be considered here.

101. The only perfectly transactional transaction is one occurring in the perfectly competitive market, itself a theoretical construct never perfectly matched in human activities, even for short periods. Moreover, when we turn from single events to ongoing social structures, a perfectly transactional ongoing social structure is, given the finite limits of human nature, an impossibility. Neither biology nor history gives a hint that human beings could completely transactionize their entire lives. Given the integrated nature of man such inability prevents any human activity from complete transactionizing, the model dreams of some microeconomists to the contrary notwithstanding.

102. See Section III (C)(6)(b), Transactionizing in relations and Section III(C)(6)(c)(iii)(b), Relationizing in transactions.

C. CONTRACT AND PROMISE; NON-PROMISSORY  
PROJECTION OF EXCHANGE

In a pure promise-transactional social structure, promises-in-transaction would be the only way to deal with exchange and the future. But no pure promise-transactional social structure has ever existed. Even in conditions of maximum approach to the perfectly competitive market, society has never been either willing or able to make the future of promise identical in *all* respects to the present world of reality. Try as we will we cannot make the future the present. Even the simplest and clearest promise, supported by conditions most conducive to its performance and backed by the most intense social, economic and legal pressure for performance, is not, at the instant it is made, the same thing as its actual performance in the future. The reasons are to be found in the nature of promise-making, in the individual and social response to someone's having made a promise, and in the non-promissory future always accompanying to some degree any promise, all of which are closely related to the nature of time and to our consciousness of it.

1. *Nature of Promise-Making*

Two aspects of the nature of promise-making call for attention. First is the inherently fragmentary nature of a promise, and second is the impossibility of complete communication between human beings.

a. *Promissory expression is fragmentary*: Professor Farnsworth performed an important service to general contract jurisprudence when he linked with contracts the psychological concept of "limited attention,"<sup>103</sup> a concept intimately related to the interstitial nature of promises. Humans are incapable of focusing on everything in a situation of any complexity (and *all* human physical and social situations are complex). They are therefore forced by neural processes to limit their attention to as many facets as they can physically handle. Moreover, although Farnsworth does not mention this specifically, it is doubtless true that typically attention is limited yet further either consciously or by habit, because maximizing the number of open channels of reception will seldom be the most effective way for the person to proceed with whatever he is about. The cacophony would be too much for the receivers to sort out efficiently. Thus in making a promise a person cannot and will not be focusing on everything even in the pres-

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103. Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860, 870 (1968).

ent situation, and the promise will in fact concern only a fragment, often a very small fragment, of that present situation. This limitation is aggravated by the nature of promise, it being inherently a mechanism for dealing with the future. Because the promissory future includes all of the present plus the additional circumstances of the future, it is therefore even more complex than the present, and the inherent behavioral limitations on attention make promises that much smaller fragments of the overall situation. This difficulty is further aggravated by the inherent unknowability of much of the future.<sup>104</sup>

As Farnsworth points out, a second level of selection occurs when parties seek to reduce their promises to contract language. It is unlikely that everything coming within the sphere of limited attention at the thinking-about-it stage will even be remembered when the time comes to reduce it to promissory communication.<sup>105</sup> And even to the extent it is remembered, numerous barriers stand in the way of its being expressed. Expression itself is a form of narrowing things down, of selecting for focus a limited aspect of a situation. (Consider, for example, how much of the situation actually perceived, *i.e.*, to which the senses have given an already limited attention, is further narrowed in the statement: "See that woodpecker on the tree trunk.") In addition, the kind of expression involved in promissory behavior is not total recall, but is limited by the purposes sought to be achieved. Both consciously and unconsciously this causes a further narrowing of the emanations of communication.<sup>106</sup> Moreover it takes work to communicate, and humans often sacrifice work in favor of leisure; all of us are in some measure lazy draftsmen. Thus, in moving from the overall operative situation to expression of promise, a constant narrowing and elimination occurs.

b. *Communication expressed is not communication received:* Limitations on the expressions of communication are by no means the last step in the narrowing process. Undoubtedly the statement: "See that woodpecker on the tree trunk" means more to the person saying

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104. [T]he promises implied in directive language are never more than "outline maps" of "territories-to-be." The future will fill in those outlines, often in unexpected ways. . . . A realization that directives cannot *fully* impose any pattern on the future saves us from having impossible expectations and therefore from suffering needless disappointments.

S. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 111 (1949).

105. Even very short periods between thought and record lead to some loss.

106. For a discussion in a collective bargaining context of this and other phenomena treated here, see Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1003-05 (1955) [hereinafter cited as Shulman].

it than it does to the person hearing it; at least it does until the hearer sees the woodpecker and the tree trunk. The meaning of the declarer can be viewed only against the wealth of detail which seeing the woodpecker created in his mind. The hearer, on the other hand, may envision a more stereotyped and less detailed picture. Conversely, the communication sometimes evokes a richer picture, because of prior experience or because the hearer enjoys a richer sensitivity and image evoking capacity than the declarer. But even so the imagery will not necessarily match the view the hearer would have had if he had seen the woodpecker in the tree, and it may conflict with the declarer's view.

Very closely related to the narrowing effect of transmission-reception<sup>107</sup> is the inevitable distortion occurring in communications between disparate human beings. There is thus an inherent non-mutuality of promise. The hearer simply does not hear what the declarer says, because what the declarer says is part of one human being and what the hearer hears is part of another and different human being. Therefore, there can never be complete communication between people; a promise made and a promise heard are two different things.<sup>108</sup> To the extent that parties recognize this and each strips out those aspects that experience suggests are not mutual, there is yet more narrowing of the truly mutual promise.

In addition to the non-mutuality inherent in the imperfect nature of communication is non-mutuality caused by grosser kinds of non-hearing, such as hearing "seventy" when the declaration was "seventeen." This is by no means uncommon, and relatively many such situations find their way into courtrooms to the misery of the parties.<sup>109</sup>

Where differences between saying and hearing occur, whether in gross or subtle ways, there is no way in which the future of *the* promise can be viewed as identical in all respects to the present world of reality, because in the present there are *two* promises, declarer's and hearer's,

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107. For the sake of simplicity the text focuses on oral communication; everything said on that subject, however, applies even more strongly to written communication, a form introducing its own special narrowing processes, down to and including running out of ink or space on a page, to say nothing of the loss of intonations, gestures, facial expressions and the like which accompany the spoken and viewed word. Moreover, the written word tends to be more formal and precise, and unless more written words are used they will convey less than the oral. What is conveyed tends to be more accurate in a discrete sense, less accurate in a contextual sense.

108. For a sad illustration of this, undoubtedly aggravated by wishful thinking, see *Klimek v. Perisich*, 231 Ore. 71, 371 P.2d 956 (1962).

109. And to the delight of teachers of contract law and the West Publishing Company who treat them under such rubrics as Mistake.

and with them *two* contradictory futures, and *both* cannot be brought into a single present.

In summary, a host of factors inherent both in human communication and in the fragmentary nature of promises preclude their constituting mirror reflections of either the present or the future. Thus they never can be a *complete* basis for dealing with the future.

## 2. *Individual and Social Response to Promises: Promises Are Not Absolutes*

Whether one focuses on party or on social (including legal) response to promises, it is perfectly clear that a great deal of promise breaking is tolerated and expected. Indeed, it is so widely tolerated that a realist would have to say that beneath the covers we are firmly committed to the desirability of promises being broken,<sup>110</sup> not just occasionally but quite regularly. Macaulay's articles on manufacturers' attitudes toward promises<sup>111</sup> brought this home forcefully,<sup>112</sup> but they would have been far more surprising if he had found among manufacturers and suppliers or buyers a strong moral commitment to absolute promise keeping. The keeping of promises, like any other phenomenon serving a social function, tends to fall into disuse when it is perceived that one of two things has occurred: (a) the phenomenon has stopped serving the function and no sufficient<sup>113</sup> substitute function is served, or (b) the cost of having it serve the function has come to outweigh the benefit derived. Both of these points are revealed by Macaulay's findings about salemen's attitude to contract:

The salesman finds contract the work of the devil; it is just one more thing to get in the way of closing a sale. Moreover, suing

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110. In this discussion I leave aside the entirely social promise, namely that lacking a significant element of economic (to be distinguished here from social) exchange. The subject of this piece is contracts; a definition limiting contracts to transactions and relations involving *significant economic exchange* can be a very useful tool of social and legal analysis. For an attempt to link legal enforcement norms to social exchange, see Lempert, *supra* note 92.

111. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963) [hereinafter cited as *A Preliminary Study*]; *The Use and Nonuse of Contracts in the Manufacturing Industry*, 9 PRAC. LAW., NOV., 1963, at 13 [hereinafter cited as *Use and Nonuse of Contracts*].

112. That Macaulay's studies apparently seemed startling (and still have hardly at all woven their way into overt contract jurisprudence) is a commentary on the manner in which legal scholars can get sucked into the vortex of whirling abstractions, and stay there for generations.

113. Sufficient in a broad sense, to include such aberrational sufficiency as the serving of a vested but functionally collateral interest.



or threatening to sue a customer who could place orders in the future is insanity.<sup>114</sup>

Of course, one way to implement such attitudes is to avoid using promises in the first place. But promises, or at least communications looking like promises, may serve useful purposes even though one party is perfectly free to revoke. By way of example rather than proof, consider a customer signing a sales slip when he purchases an item in a department store. Under a common prevailing practice his promise to pay for the item is for a time revocable *at his unfettered free will*; he need only return the merchandise within a certain or a reasonable time.<sup>115</sup> Nevertheless the store extracts the "promise." Why? Not because it wants to bind him *eo instante*, but because the promise is a vehicle for binding (and billing) him later on.<sup>116</sup> (The incentive for the store's practice is that the cost of having items returned is less than the gains lost on sales prevented by a tough return policy.)

A less than total commitment to the keeping of promises is reflected in countless ways in the legal system. The most striking is the inodesty of its remedial commitment;<sup>117</sup> contract remedies are generally among the weakest of those the legal system can deliver. But a host of doctrines and techniques lies in the way even of those remedies: impossibility, frustration, mistake, manipulative interpretation, jury discretion, consideration, illegality, duress, undue influence, unconscionability, capacity, forfeiture and penalty rules, doctrines of substantial performance, severability, bankruptcy laws, statutes of frauds, to name some; almost any contract doctrine can and does serve to make the commitment of the legal system to promise keeping less than complete.

To summarize, the response both of parties to promises and of society respecting reinforcement, including legal reinforcement, is far

114. *Use and Nonuse of Contracts*, *supra* note 111, at 15.

115. A purist will object that his free will is not unfettered since he has to bring the item back. On such purity do we find consideration when finding consideration fits some other purpose. *See generally* 1 A. CORBIN, *CONTRACTS* § 130 (1963); 1 S. WILLISTON, *CONTRACTS* §§ 101, 115 (3d ed. 1957).

116. It is, of course, perfectly possible to analyze the sale-and-return situation as involving no promise until the return time has expired. But this is lawyer's abstract thinking, not the thinking of the customer. Nor is it the thinking of the store which will recognize the income from the sale immediately, less a statistical reserve for returns. H. FINNEY & H. MILLER, *PRINCIPLES OF ACCOUNTING—INTRODUCTORY* 183 (7th ed. 1970).

117. *See* Farnsworth, *Legal Remedies for Breach of Contract*, 70 *COLUM. L. REV.* 1145 (1970); Speidel & Clay, *Seller's Recovery of Overhead Under UCC Section 2-708(2): Economic Cost Theory and Contract Remedial Policy*, 57 *CORNELL L. REV.* 681, 688 (1972) [hereinafter cited as Speidel & Clay].

from absolute. This too prevents us from equating absolutely the future of promises with the present. Perhaps one might view such party and societal responses as an inevitable consequence of the fragmentary nature and the incompleteness of human communication discussed earlier.<sup>118</sup>

### 3. *Non-Promissory Accompaniments of Promise*

Promise, even at its transactional narrowest, always is shadowed by non-promissory accompaniments. The doctrines mentioned in the immediately preceding paragraphs are legal reflections that promises have always been accompanied by burdens of the impurities of incompleteness of content and communication, objectivity, implication, custom, usage, and above all, "ongoingness" and its accompanying clouds of imprecision and future uncertainty. These non-promissory accompaniments are at the very least fillers of the gaps occurring inevitably because of the fragmentary nature of promise considered earlier. Rarely, if ever, is promise so complete and non-fragmentary as to be viable by itself independent of its context.<sup>119</sup> Vastly more important than such rare approaches to promissory independence is the fact that more commonly it is the promise which is the gap-filler while the "great sea of custom" (to quote Havighurst) forms the main structure of contract. Witness any adhesion contract in which the only promises constituting genuine mutual planning are plugged into blanks on a printed form.<sup>120</sup> (Even these fill-ins are not necessarily genuinely mutual planning in the case of standardized products and standardized prices.) As Havighurst puts it, "even in the modern industrial societies the verbal element in the shaping of conduct is small as compared with customary practice."<sup>121</sup> Standardization of product is but one of countless outstanding modern examples of this phenomenon.<sup>122</sup> Myriads of accompaniments<sup>123</sup> thus constantly shadow promise, often indeed over-

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118. This is only part of the reason for this occurrence; certainly the relational aspects of contracts play an even more significant role.

119. Even a promise in a fully abstract obligation, A. VON MEHREN, *THE CIVIL LAW SYSTEM* 553 (1957), would fail this test, since at least some of the legal effect of such a promise lies outside the communicated specifics of the parties.

120. I refer to real contracts of adhesion, not to contracts such as those between experienced parties using AIA forms where much of the printed form constitutes a type of genuine mutual planning. Much of the content of even these, however, is closer to custom than to real promise.

121. HAVIGHURST, *supra* note 61, at 15.

122. See Leff, *Contract as a Thing*, 19 AM. U.L. REV. 131, 144-47 (1970) [hereinafter cited as Leff].

123. The narrowing effect of language, at least of my language, is most evident

whelming the truly understood mutual planning of genuine promise.

Even promises made on the commodity exchange—the purest of transactions—are made against a backdrop of regulations, customs and ongoing relations among brokers, the commodity exchange, and usually customers.<sup>124</sup> True, these non-promissory shadows may be economic and relatively little fuzzed up by social exchange or other non-monetizable aspects, but they are less transactional, more assumed and less specifically communicated (in each transaction) than the promises themselves.

In order to gain emphasis by separate treatment, I have deliberately omitted from the foregoing one of the most significant non-promissory accompaniments of the promises: their jural effect.<sup>125</sup> Legal effects are not the same thing as promises mutually understood, even where the parties incorporate an understanding of those legal effects into their promises (express or tacitly assumed); the nature and limits of the processes of the law will see to this. Thus, even in the purest of transactions the law itself makes impossible complete promissory presentation of the future by reason of limitations in the very same processes by which it may maximize present effect of promise.<sup>126</sup>

An additional rub comes as soon as one moves from the highly transactional to even the slightest ongoing contractual relation. Rarely, if ever, has contract been able to free itself entirely from non-economic exchange impedimenta, such as social exchange (barely semi-specific in nature), the motivations of kinship, of friendship, of altruism, of

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here; try as I will I cannot find the words to embody concisely the fullness of these accompaniments; they encompass all the pertinent universe outside the communicated and genuinely mutually understood promise.

124. See generally Sandor, *Innovation by an Exchange: A Case Study of the Development of the Plywood Futures Contract*, 16 J. LAW & ECON. 119 (1973).

125. So important is this accompaniment that Karl Llewellyn reserved the word "contract" for the legal effect of promises. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931). This terminological usage was carried over into the UCC §§ 1-201(3), (11). This usage facilitates legal analysis, but it also may contribute to narrow, excessively legalistic approaches to the whole subject of contract, approaches against which Llewellyn himself particularly fought. Ehrlich long ago reminded us that:

In view of the fact that contracts are actionable on principle, it seems very natural to suppose that in actual life contracts are being performed only because they are actionable; not only legal history, however, but also a glance at modern life shows that, on the contrary, contracts have become actionable because, as a rule, they are being performed in life.

E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 110 (W. Moll transl. 1936) [hereinafter cited as EHRLICH].

126. The concept of presentation is discussed in Section III(C)(12) *infra*.

hatred, of distrust, of the host of psychological and social phenomena not lending themselves to the measurability or monetization of economic exchange. Moreover, the more ongoing the relation, the more diffuse and non-transactional become the economic exchanges involved. The service station operator is far more concerned about his perhaps vague future economic relations with his supplier or its distributor than he is with the fact that the last delivery of motor oil was short several cases of a popular weight.<sup>127</sup> Based on that concern he is likely to make tradeoffs about the shortage which he most certainly would not have made had he bought the motor oil in a transactional and non-relational market.<sup>128</sup> Contract has thus always meant—even if this has not always been admitted—far more than promise - in - transaction - measured - exchange - truly - specified - and - truly - communicated. And the burdens of the other aspects constantly increase as we in modern societies find ourselves increasingly engaged in exchange relations involving complex mixtures of internalization, command, relational expectations, specific promise and other even more vague psychological and cultural motivators.<sup>129</sup>

#### 4. Conclusions

In view of such phenomena as the impact of "limited attention" on promise-making, of the limitations of human communication, of the

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127. Especially now in the face of a real or imagined gasoline shortage.

128. For an interesting study demonstrating this phenomenon in a game situation, see Kelley *et al.*, *A Comparative Experimental Study of Negotiation Behavior*, 16 J. PERSON. & SOCIAL PSYCH. 411 (1970) [hereinafter cited as Kelley]. Participants in experimental games regularly voluntarily entered losing bargain transactions, *i.e.*, ones in which they paid more than they gained, for the purpose of being able to raise the level of rewards (for both parties) in future transactions to a higher level. This was done where the game rules prevented achievement of the higher level without prior repeated agreement by both parties to losing transactions. Moreover, there was no way to be sure in making one losing transaction whether the other party would agree to another transaction (which might be particularly bad from his or her standpoint) necessary to raise the level of future rewards. The game was played in some experiments solely for points; in others the points had a small monetary value. Agreement tended to be more rapid and successful in achieving the future mutual goal where the stakes were higher, *i.e.*, where the points had a monetary value.

129. A good deal of experimental research is being carried out respecting various aspects of those relations and is reported in journals such as the *Journal of Conflict Resolution*, the *Journal of Personality and Social Psychology*, and *Social Forces*. See, *e.g.*, Blau & Richardson, *Contract Formation and Overt Power: A Reexamination*, 51 SOCIAL FORCES 440 (1973); Druckman, *The Influence of the Situation in Interparty Conflict*, 15 J. CONF. RES. 523 (1971); Michelini, *Effects of Prior Interaction, Contact, Strategy, and Expectation of Meeting on Game Behavior and Sentiment*, 15 J. CONF. RES. 97 (1971).

limited ability and willingness of parties or society to treat promises as absolutes bringing the future into the present absolutely, and of the many non-promissory accompaniments of promises, it is clear that contracts have never approximated the pure independent promise that transactionism would suggest. From this I draw two conclusions. One is that understanding even heavily transactional contracts requires recognition of the factors external to the promise fragment of the transaction. This is not the grudging recognition afforded by such doctrines as implication, or by the explanations or supplementations permitted by rules of law such as UCC § 2-202.<sup>130</sup> Rather it is a full recognition that contracts consist of a variety of components, of which truly communicated promise, brought to maximum present effect, is but one coequal component,<sup>131</sup> and not always even that. The other conclusion

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130. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

UNIFORM COMMERCIAL CODE § 2-202.

131. Coequal in the sense that no factor has a presumption of hierarchical superiority, such as that set out in the second clause of UCC § 1-205(4): "when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade." This is not to suggest by any means that in any given situation one may not supersede the other. For example, "promise = as is" may supersede an implied warranty of merchantability. Or custom may supersede promise where custom makes promise unconscionable or nonsensical or not probably understood as "meant literally," etc. See *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971), noted in 1973 Wis. L. Rev. 934.

Havighurst, describing contracts in very primitive communities, says: "Contract under these circumstances . . . is only a ripple upon the great sea of custom." HAVIGHURST, *supra* note 61, at 15. Legal tendencies in a contract era, even today, are to approach custom as "only a ripple upon the great sea of promise," a most unrealistic assessment of real life.

Llewellyn was marvelously aware of all of these things a long time ago. See Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of our New Commercial Law*, 11 VILL. L. REV. 213 (1966), a perceptive piece on Llewellyn's relational outlook. Llewellyn, a practical man, however, focused in the UCC on bringing the practicalities of relationism to the commercial law largely without rejecting a broad transactional structure. In the long run this may be a quicker road to developing relational contract structures than would have been a theoretical Llewellynesque relational restructuring. But the price paid was loss of the brilliance and poetry which Llewellyn would have brought to that task. I am not at all sure Llewellyn would have engaged in it even if the UCC had not absorbed so much of his energies; he seemed to prefer less revolutionary activities involving craftsmanship more closely tied to analysis of existing legal patterns, as his glowing description of

is the semantic one urged earlier: "contract" is a very useful word to describe the totality of economic exchange relations whether promises are the dominant or even a significant factor in the relation.<sup>132</sup>

### III. THE MANY FUTURES OF CONTRACTS

#### A. INTRODUCTION TO A BEHAVIORAL CONCEPTUALIZATION OF CONTRACTS: TRANSACTIONAL AND RELATIONAL AXES

The two futures of contract examined thus far have been the promissory and the non-promissory. The non-promissory futures have been difficult to define because of their great diversity; they include, for example, not only vaguely measurable ideas such as altruism and hope, to say nothing of raging or placid subconscious or conscious desires, but also such concrete and measurable rules as UCC § 2-708(2).<sup>133</sup> In order

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the Grand Style of judicial work suggests. See generally W. TWINING, *KARL LLEWELYN AND THE REALIST MOVEMENT* (1973):

He felt constricted by collections of tightly drawn definitions; he tended to use vague terms when working at a high level of generality; orderly presentation of his ideas did not come naturally to him; and on the whole he was more concerned with 'theories of the middle range' than with 'ultimate questions.'

*Id.* at 170.

132. Professor Leff, for a purpose somewhat different from that of this Article, listed among "identifying criteria" of contracts "[t]he limitedness of contract." He went on to say:

There seems to be something significant to contract in the bordered relationship, "the deal," as opposed to more long-term, non-limit-bound interpersonal relationship like husband-wife and father-son.

Leff, *supra* note 122, at 138. In a footnote he added: "I am trying, of course, to keep from falling off the brink into the status-contract swamp, but that I am in fact hanging over it by my fingernails ought to be mentioned." *Id.* at 138 n.23.

It is plain that I am, and have long been, in that swamp, albeit voluntarily. Moreover, I think Professor Leff's fingernails slipped and that he is in there too, because the last of his "identifying criteria" was the following:

Contract seems to presuppose not only a deal, but dealing. It is the product of a joint creative effort. At least classically, the idea seems to have been that the parties combine their impulses and desires into a resulting product which is a harmonization of their initial positions. What results is neither's will; it is somehow a combination of their desires, the product of an ad hoc vector diagram the resulting arrow of which is "the contract."

*Id.* at 138. What more artful account of many of the key elements of relations could one find?

In his initial position Leff is in good company, see, e.g., SELZNICK, *supra* note 100, at 52-62; indeed his is undoubtedly the prevailing concept. While this is a semantic question, it is a vital one, since the inclusion or exclusion of relational exchange from the term "contract" affects contract jurisprudence very strongly indeed. To exclude relational exchange from the concept seems to me a form of transactionism blinding us to social reality.

133. This section may have both gained and lost concreteness and measurability in its latest refinement with economic cost theory. Speidel & Clay, *supra* note 117.

to explore further both promissory futures and diverse non-promissory futures, it seems best at this point to try to categorize contract transactions and relations along some kind of behavioral lines.

One type of functional or behavioral analysis is along transaction-type lines, a route followed, for example, by Holland,<sup>134</sup> Kohler,<sup>135</sup> Amos,<sup>136</sup> and Williston.<sup>137</sup> A related route is based on broader substantive ideas such as Havighurst's big four: enterprise, power, peace and chance.<sup>138</sup> Transaction-type analyses can, of course, be very fruit-

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The gain comes from the great precision of rule suggested therein; the loss could come in its application by the personnel of a judicial system (including counsel) most of whom have never been trained to handle such a specialized and complex rule. Moreover, it is by no means clear to me that the cost of so training an entire judicial system would be worth the benefits of such finer remedial adjustments. What is the sense, for example, of great surgical refinement in trying to put parties in the same position as performance when at the same time the law allows the meat axe of litigation costs to fall more or less as they may?

134. T. HOLLAND, *JURISPRUDENCE* 289-322 (13th ed. 1924). Holland first divides contracts into two categories, principal and accessory, the latter being those entered into only for the better carrying out of a principal contract, e.g., a performance bond. He then divides principal contracts "according [to] their object" into six categories: (1) alienation, (2) permissive use, (3) marriage, (4) service, (5) negative service and (6) aleatory gain. Pound has described this as "quite sufficient for general purposes." 5 R. POUND, *JURISPRUDENCE* 222 (1959) [hereinafter cited as POUND].

