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CONTRACTS: ADJUSTMENT OF LONG-TERM  
ECONOMIC RELATIONS UNDER CLASSICAL,  
NEOCLASSICAL, AND RELATIONAL CON-  
TRACT LAW

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INTRODUCTION

This article concerns the constant clash in modern economic struc-  
tures between the need for stability and the need to respond to change.<sup>1</sup>

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<sup>1</sup> This paper has grown out of prior published work and of working papers prepared for a number of conferences and seminars: Conference of Polish and American Jurists, Lancut,

The range of the conflict is, of course, immense. This article is aimed at but one segment of the problem: that centered around contractual ways of organizing production and distribution of goods and services. It focuses initially on the relation between classical and neoclassical contract law<sup>2</sup> and the organization of production and distribution in flexible patterns that stress discrete transactional characteristics.<sup>3</sup> It then treats the changes in planning and dispute resolution techniques required where the need for flexibility and change exceeds the dispute-resolving capabilities of a system of neoclassical law.

Variations of the following four questions form the core of the article:

1. How is flexibility planned into economic relations and what is the legal response to such planning?
2. How is conflict between specific planning and needs to adapt to subsequent change in circumstances treated?
3. How are contractual relations preserved when conflicts arise?
4. How are economic activities terminated when they have outlived their usefulness?

The first section focuses on these issues in a system dominated by discrete transactions, the second on a system with substantial infusions of relational patterns. The third section deals with highly relational patterns, where the first three questions tend to merge, and contains a separate discussion of the fourth question.

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Poland, 1974; Hungarian-American Conference on Contract Law and Problems of Large-Scale Enterprise, The Parker School of Foreign and Comparative Law, Columbia University, 1975; Legal Theory Workshop, Yale Law School, 1975; Harvard Law School Faculty Seminar, 1977; Organizations Workshop, University of Pennsylvania, 1977. I am indebted to the sponsors of these conferences and seminars for providing opportunities to air these and other ideas and to the many participants for supplying insights, criticism, and encouragement. In order to make the article complete within itself, it has been necessary at a number of points to repeat parts of articles published earlier—a fact noted where it occurs. This article was written in summer 1977, and references have not been updated across-the-board since then.

<sup>2</sup> Classical contract law refers (in American terms) to that developed in the 19th century and brought to its pinnacle by Samuel Williston in *THE LAW OF CONTRACTS* (1920) and in the *RESTATEMENT OF CONTRACTS* (1932). Neoclassical contract law refers to a body of contract law founded on that system in overall structure but considerably modified in some, although by no means all, of its detail. The latter is epitomized by the U.C.C. Art. 2, and *RESTATEMENT (SECOND) OF CONTRACTS* (Tent. Drafts, 1973-78). See generally Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589 (1974), [hereinafter cited as *Presentation*], where, however, both classical and neoclassical contract law are designated "traditional contract law."

The Uniform Commercial Code is hereinafter cited as U.C.C. or Code. All citations are to the 1972 official text unless otherwise indicated.

<sup>3</sup> See note 9 and accompanying text *infra*.

## DISCRETE TRANSACTIONS: CLASSICAL CONTRACT LAW

*The Nature of Discrete Transactions*

A *truly* discrete exchange transaction would be entirely separate not only from all other present relations but from all past and future relations as well. In short, it could occur, if at all, only between total strangers, brought together by chance (not by any common social structure, since that link constitutes at least the rudiments of a relation outside the transaction). Moreover, each party would have to be completely sure of never again seeing or having anything else to do with the other. Such an event could involve only a barter of goods, since even money available to one and acceptable to the other postulates some kind of common social structure. Moreover, everything must happen quickly lest the parties should develop some kind of a relation impacting on the transaction so as to deprive it of discreteness. For example, bargaining about quantities or other aspects of the transaction can erode discreteness, as certainly does any effort to project the transaction into the future through promises.

The characteristics of entirely discrete transactions, if they could occur at all,<sup>4</sup> deprive them of any utility as social tools of production and distribution of scarce goods and services. That fact by no means, however, renders the construct useless as a tool of economic or legal analysis, because some discreteness is present in all exchange transactions and relations. One must simply not forget that great modification is required before the model can represent a reasonably accurate picture of actual economic life. (Unfortunately, this kind of forgetfulness is an endemic problem in both economics and law.) When so modified, the construct will no longer represent an entirely discrete transaction, but will retain substantial discreteness while nevertheless remaining relatively realistic.

We do find in real life many quite discrete transactions: little personal involvement of the parties, communications largely or entirely linguistic<sup>5</sup> and limited to the subject matter of transaction, the subjects of exchange consisting of an easily monetized commodity and money,<sup>6</sup> little

<sup>4</sup> The transactions of the theoretical perfectly competitive market defined in old-fashioned terms come very close, but only because the relational effects of social structures such as acceptable money are stripped out in the model: *e.g.*, money is treated like coconuts in the sense that it is assumed to have some value to the seller, but has zero impact in creating any extra-transactional relation between the participants in the market. See notes 5, 6, 10 *infra*.

<sup>5</sup> The existence of a common language itself erodes discreteness since it postulates a common social structure.

<sup>6</sup> The availability of money presupposes a strong, existing socioeconomic relation between the parties; nevertheless the "cash nexus" relationship is such an impersonal one as to have little effect in reducing many of the characteristics of discreteness in the transaction.

or no social<sup>7</sup> or secondary exchange,<sup>8</sup> and no significant past relations nor likely future relations.<sup>9</sup> For example, a cash purchase of gasoline at a station on the New Jersey Turnpike by someone rarely traveling the road is such a quite discrete transaction.<sup>10</sup> Such quite discrete transactions<sup>11</sup> are no rarity in modern technological societies. They have been and continue to be an extremely productive economic technique both to achieve distribution of goods<sup>12</sup> and to encourage their production.

Thus far we have dealt only with present exchanges of existing goods.<sup>13</sup> Such exchanges can, however, play but a limited role in advanced economies. Advanced economies require greater specialization of effort and more planning than can be efficiently achieved by present exchanges through discrete transactions; they require the projection of exchange into the future through planning of various kinds, that is, planning permitting and fostering the necessary degree of specialization of effort. The introduction of this key factor of futurity gives rise to the question: what happens to discreteness when exchanges are projected into the future?

<sup>7</sup> See generally P. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE (1964).

<sup>8</sup> See T. PARSONS & N. SMELSER, ECONOMY AND SOCIETY 109 (1956).

<sup>9</sup> The column headed "Extreme Transactional Pole" in the chart from Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 738-40 (1974) [hereinafter cited as *Many Futures*], set out in the Appendix, *infra*, gives the characteristics of discrete transactions in more detail.

<sup>10</sup> In real life, even the most apparently discrete transaction is deeply embedded in social relations. Thus, the gasoline purchase is embedded in a great system of property and social relations: money, a social construct, is accepted in payment; the buyer will pay instead of simply taking the gasoline because of his acquiescence in various property rights; the social structure permits the customer to approach the service station attendant, and vice versa, on the assumption that most strangers in such circumstances are not physically dangerous; communication is possible through a common language; the product, simply by being delivered through a certain pump, is not merely gasoline, but gasoline of a certain type, *e.g.*, 89 octane and free of lead, etc. For many practical purposes of analysis, whether of behavior, norms, law, or what have you, these relational aspects can be and are ignored and the transaction sensibly viewed as very discrete. But such analysis invariably must be of limited scope, and when pushed beyond a certain point is defective if the relational elements continue to be excluded from consideration. For example, an analysis of the application of caveat emptor to this "discrete" sale would be highly defective if the brand relationship were omitted from consideration.

<sup>11</sup> From here forward, unless the context indicates otherwise, the terms *discrete transaction*, *discrete*, and *transaction* will be used to describe near-discreteness, not theoretical pure discreteness. I recognize that the words *transaction* and *transactional* are often used to describe circumstances far from discreteness, but here they are always used in that more limited manner.

<sup>12</sup> Some services could also be included (*e.g.*, haircuts), but services tend generally to involve less discreteness than transactions in goods, unless the goods have service-like qualities, which is true, for example, of durables.

<sup>13</sup> While money itself projects exchanges into the future, inasmuch as it is simply a promise to pay, in a money-saturated economy such as ours we treat it as present wealth, *i.e.*, like an existing good. Our treatment of money is the ultimate in presentiation. See note 25 *infra*.

The answer is that a massive erosion of discreteness occurs. This is obvious when projection of exchange into the future occurs within structures such as the family, corporations, collective bargaining, and employment, structures obviously relational in nature. Similarly obvious are various relational ways of organizing and controlling markets, for example, the guilds of the feudal era or the planning described by Professor Galbraith in *The New Industrial State*.<sup>14</sup> But this erosion of discreteness occurs even when the projection is by direct and fairly simple promise and where the subject of exchange, if transferred immediately, would permit high levels of discreteness.<sup>15</sup>

Discreteness is lost even in the simple promise situation, because a basis for trust must exist if the promise is to be of any value. Trust in turn presupposes some kind of a relation between the parties. Whether it is that created by a shared morality, by prior experience, by the availability of legal sanction, or whatever, trust depends upon some kind of mutual relation into which the transaction is integrated. And integration into a relation is the antithesis of discreteness.<sup>16</sup>

In spite of the great leap away from pure discreteness occurring when exchange is projected into the future, promises themselves inherently create or maintain at least a certain minimum of discreteness. A promise presupposes that the promisor's individual will can affect the future at least partially free of the communal will, thus separating the individual from the rest of his society. Such separation is an element of discreteness. Promise also stresses the separateness of the promisor and the promisee, another element of discreteness. Moreover, some specificity and measured reciprocity is essential to an exchange of promises—no one in his right mind promises the world. This, again, results in an irreducible level of discreteness.

The foregoing can be seen in the following definition of contract promise: present communication of a commitment to future engagement in a specified reciprocal measured exchange. Thus, the partially discrete nature of promise permits the retention of a great deal of discreteness in

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<sup>14</sup> J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 354-62 (1967). See A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

<sup>15</sup> Other projectors of exchange are inherently more relational: command, status, social role, kinship, bureaucratic patterns, religious observation, habit, and other internalizations, to mention some. Even a market, however "free" it appears, is inevitably part of a great intertwining of property, personal, social, economic, and legal relations. (Existence of markets is, of course, one of the most important projectors of exchange into the future.)

<sup>16</sup> See Lowry, *Bargain and Contract Theory in Law and Economics*, 10 J. ECON. ISSUES 1 (1976). Unfortunately, after making this point Lowry attributes all benefits derived from the transaction to the relation in which it is embedded and concludes erroneously that bargain is therefore a zero-sum game. See I. MACNEIL, *CASES & MATERIALS ON CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS* 1-10 (2d ed. 1978) [hereinafter cited as MACNEIL, CASES 2].

transactions where promise projects exchange into the future.<sup>17</sup> Where no massive relational elements counterbalance this discreteness (as they do, for example, in the case of collective bargaining), sense is served by speaking of the contract as discrete, even though the contract is inevitably less discrete than would be an equivalent present exchange.

The combination of exchange with promise has been one of the most powerful social tools ever developed for the production of goods and services. Moreover, discreteness in transactions so projected has its own special virtues. Just as a system of discrete transactions for exchanging present goods may be an effective way to conduct business free of all sorts of extraneous social baggage, so too may discrete transaction contracts serve this function.<sup>18</sup> With this background we can now turn to the questions set out above as they relate to a system of discrete transactions.

### *Adjustment and Termination of Economic Relations in a System of Discrete Transactions*

An economic and legal system dominated by discrete transactions deals with the conflict between various needs for stability and needs for flexibility in ways described below. (The treatment following deals both with present exchanges of existing goods and with forward contracts where exchange is projected into the future. But the latter are assumed to be of a fairly discrete nature, *e.g.*, a contract for 100 tons of iron at a fixed price, delivery in one month.)

*Planning Flexibility into Economic Relations.*—Within itself, a discrete transaction is rigid, there being no intention to achieve internal flexibility. Planning for flexibility must, therefore, be achieved outside the confines of the transaction. Consider, for example, a nineteenth century manufacturer of stoves who needs iron to be cast into stove parts but does not know how many stoves he can sell. The required flexibility has to be achieved, in a pattern of discrete transactions, by keeping each iron purchase contract small in amount, thereby permitting adjustments of quantity up or down each time a contract is entered. Thus, the needed flexibility comes from the opportunity to enter or to refrain from entering the market for iron. This market is external to the transaction rather than within it. The epitome of this kind of flexibility is the purchasing of needs for immediate delivery, rather than using any kind of a forward contract

<sup>17</sup> Indeed, it ensures some measure of discreteness even in highly relational exchange patterns whenever promises so defined are utilized, as they often are, *e.g.*, in corporate indentures and collective bargaining agreements.

<sup>18</sup> As is plain upon reflection, to give effect to discreteness is to ignore externalities. Such externalities, however, are not necessarily external to the parties; they are simply external to the transaction. For example, the collateral economic loss or emotional pain suffered by a poor person having to repay a bank loan is external to that relatively discrete transaction but is borne by one of the parties. (Such costs may, of course, also have effect as externalities in the usual economic sense, *e.g.*, if the borrower robs a store in desperation.)

for future delivery. Such flexibility is reduced by use of forward contracts; the larger and longer they are, the greater is the reduction.