135. J. KOHLER, *PHILOSOPHY OF LAW* 134-87 (A. Albrecht transl. 1914) [hereinafter cited as KOHLER]. Kohler, dealing with obligations in the civil law in a chapter entitled *The Law of Property*, divides his subject into such subsections as acquisition and loss of ownership (including barter), extinction of debts, securities, barter of value—interest, commerce in risks, commerce in service, partnership, gifts, compensation, and noncontract subjects such as inheritance.

Havighurst followed this pattern of organization in *CASES AND MATERIALS ON THE LAW OF CONTRACTS* (2d ed. 1950). His divisions of this type were employment, professional services, rewards, personal and family arrangements, charitable subscriptions, building and construction, sale of goods, loans, and assignments.

136. S. AMOS, *A SYSTEMATIC VIEW OF THE SCIENCE OF JURISPRUDENCE* 215-29 (1872).

137. S. WILLISTON, *CONTRACTS* §§ 922-1287 (1920). Williston's listing does not purport to be a complete one. It seems to be based on divisions followed by authors who earlier wrote texts on particular classes of contracts, which were in turn undoubtedly responsive to the practical needs of practicing lawyers. It includes contracts for the sale of land, contracts for the sale of personal property, contracts of employment and contracts to marry (in the same chapter!), contracts of bailment and of innkeepers, contracts of affreightment, bills of exchange and promissory notes, and contracts of suretyship.

138. HAVIGHURST, *supra* note 61, at 20-42. Edwin A. Patterson, in a draft manuscript uncompleted at his death in 1963, categorized both the scope and purposes of contract law and some uses of contract in society. Purposes of contract law he divided as follows: (1) promote stability and security in exchange; (2) protect promisee's expectations; (3) protect accumulations of wealth; (4) provide legal devices for termination of obligations; and (5) protect weaker against stronger bargainers. He categorized uses of contract in society as follows: (1) assure processing and distribution of goods;

ful in developing insights into contract behavior. The analysis following, however, follows a different tack, namely, focusing on concepts cutting across substantive content: outlook, behavior, structures, process and the like.<sup>139</sup> (The fundamental "substantive" concepts running throughout are those arising directly from the primal roots of contract: specialization of labor and exchange; the sense of choice; conscious awareness of past, present and future; and related social matrices, particularly language.) This range of behavioral concepts can best be viewed, I think, along a series of axes. Each axis is a behavioral concept with a transactional pole and an opposite relational pole. The table on the following pages shows twelve of these axes (subdivided in several instances). The basic characteristics of the extreme transactional pole and of the extreme relational pole are summarized here. The remainder of this Article explores each of the axes set out on the table in more detail.

#### B. TRANSACTIONAL AND RELATIONAL AXES: OMISSIONS AND "NEUTRAL" FACTORS

Before turning to more detailed treatment of the concepts set out in the table, two other matters should be considered. First is the absence on the table of societal response as a factor in the transactional-relational distinction. Here of course we would, *inter alia*, meet directly the law of contract.<sup>140</sup> It would indeed be profitable to explore that subject, but such an enterprise is too large for inclusion here. Suffice it to state some of the more obvious points: A transactional societal response emphasizes transactional characteristics wherever possible, and two especially: monetization and specific promise genuinely communicated. Transactional intervention is based on breach of promise, and the defining of the response tends to be based as closely as possible on consent, *i.e.*, specific promise genuinely communicated. Remedies tend to be substitutional (monetized damage) rather than restorative, *e.g.*, causing actual performance or otherwise maintaining the viability of the relation. On the other hand, relational-societal responses em-

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(2) transfer and protect uses of land; (3) control performance of services; (4) transfer and share risks; (5) organize and guide group activities, commercial, industrial, cultural and charitable; (6) provide relief from anxiety. (I am indebted to my colleague Stanley D. Henderson for showing me Professor Patterson's manuscript.)

139. Selznick's conceptualizations, *SOCIOLOGY*, *supra* note 94, at 52-62, are similarly cross-substantive: voluntarism, limited commitment, mutuality and boundedness.

140. As elsewhere herein "contract" is used broadly, and contract law would include labor law, for example, every bit as much as it does the contract law of the Restatement of Contracts.



CONCEPT	EXTREME TRANSACTIONAL POLE	EXTREME RELATIONAL POLE
1. Overall relation type	Nonprimary Segmental, limited, non-unique, transferable	Primary Whole person, unlimited, unique, non-transferable
A. Personal involvement	Limited, linguistic, formal	Extensive, deep, not limited to linguistic, informal in addition to or in lieu of formal
B. Types of communication	Simple, monetizable economic exchange only	In addition to economic, complex personal non-economic satisfactions very important; social exchange; non-exchange
C. Subject matter of satisfactions	One side of exchange is money; other side is easily monetized; both are actually measured; no other aspects	Both exchanges and other factors are relatively difficult to monetize or otherwise measure, and the parties do not monetize or measure them
2. Measurability and actual measurement of exchange and other factors	Apart from exchange motivations themselves, external to the transaction	Internal to the relation, as well as external
3. Basic sources of socioeconomic support	Short agreement process; short time between agreement and performance; short time of performance	Long term; no finite beginning; no end to either relation or performance, except perhaps upon death of parties
4. Duration	Sharp in by clear agreement; sharp out by clear performance	Commencement and termination, if any, of relation likely to be gradual; individual entry into existing relation often gradual, as may be withdrawal; individual entry may be by birth, and withdrawal by death
5. Commencement and termination	Substance of exchanges	Structures and processes of relation; substance planning for initial period primarily
6. Planning	Can be very complete and specific; only remote contingencies (if those) are beyond reasonable planning capacity	Limited specific planning of substance possible; extensive specific planning of structures and processes may be possible
A. Primary focus of planning	Very complete and specific; only the practically unplannable (of which there is little) left unplanned	Limited specific planning of substance carried out; extensive planning of structures may or may not occur
B. Completeness and specificity (1) Possible when planning occurs		
(2) Actual planning accomplished		

CONCEPT

C. Sources and forms of mutual planning

(1) Bargaining and adhesion

(2) Tacit assumptions

(3) Sources and forms of post-commencement planning

D. Bindingness of planning

E. Conflicts of interest in planning

7. Future cooperation required in post-commencement planning and actual performance

8. Incidence of benefits and burdens

9. Obligations undertaken

A. Sources of content

EXTREME TRANSACTIONAL POLE

Specific consent to price of a good produced unilaterally by seller; short bid-ask bargaining, if any

Inevitably present, but inherently relational and anti-transactional

No post-commencement planning

Planning is entirely binding

Enterprise planning can be expressed only through zero-sum allocative planning, hence all mutual planning is conflict laden

Almost none required

Shifting or other specific assignment of each particular benefit and burden to one party or the other

Genuinely expressed, communicated and exchanged promises of parties

EXTREME RELATIONAL POLE

Adhesion without bargaining unlikely except in case of entry of new members into existing relation; otherwise extended mutual planning merging imperceptibly into ongoing relation being established; a "joint creative effort"

Recognized aspect of relational planning, without which relations cannot survive

Operation of relation itself is prime source of further planning, which is likely to be extensive; may or may not be extensive explicit post-commencement planning

Planning may be binding, but often some or all of it is characterized by some degree of tentativeness

Enterprise planning may be separable at least in part from allocative planning, and hence relatively low in conflict; merger of non-allocative enterprise planning with allocative planning may occur in ways which mute conflict and provide non-negotiational ways for dealing with it

Success of relation entirely dependent on further cooperation in both performance and further planning

Undivided sharing of both benefits and burdens

Relation itself develops obligations which may or may not include genuinely expressed, communicated and exchanged promises of the parties

CONCEPT	EXTREME TRANSACTIONAL POLE	EXTREME RELATIONAL POLE
B. Sources of obligation	External to parties and transaction except for their triggering it by manifestation of consent	Both external and internal to the relation; same as the sources of content of the obligation as to internal element
C. Specificity of obligation and sanction	Specific rules and rights specifically applicable and founded on the promises; monetizable or moneitized (whether by mutual party planning, <i>i.e.</i> promissory or otherwise, <i>i.e.</i> by rule)	Non-specific; non-measurable, whether based on customs, general principles or internalizations all arising from relation or partly from external sources, restorative unless breach results in termination, then may become transactional in nature
10. Transferability	Entirely transferable with the sole exception of an obligor's ultimate liability for non-performance	Transfer likely to be uneconomic and difficult to achieve even when it is not impossible
11. Number of participants	Two	May be as few as two, but likely to be more than two
12. Participant views of transaction or relation	High	Low or perhaps even none
A. Recognition of exchange	None expected or occurring	Significant expectations of occurrence
B. Altruistic behavior	Presentation of the future	Futurizing of the present, <i>i.e.</i> to the extent past, present and future are viewed as separate, the present is viewed in terms of planning and preparing for a future not yet arrived
C. Time-sense	None expected, except perhaps that planned for; if it occurs expected to be governed by specific rights	Possibility of trouble anticipated as normal part of relation, to be dealt with by cooperation and other restorational techniques

phasize the relational characteristics and especially the cooperative aspects of the present and future of the relations. Relational response to the breakdown of cooperation thus tends to be defined in terms of what is necessary or desirable to restore present and future cooperation. Remedies tend to take the restorational form of negotiation, mediation, arbitration, orders to do things and other processes fostering cooperation, rather than substitutional monetized remedies.

The second matter requiring brief consideration is that of "neutral" factors.<sup>141</sup> These are factors which may have an important effect on the concepts in operation, but which do not, standing alone, fit along a transactional-relational axis. For example, the depth of party interest in a contract may have a very significant impact on the operative effect of the concepts in the table. Yet, whether a contract is transactional or relational does not necessarily establish the depth of party interests; a party can have a great deal of interest in a transaction, e.g., a purchase of a residence, or very little, e.g., the casual purchase of a pair of shoes.<sup>142</sup> So too a party can have a great deal of interest in a contract relation, e.g., employment, or very little, e.g., membership in a little used club. In spite of their apparent overall neutrality, however, these and other seemingly neutral factors<sup>143</sup> may in any given situation either intensify or counter the transactional or relational character of particular contracts.

The spuriousness of seeming neutrality can be illustrated by further consideration of societal response, especially legal response, to exchange relations. A bias exists in the very nature of the tools, especially the legal tools, heavily used in transactional societies, namely explicit rules creating explicit and monetized rights. These are transac-

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141. "Neutral" is in quotations because too many (most?) apparently neutral principles in life and law turn out on closer examination not to be neutral at all. The parol evidence rule, for example, is in black letter as "neutral" as neutral can be, yet from McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365 (1932), to Childres & Spitz, *Status in the Law of Contract*, 47 N.Y.U.L. REV. 1 (1972), its lack of neutrality has been widely recognized.

142. Transactions by their nature have a strong attention-focusing characteristic, a subject with important ramifications, some of which are discussed in Section III(C)(6) (b) *infra*. But interest may be sharply focused without being tremendously great. It is fascinating, however, how that sharpness of focus tends to increase commitment. Abstractly the thought of quarreling with anyone over a 15 cent newspaper is absurd, but let someone snatch the last *New York Times* from before the eyes of another person who had only casually thought of buying one and even a member of the refined clientele of that sheet is likely to demonstrate some strong primitive emotions resulting in a quick and intense primary relation.

143. For example, the strength and depth of obligation of the participants.

tional techniques; the western legal system, especially the judiciary (real or quasi), uses them very heavily, and is uncomfortable in the highest degree with persuasion, mediation, adjustment, compromise, etc. Since, however, life cannot proceed anywhere in any system without such concepts in heavy everyday use, their application tends to be kept under cover and away from the eye of the "law." Increasingly, however, such concepts and processes invade even the inner sanctum of the judiciary both in civil (*e.g.*, pre-trial conference techniques, often a compromising process rather than the avowed, clear-the-decks-for-action process) and in criminal matters (*e.g.*, plea bargaining, the sole current barrier to total chaos in many if not most criminal courts). Nevertheless, ultimate social weapons tend to be transactional in nature, because they proceed on the assumption that the relations in question cannot be salvaged. When relations cannot be salvaged they always tend either to disappear entirely or to become more transactional, and the legal or other societal response reflects this, *e.g.*, a support agreement or order in connection with a divorce, or the allocation of children's time between divorced mother and father. So too, the absence of sovereign societal intervention tends<sup>144</sup> to leave only relational relief available, *e.g.*, cajolery, mediation, the business pressure imposed by credit ratings, etc.<sup>145</sup>

Speaking of neutrality, what of the neutrality of the primal roots of contract themselves relative to the various transactional-relational axes? Should one or more of those roots have been set out as tending in a particular direction? This question is most interesting respecting the second primal root, a sense of choice.<sup>146</sup> Choice is probably the most sensitive matter upon which the analysis in this essay touches, as it goes to the root of the individualist-collectivist philosophical conflict.

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144. In the absence of alternative sovereigns such as the Mafia, or more legitimate sub-sovereigns, such as a trade association with disciplinary powers.

145. Transactional and relational sanctions are explored from a slightly different angle in Section III(C)(9) *infra*.

146. Division of labor and exchange have biasing effects, as will be seen in some of the discussion relating to planning; relatively simple division of labor seems to fit relational exchange patterns; more complex specialization seems increasingly to fit transactional patterns. But there seems also to be a point in technological and economic complexity when further specialization results once again in increasingly relational patterns, *i.e.*, in our present post-industrial society. Awareness of past, present and future may also vary in a "non-neutral" manner, but plotting the directions of those variances is a complex matter about which I have not thought enough to have even an offhand opinion. The bias of the social matrix root, including language, depends, of course, upon its content.

It is clear that what I have described as the extreme transactional poles suggest socioeconomic structures congenial to strong individualistic beliefs, whereas the relational poles appear more congenial to collectivist views.<sup>147</sup> To the extent that this is the case *and* to the extent that collectivist structures necessarily tend to restrict individual choice, then of course the existence of choice or at least a sense of choice points toward the transactional pole, and their absence points toward the relational pole. Maximum-minimum choice was not included as an axis, however, for two reasons. First, the concept of choice in fact runs through many of the other axes included in the table. Letting the concept emerge through treatment of those axes permits a finer, even if less choice-focused, treatment than would treatment of a separate choice-in-gross behavioral axis. Second, I am by no means convinced that in a modern post-industrial society individual choice is indeed more limited by relational structures than by transactional structures. It is all too easy and all too inaccurate to equate many modern contractual relations with feudal serfdom and its relatively choiceless status or with the relative choicelessness of members of a tradition-bound society. But as Rehbinder has pointed out:

There is freedom in modern law to choose statuses; status is no longer hierarchic and hereditary; and, contrary to the old status law, modern law endeavours to reduce economic pressure and thereby promote social mobility. . . .

Contract law burdened man by forcing him to create for himself a legal position; the law of roles now allows him to choose among positions and behavioral standards, created and safeguarded by the state.<sup>148</sup>

Moreover, the question is not, as some would have it, the relative availability of choice in a transactionally organized society enjoying the economy and technology of 1874 compared with a relationally organized society enjoying the economy and technology of 1974. The question is the relative availability of choice in a transactionally organized society compared with a relatively organized society where both have the economy and technology of 1974.

My point is not to advocate one position or the other on this sensitive question of choice, but simply to point out the likely inaccuracy

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147. To use dichotomies so broad as perhaps to be meaningless, or worse yet, so broad as to lead to unnecessary wars, but which nevertheless convey at least a flavor of meaning, a strong one.

148. Rehbinder, *supra* note 100, at 949, 955.

of an evaluation of the scope for choice based solely on which pole a given contractual structure approaches.

Finally, before turning to the specific behavioral axes, one further point should be noted. The axes by no means reflect separate compartments; in many instances they overlap. Moreover, polarity at one end of one axis tends to cause or reinforce similar polarity along other axes. As the sociologists say, they resonate. For example, long duration of an economic exchange relation tends to create relational polarity along the other axes, *e.g.*, primary relations inevitably creep in, planning becomes less binding and more subject to change. Similarly, if one side of an exchange is exclusively money and the other is exclusively something easily monetized, the likelihood is that the focus of planning will be on the substance of the things being exchanged rather than on processes.

Against this brief background, then, we can turn to a more complete examination of the various axes.

### C. TRANSACTIONAL AND RELATIONAL AXES: ANALYSIS

#### 1. *Overall Relation Type*

In view of the extensive discussion of primary and nonprimary relations in Section II(B) above, it is unnecessary to explore those concepts here in more detail than appears on the chart itself: relational contract involves primary relations, transactions do not. It should be noted, however, that intimate ties exist between these relational patterns and the other axes, as will appear in the discussion following.

#### 2. *Measurability and Actual Measurement of Exchange and Other Factors*

For a contract to lie near the extreme transactional pole the subjects of exchange must be money on one side and something easily monetized on the other.<sup>149</sup> This must be true both at the time of planning and

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149. Theoretically, I suppose, the test would also be met if both were simply easily monetized, *i.e.*, barter of highly monetized subjects. Barter, however, is an aberration in the highly monetized market this factor presupposes.

Barter has always been used in social intercourse and for that matter is still frequent in our own day, as in the past. But never since the invention of money has it usurped the latter's function. When people resorted to it, they did so for motives of convenience or as a mere accident of practice; they used it as a temporary substitute for money, not to replace it.

H. PIRENNE, *ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE* 104-05 (I. Clegg transl. 1937 [hereinafter cited as PIRENNE]). A "motive of convenience" is to be found in our American markets in the form of freedom from income taxation of certain

at the time of performance. Moreover, the parties must actually measure the exchanges, again both at the time of planning and at the time of performance. All of these tests clearly are met in a fixed price contract for future delivery of a commodity for which there is a ready market both at the time of contracting and the time of delivery.

Contrast with a commodity contract the contract formed when an engineer joins the work force of an industrial concern with the expectation of remaining far into the future. If the contract is viewed segmentally the first week is in some respects very close to a transaction. The compensation is money, the labor is readily monetized, both when the engineer signs on and when it is performed. But even viewed segmentally there is some artificiality about the monetization of the labor rendered. Unlike the uniform commodity mentioned above, the labor of Engineer *A* is not the same as the labor of Engineer *B* in economic utility, even though it is equally monetized in the sense that the labor market pays the same price for both.<sup>150</sup> But more important, the contract cannot rationally be viewed segmentally as a series of discrete weeks of employment. It can only rationally be seen as the beginning of what *may* be a long term relation. So viewed, a good deal happens to measurement and measurability. No longer is it possible to predict what will be exchanged, either the amount of money the employer will be paying, for example, five years hence, or the kinds and quality of services the engineer will then be rendering. When that time comes, of course, measurement will be possible,<sup>151</sup> subject to the limitations mentioned concerning short segments of the relation, but the future will continue with its immeasurability. And meanwhile those presently immeasurable exchanges will nevertheless affect the way the relation works *now*. Moreover, many aspects of the relation will be immeasurable until its end.<sup>152</sup> Others will be immeasurable at any time, for example, the social position and prestige related to employment in particular work or for particular employers.<sup>153</sup>

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kinds of exchanges not passing through the monetary medium. See, e.g., INT. REV. CODE OF 1954, §§ 1031, 1033(a)(1).

150. These differences are in fact reflected to some extent by the existence of differentials in pay, etc., among companies based on the kind of job, grade, etc., which will be offered.

151. This change is the result of the transactionizing through which relations go at any given present moment. See the discussion in Section III(C)(6)(b) *infra*.

152. For example, the benefits derived from the typical pension plan are unknowable to a considerable extent, until retirement. R. NADER & K. BLACKWELL, *YOU AND YOUR PENSION* (1973) [hereinafter cited as *PENSION*].

153. Cf. *ECONOMY AND SOCIETY*, *supra* note 55, at 109, 114. Parsons and Smelser refer to much of what is unmonetized as secondary performance exchange.



The employment relation, highly monetized as it is in American society, does, of course, permit and encourage a great deal of measurement of exchange however many relational characteristics also exist. Even considering the difficulties mentioned, in many ways it lies fairly well towards the transactional pole. An economic exchange relation which does not, however, is the traditional nuclear family of husband and wife, especially where the wife does not work. At the time of initiating the relation the exchanges to take place in the future are impossible of measurement. When they do take place some *could* be measured, out of context, *if* it were possible to tell what is being exchanged for what. But typically it is not possible to say that the money brought home by the husband at any particular time is exchanged for particular services of the wife. Moreover, even if it were possible for a sociologist, for example, studying the household to attribute such discreteness to the exchanges, the parties do not themselves typically make such measurements. Thus even though that kind of nuclear husband and wife relation is clearly economic, involves extensive division of labor<sup>154</sup> and therefore exchange, both measurability and actual measurement are very largely lacking, and it lies far over towards the relational pole.

### 3. *Basic Sources of Socioeconomic Support*

With the partial exception of the exchange-motivations themselves, the socioeconomic support of a transaction lies outside the exchange making up the transaction.<sup>155</sup> Thus, for example, exchange transactions can occur effectively only if property rights receive socioeconomic support from others besides the parties to the transaction. They can effectively be projected into the future only if socioeconomic support for promises is coming from others besides the parties.<sup>156</sup> This support may be moral, economic, social, legal or otherwise, but in any event it is external to the parties.<sup>157</sup> In a sense this remains the case even

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154. And with it, presumably, Durkheim's organic solidarity. DURKHEIM, *supra* note 20, at 111 *et seq.*

155. The exception for exchange motivations is only partial, because they are massively affected by cultural values external to the parties. Moreover, exchange motivations *alone* have serious weaknesses as support in transactions projecting exchange into the future. If, where they are the sole support, the motivations change for any reason before the projected exchange is completed, then the exchange will not be completed (at least not as planned), and the projection will have partially or entirely failed.

156. This is simply a repetition of the points made in Section I(D) *supra*, respecting the role of the social matrix.

157. See DURKHEIM, *supra* note 20, at 212-14;

when the only support takes the form of internalization by the parties of a moral social standard.

Relations also exist in an external social matrix and hence enjoy external socioeconomic support; such support is commonly essential to their existence and effectiveness. But in addition they generate their own socioeconomic support, and relational exchange, both present and future, takes place in the framework of that internal support. Moreover, relational exchange itself, both present and future, is an integral and very significant factor in the generation of that internal support. A good example is to be found in British labor relations and in the collective bargaining agreements arising out of these relations. British law has until recently been that such agreements are "gentlemen's agreements" unenforceable in court.<sup>158</sup> They were, therefore, lacking the legal support normally given transactional contracts in Britain.<sup>159</sup> Perhaps the most important socioeconomic support of these relations comes from within the company-union relation, including the existing and future exchange going on constantly between the company and the union members, *i.e.*, their ongoing need for each other.

A two-party exchange relation (*e.g.*, a childless marriage or a sole proprietor with one employee) generates the kind of internal support discussed above, and the power of that support should not be underestimated. But a two-party relation, or dyad, lacks a very important support-generating characteristic: it has no *collective* identity apart from its two principals.<sup>160</sup> This automatically gives it a finite life as

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[W]hen men unite in a contract, it is because, through the division of labor, . . . they need each other. But in order for them to co-operate harmoniously, it is not enough that they enter into a relationship, nor even that they feel the state of mutual dependence in which they find themselves. It is still necessary that the conditions of this co-operation be fixed for the duration of their relations. . . .

. . . In sum, a contract is not sufficient unto itself, but is possible only thanks to a regulation of the contract which is originally social.

Parsons summarizes and analyzes Durkheim's views on this subject succinctly in T. PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 301 *et seq.* (2d ed. 1949). See also *ECONOMY AND SOCIETY*, *supra* note 55, at 104 *et seq.*

158. See Hepple, *Intention to Create Legal Relations*, 28 *CAMB. L.J.* 122 (1970). Now, however, see *The Industrial Relations Act of 1971*. See generally R. HARVEY, *INDUSTRIAL RELATIONS* (1971); Gould, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, 81 *YALE L.J.* 1421 (1972).

159. They are by no means lacking in other forms of external support, *e.g.*, governmental anti-strike policies or sympathy pressures available from other unions in the event of trouble.

160. T. CAPLOW, *TWO AGAINST ONE—COALITIONS IN TRIADS* 9 (1968) [hereinafter cited as *COALITIONS*].

an identifiable collective entity. Only a relation<sup>161</sup> of three or more members can have an identity which would commonly be viewed as collective and can survive the replacement of a member.<sup>162</sup> Of course, the larger the membership of a relation the more likely we are to view it as a collective entity which adds and subtracts members rather than dying out when a member withdraws, but the minimum to maintain long term relational identity is three. This is important to the transaction-relation distinctions made here, because while some exchange relations are dyads, most are not.<sup>163</sup> Transactions, on the other hand, by their very nature tend to be two-party affairs, and therefore lack the important internal support-generating characteristic of a collective identity which can survive the departure of one of the principals.

The internal support which a relation establishes but which is lacking in a pure transaction is without question one of the most important distinctions between exchange transactions and exchange relations. It is a distinction affecting their every aspect, from day to day casual operations to major planning to various disasters to social reinforcement and control.

#### 4. *Duration*

The duration of contact<sup>164</sup> between the parties to a transaction is short; agreement is accomplished with a minimum length of contact between the parties,<sup>165</sup> and contact during performance, if any, is nearly instantaneous. Removal of goods from a seller's truck, their placement on buyer's platform, and the signing of a receipt by buyer, are typical of the contact between the parties during performance of a relatively pure transaction. Often no contact during performance occurs, as where a seller ships goods by a common carrier.<sup>166</sup>

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161. Many exchange relations rise to the level of formality of organizations:

An organization is a social system that has an unequivocal collective identity, an exact roster of members, an explicit program of activity and procedures for replacing members.