*Dealing with Conflict between Specific Planning and Needs to Adapt to Change Arising Thereafter.*—Only rarely in a discrete transaction will the items contracted for become useless before the forward contract is performed or become of such lessened value that the buyer either will not want them or will want them in greatly changed form.<sup>19</sup> To put this another way, only rarely will there be *within* the transaction a serious conflict between specific planning and changed needs. To return to the stove manufacturer as an example, seldom will the demand for iron stoves drop so much that the manufacturer comes to regret that he contracted for as much iron as he did.<sup>20</sup>

The discrete transaction technique does not, however, produce a paradise of stability for economic activity; the conflict between specific planning and the need to adapt to change arising thereafter still remains. In those relatively rare cases of difficulties arising while the contract remains unperformed, the conflict exists but is resolved entirely in favor of the specific planning and against the party desiring flexibility. Moreover, outside the discrete transaction, planning must go on; *e.g.*, the seller earlier built an iron smelter in order to sell in the iron market to organizations like the stove manufacturer. Except to the modest extent that the iron producer can shift the risks to the stove manufacturer and other buyers by forward contracts, the risks of change remain with the iron producer. If the demand for iron decreases greatly, the capital invested in building the iron smelter may be largely or entirely lost. Thus, in an economy built on discrete transactions, the risks of change remain but in large measure are not shifted by the transactions. When they are shifted they are shifted totally; *e.g.*, the stove manufacturer bears all those risks to the extent of the quantity for which he contracted.<sup>21</sup> In effect, the contract system does not provide planning for changes; it leaves that to the internal planning of each firm.

*Preserving Relations When Conflicts Arise.*—Where the mode of

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<sup>19</sup> This *has* to be the case or else the system will not work and will be replaced by techniques that do work.

<sup>20</sup> This is a different matter from price fluctuations, which may, of course, cause a buyer regret or euphoria for having entered a contract at a particular price. Only fluctuations seriously and adversely affecting the market in which the manufacturer sells his own finished product will cause him not to want the iron at all.

<sup>21</sup> They may, of course, be widely distributed among the stove manufacturer's stockholders and employees, for example, the stake of each of which may be relatively small compared to the whole enterprise (although not necessarily small for the stockholder or employee relative to his own assets). It will be noted, however, that such distribution occurs not by discrete transactions, but by relational contract, *i.e.*, the web of relationship of stockholders-corporation-employees. See the last column in the chart in the Appendix, *infra*.



operation is a series of discrete transactions, no significant relations exist to be preserved when conflicts arise. Inside the discrete transaction all that remains is a dispute. Outside the discrete transaction no relation (other than legal rights arising out of the dispute) exists to be preserved. Thus, all that remains is a dispute to be settled or otherwise resolved. The existence of the market that the discrete transactional system presupposes eliminates the necessity for economic relations between the firms to continue in spite of the disputes. That market, rather than continued relations between these particular parties, will supply their future needs.

*Terminating Economic Activities Outliving Their Usefulness.*—This economic need is simply a particular aspect of the need for planning flexibility into economic relations, the ultimate example of which is to scrap the specific planning altogether. If sheet steel becomes the only technologically sensible substance with which to make stoves, then the stove manufacturer simply makes no more contracts to buy iron. The iron manufacturer continues to produce iron if remaining markets make it worthwhile, or he shifts his production facilities to their next most valuable use. In extreme cases that may mean selling the facilities for scrap or even their abandonment.

\* \* \*

The foregoing description of the responses of the discrete transaction system to the conflict between needs for stability and needs for flexibility may be summarized as follows. Except interstitially, such a system does not shift the risks of loss resulting from such conflicts. Such losses are left to fall largely on the suppliers of goods and services. To the extent that shifting does occur it is total shifting, not a sharing of risks. Given this format, minimizing of risk through planning comes in the *internal* planning of firms, not in *mutual* planning between them through contract. Thus, the iron manufacturer plans for its concern about a declining demand for iron by building a smaller smelter, repairing rather than replacing on old one, etc. It will try, of course, to shift as much of that risk as possible through forward contracts with buyers like the stove manufacturer, but prevailing patterns of relatively short discrete transactions preclude much shifting by that method. In any event, there will be no planning or dealing with the conflicts or possible conflicts through cooperative risk sharing between the iron manufacturer and stove manufacturer.<sup>22</sup>

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<sup>22</sup> Professor Oliver E. Williamson pointed out to me that the foregoing description ignores the effect on risk distribution of the possible use of inventory-holding market intermediaries, e.g., warehouses. The use of an inventory-holding market intermediary in a discrete system does not, however, seem to me to affect the analysis in the text. The existence of such risk pooling enterprises will, of course, affect behavior of the markets in which both the iron manufacturer and the stove manufacturer are dealing. But, in the discrete transactional system postulated, risks of loss resulting from conflicts between

*Classical Contract Law and Discrete Transactions*

Any contract law system necessarily must implement certain norms. It must permit and encourage participation in exchange, promote reciprocity, reinforce role patterns appropriate to particular kinds of exchange relations, provide limited freedom for exercise of choice, effectuate planning, and harmonize the internal and external matrixes of particular contracts.<sup>23</sup> A contract law system reinforcing discrete contract transactions, however, must add two further goals: enhancing discreteness and enhancing presentation.<sup>24</sup>

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needs for stability and flexibility will continue and not be shifted very much by the contracts. Such risks will continue to fall largely on the suppliers of goods and services; and minimizing of risk through planning will continue to come through the internal planning of firms, not through mutual planning between them with contracts. All that will have happened is the introduction of an additional kind of firm which, because of its expertise and participation in a range of markets, is likely to be particularly efficient at dealing with aspects of the conflict between stability and flexibility. This more efficient handler may make markets work better and also lower costs to both the iron manufacturer and the stove manufacturer, but this will be done, in the system postulated, by intra-firm planning, not by inter-firm contract. It would be stretching the relational contract system too far to be useful to encompass within its scope consequences mediated among firms solely by the competitive market operating through discrete transactions. (As mentioned earlier, organized markets are a different matter and may well come within a useful definition of relational contract.)

<sup>23</sup> These norms are explored in more detail in the postscript to *Many Futures*, *supra* note 9, at 808-16. I am only slowly beginning their more extensive development.

<sup>24</sup> As already noted in the text, providing limited freedom for exercise of choice is a norm of all contracts, whether discrete or relational. But in a discrete contract the importance of this norm is elevated, perhaps ahead of all other norms. Moreover, the two particularly discrete norms singled out in the text may be viewed in large measure as implementations of this more fundamental norm of freedom of exercise of choice. It might very well have been better to analyze discrete transactions from this standpoint; that is, in terms of enhancing freedom of choice, rather than solely in terms of enhancing discreteness and enhancing presentation. My reluctance to do so is part of a broader pattern of avoidance of the hard issue of the social impact of the kind of analysis appearing in *Many Futures*, note 9 *supra*, and work following it. Since its writing I have lacked the extended periods for reflection necessary to embark on those fascinating issues. I hope to do so during a sabbatical leave in the near future. Meanwhile, I feel confident in doing no more than hinting at the broad policy issues and largely limiting analysis to a micro level.