T. CAPLOW, *ELEMENTARY SOCIOLOGY* 432 (1971) [hereinafter cited as *ELEMENTARY SOCIOLOGY*]. But many exchange relations do not meet all these requisites, *e.g.*, that between a supermarket and its customers. Accordingly, the more inclusive term is used in the text.

162. *Id.*

163. Perhaps the largest single class of such dyads are childless marriages, but even many of them are preliminary to the creation of a larger nuclear family.

164. Contact includes any form of communication.

165. The agreement process is considered below in both Section III(C)(6) on planning and Section III(C)(5) on commencement.

166. Except to the extent that the shipment is itself a form of communication, *e.g.*, as it is treated by UCC § 2-206(1)(b).

Duration of a transaction apart from contact between the parties may be very short, as in the case of a cash sale, or long, as in the case of a contract for future delivery of a commodity. But even the extension of such non-contact time may cause a transaction to become more relational. A loan of money made through the money markets would seem to be a very transactional event. But when a long term loan is made, numerous relational aspects tend to crop up. Consider, for example, the establishment of trustees and a whole system of government in connection with long term corporate bond issues.<sup>167</sup>

Duration of a relation, both of contact and non-contact facets, may be virtually infinite. An extended family is an example in a primitive society; a mature collective bargaining relation is an example in ours, as is General Motors. Moreover, at the extreme relational pole the relation never had any beginning; it has always existed.<sup>168</sup> In modern advanced societies, however, the socioeconomic structures with which we deal once had finite beginnings. For example, the United Mine Workers signed its first successful collective bargaining agreement with the coal operators in 1898.<sup>169</sup> But these finite beginnings often are by no means sharply defined beginnings at all; behind the 1898 UMW agreement lay the early beginnings of the UMW, the coal wars, the Molly Maguires, and countless other people and events of the last half of the 19th century,<sup>170</sup> and even earlier antecedents in the Appalachian coal mines.<sup>171</sup> Moreover, even if the UMW agreement of 1898 is viewed as having once been the "creator" of UMW-operator contractual relations, it is plain that that creation for current purposes can only be viewed as part of the current residue of history and only with the erosions and encrustations of history, those erosions and encrustations, not the original agreement itself, being what matters now. And this is typical of many existing contractual relations. Who cares, and how often, that General Motors was formed in 1916 by a merger? The residual significance of that contract transaction is what now matters, and upon

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167. Cf. Simpson, *The Drafting of Loan Agreements: A Borrower's Viewpoint*, 28 *BUS. LAW.* 1161 (1973).

168. In the fullest sense of the word "never," time being considered as cyclical rather than as linear.

169. W. FISHER, *COLLECTIVE BARGAINING IN THE BITUMINOUS COAL INDUSTRY: AN APPRAISAL* 3 (1948).

170. See H. AURAND, *FROM THE MOLLY MAGUIRES TO THE UNITED MINE WORKERS; THE SOCIAL ECOLOGY OF AN INDUSTRIAL UNION, 1869-1897* (1971).

171. To say nothing of the traditions from European coal mining which must surely have had influence in America, along with all the other behavioral patterns brought to our shores by immigration.

that residual significance we now focus rather than on the original contract of merger. That being the case, for most practical purposes, now, neither General Motors nor the relations created by the UMW-operators agreement have finite beginnings.<sup>172</sup>

The multiparty character of most exchange relations and the collective identity created thereby often result in a difference in the duration of the relation and the duration of participation of particular members. (This is not possible in a typical two-party transaction where the duration of both contact and non-contact participation of each party is identical to the duration of the transaction itself.) The participation of the individual can last no longer than the relation itself endures, but it can be shorter, much shorter. This difference can have a significant impact on numerous matters, including not only entry and withdrawal of the individual, but also the nature of his participation between entry and withdrawal. These will be explored further in a number of direct and indirect ways in the sections following.

##### 5. *Commencement and Termination*

The creation of a transaction and the individual's mode of entry into it typically are one and the same. They are accomplished by sharp consent, the boundary between being in (transaction commenced) and not having come in (transaction not commenced) being clearly defined.<sup>173</sup> The mode of individual withdrawal from and termination of the transaction itself also are typically identical: completion of clearly defined performance as planned. As with commencement, the boundaries between being finished (transaction terminated) and not being finished (transaction not yet terminated) are clearly defined. The whole process can be summarized as "sharp in, sharp out"; the boundaries between out and in at the beginning, and in and out at the end, are clear.

In relations distinction must be made between commencement

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172. This is not to suggest that many highly relational patterns may not now have a more currently significant, carefully planned, transactional commencement; obviously they do, witness any recent corporate merger. But here we are treating the most relational patterns of duration, not necessarily the most common, the latter in our society being perhaps somewhat more transactional in mode.

It should be stressed that the short duration of contact found in transactions and the long duration found in relations relates not only to performance, but also to planning, as will be seen in discussions of both in later sections.

173. A major portion of Willistonian efforts can be viewed as efforts to make the law of contracts conform to this pattern.

and termination of the collective identity of the relation and commencement and termination of individual participation. Relations themselves seldom commence sharply, although there is often a point of sharply focused consent. For example, the formal consent of marriage is preceded by courtship and engagement<sup>174</sup> and nowadays not uncommonly by entering all aspects of the relation except that of formal legal consent. So too, the creation of a new joint enterprise, such as a business partnership or close corporation, is normally preceded by other business relations giving rise to a willingness to go into a deeper relation. As to termination, except for two party relations or the occurrence of trauma such as financial failure, a similar gradualness is likely to be perceived. Old soldiers are not the only phenomena which never die but simply fade away. And indeed relations often do not even fade away, but when in a state of decline merge with other relations and continue on.<sup>175</sup> Thus, an element of gradualism tends to permeate both the creation and termination, especially the former, of relations.

Individual participation in relations may coincide with the existence of the relationship itself. For example, three doctors form a partnership to practice medicine and decide three years later that each will go separate ways. In such cases the same patterns typical of commencement and termination of relations apply also to individual participation. But those principles do not necessarily apply when new members join an existing relation or depart from one surviving them.

At the extreme relational pole the individual enters an existing relation at birth and withdraws only by death from a relation surviving him.<sup>176</sup> In a technologically advanced society entry by birth into eco-

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174. Engagement once was a point of sharp consent both socially and in the eyes of the law. To a lesser extent it still is socially. In the eyes of the law, however, it now tends usually to be of little significance.

175. Consider, for example, the formation of Amtrak.

176. Birth may seem like a sharp in entry, but not in a social structure visualizing life before conception, as is the case with many primitive societies and even some modern religions. Even in a modern "rational" society birth itself is not a sharp entry into life or society, as is shown by the practically irreconcilable conflicts of interest between mother and fetus which are nevertheless legally reconciled one way or another by our abortion laws.

It is interesting to speculate on the impact that an increasing disbelief in personal immortality has on all aspects of relations. The notion that death is final in all respects makes far more difficult a faith in relational continuity. Turned around it might be said that relational continuity itself, rather than what are now deemed unscientific primitive or romantic religious doctrines, may have been the prime support of faith that death is not final. The greatest relational extreme imaginable is that the relation and its total membership—dead, living, and yet to be born—never started and never

conomic exchange relations is, with two or three important exceptions—the family, the state, and sometimes the church—rare.<sup>177</sup> (This is one of the sharp demarcations between the dominant forms of exchange relations in an advanced contractual society and those in many primitive societies and in slave or feudal societies.) But even in a technologically advanced society individual withdrawal from many exchange relations occurs only by death. Retirement on a company pension, emeritus or retirement titles, being forever an alumnus, lifelong privileges (and duties)<sup>178</sup> of union membership (other than working), all are examples of the maintenance of relational membership until death. Of course, such membership commonly is much truncated before death occurs, and may involve great changes happening very sharply, *e.g.*, retirement on a small pension at age 65. Moreover, many memberships in long term exchange relations are fully terminated sharply.<sup>179</sup> (This is another of the demarcations between the dominant forms of exchange relations in a contractual society such as ours and those in many primitive societies where exclusion before death is, at most, a rarely exercised and extreme sanction reserved for the most serious social misconduct.) In the terminology of this paper, such sharp terminations are transactional and not relational.<sup>180</sup>

Where entry into an existing relation occurs later than at birth, typically the incoming member joins without formally modifying exist-

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will end. Views of this nature, or their absence, have a very real impact on the living operation of relations.

177. In a very broad sense this may not be true, as class structures certainly may, and often very much do, predetermine the kinds of exchange relations babies will enter. But, by and large these predeterminations lack specificity as to the particular relations which will be entered.

178. See, for example, *UMW*, 202 N.L.R.B. #79, 82 L.R.R.M. 1609 (1973).

179. For horrible examples relating to employment, see *PENSION*, *supra* note 152. Termination of medical insurance at a certain age is another example.

180. CBS News, Mar. 11, 1974: A British street sweeper, aged 84, and on the job for 60 years, announced that he was boycotting his retirement dinner. Said he: "If I had known this job wasn't permanent, I wouldn't have taken it in the first place."

Whether these sharp terminations can be said to be a transitory characteristic of a move from social transactionism to social relationism only time will tell. Not encouraging in terms of legal recognition and implementation of relationizing are recent Supreme Court decisions such as *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), where the Court excluded retirees from the definition of "employee" in the NLRA, and *Booster Lodge No. 405 v. NLRB*, 412 U.S. 84 (1973) and *NLRB v. Granite State Joint Bd.*, 409 U.S. 213 (1972), where the Court applied highly transactionized notions to the resignation of union members in the midst of a strike. *But cf.* the latest word on the issue of obligations under the NLRA of successor employees, *Golden State Bottling Co. v. NLRB*, —U.S. — (1973).

ing relational structures or patterns, as in military enlistment, taking a job, matriculating at a college, entering a franchise agreement with a national chain. Paraphrasing Leff's "goods of adhesion,"<sup>181</sup> these might be called "relations of adhesion."<sup>182</sup> However, even in adhering to an exchange relation it is often inaccurate to describe entry as "sharp in." Unions often have apprenticeships; employment has probationary periods, as well as durational and other prerequisites to full beneficial "membership" (e.g., vacation length dependent upon length of employment); colleges and universities have long, drawn-out admissions procedures in which the various consents on both sides are multiple and merge into the relation itself;<sup>183</sup> franchisors may have preliminary processes, such as training programs, before franchises are granted.<sup>184</sup>

To summarize, the commencement and termination of transactions are both sharp in time and marked by sharp expressed consent or other clear event. This sharpness relates both to commencement and termination of the transaction itself and to participation of the individual, the two usually being coextensive. In relations, however, it is necessary to distinguish between the commencement and termination of the relation itself and the individual's participation in the relation, the two very often not being the same. Relations tend to have gradual and indistinct beginnings, and, perhaps to a lesser extent, similarly diffused endings. Individuals may enter existing relations in a similar way, but may also enter them in a highly transactional and sharp manner, and individual departures from relations may also be gradual or sharp.

## 6. *Planning*

### a. *Introduction:* Planning is an inevitable accompaniment of

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181. Leff, *supra* note 122.

182. Relations can never be as adhesive as goods. Once in, even the lowliest initiate can have some impact on the relation, and often, at least collectively, those who initially adhere to a relation may change it vastly.

183. The applicant consents (with varying degrees of investment and commitment) by: (1) applying; (2) paying a deposit after acceptance; (3) matriculating; (4) doing the required work, not dropping out, and paying the fees. The college or university consents by (1) acceptance; (2) granting financial aid; (3) continuing the relation until the normal completion of the course of study; (4) conferring a degree. Indeed, it is only after the relation achieves its main purpose and the student becomes an alumnus that one might say full membership has been achieved, full membership in the sense that almost nothing can destroy it except death or dissolution. See W. O'HARA & J. HILL, *THE STUDENT, THE COLLEGE, AND THE LAW* (1972); Note, *Contract Law and the Student-University Relationship*, 48 *IND. L.J.* 253 (1973).

184. For what turned out to be a pathologically bad example see *Hoffman v. Red Owl Stores, Inc.*, 26 *Wis. 2d* 683, 133 *N.W.2d* 267 (1965).



man's highly sensitive and conscious awareness of the past, present and future. It occurs, therefore, in any human activity, but is enhanced when cooperative behavior is part of the activity. Not only do humans early in their lives become aware of the need for prior coordination of group affairs, but the existence of different but interacting centers of self-interest generates planning. Exchange is a cooperative activity among interacting centers of self-interest, whether it occurs in transactions or relations. We can thus certainly expect planning to accompany exchange, and it does. As will be seen, however, planning for a transaction and planning for a relation are in many respects quite different activities. Dealing with these differences is complicated by three factors.

First, while no further mutual planning is expected in a transaction after it is commenced,<sup>185</sup> future mutual planning is normally expected in a relation after its commencement.<sup>186</sup> Such post-commencement relational planning may or may not be similar to pre-commencement planning. A second cause of complexity lies in differences which sometimes, but not always, exist between mutual planning for the creation of an entire relation and mutual planning concerning the entry of a new member into an existing relation. Third, a process of transactionizing constantly affects relations as they move through time. The third factor is treated in the immediately following subsection; the first and second affect the structure of the two succeeding subsections; and the first is considered in a somewhat different context in Section III (C) (7) below.

b. *Transactionizing in relations*: In all contract relations a transactionizing—sometimes subtle, sometimes not—of the conscious present emerges out of the relational past and merges into the relational future. Thus, however much the relational past and future may affect the content of the transactional present, the present itself is likely to be viewed, at least consciously, as heavily transactionized. This is, I believe, but an aspect of heightened human focus on the conscious present,<sup>187</sup> a focus characterized by a vivid sense of temporal discreteness

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185. In legal terms, after the "formation of the contract."

186. This is so even in a highly static structure, although there the scope of the planning is limited. If, for example, tradition calls for planting corn at the first full moon after the equinox, and an elaborate planting ceremony is involved, preparations for the ceremony must be carried out, preparations involving some degree of coordination among the participants.

187. Although we are creatures of the past and future, most of us have yet to shake off the present as our dominating, or at the very minimum, distracting, interest.

and vivid perceptions of discreteness in environmental patterns, behavior, goals, desires.<sup>188</sup> Given the specifically "contractual" primal roots of contract—specialization of labor and exchange, sense of choice, and conscious awareness of the difference between present and future—it is inevitable that such sharp focusing will, in contractual relations, yield many of the characteristics of transactions. We can expect increased measurability and actual measurement of exchange, heightened focus on precise substantive planning, greater division of burdens and benefits and less sharing of them, and increased consciousness of exchange.

In contrast to such a transactionized present, consider what happens to perception of the present, even of a specific transaction in a non-relational context, when it disappears into the past. At the time one purchases a new house, for example, a wealth of detail about the transaction is either consciously in mind or instantly available to recall. Twenty years and five houses later all that will remain will be relatively vague recollections of the house, moving in, closing, etc., along with snippets of precise details, probably not enough to make even a reasonable mosaic of the original picture.<sup>189</sup> So too it is with the future, with our fantasies about not only "our dream house" but even the house we are hoping to find in the next few months upon moving to a new city. Memory and a sense of the future are inherently relational analogs; the knife edge of the conscious present is inherently a transactional analog.

In the terms of this essay, the passage of time may be likened to the moving of a round magnifying glass across a surface. In the center is the discreteness of the sharply focused conscious present; along the front edge is the blurred imagery of the future; along the back edge are blurred memories of the past; along the blurred side edges are the semi-conscious and unconscious of the present.

A transaction projecting exchange into the future is—both in party purpose and in traditional contract theory—an effort to preserve over a period of time *all* the perception of discreteness that the conscious mind permits. Like a viewer of an impressionistic film who seeks to

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188. Underneath, of course, runs the mighty river of the unconscious—whatever else may be its nature it certainly is not one characterized by a conscious state of discreteness. It may, however, cause behavior of a highly transactional nature, as is argued by the psychiatric school of transactional analysis. See E. BERNE, *GAMES PEOPLE PLAY* (1964) and *TRANSACTIONAL ANALYSIS IN PSYCHOTHERAPY* (1961).

189. For a lyric treatment of our sense of the past, see S. DE BEAUVOIR, *THE COMING OF AGE 361 et seq.* (P. O'Brian transl. 1972).

hold in attention the sharply focused central image against the inroads of the spectral ghostly imagery around the edges, so too the transaction maker seeks to keep "all that matters" sharply focused, unaffected not only by the spectral ghosts of past and future but also the ghosts of the present lying outside "all that matters." When a pure transaction takes place genuinely outside of relations, this effort may be relatively successful; "all that matters" can be within the focus, and the ghosts can be taken no more seriously than spilling salt on the table. When, however, these events occur in a relation, what can be focused on is not "all that matters"; treating what is in sharp focus as the totality is every bit as inaccurate a picture of reality as is excluding from one's view of an impressionistic film frame everything but the sharp. The ghosts are live, vigorous and often aggressive.

The response of 19th and early 20th century contract theory and its socioeconomic analogs was to try to transactionize the past and future as well as *all* the present, not just the conscious present. Striving for transactional immortality as well as transactional exclusivity, contract scholars sought to bring everything into the transactional present, and keep it there. Their great vehicle was the abstract but brilliant conception of consent: that to which consent is given is included, everything else is excluded; consent, once given, remains immutable. Thus were the ghosts of the past, present and future to be brought into the clear sharp focus of the discretely perceived conscious present.

For a substantial period of time, under the magical spell of wizards<sup>190</sup> and our own desires,<sup>191</sup> we thought it worked. But we learned. The ghosts would not be laid to rest—two kept popping up every time Samuel Williston tried to liquidate one. Initially they looked like nasty little surface warts on the superb structure founded on consent, but the warts turned out to be malignant and inoperable; the deeper the surgeons went the more trouble they found. Finally came the recognition, in a thousand guises, that the relational ghosts of past, present and future are not only guests at the party, but often the most important guests.<sup>192</sup>

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190. Williston was but the last, albeit perhaps the greatest, of many.

191. How neatly it fit with the obsession of 19th century science with classification, with its sureness of its own ultimate absoluteness; how neatly it fit with the needs of the dominant classes; how beautifully aesthetic it was.

192. What is the most transactional of transactional ways to create contracts and their content? What else but competitive price bidding on unilaterally formed plans sent out for bids? And so we have *Gresham & Co. v. United States*, 470 F.2d 542 (Ct. Cl. 1972). The government issued Invitations for Bids (IFBs) for many succes-

Increasingly the dominant mode of economic organization is the relation and not the discrete transaction.<sup>193</sup> Thus, all those involved

sive contracts to procure dishwashers with automatic detergent dispensers. Plaintiff bid on many of these successfully, being awarded no less than 21 contracts in a 10-month period ending before the first of the 15 contracts in dispute. There had been prior discussions relating to the dispenser requirement, a great deal of interaction between plaintiff and various government officials. In the 21 previous contracts the plaintiff had not been required to include dispensers, even though the language of the IFBs clearly required them. Plaintiff submitted its bids on the 15 contracts in issue on the assumption that the dispenser was not required. One other supplier was also given this advantage, but "there was no clear proof one way or the other, as to the other and remaining suppliers." *Id.* at 549. There is no indication in the case whether there were other bidders who did not become suppliers; if there were they evidently had no reason not to take the IFBs literally. Contrary to its expectations, plaintiff was, in the 15 contracts in dispute, required to add the dispensers. It filed for an adjustment in the price on the ground that the addition constituted a change. The government resisted on the ground that the dispenser was simply part of plaintiff's original obligation.

Viewing the events as separate transactions, the proper outcome of this case is clear enough—certainly the fact that the government was foolish enough not to maximize utilities clearly owed it in the earlier contracts does not require it to be so foolish in the future. Such a result is by no means outrageous in terms of a transactional bidding system since, for all we know from the facts, other serious bidders may have been bidding on the assumption that the IFBs meant what they clearly said. On the other hand, viewed in terms of the relation that had been established between Gresham and the government, that result would truly constitute a miscarriage of justice. Not surprisingly, the Court of Claims, although using the semi-transactional concept of waiver as its vehicle, achieved the just relational result, and allowed the claim.

An interesting sidelight on the result in *Gresham* was the court's refusal to follow the highly relational route to the same result utilized by the commissioner who heard the case initially:

Commissioner Day took the position that whatever the situation at any earlier date, by the time of award of the first of the contracts in suit, . . . specification OO-D-431b had become ambiguous with respect to the plaintiff, and therefore the contracts that incorporated the specification were ambiguous also. . . . Some of us have difficulty with this argument. We see no reasonable doubt that the specification originally, and as amended, meant that the automatic detergent dispensers were required, and plaintiff so understood. A document that, when issued, is unambiguous, but becomes ambiguous by lapse of time, is somewhat of a legal curiosity. Here, we do not think anything that happened later justified plaintiff in having any doubt as to what the original meaning was.

*Id.* at 553-54. I have no difficulty with the court's conclusion on this point, but an unambiguous document's becoming ambiguous by lapse of time should surely not be considered a legal curiosity. Last year's precisely articulated mutually transactionized planning is as surely eroded by the passage of time as last year's pyramid has lost something to the desert sandstorms.

193. Maybe it was really always thus. We are so imbued with the idea that market-type selling characterized the purest capitalist periods, that we often forget that production itself was accomplished by highly relational means, whether on farm or in factory, namely by employment. True, this was not always the case, *e.g.*, in cottage industry (although even there, internally the family productive unit was relational), but production was certainly so dominated generally, and always has been. It should be noted that many such relations were in many respects highly transactional, *e.g.*, the hourly

are increasingly called upon to fit together in satisfactory ways the parts of relations which are currently being highly transactionized, with the parts which have never been transactional, with the parts which were once subjected to a high degree of transactionizing but have now been affected by the passage of time, and with the parts yet to come, some of which have been subjected to forward transactionizing and some of which have not.

c. *Mutual planning:*

(i) *Introduction:* Planning of economic exchange transactions differs from planning of exchange relations in numerous important respects, among them, primary focus, completeness and specificity (both possible and actually achieved), sources and form, bindingness of planning, and conflicts of interest. Moreover, mutual transactional planning and relational planning may and do occur at different times; mutual transactional planning always occurs at or before commencement of the transaction, whereas relational planning occurs not only at those times, but also during the relation. When such post-commencement planning occurs it becomes an integral part of the rest of the relation, and can sensibly be considered only in that special context, a context absent from a pure transaction. In the discussions following, the differences relating to the timing of mutual planning will, where significant, be sharply brought out.

(ii) *Primary focus of planning:* In transactions, since the whole object is the exchange of specific and identified goods and services, planning inevitably focuses on the definition of the substance of the exchange—price on the one hand (including not only amount, but time and other factors, such as various risks, affecting the real price), and the goods or services on the other. Process planning, too, may

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wage earner in the woolen mill.

Worthwhile citation for the statement in the text is difficult. Even if one limits oneself to economic activity defined in a fairly transactional and monetized sense, it is virtually impossible to escape not just Hayek, but also McLuhan, not just Berle and Means, but also Cleaver, not just Cozzens, but also Hailey, *ad infinitum*. In a sense Hailey is a prime describer of what this Article is all about; the books and movies making him rich and famous—*Airport*, *Hotel*, *Wheels*—are about economic activities, and very significant activities indeed. And yet what makes them sell are the descriptions of the relational contexts in which those activities occur. Life among the fliers, hoteliers and automobile people undoubtedly is less interesting and exciting than Hailey suggests, but his recognition that all the “transactions” making up those lives are parts of relations (at least in part superordinating the “transactions”) is flawlessly accurate. Perhaps I should say to the reader, if you understand not what I speak of here, read *Airport*.

occur in connection with such transactions, but the process is intended to deal with troubles in the transaction, *e.g.*, arbitration of claims for losses from poor quality, rather than with the processes of the relation in normal operation.<sup>194</sup> Process planning in transactions is thus always a sideshow, always collateral to the main point of the transaction.<sup>195</sup>

In relations, the primary focus of mutual planning can be on the substance of exchanges to the extent that the relation is transactionized at the time the planning occurs. But even when transactionizing is extensive, *e.g.*, in the planning of a comedian's six-week run at a Las Vegas hotel, this substance planning takes place only against the backdrop of the remainder of the relation. This context will inevitably have some effect on the substantive planning, and the greater the non-transactional aspects are, the greater will be the effect. Since transactionizing of the remote future tends to be difficult and impractical to accomplish, the relational effects are likely to be greater respecting later parts of the relation than earlier parts. An inflation escalation clause in a five-year collective bargaining agreement provides an example: its present predictability and measurability grow less and less as time stretches ahead toward the end of the five-year term.

To the extent that the relation cannot be or is not transactionized at the time of planning there will be no sharp focus on the substance of the exchange to occur under the relation. This does not mean that the remainder of the relation will necessarily be unplanned. Rather, planning is likely to focus on the manner in which the relation is to operate; such planning is thus constitutional and procedural rather than substantive.<sup>196</sup> This kind of planning provides frameworks for further planning and mutual agreement as needed in the future. It may without question affect the substance of exchange in the future depending upon how it allocates power. But it does so by allocating power, not by measuring now future exchanges.