Where it is desired to carve out certain parts of relations and treat them as discrete, these will be goals of law pertaining to such carved out "discrete transactions" as well. For example, suppose the legislature or court decides that a claim for pay allegedly due a worker should be decided outside the grievance and arbitration processes of the collective bargaining agreement because back pay is a vested individual right. This in effect treats the claim for pay as a relatively discrete transaction in which the discrete norms will likely play a large role in decision making.

Relational norms also exist: (1) harmonizing conflict within the internal social matrix of the relation, including especially harmonizing the conflict between discrete and presented behavior with nondiscrete and nonpresented behavior; and (2) preservation of the relation. (These are tentative categorizations.)

Presentiation<sup>25</sup> is a way of looking at things in which a person perceives the effect of the future on the present. It is a recognition that the course of the future is so unalterably bound by present conditions that the future has been brought effectively into the present so that it may be dealt with just as if it were in fact the present. Thus, the presentiation of a transaction involves restricting its expected future effects to those defined in the present, *i.e.*, at the inception of the transaction.<sup>26</sup> No eternal distinctions prevent treating the contract norm of enhancing presentiation as simply an aspect of the norm of enhancing discreteness. It is, however, such an important aspect of the projection of exchange into the future in discrete contracts—to say nothing of microeconomic theory—that separate treatment aids analysis significantly.

A classical contract law system implements these two norms in a number of ways.<sup>27</sup> To implement discreteness, classical law initially treats as irrelevant the identity of the parties to the transaction. Second, it transactionizes or commodifies as much as possible the subject matter of contracts, *e.g.*, it turns employment into a short-term commodity by interpreting employment contracts without express terms of duration as terminable at will.<sup>28</sup> Third, it limits strictly the sources to be considered in establishing the substantive content of the transaction. For example, formal communication (*e.g.*, writings) controls informal communication (*e.g.*, oral statements); linguistic communication controls nonlinguistic communication; and communicated circumstances (to the limited extent that any circumstances outside of “agreements” are taken into account at all) control noncommunicated circumstances (*e.g.*, status). Fourth, only

<sup>25</sup> *Presentiate* is defined in the Oxford English Dictionary as “[t]o make or render present in place or time; to cause to be perceived or realized as present.” 8 OXFORD ENGLISH DICTIONARY 1306 (1933).

<sup>26</sup> Rarely do we view future events as completely presentiated, but we often come very close, especially respecting the near term. Discreteness plays an essential role in our doing this. No one even thinks he knows enough to presentiate the future, even for a few seconds, of, say, all of New York City, or even of all of a particular industrial plant. But we might feel considerable confidence in presentiating the soon-to-come purchase of goods in our shopping cart as we wait in line at a supermarket checkout. We can do this because we think of that purchase discretely from all the rest of our own lives, the rest of society (other than the checkout clerk and the rest of the people in the line) and all the physical world more than a few feet away.

<sup>27</sup> Details of this implementation are spelled out in I. Macneil, *Contracts: The Discrete Transactional Norms* (unpublished manuscript). The simplifications appearing in this paragraph inevitably sound a bit like a parody of the classical contract system. Needless to say, the real life system, even as distilled in appellate court opinions, is far richer in complexity and conflicting aims and accomplishment than is suggested here. For example, *see* Childres & Spitz, *Status in the Law of Contract*, 47 N.Y.U.L. REV. 1 (1972). Their treatment of the effect of status on the application of the parole evidence rule is built on modern cases only, and hence pertains only to the neoclassical contract law system. But certainly the real life classical system of 1880-1910, to name one period, was never so pure as to prevent analogous analyses of actual decision-making.

<sup>28</sup> *See* Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

limited contract remedies are available, so that should the initial presentation fail to materialize because of nonperformance, the consequences are relatively predictable from the beginning and are not open-ended, as they would be, for example, if damages for unforeseeable or psychic losses were allowed. Fifth, classical contract law draws clear lines between being in and not being in a transaction; *e.g.*, rigorous and precise rules of offer and acceptance prevail with no half-way houses where only some contract interests are protected or where losses are shared. Finally, the introduction of third parties into the relation is discouraged since multiple poles of interest tend to create discreteness-destroying relations.

Since discreteness enhances the possibility and likelihood of presentation, all of the foregoing implementations of discreteness by the classical law also tend to enhance presentation. Other classical law techniques, however, are even more precisely focused on presentation.<sup>29</sup> The first of these is the equation of the legal effect of a transaction with the promises creating it. This characteristic of classical contract law is commonly explained in terms of freedom of contract, providing maximum scope to the exercise of choice. Nevertheless, a vital consequence of the use of the technique is presentation of the transaction. Closely related to the first technique is the second: supplying a precise, predictable body of law to deal with all aspects of the transaction not encompassed by the promises.<sup>30</sup> In theory, if not practice, this enables the parties to know exactly what the future holds, no matter what happens to disrupt performance. Finally, stress on expectation remedies, whether specific performance or damages measured by the value of performance, tends to bring the future into the present, since all risks, including market risks, are thereby transferred at the time the "deal is made."<sup>31</sup>

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<sup>29</sup> These could also be analyzed in terms of enhancing discreteness.

<sup>30</sup> See *Presentation*, *supra* note 2, at 592-94.

<sup>31</sup> A considerable amount of quizzical writing exists concerning the function and efficacy of expectation damages, as actually implemented in the law, *e.g.*, Vernon, *Expectancy Damages for Breach of Contract: A Primer and Critique*, 1976 WASH. U.L.Q. 179, 201-03. Such analyses commonly overlook the function of rules of law as models of customary (and by definition "desirable") behavior.

For example, the law of expectation damages says to the lender of money: "You may treat the promises of the borrower to repay the principal and agreed interest as presenting the future, because the law measures your remedy for nonperformance exactly in terms of those promises." Similarly, it says to buyers and sellers of goods: "As of the time of your contract, you have shifted the market risks of the goods from seller to buyer and you have shifted the market risks of the purchase price from the buyer to the seller." These abstract statements of legal rights may be viewed as simply mirroring the economic effects of what will happen in the vast majority of contracts which will, of course, be performed as agreed. Their function, so viewed, is to tell the world of contractors: "Your customary behavior is in accord with the aims of the law; go to it. To do otherwise is legally wrong." Problems arise with *this* function of the law not so much when particular parties do not "go to it" and the limitations of implementing the principles are revealed, but when the legal mirror is an

In summary, classical contract law very closely parallels the discrete transactional patterns described in the preceding section. Such a legal system, superimposed on economic patterns of such a nature, constitutes the stereotype of interfirm (or firm and consumer or firm and employee) contracting of the *laissez faire* era.