An example of the interplay between transactional and relational

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194. Trouble in both transactions and relations is treated in Section III(C)(12) (d) *infra*.

195. See the two articles by Macaulay cited note 111 *supra*. The failure of some lawyers to recognize this point causes many a complaint among their business clients.

196. Duguit was so impressed with this aspect of collective labor contracts as to deny they were contracts since neither party willed a different thing or aimed at a different object from the other. Duguit, *Collective Acts as Distinguished from Contracts*, 27 YALE L.J. 753, 763 (1918). For an articulate statement of a more realistic view, see O. KAHN-FREUND, *LABOUR AND THE LAW* 1-20 (1972).

planning can be found in the planning of a business consortium about to embark on a major project, but anticipating future joint projects. The allocation of burdens and benefits for the first project might be planned in extensive transactional detail. But substantive allocations for future projects may be impossible on the basis of knowledge now available.<sup>197</sup> The parties may turn with respect to the latter to a variety of relational techniques, of which a provision for arbitration is but one possibility.<sup>198</sup> Examples of relational agreements containing a great deal of process planning are labor union constitutions, articles of incorporation,<sup>199</sup> collective bargaining agreements<sup>200</sup> (particularly grievance and arbitration procedures), government contracts (especially, but not only, research and development contracts), and standardized construction contracts.<sup>201</sup>

It will be noted that the foregoing comments apply as much to the entry of new members into an existing relation, *e.g.*, General Motors hiring a new employee, as they do to the start of a relation, *e.g.*, four young accountants forming a partnership. It is true that the former

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197. Fuller aptly summarized in connection with collective bargaining agreements what is described here respecting a consortium agreement: "It is at once a constitution and the written record of an economic trade." Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. Rev. 3, 5. He also noted the inaccuracy of the view that a collective bargaining agreement "is not quite like any other document ever conceived by the mind of man," pointing out that long-term supply contracts, percentage leases, and "other specialized documents" may also involve constitutional aspects. *Id.* "Other specialized documents" now occupy a major portion of the contract spectrum since they presumably include corporate charters and their progeny such as stocks and bonds, franchising agreements, AIA construction contracts, government contracts, patent licensing agreements, and who knows how many other combinations of constitution and economic trade.

198. Aksen, *Legal Considerations in Using Arbitration Clauses to Resolve Future Problems Which May Arise During Long-Term Business Agreements*, 28 BUS. LAW. 595 (1973).

199. Including, of course, all the legal baggage they carry, *e.g.*, general incorporation statutes.

200. See Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958); Feller, *supra* note 69; Shulman, *supra* note 106.

201. The planning dealt with in these paragraphs is planning related to the parties' participation in the relation. Planning as between the relation itself and those outside it may occur at the same time, and its nature will vary. For example, at the same time that two people are planning the establishment of a close corporation to carry on a small manufacturing business they may also be entering contracts with others for the purchase of a plant, for purchasing supplies and equipment, for the manufacture and delivery of goods, for employment of workers, etc. The transactional-relational polarity of each of these external contracts may or may not be affected in any significant way by the fact that the participants in the corporation are involved in interual relational planning at the same time.

event is more prone to transactional planning than the latter, and this probably tends to be true generally respecting entries into existing relations, particularly "relations of adhesion." Nevertheless, the principles are the same.

(iii) *Completeness and specificity of planning*: (a) *Possible when planning occurs*: Where the focus is on definition of the substance of exchange, and that substance can be definitely ascertained, planning can be very specific and complete. In such circumstances the only things which cannot (practically speaking) be planned are contingencies so remote that the costs of planning for them outweigh the benefits of doing so, or so remote that they are not perceived at the time of planning. Complete and specific planning is therefore not only possible but virtually inescapable in any sensible handling of transactions.<sup>202</sup>

In contrast to planning of transactions, specific and complete substantive planning in relational contracts can occur only as to those portions significantly transactional at the time the planning occurs.<sup>203</sup> For example, many of the terms of employment of a university faculty member may be highly transactional in the initial dickering and hiring process, but everyone knows (or should know) that, projected into the remote future, much of that present transactionizing will be re-

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202. This is not meant to contradict Macaulay's conclusions, see notes 111-14 and accompanying text *supra*. He was talking about transactions occurring in the relational contexts of real life, whereas the statement in the text refers to transactions free of such relational contexts. Such pure transactions are more the creation of economic theory and contract doctrine than of real life. Moreover, most of the non-planning he considers relates to contingencies and trouble. Manufacturers and buyers do indeed plan specifically the nature of the product, the price, delivery dates, and other performance aspects. For a treatment of differences between performance (operational) planning and trouble and risk planning, see I. MACNEIL, *CASES AND MATERIALS ON CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONSHIPS* 567-72, 574 *et seq.*, 804-07, 860-62, 924-28 (1971) [hereinafter cited as MACNEIL].

203. See SELZNICK, *supra* note 100, at 56-57:

In a cooperative system consensual specificity—detailed planning by prior agreement as to the obligations of each party—may do more harm than good: . . . . A zeal for specifying obligations in advance tends to close relations rather than open them, undermines trust, and limits contributions.

Furthermore, a fully planned relationship has a *static* quality. The situation of the parties at the time the bargain was struck governs the agreement for its duration. It is difficult, in strictly contractual terms, to take account of a dynamic relationship, in which the needs and contributions of the parties may change, or to establish the capacity of the new entity to deal with new situations. When terms are "frozen," and interpreted as fully explicating the scope of the agreement, there is little leeway for adaptation and growth. A contract that forms a going concern must be, in some sense, a "living" document. In that case, however, the specificity of the agreement is less highly prized.



placed by what is now unplanned specifically; in short, the future is relational.<sup>204</sup> This pattern is typical of both the entry of an individual into an existing relation and the creation of relations.

While substantive relational planning can be specific and complete only in limited respects, planning of relational structures and processes may be very specific indeed.<sup>205</sup> Depending upon its planning quality, the pressures put on the relation, and other factors, such specificity may endure relatively unchanged over substantial periods of time. Nevertheless, relational structures and processes almost invariably tend to grow and develop, and only the naive think that even very careful planning of that kind is as immutable as the substantive planning of a pure transaction. Consider again, for example, the university. Its governance, its relations with various sources of funding, its relations with its faculty members, relations between faculty and students, and a host of other bureaucratic structures and processes affecting the faculty-university relation may be planned, indeed fully operational, in great detail at the time a new faculty member is hired.<sup>206</sup> Yet everyone knows that erosions and changes will occur even in fairly short periods of time and even in relatively normal circumstances. Thus, except for initial transactional planning of substance and initial

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204. As noted in Section III(C)(6)(b) *supra*, when that future occurs it will go through the transactionizing always occurring in relations. But at the time of the initial deal between professor and university the future is relational. That does not mean that it is unimportant, indeed very often, especially in hiring at less than the older *prima donna* level, the relational future is far more vital to both parties than the initial transactionized terms.

205. It often is not, or at least much of it is not. Weyrauch, for example, observed the behavior of nine volunteers kept isolated for 3 months in a penthouse during the conduct of nutritional experiments. He articulated the basic law which emerged among the nine, and published it, in *The "Basic Law" or "Constitution" of a Small Group*, 27 J. Soc. ISSUES 49 (No. 2, 1971). One of the rules he observed in operation was that rules were not to be articulated. He further observed that if a rule were articulated, whether inadvertently or otherwise, a subsidiary rule operated: the articulated rule was discarded. A corollary rule was that the stringency of a rule was determined by its level of articulation: the more articulated it was, the less it had to be followed. Although the rules were not particularly related to whatever exchange behavior may have occurred in the group, there is nothing in the report to suggest that exchange behavior was singled out for different treatment from that accorded other aspects of the relations of the group. Cf. Shulman, *supra* note 106, at 1005:

The agreement then becomes a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.

206. Or in the rarer event of the founding of a new university relatively full blown.

process and structure planning, planning in relations always involves an element of tentativeness,<sup>207</sup> and with it an inherent limitation on the degree of specificity and completeness possible or desirable.

(b) *Relationizing in transactions*: For planning of the substance of exchange to be specific and complete, the substance must be definitely ascertained. In this requisite lies buried a question lurking elsewhere throughout this essay: Why are relations increasingly the dominant form of economic activity and planning in modern society? Or, to put it another way, why are transactions increasingly taking place in relational frameworks? A host of answers in one form or another have been given and are being given to those questions by countless people ranging from advertisers to theologians, city planners to ghetto leaders, sociologists to union leaders, the country club set to the denizens of communes. Without in the least questioning the validity of other ways of asking the questions or of other answers I should like here to consider the questions in term of the focus of this paper: projecting exchange into the future.<sup>208</sup> The following answer is offered, not as *the* reason, or even the most important reason, but as an important one: transactions alone cannot serve adequately the planning needs of a technologically complex and heavily capitalized society.<sup>209</sup>

Transactionizing of economic life in the post-feudal period can be viewed as a response to the relative inflexibility of feudal structures

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207. This is true even of very authoritarian planning, which is often highly changeable because of its potentially whimsical nature. Tentativeness of planning is discussed in Section III(C)(6)(c)(v) *infra*.

208. This discussion omits any consideration of the impact on the human soul, psyche and body of a highly transactional economic and social structure, of alienation, of the decline of community; it omits much of theories of the efficiency of the firm; it omits any consideration of logical successions of economic patters, *e.g.*, the tendency of competitive markets to destroy themselves; it omits any consideration of economic, social or any other determinism; it omits infinitely more than it contains. As Carlyle said:

Cash payment the sole nexus; and there are so many things which cash will not pay! Cash is a great miracle; yet it has not all power in Heaven, nor even on Earth.

T. CARLYLE, *Essay on Chartism* (1839), in *SELECTED WORKS, REMINISCENCES AND LETTERS* 293 (J. Symons ed. 1957).

209. Although the balance of the discussion in this section is aimed mainly at goods, it should be noted that very similar principles apply to services. Services are inherently relational, and inherently less subject to exact prior planning. And services constitute at least 42 percent of the American GNP. *STATISTICAL ABSTRACT OF THE UNITED STATES* 312 (1972). Morgenstern says 60 percent. Morgenstern, *Thirteen Critical Points in Contemporary Economic Theory: An Interpretation*, 10 *J. ECON. LIT.* 1163, 1183 (1972).

such as the manor and the guilds (the latter themselves in part but way stations on the road from feudal relations to post-feudal transactional patterns). These structures provided adequate flexibility for both activity itself and planning for activity when technological and economic change occurred slowly. But, as change itself began gradually to speed up, greater flexibility was required than those relational structures could supply. More activities began to occur in transactional modes. Initially these modes supplied no planning capacity beyond the unilateral planning of the individual seller who purchased or manufactured for sale in what he hoped would be a market with demand for his product adequate to make his business profitable.<sup>210</sup> The traditions, customs and rules which supplied planning adequate to the purposes of the slowly changing feudal structures were not available in the market itself. But as long as the feudal structure enveloped the bulk of the economy, and as long as the products in the market sector were relatively simple and in some senses merely surplus from the looming feudal structure, an umbrella of stability was thereby provided sufficient for the planning needs of participants in the markets clustered in the interstices of feudalism.<sup>211</sup>

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210. Readers will recognize this paragraph as an at least slightly "phony historical paradigm." See *Leff*, *supra* note 122, at 144.

211. See generally *PRENNE*, *supra* note 149.

The triumph of capitalism during the eighteenth and nineteenth centuries, with its spectacular increase in the productivity of labor, was possible only because of a constant refinement of the division of labor. This development in turn presupposed that enterprisers could depend on a continuous flow of goods and services exchanged in a free market. And to be able to exploit the factors of production in the most efficient way, enterprisers had (and still have) to be able to bargain for goods and services to be delivered in the future and to rely on promises for future delivery. Thus, it became one of the main functions of our law of contracts to keep this flow running smoothly, making certain that bargains would be kept and that legitimate expectations created by contractual promises would be honored.

F. KESSLER & G. GILMORE, *CONTRACTS, CASES AND MATERIALS* 2-3 (2d ed. 1970).

To be sure, when men unite in a contract, it is because, through the division of labor, either simple or complex, they need each other. But in order for them to co-operate harmoniously, it is not enough that they enter into a relationship, nor even that they feel the state of mutual dependence in which they find themselves. It is still necessary that the conditions of this co-operation be fixed for the duration of their relations. The rights and duties of each must be defined, not only in view of the situation such as it presents itself at the moment when the contract is made, but with foresight for the circumstances which may arise to modify it. Otherwise, at every instant, there would be conflicts and endless difficulties. We must not forget that, if the division of labor makes interests solidary, it does not confound them; it keeps them distinct and opposite. . . . [E]ach of the contractants, while needing the other, seeks to obtain what he needs at the least expense; that is to say, to acquire as many rights as possible in exchange for the smallest possible obligations.

*DURKHEIM*, *supra* note 20, at 212-13.

What is all too often overlooked should once again be noted: transactions can serve

When more of the economy shifted into markets, when money became more the glue of society, and when goods became more complex and complexly produced, more extensive planning was required than could be supplied by relying on contemporaneous exchange transactions in the market. Planning had to occur before the commodity was produced, the producer had to know that it was wanted, exchange had somehow to be projected into the future. The projection took the form of the merger of transactions with that age old concept, promise. This merger had the flexibility—attuned as it was to each transaction—lacking in traditional structures, and yet it too bound the future. It provided the degree of certainty necessary both to exploit and to control change. Increasing use of this technique both caused and was aided by the development of legal reinforcements which we call contract. Planning-with-flexibility could, with this brilliant combination of market choice and promise, proceed apace.

But as technology advanced even further, and production, distribution and consumption became ever more complex and subject to change, the combination of market choice and promise no longer provided a social or legal vehicle with the right combination of planning-with-flexibility. Imagine, for example, trying to draft in 1962 a master contract with all the performance terms required for a prime contractor to agree with the government to put a man on the moon by 1970! One can hardly say that the idea staggers the imagination, because it is too absurd to justify spending much imagination on it. Transactions with promise provide for economic growth and change through their external diversity, actual and potential, but internally they are rigid.

Relations, unlike promise transactions, have internal capacities for growth and change, capacities absolutely essential for the successful

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the purposes pointed out by Kessler and Gilmore only as part of an overall relational pattern of society and law.

Every contract . . . supposes that behind the parties implicated in it there is a society very ready to intervene in order to gain respect for the engagements which have been made.

*Id.* at 114. See also EHRlich, *supra* note 125, at 46. Isolated bargaining is inherently vicious and unstable, as noted by T. SCITOVSKY, WELFARE AND COMPETITION 13 (1971). Absent some support structure bargaining can never result in anything final until instantaneous performance ends the transaction, there being nothing to hold together any "agreements" made except whatever exchange-motivations may prevail at any given instant, motivations reflecting solely the relative personal power positions of the two parties. Indeed, even performance ends neither the bargaining nor the transaction if one party sees an opportunity to gain back by stealth or force what was surrendered earlier to achieve the exchange.

completion of any enterprise not capable of specific and complete planning *ab initio*.<sup>212</sup> The upshot of increasing complexity of technology was, therefore, the development of new relational vehicles in which both promise and market played significant, but no longer exclusive, roles. Of these the earliest (and probably most important, both historically and still) were the techniques of joint ongoing relations which ultimately resulted in what we know today as the corporation. Nowadays such relational forms prevail throughout the economy. Consider, for example, franchising, with its often felicitous combination of franchisor expertise and capital (of certain kinds) on the one hand and franchisee individual reward motivation and capital on the other. Franchises may be heavily planned substantively, but they can never be planned totally at the time of the "transaction" starting the relations.<sup>213</sup> Everyday provisions such as the changes clause in any construction contract are another example of the limit of transactional planning. And when we move from the production of physical goods to the production of services (a major, if not the major, part of the GNP) it is clear how much planning has to be of the non-transactional sort, *e.g.*, planning for inspection and supervision. Indeed, it is by no means easy these days to find a transaction which is pure at all in terms of the phrase with which this section started: "the substance must be definitely ascertained."

(c) *Actual planning accomplished*: Substantive transactional planning not only can be, but tends to be, specific and complete, whenever the substance can be definitely ascertained. The only question about how complete to make it turns on evaluation of the cost-benefit analysis suggested at the beginning of Section III (C)(6)(a) above.<sup>214</sup> Similar considerations go into the planning of the transactional parts of relations. It should be noted, however, that the very fact that the exchange will take place in a relation may keep from being transactionized what would likely be transactionized in a transaction. I have, for example, known quite a few law students who accepted jobs from law firms without knowing what their starting salary was go-

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212. See note 203 *supra*.

213. This accounts in part for such developments as arbitration provisions in franchise contracts. See, *e.g.*, Whittaker, *The General Motors Dealer Relations Umpire Plan*, 28 *BUS. LAW.* 623 (1973). See generally Hunt, *The Socioeconomic Consequences of the Franchise System of Distribution*, 36 *J. MARKETING*, July, 1972, at 32.

214. See p. 754 *supra*. A now classic description of conflicting views of that issue is to be found in Stewart Macaulay's companion articles, cited at note 111 *supra*.

ing to be. Foolish? Not particularly, since the long run relation is typically more important than the starting salary, and they explored the former as extensively as they could. I very much doubt if they would have failed to ask about salary if the job were for only four weeks, and certainly the same people find out how much a car costs before buying it.

Structural and process planning also may or may not occur extensively before relations commence or before new entrants come into a relation. Certainly such planning is possible, but whether the parties engage in it depends upon numerous factors, including not only the direct economic costs of such planning, but also psychic costs and inhibitions caused thereby, such as the injury which may be done to a sense of cooperation and flexibility by formalizing processes.<sup>215</sup> Since exchange relations range from the simple and relatively short (*e.g.*, employing a babysitter for an evening) to the massively complex and possibly infinite (*e.g.*, the merger which created American Motors), accurate generalization on this subject is impossible.<sup>216</sup>

(iv) *Sources and forms of mutual planning: (a) Bargaining and adhesion:* The source and form of mutual planning at the extreme transactional pole is plain enough: specific and mutual consent to the price in a sale of a good produced for a market by unilateral plan of one of the parties.<sup>217</sup> The buyer's prior plan, if any, consisted

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215. Lawyers who will prepare sixty-page contracts for their clients (because they know that businessmen can't be trusted) will organize their own office on a scribbled piece of notepaper that may not even be signed by anybody (because they know they can trust their partners). Daniel J. Cantor, a management consultant specializing in the problems of law firms, says that 55 percent of the nation's law partnerships have no written agreement whatever.

M. MAYER, *THE LAWYERS* 18 (1967).

Where an attitude reflecting such a practice prevails, nothing but suspicion and ill-will would be generated by a suggestion that things ought to be "spelled out." For a description of the relational ways in which large law firms divide the spoils, see Orren, *A Look Inside Those Big Law Firms*, 59 A.B.A.J. 778 (1973).

216. This statement applies to establishment of brand new relations, to the special case of mergers of existing relations (*e.g.*, the American Motors merger), and to the entry of new members into an existing relation.

217. In what he describes as a "phony historical paradigm" Leff calls seller-designed-and-produced goods (as distinguished from custom-made, customer-cooperating-in-design-and-production goods) "goods of adhesion." Leff, *supra* note 122, at 144-47. Goods of adhesion are the only goods (complex or simple) which can be sold in relatively pure transactions.

Unilateral planning by *this* seller will be absent if the goods came into his hands originally for personal use and he later decides to sell them, *e.g.*, the stuff one disposes of through a garage sale. The goods remain, however, goods of adhesion, although

only of searching for such goods at a price he was willing to pay. In the theoretically perfectly competitive market, the *mutual* planning of a transaction will consist only of the buyer's expression of consent to purchase at the market price at which, of course, the seller is offering the goods.<sup>218</sup> This tends to remain the case with some transactions involving the sale of existing goods on credit. But those transactions involve at least some planning on the part of the seller relating specifically to the other party, *i.e.*, finding out something about his credit standing; thus a hint of mutuality of planning begins to creep into even such essentially transactional exchange.<sup>219</sup> Patterns similar to those described respecting the perfectly competitive market also occur even though the seller unilaterally fixes the price in accordance with monopoly or other principle, rather than in accordance with the dictates of the competitive market. The source and form of *mutual* planning in such instances will remain the specific and mutual consent of the parties to the price in a sale of a good produced for a market by unilateral plan of one of the parties.

Where the price is not set by the market or unilaterally by one of the parties, but where the transaction nevertheless involves a "good of adhesion," a process of bid-ask bargaining is found to occur as each party feels out the other to ascertain the most advantageous price at which the deal can be closed; at this point the seller and buyer are very much engaged in mutual planning of the price. Depending upon the product, the market, and the social setting this may or may not involve a good deal of interaction. But even where it does, and even where bargaining is a social process as well as a narrowly economic one, the focus tends to be primarily on a single facet—price—

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the buyer's adhesion is to the plan of someone else than the present seller, *i.e.*, that of the original manufacturer.

218. In accordance with the systematics adopted throughout this Article, this transaction might be excluded from our concept of contract because it lacks a future. But this illustrates the difficulty of excluding even the most apparently instantaneous exchange from the realm of contract: a good deal of "future" hovers around this transaction; both the seller's procurement and the buyer's search for the goods, if any, were future-oriented. The only future not involved is a mutual future after the instantaneous exchange takes place. This is, however, an important omission, since it is mutual futures, rather than unilateral, independent futures which create what are here called relations.

219. Such transactions cannot be perfect market transactions because the identity of the particular buyer does affect the transactions since different buyers have different credit standings.

and the deal is on a "take-it-or-leave-it" basis.<sup>220</sup> Mutual planning tends to be of short duration in such circumstances since there is a limit as to how long, at any given time, most people want to stand around dickering about a single issue like price.<sup>221</sup>

Where the goods being sold are not goods of adhesion but goods in the design of which the buyer somehow participates, the scope of mutual planning expands. There are virtually no limits to this expansion, as the space program demonstrates. With any substantial expansion, however, the commencement of mutual planning itself initiates the relation, and most of the planning becomes post-commencement planning, with all that entails.<sup>222</sup> Moreover, when this occurs there has been a substantial move from transactional poles in the direction of relational poles.

Instant, adhesive mutual planning of the transactional sort is most unlikely to occur in the creation of any extensive, entirely new relation.<sup>223</sup> The rarity of adhesive creation of such relations results, I believe, from the variability of human character. Unilateral planning by the producer of goods for sale in a market presupposes that buyers will buy the goods as planned. The justification for this presupposition lies in prior experience and the standardization of product resulting from that and other environmental factors.<sup>224</sup> If no one buying in the market ever uses any grain but wheat, no rational seller will produce for that market large quantities of some

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220. Whole person involvement in bazaar bargaining may be quite intense, and may satisfy many motives besides pure economic acquisitiveness. But, at least among strangers, the same aura of "not for keeps" about the whole person involvement obtains that one finds in a truly amateur athletic event. (And maybe in some professional athletic events. No one who saw on TV some years ago *The Violent World of Sam Huff* could doubt the whole person involvement of the professional football player of a Sunday afternoon. Yet when Huff had a choice remark to make to an offending opponent he used the man's number rather than his name. There may be good tactical reasons for this kind of behavior, but there is also the need to keep, both among teammates and opposing players, artificiality and impersonality in antagonistic onfield whole person involvements. How else could the many friendships among the players survive?)

221. For the same human reasons, if it is extended it is likely to consist of episodes, each of which is likely to be relatively short.

222. See Section III(C)(6)(c)(iv)(c) *infra*.

223. This is not true of the entry of a new member into an existing relation, a variation treated below.

224. Prior market experience is by no means the only cause of standardization of product. For example, biology supplies only a limited number of kinds of grains; a given soil, the only soil available to a producer, will produce only certain kinds of crops; technological knowledge is always limited; etc.



exotic unsaleable product like oats. This standardization also has an effect on the buyer's willingness to purchase the product which the seller has unilaterally planned. The buyer is preconditioned to want wheat, and when he sees something being sold, upon ascertaining that it is indeed wheat in reasonable condition, trusts enough in the utility of what he is getting to make the purchase. But human beings are too variable, both among individuals and over time, ever to permit such unilateral advance standardization of what one has to offer in services for sale or purchase in the creation of a new and significant relation of substantial duration.<sup>225</sup> This being the case, people considering creating such a relation, *e.g.*, small farmer and farmhand, or partnership to engage in retail selling, will have inadequate information to go ahead unless they engage in some give and take of information—a give and take which constitutes a form of mutual planning. Such planning is not necessarily done on a plane of equality, but some elements of mutuality of planning beyond simple instant consent to proffered unilateral terms are bound to be present, unless the imbalance of power is truly overwhelming.<sup>226</sup> It is difficult to think of a common modern example of such an imbalance in the initial creation of an entire relation.<sup>227</sup>

Although extended mutual planning is characteristic of the creation of entire relations, it is by no means necessarily characteristic of the entry of new participants into existing relations. There the existing relation may engage, indeed is very likely to engage if it can, in unilateral planning, and then tender that planning on a take-it-or-leave-it basis. Where this occurs the only *mutual* planning consists of the tender and acceptance of the tender of the new participants. Paraphrasing Leff,<sup>228</sup> these might be called "relations of adhesion." They are very common; indeed, an obvious example is presented by most employment contracts. But why the

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225. As the relation nears the transactional pole, *e.g.*, quickie prostitution, more standardization acceptable adhesively on the market is possible.

226. As it sometimes may have been, for example, in the hiring of household servants a few generations back.

227. This is in part because of the more general rarity of entire relations starting from scratch following a period of unilateral planning that becomes mutual by consent, however extended. This sort of thing might sometimes occur in the financial world, but generally speaking relational planning is post-commencement planning, since relations seldom emerge full blown as in the Biblical story of the creation of Adam and Eve. Instead they tend to evolve gradually with, perhaps, occasional metamorphoses, *e.g.*, change from a partnership to a corporation.

228. Leff, *supra* note 122.

ubiquitousness of "relations of adhesion" in adding participants to existing relations, as contrasted with their rarity in the creation of entire relations? Why are people willing to adhere to existing relations whereas they do not commonly adhere to proposals to join in entirely new relations? The answer lies, I believe, in the standardization achieved by the operation of an existing relation. That standardization is analogous to the standardization achieved by the producer of goods for a market. So too, its acceptance by the new participant with no mutual planning, except short and sharp consent to the unilaterally developed terms, is based on that standardization.<sup>229</sup> The new employee of IBM knows that IBM puts out a standardized employment relation which has been acceptable to many others, and for that reason can, with some confidence, accept what is proffered. Another example is the prospective franchisee entering an agreement with McDonald's: it is not necessarily at all difficult for him to say: "It's my kind of place." This will be especially true where a pole of power within the relation is believed by the entrant to represent people in his position and to have played a role in the standardized unilateral planning of the relation. A labor union is a good example. But typically it is knowledge of standardization and its widespread acceptance by others which provides the basis for acceptability even where there is no such representational reinforcement.

A reinforcing reason for willingness of a new participant to adhere to an existing relation by consent to a unilateral plan presented by the relation itself lies in the parties' knowledge of some essential differences between transactions and relations. Although linguistically the adhesive consent to either appears to be the same, in context there are subtle but real differences. The context of "I accept" in a transactional sale of goods is an atmosphere of total uncondition.<sup>230</sup> The context of "I accept employment on your terms" is a recognition of the inevitable tentativeness of consent to a relation, the inevitable mutuality of future superseding events, and all the rest of the elements which, in a relation, cause even the clearest expression of adhesive consent to suffer from essential fuzziness.<sup>231</sup>

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229. Cf. text accompanying note 148 *supra*.

230. The reader who disagrees with this statement, thinking perhaps of the latest "transaction" he or she entered, say the purchase of a TV set, should ask whether such a purchase really is a "transaction" nowadays. Most modern merchandising has developed heavy relational aspects.

231. This occurs even in the most authoritarian relations; a military enlistment, for example, is subject to countless ifs, ands, and buts in regulations and statutes, vir-

In spite of the foregoing, it is clear that obtaining new members through adhesion to a relation is a partial transactionizing of the relation, and by no means the epitome of mutual planning of a relational type. As shown by the tug and pull involved in public efforts to impose on relations analogs of mutual planning, *e.g.*, statutorily imposed terms favorable to franchisees, transactionizing of this nature may not always be thought to be in harmony with other aspects of the relation.

To summarize, transactions are characterized by buyer adhesion to terms of the seller, including not only the price, but also the nature of the goods. A short bid-ask bargaining process may occur without moving the transaction substantially in the relational direction. Such adhesive creation of a new relation, however, is most unlikely because all parties are, to the extent that there is planning, likely to engage in mutual planning of the new relation, such planning being very likely to merge with the ongoing relations themselves (*i.e.*, a joint creative effort which may be indistinguishable from the workings of the relations). Nevertheless, entry of new members into existing relations often is adhesive and non-bargaining in nature, the prior operation of the relations providing a standard which may make adhesion a rational act. Moreover, a degree of tentativeness characterizes consent to participation in ongoing relations, a tentativeness mitigating the starkness of the transactional concept of consent.

(b) *Tacit assumptions in planning*: What Fuller calls "tacit assumptions"<sup>232</sup> are a form of mutual planning relational in nature, but nevertheless found in virtually all transactions as well. Fuller describes a tacit assumption as a "psychological state . . . that does not involve a consciousness of alternatives."<sup>233</sup> It is one lying "somewhere between the superficial layer of consciousness and the dark inner recesses of the human psyche probed by the psychoanalysts."<sup>234</sup>

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tually all of which are potentially subject to change officially by the military (or its legal superiors) and unofficially by the future manipulative behavior (intentional or otherwise) of the enlistee. See Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121 (1974).

This fact is not enough by itself to lead to adhesionsary consent in the creation of entirely new relations, but it reinforces the confidence the entrant has in the utility of entering an existing relation, since there is at least some possibility of modifying things he does not like.

232. FULLER & EISENBERG, *supra* note 76, at 804.

233. *Id.* at 805.

234. *Id.* at 806.

He gives as an example the tacit assumption of an absent-minded professor reading a book as he walks out of his office that the hall floor has not been removed. When such tacit assumptions concern an exchange, and when they are mutual assumptions, they serve the same planning functions as specifically expressed mutual consent. But, even apart from problems such as difficulties of proof, if conflict subsequently arises mutual tacit assumptions are by no means identical to express mutual consent. They can arise mutually, apart from coincidence, only if some relational framework has created the necessary states of mind in both parties. For example, it is, I suppose, a tacit assumption in most transactions nowadays that neither party will promptly steal back what he just gave in exchange. This assumption arises from prior direct or indirect relations between the parties that are economic, social, and legal. Such a tacit assumption was not made (at least not by wise men) in the early days of trade-and-piracy. In trade-and-piracy no relation provided a framework for trusting strangers in such a manner.<sup>235</sup>

Mutual tacit assumptions are relational in many other respects as well, among them the following. They are particularly likely to thrive in primary relations where the efficiencies, not to mention the very decencies, of life require a muting of specification of consent. They tend to be less focused and specific than mutual expressed consent. They tend to thrive where further cooperation is expected between the participants. They are safer and therefore more reliable where relational sharing of benefits and burdens is anticipated than they are in the face of transactional allocation of benefits and burdens. In short, they are highly relational.

(c) *Sources and forms of post-commencement planning*: Complete and specific planning at or before the commencement of a pure transaction renders unnecessary, indeed inconsistent and undesirable, further planning or other readjustment after commencement of the transaction and prior to its termination. Only in the event of occurrence of remote contingencies beyond practical planning capability might such new planning or readjustment occur. Even in such

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235. It is true, of course, that the same thing could be said about expressly specified mutual consent: it too depends for efficacy upon a relational background of support, e.g., law, religion, morality. It is the inevitable relational backdrop to transactions which makes a truly "pure transaction" an utter impossibility, even in theory. See notes 53 and 60 and Section III(C)(3) *supra*. It is fair to say, however, that reliance on mutual tacit assumptions commonly requires a more extensive relational backdrop than does reliance on specified mutual consent.

circumstances there is a tendency (often displayed in the legal system) to assume, however unrealistic such an assumption may be, that the contingencies were indeed planned before commencement. This may be accomplished, *inter alia*, by implication, by literal interpretation of language, and by manipulation of risk concepts or other communication techniques.<sup>236</sup> To concede the occurrence of post-commencement planning is to be anti-transactional; it is to concede the existence of relations. Transactionism avoids this concession whenever possible, and when necessary does so through the use of fictions.

Unlike transactions, relations are characterized by extensive post-commencement planning, the fundamental source of which is the ongoing operation of the relations themselves. Such planning may range from very precise and considered to highly inadvertent, muddling if you will.<sup>237</sup> The only justification in the latter instance for the label "Planning" is the existence of a vague recognition that present actions will indeed have impact on the future.<sup>238</sup> In such instances planning is by default, but it is no less significant on that account in terms of future impact. In contract relations relatively inadvertent planning is important not only for itself, but because it is on this sea of day-to-day "ongoingness" that the explicit planning, if any, sails. In a relation explicit planning always takes place within the constraints of the relation itself, and can be understood only in the contexts of the relation.

In a relation lacking a currently significant beginning, *e.g.*, a traditional tribal structure, the only constraints on current explicit planning are those of the ongoing patterns of the relation, including often highly

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236. To say nothing of manipulating the anti-adjustment concepts of the doctrine of consideration.

237. Cf. Note, *The Postal Reorganization Act: A Case Study of Regulated Industry Reform*, 58 VA. L. REV. 1030, 1046-47 (1972), describing the operation of economic organization:

The normative model of conduct may be defined in terms of two concepts: planning and managing. Planning is the process of setting goals and of formulating procedures to achieve those goals. The rational manager anticipates all relevant variables on the basis of complete information and allocates available resources to achieve the desired goals. . . . Planning may be contrasted to incrementalism, which is concerned only with solving immediate problems.

238. Such inadvertence is often attributed by its critics to the operation of the market (which might be viewed en masse as a kind of super-contract relation). Planning of this kind may result in only glacial rates of change, as in the case of a traditional society where external inputs remain largely as in the past. But it also may be extremely rapid, as in the case of a traditional society facing the impact of a different and vastly more powerful civilization.

verbalized and specific planning, *e.g.*, legislation. But in a relation having a currently significant beginning, as do a great many exchange relations in our modern society, one of the constraints—often a major one—is explicit pre-commencement planning.<sup>239</sup> This constraint does not necessarily work in exactly the same way as, for example, the explicit rules (perhaps highly verbalized, *e.g.*, legislation) which commonly emerge in the course of the maturing of relations. For one thing, an element of consensual choice pervades pre-commencement planning, an element which may be lacking or at least of a different nature in the planning emerging from post-commencement legislation or other verbalizing techniques of mature relations. Often only fictional concepts, such as those of social contract, can equate the two. In the absence of such fictions, post-commencement consent may be very significantly muted, or, if not, is different from pre-commencement consent, *e.g.*, majoritarian in nature rather than individual. Where this is the case the concepts of transactional bindingness<sup>240</sup> will be applied, if at all, only by use of fictions, and other concepts—perhaps tighter, perhaps looser—will likely be applied in dealing with the effects of post-commencement planning.<sup>241</sup>

The existence of pre-commencement planning in modern contractual relations imposes on post-commencement planning limitations of great significance. These limitations may range from heavy dominance of the pre-commencement planning over the post-commencement planning, as in the case, for example, of explicit charter limitations on the powers of corporate directors, to mere contributing flavors of the present ongoing situation, as in the case of precatory admonitions which over the years have been eroded by day-to-day practices or even explicit provisions of pre-commencement contracts which have been overridden by changed practices. Naturally, it is impossible accurately to generalize about the interplay, other than to say that it occurs, and that the special nature of pre-commencement consent is very likely to have some impact

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239. In traditional terminology, a contract.

240. See Section III(C)(6)(c)(v) *infra*.

241. These differences may not only be subtle, but may even disappear in fact, if not in theory. Consider, for example, the establishment of a new union retirement plan, created after much political process within the union. Some years later a question arises concerning proposed modifications of the plan. The constraints—economic, legal, fraternal or what have you—imposed by the existing plan would, other things being equal, seem to be the same as to all members, whether they had become members shortly before the original plan was established by legislative processes or whether they adhered to it thereafter by joining the union shortly after the plan had been established.

on responses to post-commencement planning of participants and outsiders, *e.g.*, courts.

(v) *Bindingness of planning*: Bindingness of planning is related but not identical to bindingness of obligation, a subject dealt with in some detail in Section 9, below. The former reflects the extent to which planning is thought to be immutable rather than serving as an assemblage and dissemination of information or a structuring of present and expected activities in rational ways. Planning, even extensive planning, may be unbinding through a recognition that all is subject to whatever degree of change seems sensible in the future. Sensible change could be in terms of the interests of all concerned, very possibly accompanied by a reallocation of benefits and burdens among the participants in which some may gain and some may lose. Bindingness of obligation, on the other hand, reflects the strength of obligation of each participant to abide by the constraints of the transaction or relation whether the source of those constraints is mutual planning or something else, *e.g.*, status.

In transactions no sensible line can be drawn between bindingness of planning and bindingness of obligation. Transactional obligation is founded on specific planning, and therefore, to the extent that the planning is binding, so is the obligation.<sup>242</sup> In relations bindingness of obligation may have many sources besides mutual planning of the participants, and hence planning can be of an unbinding nature even though the overall relation is replete with a great deal of obligation. An obvious example is the rigorously enforced duties of soldiers, duties which may have been largely unplanned by either the military or the soldier at the time of enlistment. Military life also supplies countless examples of how obligation may be great while planning is singularly unbinding, *e.g.*, the countless changes which seem to permeate military planning. Every experienced soldier knows that at any time all the threads of existing plans may come entirely unraveled, but nevertheless at any given instant the obligation to perform in accordance with existing plans is quite absolute.

Virtually all aspects of relations give an air of tentativeness to relational planning. Even the least sophisticated are aware of the dif-

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242. See Section III(C)(9) *infra*. This is an oversimplification. Since no such thing as an absolute obligation exists, obligation can be understood only in terms of obligational sources, including, ultimately, the nature of sanctions for breach. For that reason planning, which is internal to the transaction, can never quite be equated with obligation, which includes external elements,

faculty of planning rigidly and successfully the manner in which primary relations work. Lack of measurability makes binding planning difficult to accomplish in the first place and hard to carry out once done, and hence tends to make planning subject to change. The duration of relations lends an air of unreality to substantive planning projected beyond the next succeeding stage in which present transactionizing is possible. So too, the lesser specificity of planning in relations adds to the anticipation of flexibility in making changes. The fact that the operation of the relation will inevitably evoke new problems to be dealt with through new planning and activity requiring further cooperation of the parties has a similar effect, as does the nature of relational obligations. The ultimate effect is a marked separation in relations between the bindingness of planning and the bindingness of obligation. They commonly parallel each other to some extent, but obligation may be far more binding than planning.<sup>243</sup> The obligation in such circumstances is very diffuse (although perhaps ultimately reinforced by sanctions which will become highly specific when actually implemented). As Selznick puts it, "association undermines predictability and proliferates obligations."<sup>244</sup>

(vi) *Conflicts of interest in planning*: In transaction planning, all conflict is brought into focus in the one question: "How much?" Behind the answer lie the elements of harmony permitting a mutually agreeable answer to the question, namely, the seller's desire to sell and the buyer's desire to buy. Nevertheless, agreeing to the price is allocative planning; moreover, since the process of answering is always a zero-sum game it is a process heavily laden with conflict, conflict of the most overt nature. Since that process is the only way whereby the parties can bring together and effectuate their respective unilateral enterprise planning, even that unilateral planning is always colored from the start by the conflict which will obviously arise when the time arrives to answer the question "How much?"<sup>245</sup> There is thus in a transaction no way to separate conflict-laden allocative planning from the remainder of enterprise planning. Moreover, there is no *mutual* enterprise planning in which party interests might coincide to leaven the conflict inherent in the allocative planning.<sup>246</sup> Nor are

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243. The opposite is theoretically possible, but unlikely in fact.

244. SELZNICK, *supra* note 100, at 55.

245. For some empirical support of the latter part of this statement, see the experiments described in Kelley, *supra* note 128.

246. Such conflict, or at least the perception of it, may be either lessened or heightened by the process whereby the question "How much?" is answered. Negotiation



there present other factors to mitigate the harsh conflict inherent in "How much?"<sup>247</sup>

In exchange relations many factors go to alter the open sharp conflict of "How much?" Indeed, most, if not all, of the polar characteristics of relations tend to have this effect. For example, whole person relations can seldom long survive continuous sharp focusing on conflict of interest.<sup>248</sup> The lack of measurability and actual measurement of exchange characteristic of relations tends to dull the spurs of jealousy and greed engendered when numbers make it very clear who is winning and who is losing a zero-sum game. Other aspects of relations have similar effect,<sup>249</sup> but for the sake of simplicity I wish here to limit consideration to a factor particularly related to conflict of interest *in planning*: the simultaneous occurrence of mutual enterprise planning with mutual allocative planning.

As already noted, purely allocative planning is a zero-sum game, and hence conflict laden. But planning for the relational enterprise itself in theory need involve no conflict whatever among the participants; it is not for any of them a zero-sum game but one in which all hope to, and quite normally do, gain. Consider a new partnership. Deciding who gets what percentage of the net profits appears to be de-

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itself is a process that raises consciousness of conflict higher than do many other forms of mutual accommodation. Thus the fixed prices of the managed market, *e.g.*, a supermarket, may heighten consciousness of the zero-sum conflict less than do the haggled prices of the bazaar. The buyer who picks up a good meat special at Grand Union thinks he got a good deal; the buyer who haggles well in a bazaar thinks he really beat down the other guy (and got a good deal). The latter buyer may even feel guilty if he did exceptionally well, but who ever felt guilty about picking up a good special at a supermarket?

247. To the extent that "How much?" is answered only by simple auction or bid-ask price bidding, the bargaining fails to perform a most important function: establishing agreed terms which adhere to some kind of a norm. Bargaining where the parties reveal information about costs, market prices, etc., performs this important function by convincing the parties not only that each is willing to deal on the terms mutually agreed to, but also that by some additional standard the agreed terms are just. Macaulay notes the failure of automobile dealer franchise agreements to achieve this in S. MACAULAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* 9 (1966).

248. Unless one of the parties has great coercive power over the other, or if external pressures counter such centrifugal conflicts, or perhaps in the case of some kinds of neurotic relations.

249. This is not to suggest that a socioeconomic system heavily based on relations is necessarily any more conflict free than one based heavily on transactions. The conflicts, both internal and external to the relations or transactions, simply take different forms. What balance of transactionizing and relationizing best harmonizes and reduces human conflict has to be left to the philosophers—theoretical and practical—to decide.

cidedly allocative and zero-sum, whereas deciding where to locate the main office of the partnership enterprise is (in theory) not. In fact, the latter decision is bound to affect the participants differentially, thereby creating some allocative interests and potential conflicts among the participants. And the former decision may have a distinct effect on enterprise planning, if, for example, giving one partner a larger percentage is expected to spur him on to produce income for the enterprise in amounts partially or even completely countering the allocative effect of his special treatment. Many planning decisions, of course, involve more closely balanced enterprise and allocative elements. This coexistence in relational contract of both enterprise planning and allocative planning has a serious impact on conflict of interest and how it is perceived by participants.

To illustrate the foregoing, consider a new partnership trying to decide whether to use accrual accounting or cash accounting for tax purposes. Suppose that cash accounting is perceived as best for all concerned, each partner and the partnership considered as an enterprise. If this is the case there appears to be no allocative issue, and indeed the allocative effect is minimal.<sup>250</sup> Suppose, however, that accrual accounting would be better from the view of the partnership as an enterprise, but poor from the standpoint of each partner individually. Some effort will now have to be made to determine relative total benefits, and unless the accrual technique is equally harmful to all the partners, there will be a merger of enterprise and allocative planning in their respective votes on how to handle the matter. This merger will be even more obvious if one but not all of the partners would benefit individually from use of the accrual method. There then would be no question but that the conflict exists, and that an allocative decision will have to be made if the enterprise is to get on with its business. Nevertheless, the response to the conflict may be very different from the response to "How much?" in a transaction. Even if everyone is fully cognizant and protective of his own interests he must nevertheless weigh his own private losses from using a particular method against his own private gains from having the enterprise do better (or the reverse). The latter may often outweigh the former,<sup>251</sup>

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250. It consists of the possibility that the cash method may benefit one of the participants more (or less) than it does others, or more (or less) than it does his share of the enterprise, a relative benefit (or detriment) which in the totality of things is allocative in a relative sense, although this is not a zero-sum situation.

251. Especially is this the case when a particular issue is considered in its full context of the entire relation.

something which cannot happen in a pure transaction. Moreover, in many instances some or all of the participants will not be fully aware of the allocational impact of decisions like this, perhaps not at the time of the planning, perhaps not ever. In such instances the consciousness of conflict of interest will of course be lower. Again, in a transaction this kind of escape from conscious conflict is possible only for the very gullible. It *can* be gullible so to escape in a relation, but is certainly not necessarily so.

The mixture of enterprise and allocative planning occurring in relations has a very significant impact on the conduct of mutual planning. As noted earlier, negotiation itself is a conflict process elevating consciousness of conflict levels. In a transaction it is the only technique available for adjusting differing answers to the question "How much?" But when that allocative question is merged into enterprise planning, non-negotiational types of mutual planning will occur if the parties do not realize there is anything to negotiate about. Moreover, even if one or more does see the allocation issue, subtler techniques than negotiation are available and often more effective. For example, building a case for a particular course of action in terms of its benefits to the overall enterprise or subtle "politicking" may work better than engaging in haggling about the allocative issue. This is not naively to suggest that the most brutal kinds of infighting cannot occur on such issues. It is simply to point out that negotiation—"conflict-out-in-the-wide-open"—may not occur.

To summarize, all mutual planning in transactions—including all enterprise planning, which will ultimately have to be channeled through the establishment of price—is conflict laden. In relations enterprise planning may be partially separable from allocative planning, and hence relatively low in conflict. Relations also provide the possibility of leavening the conflict of allocative planning through a range of ways in which allocative planning can be merged with enterprise planning, eliminating or reducing consciousness of conflict, and providing non-negotiational techniques for dealing with it.

### *7. Future Cooperation Required in Post-Commencement Planning and Performance*

Mutual success in the pure transaction does not depend upon future cooperation, either in further planning or respecting performance. Even in theory, however, I find it difficult—if not impossible—to

envisage such a transaction if it involves any projection of exchange into the future. If something remains to be done by one side (and initially that is always the case except in a completely present exchange, a transaction outside the realm of contract as that term is used here) some future cooperation respecting performance is essential to the success of the transaction. Nevertheless, the range of cooperation in the purest kinds of transactions is very limited. It involves simply producing at the planned time and place what is either money or a highly monetizable item, the nature of which was very specifically agreed upon initially.<sup>252</sup> Moreover, although a modicum of cooperation in performance is required to achieve mutual success, the transaction can be entirely free of any planning beyond the plan creating the transaction in the first place, and thereby free of any need for cooperation in planning.

In contrast with the contract transaction, the contract relation depends entirely upon further cooperation, not only in carrying out what performance has been planned, but in further planning of the substantive activities of the relation. Thus, everything is dependent upon further cooperation, not only in performance, but also in planning. To comprehend this, one need think only of one's own experience in the student-college relation. Repeated and continuous mutual planning after the initial contract is one of the two dominant themes of such a contract relation, the other being repeated and continuous performances.<sup>253</sup> This is a dominant characteristic of most employ-

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252. Cf. Williston's definition of tender:

Tender is an offer to perform a condition or obligation coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied.

15 S. WILLISTON, CONTRACTS § 1808 (3d ed. 1972).

The "silent trade" of some primitive people is also quite close to minimum cooperative behavior especially where prior relations had developed fairly standard exchange values. See Schechter, *supra* note 23, at 576. Silent trade is not, however, transactional in all respects. The very fact that the parties do not communicate other than by leaving and collecting goods at a given point out of each other's presence presupposes an element of trust that can have evolved only by repeated transactions. Schechter quotes Torday's account of the silent trade of Congolese pygmies who need vegetable, food or iron from their neighbors:

[A]n animal they have killed is deposited at night near the entrance of a village; next night they come to fetch the price, which they expect to find in the same place where they have put their game. No villager would dare to take some of the meat without paying its full value; for, unseen by him, he is watched by the little men, and should he defraud them he is sure to be found dead a few days later with a tiny poisoned arrow in his side.

*Id.* at 577.

253. Even if one inaccurately views the student as purely a paying purchaser, tui-

ment, all internal corporate enterprise, franchising, membership organizations of all stripes, family structures, and virtually every political or social activity in which exchange takes place.

### 8. *Incidence of Benefits and Burdens*

The very function of a transaction is the shifting or assignment of the entire incidence of particular benefits and burdens to one party. Consider, for example, a simple sale of goods. The owner of money is giving up the benefits and burdens of the purchase money, heretofore exclusively his, in return for the benefits and burdens of the goods, heretofore exclusively the seller's. There is no sharing of these burdens as the result of the transaction, simply a reciprocal shifting.

In contrast, in relational contracts the benefits and burdens are shared. Consider the partnership of two lawyers where each contributes his own efforts to the work of the partnership in return for the efforts of the other. Unlike a transaction, where each would receive the full benefit of the efforts of the other, in a partnership each party receives only part of the produce of the efforts of the other. In addition part of the benefits created by each party is returned to him. Looked at in somewhat abstract terms, a member's exchange is with the partnership, of which he is part, and therefore in part with himself, and not with the other partner. Even with the development of specialization (and with it Durkheim's organic solidarity) this remains true. The tax law specialist called in by the securities law specialist can be viewed as exchanging his services with those of the securities lawyer, but the process of the firm is such that benefits are shared rather than exchanged among the partners, as are all the burdens other than individual work contributions, *e.g.*, the rent, the possibilities of loss of clients from ill luck, mishandling, or other causes.<sup>254</sup>

Undoubtedly the partnership relation could be analyzed in economic terms that would in the end strip away the distinctions made here. But how, other than by ignoring it, can conventional economic

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tion payments themselves are repeated occurrences. In fact, the student is not simply a payor of money, but inevitably makes countless other contributions to the relations.