#### VARIATIONS FROM THE DISCRETE TRANSACTION: NEOCLASSICAL CONTRACT LAW

The discrete transaction is at one end of a spectrum, at the other end of which are contractual relations.<sup>32</sup> Were we to push far in the direction of contractual relations, we would come to the firm itself, since a firm is, in significant ways, nothing more than a very complex bundle of contractual relations.<sup>33</sup> It is not my intention at this point to push that far, but rather to confine consideration of adjustment and termination of long-term economic relations to those where it is clear that the contractual relations are *between* firms rather than *within* a firm. They are, even in traditional terms, contracts. Again, this section will be organized around variations of the questions appearing in the introduction.

#### *Planning Flexibility into Long-Term Contractual Relations and the Neoclassical Response*

Two common characteristics of long-term contracts are the existence of gaps in their planning and the presence of a range of processes and techniques used by contract planners to create flexibility in lieu of either leaving gaps or trying to plan rigidly. Prior to exploring the legal response to such planning, an examination of the major types of planning for flexibility used in modern American contracts is in order.<sup>34</sup>

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inadequate reflection of customary behavior. Thus, if some level of nonperformance becomes both routine and acceptable, at least to the extent that the injured party does not seek expectation damages, an expectation rule becomes a distorted mirror of actual contractual behavior, and "go to it" falls on deaf ears. Distortion in the mirror of legally assumed custom thwarts one of the goals of contract law: implementing intent.

<sup>32</sup> See text accompanying note 9 *supra*, and chart in the Appendix, *infra*, under the heading "Extreme Relational Pole."

<sup>33</sup> I am indebted to Professor Oliver E. Williamson for alerting me to a potential danger of saying this. The statement *appears* to accept the Alchian and Demsetz view of the firm, since they too refer to "the contractual form, called the firm." Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 778 (1972). He is perfectly correct about the danger of misinterpretation. Anyone who persists in thinking of contract solely in the unrealistic and fallacious manner in which it is typically used in the microeconomic model (as Professor Williamson himself certainly does not) will indeed conclude that the statement is an acceptance of the Alchian and Demsetz theory of the firm. Those who are aware of those fallacies should, however, have little difficulty in understanding that it is not. Two articles by economists fall in the latter category: Goldberg, *Toward an Expanded Economic Theory of Contract*, 10 J. ECON. ISSUES 45 (1976); Williamson, Wachter & Harris, *Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange*, 6 BELL J. ECON. 250 (1975).

<sup>34</sup> They are based on Macneil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627,

*Standards.*—The use of a standard uncontrolled by either of the parties to plan the contractual relation is very common. One important example is the provision in many collective bargaining agreements for adjustments of wages to reflect fluctuations in the Consumer Price Index.<sup>35</sup>

The standard incorporated may sometimes be established by third parties not altogether unrelated to the contractual relation. For example, it is common to find building contracts requiring compliance with regulations, plans, or standards of the Federal Housing Administration or the Veterans' Administration. Both of these agencies insure mortgage loans, and their regulations are promulgated to deal with mortgages they insure. Thus, although the regulations are drafted with no particular contract in mind, they aim at a class of contracts, some of which incorporate them by reference. This kind of planning merges into the technique of using direct third-party determination of performance, the subject of the following section.

*Direct Third-Party Determination of Performance.*—The role of the architect under form construction contracts of the American Institute of Architects (AIA) provides a good example of direct third-party determination of performance. The architect is responsible for determining many aspects of the performance relation, including everything from "general administration" of the contract and making final decisions "in matters relating to artistic effect" to approving the contractor's selection of a superintendent.<sup>36</sup> The use of an expert relatively independent of the parties to determine contract content is, however, no guarantee of smooth performance; witness the fairly large amount of litigation arising under the AIA contracts with respect to delays, payments, and completion of the work. This occurs in spite of the broad authority given the architect, perhaps because a recurrent problem is the scope of finality to be accorded to his determinations.

A particularly important and increasingly used technique for third-party determination of performance content is arbitration. Arbitration is best known for its utilization in resolving "rights disputes,"<sup>37</sup>—disputes about existing rights, usually growing out of existing contracts<sup>38</sup> and

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657-63 (1975) [hereinafter cited as *Primer*]. The text is a somewhat barebones treatment of the subject. Readers wishing to examine the subject in richer detail would do well to read Goldberg, *Regulation and Administered Contracts*, 7 BELL J. ECON. 426 (1976), and Williamson, *Franchise Bidding for Natural Monopolies—In General and with Respect to CATV*, 7 BELL J. ECON. 73 (1976).

<sup>35</sup> See Hurst, *Drafting Contracts in an Inflationary Era*, 28 U. FLA. L. REV. 879, 889-93 (1976); Rosenn, *Protecting Contracts from Inflation*, 33 BUS. LAW. 729 (1978).

<sup>36</sup> In addition, the architect has important functions respecting trouble and dispute resolution.

<sup>37</sup> This is a term common in industrial relations.

<sup>38</sup> An example of arbitration of a noncontract rights dispute would be the submission to arbitration of claims relating to the collision of two ships.

always substantially defined and narrowed by law at the time the arbitration takes place. Planning for the arbitration of rights disputes is an important aspect of risk planning. But arbitration is also used for filling gaps in performance planning, *e.g.*, in industrial relations where the inability of management and labor to negotiate on their own the performance terms of a collective bargaining agreement is known as an "interest dispute."<sup>39</sup> Collective bargaining agreements are not, however, the only agreements that leave open issues relating to future performance and provide for their arbitration. For example, certain joint ventures among design professionals may leave important aspects open to arbitration to provide necessary flexibility.<sup>40</sup>

Interest disputes and hence their arbitration are inherently more open-ended than rights disputes. In the latter, the very notion of "rights"—whether they are based on contract terms or other legal sources, such as the rules of tort law—circumscribes the scope of poten-

<sup>39</sup> See NATIONAL ACADEMY OF ARBITRATORS, *ARBITRATION OF INTEREST DISPUTES* (1974). Although the distinction between a rights dispute and an interest dispute can be easily verbalized, it may be difficult to perceive both in practice and in theory. In an interest dispute the status quo may be as rigid a definer of future rights as would be any express agreement.

Throughout the history of interest arbitration in the newspaper publishing industry, there has been one principle upon which all of the decisions have been based, regardless of whether the specific issue was wages, hours, or manning. Arbitrators will leave the parties where they found them unless that party which seeks a change in the previous bargain, assuming that it was equitable, demonstrates that sufficient changes have occurred which warrant the alteration of the previous bargain.

Adair, *The Arbitration of Wage and Manning Disputes in the Newspaper Industry*, in *id.*, at 31, 47. The current great growth area of interest arbitration is in public employment collective bargaining. See Anderson, MacDonald, & O'Reilly, *Impasse Resolution in Public Sector Collective Bargaining—An Examination of Compulsory Interest Arbitration in New York*, 51 ST. JOHN'S L. REV. 453 (1977).

<sup>40</sup> See Aksent, *Legal Considerations in Using Arbitration Clauses to Resolve Future Problems Which May Arise During Long-Term Business Agreements*, 28 BUS. LAW. 595, 599 (1973):

One or more architects will join with various engineers to provide complete design work and supervision for a large project and generally the intention is to use the strengths of each firm and provide for a maximum of efficiency and profit at the negotiation stage. Before the job has been undertaken, the parties must attempt to ascertain the percentage contribution of each party and division of labor and income. But, in this type of arrangement it is often impossible to predict dependably what each contribution will be in terms of work or time and it may have no relationship to the relative size of the joint ventures. Blueprints and specifications may take considerably longer than anticipated, structural design work may be more intricate than was originally believed or supervision of the job may turn out to be a much more time consuming element. If the joint venturers have tied themselves to fixed percentages of the contract price, there are gross inequities which can result. A negotiated solution which sets tentative percentages and permits arbitral adjustments in the event of changed circumstances guarantees a means of reallocating income in terms of actual work performed without either endangering the project or creating the possibility of economic oppression for one or more of the parties.

Close corporations constitute another example where such issues may arise, although most such issues are probably more likely to be risk and trouble disputes. See generally Note, *Mandatory Arbitration as a Remedy for Intra-Close Corporate Disputes*, 56 VA. L. REV. 271 (1970).

tial arbitral resolution. In theory, if not in fact, such limits are far looser or perhaps even nonexistent in interest disputes.<sup>41</sup> This calls for particular care in planning arbitration aimed at filling gaps in performance planning, and consideration must always be given to the need to include substantive limits on arbitrator authority.<sup>42</sup> In any event, the planner should be fully aware that identical general language of broad arbitration clauses applied to interest disputes lacks the situational limits usually present when the same language is applied to rights disputes.<sup>43</sup>

*One-Party Control of Terms.*—Rather than use external standards or independent third parties, the contract may provide that one of the parties to the contract will define, directly or indirectly, parts of the relation. This may go so far as to allow one party a completely free will to terminate the relation. For example, in an option contract a party may purchase the privilege of either going ahead with a contract or not doing so. One-party control of terms in the form of a “deal no-deal” option is important in certain areas of enterprise such as the financial markets, commercial real estate transactions, some kinds of commercial sales of goods,<sup>44</sup> and certain types of consumer transactions, *e.g.*, insurance.

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<sup>41</sup> But see note 39 *supra*. The lack of “rights” as the basis for resolving interest disputes has in the past led courts to hold such disputes to be nonarbitrable because they raise nonjusticiable questions. See M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* § 12.02 (1968). This has been a particularly lively area of industrial relations, and one not necessarily settled yet. See, *e.g.*, *NLRB v. Sheet Metal Workers, Local 38*, [1978] LAB. REL. REP. (BNA) (98 L.R.R.M. 2147) (2d Cir. 1978); NATIONAL ACADEMY OF ARBITRATORS, note 39 *supra*.

<sup>42</sup> For example, in the design contracts described in note 40 *supra*, thought might be given to the inclusion of floors or ceilings on percentages to be allowed the various parties. These may also help in some jurisdictions to make legally arbitrable issues the court might otherwise possibly find nonarbitrable because it finds them nonjusticiable.

<sup>43</sup> While arbitrators are less bound by terms of agreements and legal rules than are courts in the sense that a court may often be unable to overrule arbitrators as readily as it could the decision of a lower court in similar circumstances, arbitrators too are part of a society of contract and law. They too in rights disputes tend to follow both agreement terms and law. Even the more expansive proponents of arbitrator discretion in labor relations are very modest in suggesting departures from those hoary standards. For a good summary of varying views of the arbitrator's role in labor arbitration, see Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. Rev. 3.

<sup>44</sup> One example is blanket orders, used extensively by some manufacturers, particularly automobile manufacturers.

The term “blanket order” is often applied to requirements contracts, particularly those in which the obligation of the buyer to purchase may be quite illusory. This is commonly the case with automobile manufacturers' parts orders reserving broad rights to cancel. Under its terms, such a blanket order becomes a firm obligation of the automobile manufacturer only when it sends the supplier a direction to ship a certain number of parts “contracted for” earlier under the blanket order. Nevertheless, the position of the manufacturer is so strong that even such a one-sided arrangement elicits a great deal of cooperation from the supplier. Professor Stewart Macaulay recorded the following from an interview of a supplier:

When you deal with Ford, you get a release which tells you to ship so many items in January and gives an estimate on February and March. Ford is committed to take or pay for the February estimate even if it cancels. However, it is not bound to take the parts estimated for March if it cancels in February. One fabricates the



Whenever a party is not clearly paying for the privilege of retaining a free will not to perform his own contractual "obligations," the contract drafter wanting to give that party such freedom walks a narrow line between rigid planning and the danger that the consideration doctrine will make that party's "rights" unenforceable.<sup>45</sup> To cope with the difficulties created by its own doctrine of consideration, the transactional legal structure has produced a wide range of concepts, provisions, techniques, and other devices limiting the impact of the doctrine.<sup>46</sup> The drafter desiring to achieve workable flexibility must be aware both of the limitations the law imposes on available techniques and the opportunities the law offers.

*Cost.*—A very common technique for achieving flexibility is to provide that compensation for goods or services shall be the cost to the provider, with or without an additional fee (specified in amount or a percentage of the cost or otherwise determined) and with or without definition of what constitutes cost. This technique in a sense combines all of the preceding three. First, this technique utilizes a standard, namely, those of the markets in which the goods and services are purchased. Second, this technique utilizes an element of direct third-party determination in that, while the prices in those markets may be determined without regard to this particular contract, in many cases subcontractors and suppliers will be fixing their own prices with complete awareness of the contract. Finally, there is an element of one-party control since the supplier of the goods and services inevitably has some control over his own costs and hence over the price term of the contract. In general this important technique raises no problems for neoclassical contract law. It may, of course, raise many problems in applying that law to particular situations, over such issues as the definition of costs, assignment of overhead, and the like.

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March parts at his own risk, but Ford tries to encourage its suppliers to take this risk so there will be an inventory to handle sudden increased orders. In the example just given, it would be in Ford's interest to pay some of the cost of the March parts to encourage companies to go ahead. If you are a good supplier, it might give you some consideration, but it doesn't have to.

I. MACNEIL, *CASES & MATERIALS ON CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONSHIPS* 70 (1971). The legal enforceability of blanket orders in the absence of a specific order is, however, far from clear; their enforcement mechanism apparently turns largely, if not entirely, on the desire of the supplier to continue doing business with the manufacturer.