254. All other things being equal, the sharing process of the relation yields more uncertain individual returns than does the division process of the transaction. In this respect the former is analogous to what Knight called residual (entrepreneurial) income, and the latter to what he called contractual income. F.H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 271 *et seq.* (Reprint 1964). See S. OZGA, EXPECTATIONS IN ECONOMIC THEORY 157 *et seq.* (1965).

analysis deal with the attitude expressed by a fictional, but by no means atypical, senior partner in a large law firm:

He used to describe us as a "group of gentlemen loosely associated by a common enthusiasm for the practice of law."<sup>255</sup>

Something of this attitude must prevail for any partnership to remain cohesive. Moreover, the sharing pattern, simply cannot be ignored even if such attitudes were nonexistent, since the actions of even purely economic men in such circumstances are affected by the sharing pattern imposed on them by the relation.<sup>256</sup> Thus the operational end results of such transactional economic analysis would differ from those which would obtain were the efforts involved organized in a transactional structure rather than a relational one.<sup>257</sup>

## 9. *Obligations Undertaken*

a. *Sources of content:* In a pure transaction the exclusive source of the content of obligation undertaken is to be found in genuinely expressed, communicated and exchanged promises of the parties. Such a transaction is, in a sense, unknown in the real world, since *some* of the content is the bindingness of the obligation, and *some* of the bindingness always comes from external sources residing in the social structure in which the transaction occurs.<sup>258</sup> Neverthe-

255. L. AUCHINCLOSS, *THE GREAT WORLD AND TIMOTHY COLT* 123 (1956).

256. See generally M. OLSON, *THE LOGIC OF COLLECTIVE ACTION; PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

257. Cf. SCHUMPETER, *supra* note 79, at 160:

[T]he family and the family home used to be the mainspring of the typically bourgeois kind of profit motive. Economists have not always given due weight to this fact. When we look more closely at their idea of the self-interest of entrepreneurs and capitalists we cannot fail to discover that the results it was supposed to produce are really not at all what one would expect from the rational self-interest of the detached individual or the childless couple who no longer look at the world through the windows of a family home. Consciously or unconsciously, they analyzed the behavior of the man whose views and motives are shaped by such a home and who means to work and to save primarily for wife and children. As soon as these fade out from the moral vision of the businessman, we have a different kind of *homo economicus* before us who cares for different things and acts in different ways.

After quoting the above from Schumpeter, Nisbet goes on to say:

Much of the predictability of human response, which the classical economists made the basis of their faith in the automatic workings of the free market, came not from fixed instincts but from the vast conservatism and stability of a society that remained deeply rooted in kinship long after the advent of the capitalist age.

R. NISBET, *THE QUEST FOR COMMUNITY* 68 (1970). One might add in speaking of many business relations that analogs to kinship notions go right on today, thereby providing both a base for and a limit to "neo-classical economic" analysis of such institutions.

258. See the discussion in Section III(C)(3) *supra*. Even the silent trade of the

less, as long as the externally imposed bindingness is triggered both always and only by genuinely expressed, communicated and exchanged promises, and as long as the nature of such sanction is as reflective of the content of those promises as is humanly possible, even real world transactions retain in significant practical measure this exclusivity of promissory source of obligational content.<sup>259</sup>

An important aspect of this promissory source of transactional obligation is that the promises themselves be exchanged. This is something more specific than the presence of exchange and the existence of expressed and communicated promise. Each promise must, to meet this test, be the motivation for the occurrence of the other promise (or performance, if the arrangement is unilateral as to promise). Such a test is clearly met, for example, when a purchaser of a television set promises to make 24 monthly payments of \$12.94 each. But it is not met at all typically in such a transaction respecting the "promises" of the purchaser appearing in the fine or not so fine print on the purchase form, promises which he never reads.

If the other tests of genuine expression and communication are met,<sup>260</sup> the true exchange of promises described in the foregoing paragraph automatically occurs (or at least would ordinarily and reasonably be assumed to occur), and in that sense, stating that the promises must be exchanged involves either emphasis or redundancy. Since, however, the disappearance of such exchange is so often countenanced in various guises under objective theories of contract,<sup>261</sup> emphasis or even redundancy seems warranted.

At the relational pole there may or may not be promises of the parties that can properly be called genuinely expressed, communicated and exchanged. If there are, obligation may arise from the promises in the same way as from promises in a transaction, subject always to the limits imposed by the balance of the relations in question. The sources of the content of obligation other than such promises are the same as the fundamental source of planning content con-

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pygmies, *see* note 252 *supra*, involves some social structure, however separate and negative it may be. Without the bindingness it provides there would be no possibility of ongoing trading of that kind based solely on the fear of murder by the pygmy.

259. Even this must be taken with a grain of salt. No known form of enforcement can really equate most promises with performance where the performer is unwilling.

260. *See* particularly Sections II(A), III(C)(6)(c)(iii) and (iv).

261. And, I believe, not uncommonly in the intricacies of microeconomic analysis.

sidered earlier.<sup>262</sup> When sufficiently explicit obligations are created by the ongoing processes of the relation they may be, subject to limitations discussed earlier, virtually indistinguishable from promises. But many obligations arising out of ongoing relations are not that specific (see below) and the content may therefore differ markedly from the content of promise, which in a transaction is the only source of content, other than the external impositions of obligation.

b. *Sources of obligation:* As noted earlier,<sup>263</sup> transactions with future obligational effect can occur only in some kind of social matrix providing a source of obligation. No suggestion is, however, made that the matrix need necessarily supply the kind of liability for damages contemplated by Holmes' concept of *The Bad Man*.<sup>264</sup> The social obligation may very well be as non-legal and diffuse as simple internalizations by the parties of "ought." But without either some sense of party internalization of social obligation or some sanction derived from social sources external to the transaction itself, a pure transaction with future obligation simply cannot exist. Moreover, apart from the manifestations of choice (whether called consent, planning, or what have you), the transaction itself generates no obligations; it simply is created when the obligations are created.<sup>265</sup> Thus the obligation created in a transaction is never anything more than a merger of the exercise of party choice with whatever obligational sanctions are available to preserve the stability of the transaction.<sup>266</sup>

In contract relations one or more sources of obligation may be, and often are, external, not only as to promise-created obligations, but also as to obligations arising out of the ongoing processes of the relation, *e.g.*, the legal obligation of a parent to support a child born of a

262. See Section III(C)(6)(c)(iv) *supra*.

263. See Sections III(C)(3) and III(C)(9)(a) *supra*.

264. The *Bad Man* passage particularly pertinent to contracts:

If we look at the law as it would be regarded by one who had no scruples against doing anything which he could do without incurring legal consequences, it is obvious that the main consequence attached by the law to a contract is a greater or less possibility of having to pay money. The only question from the purely legal point of view is whether the promisor will be compelled to pay.

HOLMES, *supra* note 61, at 317. See generally Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275 (1973).

265. The transaction itself may and very often does reflect motives aiming toward performance of the obligation, as for example the desire to perform a fully executory bilateral contract, the performance of which each party considers beneficial to himself.

266. As noted in Sections III(C)(6)(c)(v) and III(C)(9)(a) *supra*, the bindingness of planning in transactions, being commonly coupled with sanctions very closely measured by the planning, tends to equate the obligation with the planning.



marriage. But, unlike the transaction, the ongoing relation itself creates obligation just as it defines the content of the obligation.<sup>267</sup> To pick another family example, consider the obligation one brother may feel toward another brother, not because of the dictates of society as such, but simply because of the obligations created through growing up together.<sup>268</sup> It is true, of course, that these obligations are seldom, if ever, *entirely* internal to the relation; since contract relations tend to include whole person primary relations, such total internalizing would be virtually impossible. Nevertheless they can be and often are significantly internal to the relation. When a relation is larger than a dyad it commonly creates obligations external to individual members but internal to the relation. These may be formal, *e.g.*, a written Standard Operating Procedure, or informal, but they occur in all contract relations of any duration and size.

c. *Specificity of obligation and sanction*: In both exchange transactions and relations initial specificity of obligation tends to parallel specificity of performance planning. Consider a transactional example. The obligation of a seller contracting to sell goods for which an active market exists closely parallels the performance planning of the parties and is highly specific: deliver the goods when agreed. Moreover, thinking of the obligation in terms of their ultimate sanction, Holmes' Bad Man approach, the obligation also is specific; the seller is liable to judgment for non-delivery in an amount equal to the market price of the goods at the time the buyer learns of the breach less the unpaid portion of the price.<sup>269</sup> Nevertheless, viewed at the time the obligation is incurred, *i.e.*, at the making of the contract,

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267. It is not altogether accurate to separate in relations the notion of obligation from the notion of commitment as the latter term is used by sociologists. For example, Alutto, Hrebiniak and Alonso argue that in addition to social psychological causes, commitment to stay in an organization (or profession) is increased by "side-bets," namely investments in staying which accrue mainly as "a result of passing through organizational and career structures." Alutto, Hrebiniak & Alonso, *On Operationalizing the Concept of Commitment*, 51 SOCIAL FORCES 448 (1973). Such investments in theory create no obligations. But since in employment the organization is also making somewhat similar investments (at different rates), and more particularly, since the organization knows the employee is making such investments, obligations do inevitably grow out of the investments by the other party; witness the present belated stirrings about inadequate pension responses to employee investments of this kind.

268. Delderfield portrays a particularly vivid brotherly relationship of this nature in *The Avenue* (1958). The relational obligations went far beyond anything either the family or society expected, or indeed wanted. A more sophisticated example can be found in the web of economic and social relationships described by James Gould Cozzens in *By Love Possessed* (1957).

269. An oversimplification of UCC §§ 2-711 and 2-713.

the obligation is less specific in terms of dollars than it will be when the sanction is ultimately incurred, *i.e.*, upon execution of an exact money judgment. Seen at that early time in sanctional terms numerous factors make the obligation something less than specifically measurable in dollars: the market price at the time the buyer learns of the breach (not having yet occurred) is not precisely known, even if partially predictable; possible disputes about who is right and who is wrong if trouble occurs produce an inherent "iffiness" of obligation; compromise is always a potent possibility; many hindrances lie in the way of securing and collecting a judgment; etc. All of these create an aura of diffuseness and generality around what may seem at the time of contracting to be a quite specific monetary obligation. As trouble occurs and as the processes of sanctioning are undertaken these layers of generality are peeled off, until finally, with successful execution of judgment, the exact dollar amount of the originally less-than-fully-specific obligation is finally revealed. Thus, even highly specific obligations tend to become more specific in terms of sanctions as judgment day nears.<sup>270</sup>

It will be noted that in a contract for the sale of goods the obligation-sanction route, when followed to the end, closely parallels the very specific planning of the transaction. This is an inevitable consequence of expectation damage remedies<sup>271</sup> when applied to the specific planning of transactions.<sup>272</sup> Similar results follow when such reme-

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270. In terms of prediction rather than in terms of obligation, a movement occurs in the opposite direction when trouble commences in what has been untroubled performance. Prior to any trouble, as planning unfolds into more precise planning and further preparation for performance and then into performance itself, specificity of obligation and of prediction of its fulfillment increases. But when trouble occurs, specificity of prediction of how an obligation will be carried out begins to decrease, perhaps drastically. What one thought was the highly likely completion of a building to existing specifications with no more than minor changes and the inevitable differences between blueprints and steel-and-concrete, now becomes a potential mare's nest of rights arising from legal obligation. It is only after trouble has reached its peak, and negotiation, mediation, arbitration, invocation of legal process and the like commence that specificity of right (and obligation) begins to rise from the ashes.

271. An expectation remedy is a remedy aimed at putting the plaintiff in as good a position as would have voluntary performance of the obligation. See generally Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 373 (1936-37) [hereinafter cited as Fuller & Perdue].

272. Because of the monetary precision required for a damage judgment, difficulties arise in securing this kind of legal reinforcement when the planning of transactions is insufficiently specific to permit such precise measurement, difficulties dealt with under rubrics such as indefiniteness and uncertainty. Sometimes these difficulties lead to limiting legal reinforcement to restitutional or other non-expectation relief; some-

dies are available for breaches of specific obligations based on specific planning in relations, *i.e.*, to the extent that the relations are transactionized. An example is the obligation to pay a bonus of fixed amount to an employee. But transactionizing may also occur respecting a relational obligation which started out general and diffuse. Consider the obligation to support a spouse or future children, an obligation typically largely unplanned at the time of marriage. This obligation develops some form and content with the ongoing progress of the fortunes of the family, but in the absence of any familial trouble remains quite diffuse. When, however, trouble heaves into view, that diffuse obligation of family support is likely to be transformed upon divorce or separation into an obligation to pay specific amounts pursuant to a support order.<sup>273</sup> A support order is highly transactional although even it is not the same thing as a typical money judgment of permanently fixed amount, since it remains subject to modification as circumstances change.

Although the diffuseness and generality of many relational obligations may, upon the potential or actual occurrence of difficulties, become far more transactional and specific because of the specificity of impending sanctions, many retain a high degree of diffuseness and generality in spite of trouble. This can happen whenever the sanctions looming on the horizon are themselves of a procedural nature leaving substantive obligations undefined, at least presently. Among relational obligations of this nature are duties to engage in decent negotiation; to permit conciliation and mediation; to suspend resolution of difficulties in the hope that they will dissolve in the midst of other activities of the relation; to go to arbitration, particularly before an arbitrator whose function is viewed primarily as patching up things so that the game can go on; etc. It is true that ultimately these processes may fail and with the failure may come more specificity of obli-

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times they lead to the provision of remedies such as specific performance rather than damages.

273. Another example is to be found in the vague obligation of military personnel not to engage in conduct "to the prejudice of good order and discipline in the Armed Forces" or conduct "bringing discredit on the Armed Forces," obligations with analogs in virtually all contractual relations of significance and of long duration. The sanctions behind the obligation become increasingly specific after a violation occurs and charges are filed and trial ensues, unless of course the provision creating the obligation is found to be invalid. See *Levy v. Parker*, 478 F.2d 772 (3d Cir. 1973), *appeal filed*, 42 U.S.L.W. 3155 (U.S. July 30, 1973) (No. 73-206); *Avrech v. Secretary of Navy*, 477 F.2d 1237 (D.C. Cir. 1973), *juris. noted*, 42 U.S.L.W. 3194 (U.S. Oct. 9, 1973) (No. 72-1713). *But see In re Bithoney*, 486 F.2d 319 (1st Cir. 1973), where F.R.A.P. 46 ("guilty of conduct unbecoming a member of the bar") is upheld.

gation in the form of expected or imposed sanctions of a highly specific nature. On the other hand, this ultimate transactionizing may never occur even in the face of heavy battling, if the sanctioning authority views continued fighting or total defeat for one party as preferable to the imposition of specific duties.

The latter situation may be illustrated by the duty to bargain in good faith imposed upon employers and unions by the National Labor Relations Act.<sup>274</sup> Sooner or later the only way to effectuate that obligation against a truly recalcitrant party, is to transactionize its obligation by imposing upon the reprobate specific terms in the collective bargaining agreement. The reluctance of the Supreme Court to do this is illustrated by *H.K. Porter Co. v. NLRB*,<sup>275</sup> where the Court refused to uphold a Board order directing the employer to include a checkoff provision in a contract even though the employer's *only* reason for failure to agree to such a provision in the first place was found to have been to avoid concluding any collective bargaining agreement (a violation of the NLRA).<sup>276</sup>

To summarize, specificity in planning of both transactions and relations tends to create specificity in the ultimate sanctions lying behind obligation, although this tendency may be reduced in the case of relations. As trouble occurs specific transactional obligation may temporarily become more diffuse and speculative, but as the ultimate sanction becomes more imminent specificity is restored, although in modified form. Diffuse relational obligation tends to become more specific as trouble occurs and the utilization of ultimate sanction becomes more imminent. But diffuse relational obligation, even in the face of serious trouble, often remains unspecific in terms of ultimate sanction, although processes (as distinct from substantive remedies) for

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274. 29 U.S.C. § 158 (1970).

275. 397 U.S. 99 (1970).

276. So, too, the reaction of the Board, and to a lesser extent, the Court of Appeals for the District of Columbia Circuit, to efforts to award what would have been provided by the collective bargaining contract which would have been made if the recalcitrant employer had bargained in good faith. See *Food Store Employees, Local 347 v. NLRB*, 476 F.2d 546 (D.C. Cir. 1973); *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058 (D.C. Cir. 1971); *UAW v. NLRB*, 449 F.2d 1046 (D.C. Cir. 1971); *Tidee Products Inc.*, 194 N.L.R.B. 1234 (1972). Such remedies would have been perfectly consistent with transactional contract expectation remedies, notwithstanding the views expressed by the Board's opinions in those various cases. Nevertheless, to supply such remedy is inevitably to transactionize an ongoing relation. The view just expressed is by no means identical to alleged freedom of contract notions supporting such decisions, e.g., *Swerdlow, Freedom of Contract in Labor Law: Burns, H.K. Porter, and Section 8(d)*, 51 TEXAS L. REV. 1 (1972).

continuing relations in spite of trouble may be quite specific in nature.

### 10. *Transferability*

Exchange transactions after formation and before completion, and exchange relations at any time, are forms of wealth, of capital utilizable for future satisfactions of desires.<sup>277</sup> Since the ability to transfer wealth, particularly by exchange, typically enhances its value,<sup>278</sup> there is near universal pressure to make wealth alienable by exchange. Nevertheless, no society permits, much less encourages, unlimited exchange of everything considered by its citizens to constitute wealth. Moreover, some forms of wealth are by nature non-transferable, for example, the friendship and resulting patronage of a powerful person toward someone who amuses him. And some forms of wealth may be the greater because they are not transferable, *e.g.*, the prestige of being among the chosen on the basis of birth.

But, subject to such limitations, a near universal proposition is that wealth will be alienable by exchange in the absence of societal restraint. In analyzing the differences in transferability of transactions and relations, therefore, the fundamental question concerns the presence or absence of inhibiting factors which would tend to counter the natural tendencies toward transferability.

Examination of the nature of transactions reveals virtually nothing inhibiting alienability of rights, and only one (important) inhibition on the transfer of duties. Indeed, almost everything about the transactional polar axes tends to make pure transactions as exchangeable as pieces of clay pottery. Their discreteness as nonprimary relations, the subject matter of the exchanges, the careful measuring, the sharpness of commencement and termination, the completeness and specificity of bindingness and obligation in planning, the absence of need for extensive future cooperation, the absence of sharing of burdens and benefits, all mean that with one exception nothing in the nature of transactions stands in the way of complete transferability. Thus, whatever transactional projection of exchange is socially

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277. Cf. 3 POUND, *supra* note 134, at 162: "Credit is a principal form of wealth. It is a presupposition of the whole economic order that promises will be kept." The satisfactions need not, of course, be limited narrow economic concepts, but may be as broad as human nature and human society permit.

278. Value is used here in terms only of individual substitution values. For an explanation of the reasons why alienability by exchange typically enhances total satisfactions, see A. ALCHIAN & W. ALLEN, *UNIVERSITY ECONOMICS* 35-40 (3d ed. 1972).

recognized is also transferable by exchange.<sup>279</sup>

The one exception to full transferability of transactions arises from the importance of the identity of the obligor. "Who is it that owes me?" is a question so important to the value of a transactional right that completely free transferability of *all* duties by the obligor is never feasible. While the obligor may freely delegate the performance of all of his duties without disturbing the transaction, he must, unless the other party agrees to release him, retain one obligation, namely the ultimate liability should the obligations not be performed. This is another respect in which transactions—even the most pure—are inherently relational.<sup>280</sup>

Just as virtually all the characteristics of transactions permit full and free transfer of all transactional rights and all but ultimate liability for transactional duties, so do many of the characteristics of relations have the opposite effect. Primary relations, depending as they do heavily on the identity of participants, tend to be non-transferable, at least by simple exchange.<sup>281</sup> The absence of measurability and actual measurement in pure relations makes exchange transfers difficult, as do the absence of finiteness and clarity of commencement and termination of relations. Similarly, both the length of relations and the nature of limitations on relational planning make simple transfers of relations difficult to achieve. The possibility of future planning altering relations, the absence of bindingness of planning, and the great need for future cooperation and relational development of future obligations all make simple exchange transfer of relations an anomalous concept, particularly since burdens and benefits tend to be shared rather than divided and parceled out. Finally, the elements of trust demanded by participant views of relations make identity important, and simple transfer therefore unlikely.

None of the foregoing is to say that transfer of relations is al-

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279. It will be noted that the early recognition of executory contracts in the law merchant was followed by the somewhat later development of recognition of assignment and negotiability. T. PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW 666-70* (5th ed. 1956).

280. Others mentioned earlier are the presupposition of a social matrix in which transactions must always occur, including the basic underlying sources of socioeconomic support, and the inevitability of tacit assumptions in all planning, including transactional planning.

281. They may be "transferable" in other ways, as by certain psychiatric techniques, for example, but this is not the kind of simple exchange transfer which is of prime importance in the present discussion, and which can be easily accomplished with transactional rights and duties.

ways necessarily impossible. The pervasive existence over many centuries of mercenary soldiers is enough alone to counter such a view. Nevertheless, when most of the relational characteristics are present in sufficient strength, simple transfer is at best difficult, and in any event no gain may be in sight from simple transfer, the likely costs of transfer being in excess of the likely gross gain. In these circumstances, the proposition that wealth is normally transferable by exchange no longer applies, and transfer is an unlikely event.<sup>282</sup>

In summary, it can be seen that, except for the ultimate liability of an obligor's duty, transactions tend to be fully transferable (in the absence of societal restraint founded on superseding policies), whereas transfer of relations tends to encounter difficulties and sometimes impossibility.

### 11. *Number of Participants*

There are but two parties to the purest of transactions. The presence of additional parties<sup>283</sup> automatically begins to create circumstances generative of relational characteristics.<sup>284</sup> For example, the need to harmonize the interests of several people in establishing agreement tends to result in more primary relations at the bargaining stage than does simple bid-ask bargaining of a two-party transaction. So too, the presence of multiple poles of interest is likely to lead to increased planning of structures and processes at the expense of measured substantive planning of exchange. Without being more specific, it can nonetheless accurately be stated that the presence of large numbers of poles of interest in the form of additional participants tends to affect virtually every transactional-relational axis of behavior, pushing always in the direction of relation.

A special case of the tendencies described in the foregoing paragraph occurs when one or both of the parties to a "transaction" is

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282. As this situation is approached, it also becomes more likely that society will refuse to recognize transfers which one of the parties wants to make, *e.g.*, an employer assigning an employment contract.

283. Apart from transfers subsequent to commencement of transactions, *e.g.*, assignment, this is a rare case in anything identifiable as an ordinary transaction, almost as rare as a three way war, and perhaps for similar reasons. Third party beneficiaries may sometimes create a partial exception to this statement, but only partially because they are usually merely the recipient of a benefit and in any event not full fledged parties *ab initio*.

284. Even the addition of but one person to the dyad has this effect. *Cf.* COALITIONS, *supra* note 160.

putatively single, but in many ways multi-person, *e.g.*, a corporation. This too tends to push the transaction in the direction of relation, to whatever extent the party (or parties) is not truly monolithic. As more real persons are involved in the "transaction" it becomes more likely that some of the relational characteristics will begin to creep in, even though in theory all those persons are part of a single monolithic center of power. For one thing, self-interest will tend to break the monolithic character of that center if there is any leeway at all for its exercise, and there almost always is in large organizations. For example, perhaps the clerk in the purchasing department of the buyer has a personal interest in covering up a mistake in a purchase order, an interest which leads him to make to the seller a non-transactional concession on delivery dates in order to avoid discovery of the mistake by his supervisors. Whether such a concession is or is not in the long or short run interest of the buying corporation, it nevertheless pushes the "transaction" in the direction of relations. These tendencies become even more obvious when the center of power is frankly less than totally monolithic, as in the case of a labor union in the negotiation and administration of a collective bargaining agreement.

While relational characteristics inevitably arise in the case of multiparty situations, it does not, of course, follow that two-party relations cannot exist; witness any childless marriage where children are no longer expected. Most of the characteristics of relations can and often do occur in dyads; about the only one which cannot is its existence before the birth of both parties and continuance after the death of one. Nevertheless, it may be true that in many circumstances the fact that there are only two parties tends to keep the relation more transactional than it would be if more parties were involved. For example, it is likely to be easier for husband and wife in a childless marriage to measure exchanges than it is when children are involved, and they may, therefore, be more inclined to engage in such measurement. If this is true, the presence of large numbers not only transforms transactions into relations, but also tends to make relations more relational.<sup>285</sup>

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285. This is probably true only to a certain point. As relations become more complex they tend to become more bureaucratized, and as bureaucratization sets in efforts are made to reintroduce many of the characteristics of transactions. They cannot, of course, be introduced in pristine transactional form, but only in their bureaucratic relational context. Thus, for example, bureaucracy may introduce a high degree of measurability and actual measurement in the exchanges involved in relations. But, unlike the transactional measurement, which will be in monetized terms, *i.e.*, terms entirely reflective of the interests of the two transactors, bureaucratic measurement is



## 12. *Participant Views of the Transaction or Relation*

One of the most important behavioral facts about a transaction or relation is the way the participants view it, their subjective views inevitably having an impact on their actual behavior.<sup>286</sup> In this subsection four of many possible areas of participant attitude are considered briefly: (a) recognition of exchange; (b) altruistic behavior; (c) time-sense; (d) expectations about trouble in performance or between the parties.

a. *Recognition of exchange*: As noted earlier,<sup>287</sup> where there is specialization of labor there also is exchange. Exchange is simply the transfer mechanism essential to distribution of the fruits of specialization if it is to continue and achieve its efficiencies of production.<sup>288</sup> In dealing with exchange among humans, however, it is easy to overread the word, adding to it conscious recognition of its occurrence and particularly of the gains to be achieved through it.<sup>289</sup> The origin of this overreading lies in the concept of choice. We do not speak of recognition of exchange or recognition of its motivations among ants because we believe that they are genetically programmed to engage in specialization and exchange without the exercise of choice. A human, however, we believe (or act as if we believe) to have a choice whether to exchange. When a human takes part in exchange, our tendency is to conclude that he recognizes the exchange as being

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likely to be at least in part in terms of the overall relation, *e.g.*, some productive measure such as widgets per manhour. Consideration of the reintroduction of transactional characteristics, modified or otherwise, into bureaucratic contractual relations is beyond the scope of this Article.

286. See Singelmann, *Exchange as Symbolic Interaction: Convergences Between Two Theoretical Perspectives*, 37 AM. SOCIO. REV. 414 (1972), for a discussion of the impact of subjective understandings on actual behavior.

287. See text accompanying notes 14-15 *supra*.

288. The *prospect* of the availability of exchange also tends to be a prerequisite to specialization of labor, since in its absence engaging in specialized labor would appear to be most unrewarding.

289. With this addition hereinafter referred to as exchange motivations. Fortunately, this analysis of party recognition of the occurrence of exchange and of motivations leading to its occurrence can proceed without resolving questions as to when exchange can occur without a party's being motivated to make the exchange in question by the gain resulting from the exchange itself. Certainly sometimes this happens, *e.g.*, in the compulsory government taking of property which under no circumstances would the seller have sold through ordinary market exchange, and does so only because of the compulsion of law. But typically exchange goes hand in hand with the party's being motivated to make it by desires to gain from the exchange itself. Since we are here concerned with recognition of *either* exchange or exchange motives, it is not necessary to make the distinction.

such and that he recognizes being motivated by the desire to gain from the exchange. The purpose of this section is to explore the differences in party views of such recognition in transactions and relations. To accomplish that exploration effectively it is desirable to continue to limit the term "exchange" to the transfer mechanism mentioned at the beginning of this paragraph.

The discrete transaction is the perfect setting for maximizing recognition of exchange and its motivations.<sup>290</sup> The narrow focus of the nonprimary relation and of transactional planning, the monetization and measuring of what is exchanged, the minimum need for cooperation in planning and performance, the discreteness of the incidence of burdens and benefits, the specificity of obligation and the nature of potential sanctions, all go to guarantee the absence of room for anything but exchange and its motivations. Indeed, in the absence of such motivation the transaction will never come into existence in the first place, there being no other motivation to bring it about. Recognition by the parties of the prevalence and exclusivity of exchange motivations is inevitable in such transactional circumstances. Indeed, the very survival of participants economically dependent on transactions depends upon the ability to recognize such motivations in others and to have them in oneself.<sup>291</sup>

Much in a relation works in the opposite direction. The multi-plex and immeasurable aspects of primary relations, the emergence of planning and cooperation through the workings of the relation itself (as distinguished from sharply articulated exchange planning), the

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290. Exchange motivations are distinguished from motivations to steal only by the presence of a willingness to part with the contribution required to motivate other potential parties to make the desired exchange.

The Vikings, in fact, were pirates, and piracy is the first stage of commerce. So true is this that from the end of the ninth century, when their raids ceased, they simply became merchants.

PIRENNE, *supra* note 149, at 22. The practical inability to get what is desired without paying, imposed by property rights and sanctions, results in exchange rather than theft. Since parties are aware of these rights and abide by them as a social norm, they would properly be shocked by the suggestion that they are thieves at heart, although the notion of economic rationality seems to suppose that they should be. A recent article summarizing contributions of other writers and hypothesizing about possible rules of social exchange behavior sets out a number of values operating besides maximizing profit (rationality): effectuating a norm of reciprocity, status consistency, altruism, and competition (getting the better of the other participant even at the cost of lower profit). Meeker, *Decisions and Exchange*, 36 AM. SOCIO. REV. 485 (1971).

291. Cf. R. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* 11 (1926):

A medieval cynic, in expounding the canon law as to usury remarked that "he who takes it goes to hell, and he who does not goes to the workhouse."

sharing of benefits and burdens, the nature of obligations and sanctions, all go to mute participant sensing of exchange motivations and of exchange itself. All also go to minimize the rewards for high levels of recognition of exchange, indeed to make them of negative value. In fact, participants may have so internalized contrary motivations and thinking as to be made to feel guilty or otherwise uneasy in recognizing the existence of extensive exchange motivations either in themselves or in other participants.<sup>292</sup> In such circumstances they tend to repress recognition of their own exchange motivations and view them in others with hostility. Should a spouse reply "How much?" upon being asked to perform some helpful service, the marital soul is jarred.<sup>293</sup> So too, the last thing an ambitious executive would ever want his superiors to think is that he has his mind too much on immediate exchange motivations.<sup>294</sup> In short, there is neither selfish sense nor social decency in maintaining a high consciousness of exchange motivations in any situation in which resource allocation and social rewards occur through relational patterns rather than through transactions.<sup>295</sup> When participants in a relation start to recognize high lev-

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292. See Bennett, *Reciprocal Economic Exchanges Among North American Agricultural Operators*, 24 S.W.J. ANTHR. 276, 291, 293 (1968):

Jasper agriculturists prefer to view cooperative economic exchange as a spontaneous expression of benevolence, good will, and neighborly assistance. The economics of exchange were given no easy or ready articulation; it was viewed as disgraceful, or simply crass, to speak of exchange in monetary terms, or in terms of calibrated reciprocity.

However, as field work proceeded, evidence of calculated reciprocity in the context of the actual value of goods and services began to accumulate. . . . [Accounts of various interviews].

From this and similar accounts it was possible to construct a table of approximate equivalents. We consider them "approximate" since they were always mediated by personalistic or particularistic considerations. . . .

293. Unless it is a joke, one depending for its humor upon the very anomaly of the response, like the tender use of otherwise insulting words: "Smile when you call me that!"

At least before feminist literature brought a degree of social acceptability to marital transactionism by discussion of "marriage contracts," any partner who too obviously and too carefully measured the exchanges of marriage would have been considered a less than satisfactory mate. It is interesting to note the pejorative which would have been used to describe such a person not many years ago (particularly, I think, in New England): *calculating*. That word not only means "shrewd or cunning," it also describes someone who brings the measurement of transactionism to relations, the social norms of which exclude highly transactional thinking.

294. Hard driving ambition may be fine in such circumstances, but it must be viewed by his superiors as motivated by a desire to succeed *through* the relation and not by excessive conscious concern about immediate gains from exchange.

295. Cf. Weyrauch, *Taboo and Magic in Law*, 25 STAN. L. REV. 782, 802 (1973), a review of A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE: ON ETHICS, AESTHETICS, AND "LAW"—ON CRIME, TORT, AND PROCEDURE* (1971):

[T]he Chinese experience suggests that an analysis of the law of status could

els of exchange motivations the relation is well on its way toward becoming transactionized.<sup>296</sup>

In transactions, party recognition of exchange and exchange motivations is an accurate picture of what is really occurring. But in relations, participant non-recognition of exchange motivations may or may not reflect reality. Indeed, cynics through the ages have urged that at best<sup>297</sup> people are motivated only by what they can get in return for the lowest personal cost possible, a view not entirely inconsistent with the social exchange theories of Homans and Blau.<sup>298</sup> But even without accepting the notion that exchange motivations are the highest degree of altruism to be found in mankind, certainly many instances occur where participants in a relation may mistake their own or others' actual exchange motivations, viewing them as lower than in fact they are. Nevertheless, those views, mistaken or not, will have significant effect on the processes and operations of the relation.

b. *Altruistic behavior*: Very closely related to participant recognition of exchange and its motivations are participant views of altruistic behavior. Do they expect it? Its manifestations? Do they think it occurs? Again, the question is not the difficult one whether such behavior can occur or does occur,<sup>299</sup> but one of the outlook of the participants.

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be important for understanding a cultural willingness to mediate. Emphasis on personal relations may discourage assertion of rights and evolution of conceptual dichotomies.

Consciousness of exchange is, of course, one of the most important "conceptual dichotomies" which can affect human behavior.

296. Witness this process in any souring or otherwise declining relationship, whether it is a couple really beginning to think of *meum et tuum* (especially *meum*) as the marriage slides towards break-up, or an employee nearing retirement, or business partners beginning to go separate ways, or the termination of a business consortium. These are times when the counting begins in earnest.

297. At best, because at worst lies the motivation of taking what is needed or wanted and returning nothing; might takes what it can and gives nothing. This of course is even more destructive of relations, except when participants actually prefer such selfishness in others in order to satisfy certain kinds of psychological needs.

298. BLAU, *supra* note 78; Homans, *Social Behavior as Exchange*, 63 AM. J. SOCIO. 597 (1958). See Nord, *Adam Smith and Contemporary Social Exchange Theory*, 32 AM. J. ECON. & SOCIO. 421 (1973) for a summary of current social exchange theory and an effort to show Adam Smith as the true progenitor of that theory (largely in his *The Theory of Moral Sentiments* (1759)).

299. See generally M. MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* (Cunnison transl. 1967) [hereinafter cited as MAUSS]; T. NAGEL, *THE POSSIBILITY OF ALTRUISM* (1970); R. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

Altruism has been variously defined,<sup>300</sup> and no particular definition is absolutely better than others. But the following seems useful for the purposes of this analysis: "Behavior carried out to benefit another without anticipation of rewards from external sources,"<sup>301</sup> external being taken here to mean external to the donor.

In a transaction it is clear enough that parties do not expect altruism, nor do they think it occurs. The dominance of exchange motivation drives out all else and produces such a high degree of consciousness of exchange that it would be impossible to say that the transaction is entered or carried out "without anticipation of rewards from external sources."<sup>302</sup> There is not even partial altruism in the sense of dual motivation of exchange and a purpose of unrewarded beneficence. In the true transaction attitudes of unrewarded beneficence are nonsense; worse, they are counter to the proper spirit of the whole thing. In the transactional mode nothing is free, and an even partially "altruistic" concession tends to be viewed as the beginning of an effort to impose a unilateral exchange in which the recipient of the "beneficence" will be expected to pay in full and careful measure.<sup>303</sup>

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300. For example, "the disposition of an individual to further the welfare or happiness of other individuals or groups," 2 ENCY. SOC. SCI. 14 (1930), or "self-destructive behavior performed for the benefit of others," WILSON, *supra* note 17, at 461. The former definition permits application of the adjective "altruistic" to any kind of behavior so long as it reveals a disposition to help others. Even the participants in a pure transaction could normally be so described, irrespective of the intensity of their exchange motivations, as exchange is generally beneficial to both participants. Even Scrooge before his saccharine reformation would have to be described as altruistic in this sense. Since the latter definition concerns insect behavior, the loss is either loss of life or of some life support need, *e.g.*, food. It is possible to argue that there is no difference between this definition and the definition used in the text *infra*, since the "behavior carried out to benefit another" inevitably involves a sacrifice of alternative behavior which might benefit the donor, and hence is "self-destructive."

301. ALTRUISM AND HELPING BEHAVIOR 3 (J. Macaulay & L. Berkowitz eds. 1970) [hereinafter cited as ALTRUISM]. I assume external here means external to the donor.

302. *Cf.* the discussion in the text accompanying note 245 *supra* concerning conflict of interest in planning.

303. Initiation of exchange by "gift" which carries with it some compulsion to return is a technique of creating social bonds, and in that sense is clearly relational rather than transactional. See generally MAUSS, *supra* note 299. In relations to the conferring of "altruistic" benefits may be viewed as imposing obligations of reciprocity, and these may, as BLAU, *supra* note 78, at 116, notes, be resented by the recipient. Nevertheless, such behavior is, as noted below, an integral part of human relations and within such relations therefore not shocking, as it is in a transaction. Moreover, the process is softened by the less measured and more complex subjects of relational exchange.

The concept of altruism becomes more complex in relations, and it becomes more difficult to differentiate exchange behavior from altruistic behavior. This can be vividly demonstrated by considering one of the examples that Wilson gives of altruistic insect behavior, the often fatal response of soldier insects in vigorously defending the colony.<sup>304</sup> "Theirs not to reason why, theirs but to do and die." Altruism or exchange? These sacrifices are exchange behavior only if one considers the past benefits received from the workers who feed the soldiers or the future benefits the soldiers will receive from having the colony survive while the soldier goes to the insect Valhalla. In anthropomorphic terms the soldier is either paying a debt or working towards species immortality. The concept of past debt is, I suspect, as foreign to biology as it is to common law doctrines of consideration.<sup>305</sup> The concept of species immortality is, however, by no means foreign to biology; it is a guiding, if not *the* guiding, concept applied in that field of study. The preservation of genetic material similar to that of the soldier<sup>306</sup> could certainly be conceived as a "desired" individual goal, a goal which would make colony defense by the soldier exchange rather than altruism. It would be altruism only if the soldier does not "care personally" whether the colony survives or not, an "attitude" not permitted by its genetic programming.

The reason for difficulty in deciding whether behavior such as that of the soldier ants, or its many human analogs, is altruism or exchange turns on the nature of relations, the colony in the case of insects, the contractual relation in the case of humans. Theoretically, at least, each of these relations permits behavior which could be said to be "carried out without anticipation of rewards from sources" external to the individual, carried out by the soldier insect by reason of genetic programming, by the human by reason of social or cultural programming or perhaps even by a free will exercised in a beneficent manner. But they also permit behavior carried out with anticipation of rewards external to the individual although internal to the relation

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304. WILSON, *supra* note 17, at 321.

305. I am not sure why it should be; in a very real sense the genetic programming of the soldier insect to act as she does, after being cared for by those she benefits, is a far more rigorous enforcement mechanism than any contract remedy available in the courts of the United States or any other country.

306. The peculiarities of insect reproduction, which in many of the most social species leads to particularly close genetic relationships among sisters, workers and soldiers both being females, is discussed by Wilson in terms of social implications. WILSON, *supra* note 17, at 320-35. This chapter is well worth reading for the insights it provides concerning altruism generally.

itself, rewards which the individual receives only as a member of the group forming the relation and not as a direct and measurable return for this particular behavior.<sup>307</sup> It may be virtually impossible to tell which is which in any given situation.<sup>308</sup> Nor is it really necessary for the purpose of the analysis here. Whether participants in relations believe in a "genuine" altruism of the first kind or only in the "group benefit individual exchange" altruism of the second kind makes little difference in distinguishing relations from transactions. Participants in relations can and do rationally believe in one or the other; participants in transactions can rationally believe in neither. This is a matter of significance, since beliefs in either kind of altruism can greatly affect the manner in which relations operate and what they produce.<sup>309</sup>

*c. Time-sense; presentiating the future and futurizing the present:*<sup>310</sup>

The same phenomenon relating exchange to the future may be conceptualized in two ways. Consider a (non-exchanging) squirrel. When a squirrel stores seeds and nuts is he projecting the present into the future, or is he bringing the future into the present? Obviously the squirrel neither knows nor cares since such a question can occur only to a more complex consciousness than his. For that reason our answer must be that the squirrel is doing neither; he is simply poking seeds and nuts into a hole in the tree because he receives orders to do so from genetic programming reacting to the environment. If we say that the squirrel is futurizing the present, *i.e.*, preparing for the future, or presentiating the future, *i.e.*, bringing the future into the present, we are expressing an inaccurate anthropomorphism.

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307. The reader will note the relevance of this discussion to the sharing of burdens and benefits characteristic of relations at text accompanying note 254 *supra*.

308. Cynics might deny that the first could ever actually occur, and might measure the intensity of individual motivations for group benefit solely by an individual cost-benefit analysis.

309. See generally the various experiments described by J. Macaulay and L. Berkowitz in ALTRUISM, *supra* note 301.

310. Presentiate: to make or render present in place or time; to cause to be perceived or realized as present. This old-fashioned word was described as long ago as the 1933 Oxford as rare. I could find none in current use to bring out the important psychological differences between the two processes of presentiating and futurizing and hence the resurrection of the former and the coining of the latter. We have many common words for futurizing the present, *e.g.*, planning, forecasting, promising, but only the unused word presentiate for recognizing that the same processes also render the future "present in place or time." This state of our vocabulary may reflect that modern man is, in psychological outlook, living more and more in the future; the present-in-fact is actually the past in psychological realization. Cf. A. TOFFLER, *FUTURE SHOCK* (1970).

When we turn from squirrels to human beings and their behavior in relation to the future, the differences in conceptualization may reflect genuine differences in the conscious outlook of human beings. Whether the parties to a contractual relation view themselves and are viewed by society as projecting exchange into the future or as presentiating future exchange often has a significant effect on how they and society treat the relation, and such a distinction can be useful in analyzing contractual relations.

The ultimate goal of the parties to a pure transaction is to bring *everything* from the past and *everything* from the future into the immediate present, *i.e.*, a two way presentation.<sup>311</sup> Kohler describes the second part of this process almost lyrically:

[O]bligatory relations bring the future to the aid of the present. Just as they ignore distance, and make commodities from the farthest points subject to exchange, so, too, they bridge over time, and press what the future has to bring into the service of the present. This is a tremendous aid to the development of intellectual powers; for many people can achieve more than they ordinarily would if they can obtain existing wealth in exchange for what they will have to offer in the future. It is just the most energetic and ambitious natures that can procure, in this way, the means for the production of new goods.

Thus, it is the function of the law of obligations to smooth away inequalities and chance, and thereby to make it possible for the values that are inherent in humanity to become effective in their proper proportions. In this way, it liberates development, and relieves it from the hazards of time. A great variety of values lie in the future, and for the time being, do not exist for the present: time is the stepmother of humanity; it suppresses values that deserve full recognition and application. And, in this contingency, it is the province of the law of obligations to draw the future into the present. By this means, economic life, in fact the whole world of human values, is tremendously enriched, and the future already devotes its gifts to the present.

The nations that thus "discount" the future are optimistic nations, full of the joy of production. But not all nations are so; some refuse to reach into the future: to them it is inviolably sacred, or it is nothing, and lies outside the range of commerce. This conception of the future as a blank page lying beyond our

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311. This is virtually a definition of transactionizing. See discussion in Section III(C)(6)(b) *supra*.



power is thoroughly oriental and it explains the oriental prohibition of transactions involving future values; for, in such transactions, one gives a present value for a future value which presently is not recognized by the law. Chance is an immense factor in the future, and the Orient does not concern itself with chance.

This also explains the prohibition of usury, that is to say, of taking interest; even though the money produces profit, yet this is only the result of future acquisitive activity. This future result cannot be considered at the time; and as it does not come into consideration, no equivalent value can be given for it, otherwise interest would be given in payment for nothing. From this, too, we understand why, in the Orient, the prohibition of taking interest, and the prohibition of transactions involving future things, are related and appear as one institution.<sup>312</sup>

The consequences of presentiation, whether in economic, social or psychological terms, are too immense to consider either extensively or intensively in a paper of this nature. Much of microeconomic theory seems tacitly based on presentiation assumptions; much contract law—certainly the notion of consent—implements presentiation;<sup>313</sup> the entire credit structure, including the monetary system itself, is founded on presentiation. Virtually no aspect of life in a modern society is left untouched by presentiation related to exchange.<sup>314</sup> For the purpose

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312. KOHLER, *supra* note 135, at 135-36. Some of the perils are illustrated by the following comment on an about-to-collapse 18th century Scottish bank:

Everything seemed prosperous with the Ayr Company, its proprietors being under the pleasing delusion of Mr. Micawber that every promissory note given was a payment made.

H. GRAHAM, *THE SOCIAL LIFE OF SCOTLAND IN THE EIGHTEENTH CENTURY* 525 (2d ed. 1900).

313. The demand for predictability and certainty in the law of contracts, the constant (and constantly frustrated) theme of Williston, is a manifestation of attempts at presentiation. *See also* R. POUND, *INTERPRETATIONS OF LEGAL HISTORY* 154 (1923):

In matters of property and commercial law, where the economic forms of the social interest in the general security—security of acquisitions and security of transactions—are controlling, mechanical application of fixed, detailed rules or of rigid deductions from fixed conceptions is a wise social engineering. Our economically organized society postulates certainty and predictability as to the incidents and consequences of industrial undertakings and commercial transactions extending over long periods.

*See also* Pound, *Individual Interests of Substance—Promised Advantages*, 59 *HARV. L. REV.* 1 (1945).

314. I hope to explore some of these consequences, and particularly the relation between presentiation and consent in contract law in a later article. A small step in that direction is my *Commentary: Restatement of Contracts (Second) and Presentiation*, 60 *VA. L. REV.* — (1974). For a description of the practical fundamentals involved in presentiation in the planning of manufacturers, see Mack, *Business Expectations and the Buying of Materials*, in *EXPECTATIONS, UNCERTAINTY, AND BUSINESS BEHAVIOR* 106 *et seq.* (M. Bowinan ed. 1958). In economic theory the most fundamental effect of pre-

of fleshing out the behavioral concepts considered here it is, however, sufficient simply to recognize that pure transactions are the epitome of human presentation.

Relations tend to merge past, present and future into a continuum in which the present, however sharply focused the consciousness,<sup>315</sup> is part of both the past and the future, and they part of it. This softening of the consciousness of the separation of present and future could be viewed as a form of presentation, but it is essentially different from true transactional presentation since the latter in a sense denies the future by pulling it into the present, whereas the former recognizes the future and leaves it in position. Nevertheless, in relations as well as in transactions things are done now and plans made now to deal with the future, and a recognition exists that while past, present and future are a continuum, they are nevertheless somewhat disparate parts of that continuum. When these things occur, to the extent that the relation does not lapse into transactional presentation, the present is viewed as a time of planning and preparing for the future. In psychological terms, this is not an effort to bring the future into the present, but to project the present into the future. Recognizing that the future will come (note, *not is here*), the relational participants prepare for it by planning or other anticipatory action.<sup>316</sup>

The foregoing perceptions may be illustrated by contrasting the outlook of a careful businessman buying fire insurance for his business and the outlook of the same man buying personal life insurance. He would view the risk of loss by fire as a current cost of doing business, measured (to the extent the risk of loss can be covered by insurance) by the insurance premiums. He would be properly incensed if either his accountants or the Internal Revenue Service told him that he had no cost unless he had a fire, simply because a fire, at any given moment before it starts, is a future event. His view would be that he had presentiated the future and incurred a present cost by paying the premiums. But if you were to inquire about the life insurance naming his family as beneficiary, he would view the premiums as wise prepara-

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sentiation wrought by contract law is that it permits the immediate transfer of market and other risks relating to goods and services which will not be physically delivered until later, indeed relating to goods and services not yet in existence.

315. Inevitably less than in an equivalent transaction, because most transactional processes are consciousness sharpening, whereas many relational processes are consciousness muting.

316. This difference is closely related to the difference in bindingness of planning between transactions and relations discussed in Section III(C)(6)(c)(v) *supra*.

tion by a participant in the family relation for the future as it might befall his family. Pressed, he would have to admit that the premiums are as much a cost of living *now* as the premiums on the commercial fire insurance are a cost of doing business *now*. But that would not alter the fact of his initial response; he views his business activities in a far more presentiated light than he views his family's progress through time.

The outlook of non-presentiation in relations is a psychic parallel of many of the aspects of relational planning treated earlier; it is a recognition of the limited ability of humans to bring the future into the present, and perhaps of the limited desirability of trying to do so.

d. *Expectations about trouble in performance or among the participants*: Transactions are not supposed to get into trouble. When one does the assumption automatically is made that someone messed up in planning the thing. Why? Because someone should have planned for the trouble, so that when it came it would not really be trouble at all, but simply one of the ways the transaction might work out.<sup>317</sup> What would have happened if that had been done is not one of the more mutually beneficial ways the transaction could have worked out. It is not, however, trouble in the sense of requiring further mutual planning and conflict resolution. The unrealistic character of such views in many circumstances is testified to by endless streams of disputes (up to and including litigation) arising out of relatively transactional contracts. Surely that never ending stream may be primarily attributable to the nature of the beast rather than to constant human failures to live up to a decent standard of contractual planning.<sup>318</sup> Nevertheless, such scapegoat views are widely held, particularly by the denizens of the legal system.<sup>319</sup> However unrealistic, they are really not surprising, because the thrust of virtually every behavioral concept of the pure transaction discussed earlier is in the direction of *trouble-free* presentiation of the future, however Utopian a goal that may be.

In relations, trouble is expressly or tacitly expected as a normal aspect of life, trouble requiring new planning and new conflict resolu-

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317. This is another aspect of presentiation.

318. The best laid schemes o' mice and men  
Gang aft a-gley;  
An' lea'e us nought but grief and pain,  
For promis'd joy.