<sup>45</sup> To the extent, if any, that the doctrine of mutuality adds to the scope of nonenforceability beyond the scope imposed by simple consideration doctrine, the line may be narrowed even further. See J. MURRAY, *MURRAY ON CONTRACTS* § 90 (2d rev. ed. 1974).

<sup>46</sup> For example, protection of contract interests such as the restitutionary and perhaps reliance interests, even when "contracts" are not fully enforceable; developing good faith limitations of various kinds on exercise of one-party controls; manipulation of consideration doctrines; implied obligations; and judicial interpretations contrary to complete one-sidedness. See generally Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

*Agreement to Agree.*—A flexible technique used more often than one might initially expect is an “agreement to agree.” Since parties can almost always agree later to fill gaps in their relation, such an express provision seems pointless, particularly since, if taken literally, it is meaningless. But common human behavior patterns are seldom if ever pointless, and this is no exception. In general, parties probably use the technique because they are not yet prepared to agree on details requiring agreement, but they want to emphasize to each other that resolution will be required and to express a willingness to engage in the processes of agreement at the appropriate time. These processes undoubtedly more often than not lead to future agreement; but when and if difficulty later ensues in trying to reach agreement, a gap in the contract is revealed. The law should treat such gaps quite similarly to other gaps. The cases are legion,<sup>47</sup> however, in which courts have said “an agreement to agree is not a contract” or some similar bit of doggerel. Often these cases involve circumstances where the court would have held a contract to exist if the gap had occurred in any other manner than a breakdown of an explicit “agreement to agree.”<sup>48</sup> Thus, the enunciation of an agreement to agree can be fatal to later securing judicial gap-filling. The planner may avoid this difficulty either by avoiding the technique entirely or by adding an alternative gap-filling technique to come into operation if the parties are unable to agree. Which of these routes is chosen depends at least in part upon how important it is to alert the parties to the need for further negotiation at the appropriate time.

As some of the legal references in the foregoing paragraphs suggest, flexible planning techniques and gaps in planning inevitably raise difficulties for any legal system implementing contractual relations. They raise particular difficulties for classical contract law systems. As already noted, one of the key goals of such a system is enhancing presentation, a goal inimical to flexibility in contract planning because the latter precludes complete predictability as of the time of the acceptance of an offer.

The neoclassical contract law system may be seen as an effort to escape partially from such rigorous presentation, but since its overall structure is essentially the same as the classical system it may often be ill-designed to raise and deal with the issues.<sup>49</sup> Nevertheless, the present neoclassical system permits a great deal of flexibility and gap-filling, as is

<sup>47</sup> For a discussion of agreements to agree and citations, see 1 P. BONASSIES, G. GORLA, J. LEYSER, W. LORENZ, I. MACNEIL, K. NEUMAYER, I. SAXENA, R. SCHLESINGER, & W. WAGNER, *FORMATION OF CONTRACTS* 458-64 (R. Schlesinger ed. 1968).

<sup>48</sup> The courts quite often draw the inference that the parties intended the expression “agreement to agree” or similar language to mean more about the consequences of non-agreement than they would have intended if they had said nothing or dealt with the issue by some other flexible technique which also failed. Such an inference is only rarely correct where extensive agreement has occurred relating to other matters, especially where some or all of the remainder of the agreement has been performed.

<sup>49</sup> This proposition is developed at length in *Presentation*, note 2 *supra*.

demonstrated by the following extract from Professor Murray's recent contract law text, an extract conveying well a sense of the limits beyond which the American neoclassical contract law system will not go in implementing flexibility.

**Proposals that are too indefinite to constitute offers.**—It seems self-evident that before a proposal can ripen into a contract, upon the exercise of the power of acceptance by the one to whom it is made, it must be definite enough so that when it is coupled with the acceptance it can be determined, with at least a reasonable degree of certainty, what the nature and extent of the obligation is which the proposer has assumed. Otherwise no basis exists for determining liability. However, it is to be emphasized that the requirement of definiteness cannot be pushed to its extreme limits. The fact is that people seldom express their intentions with complete clarity, so that if we were to take the position that any uncertainty in regard to the intentions of the parties invalidates the offer, few offers could be found. The law must of necessity draw a line short of complete definiteness. If we are to have a workable rule, all that can be safely required is that the proposal be reasonably definite. . . .

. . . .

Certain more or less common types of indefiniteness are uniformly held not to invalidate offers. Thus if one undertakes to perform definite services, or to sell ascertainable goods, or to render some other definite performance without, explicitly or by implication, specifying the price to be paid in return for the same, it is generally held that the proposal is a valid offer and that a reasonable price is the measure of the acceptor's undertaking. At least this is true where the performance offered has a market value, or the equivalent, so that some proper standard exists for determining the extent of the acceptor's liability. The theory back of this holding seems to be that a reasonable price is implicit in the offer. It is submitted that the result thus reached is desirable and that in most cases, if not in all, it agrees with the actual intention of the parties. So also, if an undertaking, that is in other respects definite, leaves indefinite the time of performance, it is uniformly held, in the absence of evidence of a contrary intention, that a reasonable time must have been understood, and the agreement will be upheld on that basis. This holding probably also agrees with the parties' actual intention, or at least with what their intention would have been had they given the matter any consideration. It is to be observed, however, that the foregoing principles are applicable only if the parties have omitted any attempt to express any intention in regard to the matters mentioned. *If they have purported to fix a price, or a time of performance, and their expression is so indefinite that its meaning cannot be determined with at least a reasonable degree of certainty, then it will be held that the agreement does not constitute a contract for want of definiteness. This is so because their very attempt to state the matter, or their understanding that it should be left for future determination through mutual agreement, makes it clear that an objectively determined reasonable price or reasonable time, as the case may be, was not contemplated and might be inconsistent with their intention.*

It is also to be noted that an agreement which is too indefinite in some material aspect for enforcement at the outset, may later become definite as the result of part performance. If performance is rendered by one party in such a way as to make definite what before was indefinite, and this performance is acquiesced in by the other party, there is no apparent reason why the agreement should not be regarded as obligatory from that time forth. The performance may be regarded as the offer which is accepted by the acquiescence of the other party. This is the result usually reached in the decided cases.<sup>50</sup>

While the foregoing extract expresses well the spirit of the neoclassical contract law system, it fails to focus on what I believe to be the fundamental principle underlying the reluctance in such a system to enforce contractual relations in the face of excessive indefiniteness. This principle is founded on the nature of choice-generated exchange and the underlying assumption that the function of a classical or neoclassical contract law system is to enhance the utilities created by choice-generated exchange but not necessarily those created by other kinds of exchange.