—Robert Burns

319. See works by Macaulay cited *supra* note 111.

tion beyond any carried out before the trouble occurred. When it occurs it may be attributed to any number of sources. Among these may be bad planning, but they are more likely to include recognition of real or imagined defects in the present personalities of participants, pressures external to the relation, internal changes in the relation since prior planning took place, the difficulties inevitable in whole person relations extending over long periods of time, in short virtually everything which goes to make up mankind's plight in this vale of tears.

Because trouble is expected in a relation, efforts may be made in advance to deal with it transactionally, *i.e.*, to eliminate it before it occurs through resolving the conflicts in advance, thereby turning what would have been relational trouble into what is simply an allocated (presentiated) cost. (Note that this is not the same thing as preventing trouble by preventing the negative events themselves from occurring. There is a difference between installing a sprinkler system and allocating between landlord and tenant liability for future losses from fires.) But, because of the nature of relations, such transactional allocations of trouble can by no means deal with all, or maybe even most, of the difficulties that may come to trouble the relation. The expectation of trouble therefore often leads to consideration of processes for dealing with it by cooperation and other restorational techniques, *e.g.*, grievance procedures in collective bargaining agreements. Whether these are planned in advance or not they are techniques expected to be used to keep the relation from tearing apart (and thereby very likely becoming, in its death throes, highly transactional). The very existence of reliance on such techniques, whether planned in detail or left to ad hoc development, is a negation of the prior allocation principles of a transaction.

#### IV. POSTSCRIPT

This essay has been an attempt to free contract from the myth of pure transactionism which so dominates many current concepts,<sup>320</sup> to put

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320. A remark like this tends to evoke from colleagues comments about beating dead horses. Fuller, Llewellyn, the UCC, Justice Traynor, Restatement (Second), promissory estoppel, Lord Denning and heaven knows who and what else have changed everything. Have they? Look at the Table of Contents of virtually any book denominated in some fashion or other "Contracts"; look at the headings and overall structure of UCC Article 2; look at almost any course description for Contracts or its poor cousin, Business Law; look at most law review articles indexed under Contracts (and while at it, look at the index itself); look at the structure (and much of the detail) of Restatement (Second); look at the chapter on contract in one of the most recent interdisciplinary efforts, R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973); look at the

exchange in its real life context of relation, and to show promise as the limited tool it is. It is intended as an initial effort at conceptualizing contract behavior in the interplay of transaction and relation. Since I plan in future work to deal with many aspects of the theoretical model proposed here,<sup>321</sup> I intended to say little more than this in the way of conclusion to this Article. But several of the people who very kindly devoted a great deal of time to reading a late draft<sup>322</sup> expressed discontent with the absence of some normative or other connection of the conceptualizations with the real world. While this criticism appears meritorious, acting upon it poses problems.

First, I am by no means qualified to suggest what kind of impact use of the theoretical structures described here could have on analysis in disciplines other than law. One of the comments made by Professor Gellhorn, for example, was that the argument in the Article leaves open the possibility that the most effective technique of economic analysis of relations as well as of transactions might well be modern equilibrium analysis, in spite of its own primarily transactional patterns.<sup>323</sup> While I have intuitive biases partially counter to that suggestion, they are not much more than that, and certainly not of the calibre to justify firm exposition in a learned journal. It probably is presumptuous even to suggest that at the very least the conceptualizations

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analysis (although not necessarily the outcome) of most cases the judges have decided are "contract" cases. Having been thus totally immersed in transactionism, start looking at certain key relational areas, say corporations generally and industrial relations particularly. How much recognition does one find in legal scholarship, education, philosophy or application that these vital socioeconomic structures constitute patterns of exchange behavior just as much as did the sale of Rose of Aberlone, but patterns integrated with relations rather than part of relatively discrete transactions? Where, for example, in the modern legal world can one find the kinds of insights into the spectrum of relational-transactional exchange which can be found respecting primitive societies by picking up virtually any book on economic anthropology? Outside of the legal world the transactional horse may be on its last legs, but within that world it is still alive and snorting in spite of the wounds it has received.

321. *E.g.*, traditional (and neo-traditional) contract legal doctrines and the perfectly competitive market; transactional contract legal doctrines and contract relations; the roles and development of relational contract legal doctrines; the role of consent in transactional and relational contracts; and, if I can ever educate myself enough to understand what the microeconomists are really doing these days, a treatment of transactional economic analysis of contract relations.

In some respects I have already done this elsewhere. See Macneil, *Whither Contracts?*, 21 J. LEGAL ED. 403 (1969). At a pedagogical level there is much direct and indirect treatment of this subject in my American casebook, MACNEIL, *supra* note 202, and my East African casebook, I. MACNEIL, *CONTRACTS: INSTRUMENTS OF SOCIAL COOPERATION—EAST AFRICA* (1968).

322. See note \* *supra*.

323. See, *e.g.*, *Marriage*, *supra* note 91.

herein should make the builders of normative economic models just a touch less sure of themselves when they postulate or advocate *legal* structures built largely on transactional contract doctrines. In sum, as far as non-legal disciplines are concerned, I can say no more than that the theoretical structure outlined in Part III seems to me a closer approximation of what I perceive to be reality than is the discrete transactional model presupposed in much writing about exchange and contract found in some other disciplines, particularly economics.

Turning from other disciplines to law, however, it may not be amiss to consider here some of the legal implications of the proposed theoretical analysis.<sup>324</sup> What are the basic principles of contract law under a socioeconomic structure theorized in terms of the primal roots of contract and relational-transactional axes of behavior? This postscript is an attempt to answer that question in skeletal form, and to examine some of the consequences of the answer.

Consideration of a preliminary question is required: *Can* there be any basic principles of contract law, or is the notion a delusion? In a seminal article, Professor Clyde Summers asserts that the "legal rules governing everyday commercial contracts can contribute little but mischief when applied to collective agreements."<sup>325</sup> He implies the same conclusion about the contribution to everyday commercial contracts<sup>326</sup> of specific rules governing collective bargaining agreements. He presumably would apply these conclusions to any attempted integration of the "legal rules" of any specific kind of relational contract with any other kind of contract, relational or transactional. The specific legal rules of corporation law, for example, would surely "contribute little but mischief" not only to "everyday commercial contracts" but also to collective bargaining agreements or to franchising.

Summers, however, goes on to argue persuasively for the usefulness of an integration of the basic principles of contracts of all kinds,<sup>327</sup> and then describes the nature of these basic principles:

We no longer expect to find common rules and principles except at the most basic level, framed in the most general terms. It

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324. Reserving the right of partial or even total modification in the future.

325. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 527 (1969) [hereinafter cited as Summers].

326. By everyday commercial contracts Summers means something very close to what I mean by transactions, *i.e.*, they are characterized by discreteness.

327. As the title of his article suggests, his focal point is primarily the integration of the basic principles of collective agreements with what is herein called transactional contracts, but he envisages a broader integration encompassing all kinds of contracts.

would seem a reasonable guess, in fact, that the principles common to the whole range of contractual transactions<sup>328</sup> are relatively few and of such generality and competing character that they should not be stated as legal rules at all. Indeed, they may be nothing more than a set of common problems radiating from centers of tension such as that between subjective and objective tests of agreement, between arms-length and fiduciary relations of the parties, and between freedom of contract and social control.<sup>320</sup>

Summers proceeds to formulate some "sets of common problems."<sup>330</sup> While his formulations purport to be neither comprehensive nor fully developed, they nevertheless lend considerable weight to his persuasive argument that there are indeed broad principles running through all of contracts, transactional and relational.<sup>331</sup> They leave open, however, the questions of how and if more comprehensive formulations might be developed. The following suggests a possible approach and some of its likely radiations.

The broad principles of contract law running through all contracts, relational and transactional, are norms growing out of the four primal roots of contract. They may be characterized as follows: (1)

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328. Summers uses the term "transactions" far more broadly than it is used throughout this Article, uncircumscribed by the notion of discreteness. It is clear from his article that he means the phrase "contractual transactions" to include most, if not all, exchange relations in addition to discrete exchange transactions, the latter often being referred to by him as "everyday commercial contracts."

329. Summers, *supra* note 325, at 568.

330. His formulations do not lend themselves to easy and brief recapitulation, but I think it not inaccurate to say that he centers his attention on three: (1) an obligation of good faith (in bargaining, terminating, conveying information and not overreaching); (2) a principle calling for the drawing forth of purposes underlying express terms, which in turn operate as implied limitations on other aspects of the relation (including limitations on other express terms?); (3) a broad principle of procedural regularity. *Id.* at 568-74.

The difficulties of getting courts to think along lines suggested by Summers is illustrated by *Local Union No. 186 v. Armour & Co.*, 446 F.2d 610 (6th Cir. 1971), where the court cites Summers approvingly and then uses legal rules in precisely the way he says they should not be used.

331. Summers pushes for what he describes as a comparative approach:

Like the law of insurance contracts, the law of leases, the law of partnership agreements, and many other special contractual transactions, the law of collective agreements is a part of that amorphous field of law which might best be labeled the law of contractual transactions. Each of these categories has its own identity, for each has its own body of rules shaped by the special economic, social, institutional, and legal conditions surrounding the type of transaction with which it is concerned. If the "law of contracts" is to be conceived as encompassing all contractual transactions, it must not be conceptualized as a single body of law but as a family of bodies of law, interrelated but each distinctive. The study of contract law then becomes a study of comparative law.

Summers, *supra* note 325, at 567.

reciprocity; (2) role effectuation; (3) limited freedom of exercise of choice; (4) effectuation of planning; and (5) harmonizing of contracts with their internal and external social matrices. These are by no means watertight compartments, and in a sense all of them arise from all the primal roots. Nevertheless, as the following discussion shows, several have a particular connection with a particular root.

Specialization of labor and exchange yield both the norm of *reciprocity* and the norm of *role effectuation*. Reciprocity recognizes as fundamental the idea that exchange is a process of mutual, not unilateral, benefit. To implement such a norm, the touchstone of more specific legal principles and rules must be the fostering of mutuality of benefit.<sup>332</sup> Closely related but distinguishable from the norm of reciprocity is the norm of role effectuation. A role is "the pattern of behavior expected of the incumbent of a given social position when interacting with the incumbents of other given positions."<sup>333</sup> Specialization of labor is, of course, the prime producer of roles in exchange transactions and relations. The norm of role effectuation reflects the desirability of achieving such goals as the maintenance of consistency of role behavior and of harmonizing inconsistent or conflicting roles.

The norm of *limited freedom of exercise of choice* is, of course, most closely connected with the second primal root of contract, a sense of choice. It is what Summers calls a "center of tension,"<sup>334</sup> and

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332. Concepts of expectation, reliance and restitution interests seem to me to be extremely valuable middle level principles, useful in determining how the norm of reciprocity, as well as the other norms suggested here, are to be effectuated in given situations. In the total contract context (as distinguished from the context of transactional contract alone) they have limited value, however, as ultimate touchstones. To use them requires answers to three questions: what expectations should be effectuated? what reliance on what should be protected? what enrichment is unjust? In discrete transactions the answers to these questions flow in large measure from consent and the dominating role assigned to it by transactional contract law. But to answer these questions across the entire range of contracts we must return to even more fundamental norms, such as the norm of reciprocity.

Similarly, I would describe two of Summers' formulations of principle—good faith and procedural regularity, *see* note 330 *supra*—as middle level principles with bases in more fundamental norms, or possibly as aspects of the definition of those norms, particularly that of harmonizing of contracts with their internal and external social matrices.

333. ELEMENTARY SOCIOLOGY, *supra* note 161, at 22. Caplow discusses briefly the differences between complementary and identical roles, and the norm of reciprocity present in both types. *Id.* at 23. *See also* SOCIOLOGY, *supra* note 94, at 18-20. A close connection exists between the concept of complementary and identical roles and Durkheim's distinction between organic and mechanical solidarity. *See* notes 20 and 56 *supra*.

334. *See* text accompanying note 329 *supra*.



consists of a recognition that free exercise of choice is a social desideratum, as is the limitation of that freedom. The tension is inherent in the notion of contract itself: freedom of contract means the freedom to exercise a choice which, if exercised one way, will result in severe limitations on choice in the future, *i.e.*, restraints imposed by the potential consequences of breaching the contract made by the first exercise.<sup>335</sup> When the choice is made initially in favor of binding the future, that exercise thereafter becomes important primarily because it defines (at least in part) just how the future is bound and because it brings into play all the other norms.

The norm of *effectuating planning* arises from the force of all of the primal roots in fairly equal distribution. Conscious awareness of past, present and future provides the sense of both a possibility of and a need for effective planning to cope with the future; specialization of labor and exchange inevitably involve activities which must be planned to be socially useful; planning is accomplished by the exercise of choice; and the social matrix of every contract transaction and relation demands effective planning.

Finally, the social matrix primal root of contract yields the norm of *harmonizing the transaction or relation with its social matrix, both external and internal*.

Although one of the five normative principles, limited freedom of choice, is internally conflicting, and each will sometimes, perhaps often, get in the way of others, as a whole they are something a good deal more than Summers' "set of common problems radiating from centers of tension."<sup>336</sup> They can, I believe, be serviceable as the foundations for framing more specific legal principles<sup>337</sup> and finally fairly precise legal rules.<sup>338</sup> Moreover, they can serve as touchstones for testing the efficacy of those more precise rules in accomplishing their underlying purposes.

Since this postscript is but a brief introduction to this subject I

335. Freedom of contract is in this, one of its common usages, a freedom to subject oneself to the power of contract. See 6A A. CORBIN, CONTRACTS § 1376 (1962); J. HALL, COMPARATIVE LAW AND SOCIAL THEORY 143 (1963); Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495 (1962).

336. See text accompanying note 329 *supra*.

337. See note 332 *supra* for some of the most important middle level principles; they too can probably be developed into a higher degree of specificity and still retain universality.

338. Certainly the latter and probably the former will often vary markedly among contract types. Accord, Summers, *supra* note 325.

shall consider here just two specific legal rules of seemingly markedly different nature to see how they reflect the five normative principles and how they relate to three of the transactional-relational axes:<sup>339</sup> (1) measurability and actual measurement of exchange and other factors; (2) future cooperation; and (3) participant recognition of exchange.

The first rule is UCC § 2-708(1): "the measure of damages for non-acceptance . . . by the buyer is the difference between the market price . . . and the unpaid contract price."

UCC § 2-708(1) is a highly transactional legal rule. It recognizes as precisely as any monetary damage remedy can, the carefully measured exchange where one side is money and the other side (goods) is easily monetized.<sup>340</sup> Further, it is founded on the assumption that no further cooperation among the parties will be forthcoming, since nothing more than execution of a money judgment will follow from the application of the rule.<sup>341</sup> And, since it is a calculation of damages in terms of the expectations of the parties based on their high consciousness of exchange, it matches that particular transactional outlook.<sup>342</sup>

A rule such as the clear expectation rule of UCC § 2-708(1) fits all five of the broad normative principles of contract law. The norm of *reciprocity* is achieved since the rule produces as closely as possible the same reciprocity the parties tried to achieve in their initial planning.<sup>343</sup> It also *effectuates the roles* played by the parties as deliberate shifters of specific and circumscribed risks, or more colloquially as participants in a deal. Such a rule also fully implements the original *exercise of choice* of the parties. At the same time it demonstrates the minimum, but still real, *limitation on future choice* resulting from the original exercise, since the rule prevents the breaching buyer from choosing to escape the consequences of the original

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339. These are numbers 2, 7, and 12(A), respectively on the chart at pp. 738-40 *supra*.

340. When monetization is difficult, *i.e.*, where a good market for the goods does not exist at the pertinent times, the rule runs into problems, and special provisions are required to deal with the situation. See UNIFORM COMMERCIAL CODE § 2-723(2).

341. It is transactional with respect to all the other transactional characteristics as well, but for the sake of brevity specific analysis of the others is omitted here.

342. In view of the modesty of the commitment of the legal system to this remedy, *e.g.*, disallowing attorney's fees, this is an overstatement.

343. It will be noted that in many circumstances, *e.g.*, in the case of unconscionable pricing, the genuineness of the original "reciprocity" may be called into question. In such cases we are likely to find erosions of a rule like § 2-708(1) through the use of other rules, *e.g.*, UCC § 2-302.

deal. Similarly, since the function of the original planning was to exchange risks of owning the goods for risks of owning money—and the expectation rule of § 2-708(1) does this as to market risks—the rule follows the norm of *effectuating planning*. Finally, by giving full effect to all of the foregoing, it *harmonizes the transaction with the social matrix*—including its language—<sup>344</sup> in this case a matrix heavily oriented to market processes.

The second specific legal rule operates at the relational end of the spectrum. Wisconsin Family Code Section 247.081(1) provides:

In every action for divorce . . . the family court commissioner shall cause an effort to be made to effect a reconciliation . . . either by his own efforts and the efforts of a family court conciliation department . . . or by referring such parties to and having them voluntarily consult the director of the . . . public welfare department, a county mental health or guidance clinic, a clergyman, or a child welfare agency . . ., or by other suitable means. . . .

The process orientation of this legal rule is highly consistent with the fact that in marital relations both exchanges and other factors are difficult to monetize or otherwise measure, and that when the relations are harmonious the parties monetize and measure them relatively little, at least with any degree of precision. The rule also recognizes that successful continuation of the relation is entirely dependent upon future cooperation in both performance and planning. And finally it harmonizes with the fact that in successful relations party consciousness of exchange is relatively low.<sup>345</sup>

In spite of its vast differences from UCC § 2-708(1), the push toward conciliation given by Wisconsin Family Code Section 247.081(1) also harmonizes with all five of the broad normative principles of contract law. Since the goal of the provision is restoration of a viable marital relation, a highly reciprocal arrangement, the norm of

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344. The entire objective theory of contract may be viewed as a massive effort to harmonize transactional contract law with basic social demands for stability of language.

345. It was noted earlier in Section III(C)(6)(b) that when relations break down they tend to become transactionized. Thus at the time the Wisconsin provision may be invoked, party perception of exchange is likely to be extremely high ("He owes that much to me, I've given him the best years of my life." "Get the best deal you can on custody of the kids, but for crying out loud, keep the alimony reasonable.") The reconciliation therefore can be viewed in part as an effort to lower the consciousness of exchange to viable levels.

*reciprocity* is fulfilled whenever the reconciliation works. So too, a primary aim of the counselling must be the *refurbishing of differentiated roles* acceptable to the parties. A mutually viable balance of *freedom of choice and of limitations thereon* must be reached. Further, the process of counselling must be founded on the *fundamentals of the initial marital planning, i.e., to live together (and, often, to raise a family)*.<sup>346</sup> Finally, the legal push towards conciliation can be successful only if the counselling leads to a harmonization of the marital relation with the demands imposed on it by external society and by the internal society it seeks to recreate. In words used here that means *harmonization with both the internal and external aspects of the social matrix*.<sup>347</sup>

The foregoing illustrations of the interplay of specific contract rules, of transactional-relational characteristics, and of basic contract norms are not intended in any way to be definitive. They do show, however, how markedly different legal rules can be seen as effectutors of the same basic contract norms, the differences in the rules themselves resulting from the transactional-relational balances in the contracts in question. Taking that proposition as given rather than proved, we can now examine some of the consequences.

First, it is quite plain that acceptance of this analysis as a jurisprudential framework would work no general overthrow of present transactional contract doctrines. Those doctrines have developed in response to needs of parties in transactions, and as long as transactions remain a significant aspect of the economy the doctrines will continue to perform useful functions. On the other hand, I believe that partly for lack of anything better, and partly for other reasons, transactional contract doctrines all too often are used in circumstances where they are at best useless as tools of functional analysis and at worst misleading.<sup>348</sup> They do not in such circumstances lead the lawmaker or law-

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346. In some cases circumstances may have so changed since marriage that what is achieved does not much fit the original planning. For example, at marriage the parties wanted to live closely together and raise a family. Twenty-five years later the family is grown up and the only viable relation may be one with a high degree of spousal independence, even in distance, as may happen where two careers are involved. Even in such cases, however, reconciliation is likely to pattern on relatively recent efforts of the parties, however abortive, to plan for the new and more independent style.

347. This by no means is to suggest that it must harmonize with some "ideal family" concept. The external society with which the relation is most concerned may be some arcane sub-culture and the internal society may be one that would seem quite strange and unworkable to those adhering to more common patterns.

348. *E.g.*, UCC § 2-207, dealing with variances between offer and acceptance.

user to consider the things needing consideration if a result in harmony with basic contract norms is to be reached except by sheer luck. To the extent that useful legal doctrines can be developed out of contract norms such as those described herein, they might be expected to supersede transactional contract doctrines in the legal treatment of contract relations. Such shrinkage of the areas of pertinence of transactional doctrine has, of course, been occurring for a long time,<sup>340</sup> but it might be hastened by increased development of encompassing legal theories patterned on contract norms which are as basic to relations as they are to transactions.

Second, closely connected with the first point, I believe that the theoretical framework of transactional-relational patterns described here, coupled with recognition of the basic normative principles of contract, could be a basis for a reunification of the law of contract. In 1920 Williston said "[t]he law of contracts . . . after starting with some degree of unity now tends from its very size to fall apart."<sup>350</sup> Williston undertook to remedy this both in his texts and in the Restatement by endeavoring "to treat the subject of contracts as a whole, and to show the wide range of application of its principles."<sup>351</sup> It is hardly necessary to recapitulate here the story of the ultimate failure of the efforts of Williston and other Willistonians to restore unity to the law of contracts.<sup>352</sup> Since 1920 it has become less rather than more unified. This has not been, as implied by Williston, primarily because of the massiveness of the corpus juris of contract.<sup>353</sup> Rather it has resulted from a fundamental weakness in the Willistonian system, based as it is almost entirely on transactional concepts. That system simply could not cope with extensive relationizing of exchange behavior, and whenever such behavior was significant enough to be important, the legal structure spun new webs of law for it, such as labor

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349. This is by no means limited to old-fashioned, pre-realist, pre-UCC, pre-Restatement (Second) contract doctrine. See generally L. FRIEDMAN, *CONTRACT LAW IN AMERICA; A SOCIAL AND ECONOMIC CASE STUDY* (1965). Cf. Summers, *supra* note 325, at 536-37.

Collective agreements are not "ordinary contracts," but neither are construction contracts, lease purchase agreements, requirements contracts, dealership franchises, insurance policies, stock certificates, and a lawyer's retainer.

350. 1 S. WILLISTON, *CONTRACTS* iii (1920).

351. *Id.*

352. To the extent that unity has been maintained we are obliged more to non-Willistonians like Fuller who isolated unifying concepts fitting only restlessly in the Willistonian structure. See, e.g., Fuller & Perdue, *supra* note 271.

353. Even in 1920 Williston had to cope with the citation of nearly 50,000 cases. S. WILLISTON, *LIFE AND LAW* 264 (1940).

law and corporate law. So much has spun off that whatever unity may appear upon superficial examination of works on standard contract law is largely fictional.<sup>354</sup> If legal rules can be evolved more frankly based on the fundamental contract norms and recognizing the spectrum of transactional-relational contract behavior, then a conceptual unity of contract law can be achieved.<sup>355</sup> Such a unity could, I think, provide a valuable organizational pattern for assessing the normative impact of the rules of law on contract transactions and relations.

Third, and still closely related to both the foregoing points, a frank legal recognition of the relational nature of much contractual behavior could relieve transactional contract doctrine of the tremendous pressure of coping with situations for which it was never designed. Present removal of relational subject matter from the domain of transactional rules is by no means necessarily complete,<sup>356</sup> nor indeed, does it necessarily occur at all. The twistings of fact and doctrine and the fictions imposed in order to reach sound results within transactional rules can be and often are immense. The specific consequences of freeing transactional rules from such pressures can only be guessed, but they would certainly be great.

Fourth, recognition of both the basic contract norms and the relational aspects of contracts as suggested in this Article would result in more realistic analyses of the concept of consent and its limitations than is now commonly found<sup>357</sup> in the law. (And indirectly it might have a similar effect in at least some normative economics.) A particularly idealistic view of consent is essential to transactional law, a view which becomes increasingly recognizable as being unrealistic in relations. If relational and transactional analysis is treated as a unity, such recognition respecting relations would tend to cause greater recognition of the lack of realism respecting transactions as well.

In conclusion: Basic contract norms exist and are implemented by the legal system; those norms run through the whole transactional-

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354. Even the fiction is abandoned when, as is often the case, we find in works "On Contract" no treatment whatever of vast areas of relational exchange such as corporate structures, franchising, leasing, labor agreements, etc.

355. Whether it is worth the effort is another matter, but that consideration does not always deter creators of abstract systems.

356. *E.g.*, *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). See particularly Justice Frankfurter's highly transactional views in a highly relational situation. *Id.* at 471-76 (Frankfurter, J., dissenting).

357. Except sporadically, and then mainly in relief-of-consumer situations.

relational spectrum; they result in specific legal rules of widely differing content; the differences, particularly when they are effective in implementing the norms, are dependent upon locus in the transactional-relational spectrum; the specific rules can, with adequate recognition of transactional-relational differences, be tested against the basic contract norms; a reunification of contract law based on the foregoing is possible; such a reunification might lead to more effective administration of contract justice than is presently achieved when the only general contract law is transactional and when relational contract law is specific to substantive areas.