When *A* and *B* agree to exchange *A*'s good *X* in return for *B*'s good *Y*, we conclude, in the absence of factors other than desires for *X* and *Y* causing the agreement to occur, that the exchange will enhance the utility levels of each. Where, however, the parties neglect—to take an absurd example—to define in any way what *X* and *Y* are, the operators of a contract law system—judge or jury—can have no assurance whatever that judicial definition of *X* and *Y*, and enforcement of the exchange, will enhance the utility levels of either *A* or *B*, let alone both. The example is absurd, but it demonstrates the limits beyond which enhancement of individual utility levels cannot serve as an adequate reason for enforcing a sufficiently indefinite agreement. Beyond such a point, if enforcement is to be had, other justifications must be found, *e.g.*, avoiding unjust enrichment. Moreover, as Professor Murray suggests, parties can and do fail to define *X* and *Y* sufficiently to provide reasonable assurance to a court that enforcing the “contract” would enhance utilities on both sides as those utilities were originally viewed by the parties.<sup>51</sup> If, as is typical of discrete transactions (especially as treated by a classical or neoclassical contract law system), no other reason exists to enforce the exchange, that is the end of it.<sup>52</sup>

<sup>50</sup> J. MURRAY, *supra* note 45, § 27 (footnotes omitted) (emphasis supplied) (reprinted with permission of the author and the publisher, the Bobbs-Merrill Co.).

<sup>51</sup> Of course, by the time the legal system becomes involved in this kind of dispute it is, in relatively discrete transactions, normally no longer possible to raise utilities of both. That is why stress in the text is on the phrase “as these utilities were originally viewed by the parties.”

<sup>52</sup> The analysis in the text is consistent with that in R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.2 at 69-70 (2d ed. 1977). Posner, however, does not appear to recognize that the analysis is circumscribed by the assumptions of a discrete transactional system; such a

It will also be noted that one of the goals, mentioned earlier, of a classical contract law system is complete presentation at the time of agreement. The greater the degree of indefiniteness in an agreement, the more a court must fly in the face of this goal in enforcing the agreement. The increasing laxity of the neoclassical system about definiteness, in contrast to the classical system, reflects relaxation of this goal.

Since the neoclassical contract law system remains structured on the classical model in large measure, it too is limited by the foregoing considerations. On the other hand, the neoclassical system, being significantly more relational in nature,<sup>53</sup> can go much further than the classical system, just so long as it does not break out of the classical structure altogether. What happens when a system pushes beyond the limits even of a neoclassical structure will be discussed later.<sup>54</sup>

*Conflict between Specific Planning and Needs for Flexibility:  
The Neoclassical Response*

As a general proposition in American neoclassical contract law, specific planning in contractual relations governs in spite of changes in circumstances making such planning undesirable to one of the parties. The same principle of freedom of contract<sup>55</sup> leading to this result permits the parties, however, to adjust their relations by subsequent agreement. A description of these processes and some of the legal considerations follows.<sup>56</sup>

Adjustments of existing contractual relations occur in numerous ways. Performance itself is a kind of adjustment from original planning. Even meticulous performance of the most explicit planning transforms figments of the imagination, however precise, into a new, and therefore different, reality. A set of blueprints and specifications, however detailed, and a newly built house simply are not the same. Less explicit planning is changed even more by performance. For example, the vaguely articulated duties of a secretary are made concrete by his or her actual performance of a day's work. Perhaps this is merely a way of saying that planning is inherently filled with gaps, and that performance fills the gaps, thereby altering the relations as originally planned.

Events outside the performance of the parties also may effect adjustments in contractual relationships. The five dollars per hour promised an employee for his work in 1977 is not the same when paid in November

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circumscribed analysis may be and often is singularly inadequate when applied to indefiniteness in ongoing contractual relations.

<sup>53</sup> For a discussion of this, see *Presentation*, note 2 *supra*.

<sup>54</sup> See text accompanying notes 104-40 *infra*.

<sup>55</sup> Freedom of contract here means, of course, power of contract, *e.g.*, the power to bind oneself, by agreement, to further action or consequences to which one otherwise would not have been bound.

<sup>56</sup> The following paragraphs are based on *Primer*, *supra* note 34, at 663-66.

1977 as it was when promised at the beginning of the year; inflation and other economic developments have seen to that. More or less drastic changes in outside circumstances constantly effect contractual adjustments, however firmly the parties may appear to be holding to their original course.

Nonperformance by one of the parties without the consent of the other also alters contractual relations, although in a way different from performance. This is true no matter how many powers are available to the other party to redress the situation.

Another kind of adjustment occurring in any contractual relation is that based either on mutual agreement or on unilateral concession by one of the parties of a planned right beneficial to him. These alterations, additions, subtractions, terminations, and other changes from original planning may take place at any time during any contractual relation. This is vividly illustrated by various processes of collective bargaining, including periodic renegotiation of the "whole" contract.

When disputes arise out of contractual relations after adjustment by mutual assent or concession, does the original planning or the adjusted planning govern? Keeping in mind the exchange element basic to contractual relations and the various problems the legal system has in dealing with contractual disputes, the answer might seem to depend in any given situation on answers to the following kinds of questions:

1. How sure is it that the adjustment really was mutually agreed upon or conceded?
2. Did one party take improper advantage of the other in securing the concession or agreement?
3. Was the adjustment mutually beneficial, *e.g.*, was there an exchange element in the adjustment itself, or did only one of the parties benefit?
4. If the adjustment benefited only one party, was its purpose to alleviate some difficulty resulting from lack of prior planning or from unplanned consequences of prior planning?
5. How much had the adjustment become integrated into the relation when disputes concerning it arose, *e.g.*, was there unjust enrichment or reliance, among other things?<sup>57</sup>

No comprehensive doctrinal structure has developed in American neoclassical contract law to answer systematically the foregoing ques-

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<sup>57</sup> Other possible questions are: To what extent was the adjustment part of an ongoing and still viable relation, and to what extent was it only a settlement of disputes arising from a defunct relation? What is the reason for the attack on the adjustments?

Moreover, other ways of stating the issues are perfectly possible and perhaps more useful to anyone setting out to organize the now disorganized legal thinking in the area. For example, overlapping many of the above questions is the following: Was the adjustment in harmony with the rest of the relation, not just as originally planned, but as it had developed to the time of the adjustment in issue and thereafter?

tions.<sup>58</sup> The closest it comes to providing such a structure is the doctrine of consideration, which pervades much thinking on the subject.<sup>59</sup> Consideration doctrine, however, by no means deals comprehensively with all the questions. For one thing the doctrine normally impedes change if it operates at all, thus implementing discreteness and presentation as of the "original formation."

Where the parties are unable to agree to adjustments to reflect changes in circumstances, neoclassical contract law provides a limited array of doctrines whereby one party may escape some or all the consequences of the change. Doctrines of impossibility of performance, frustration, and mistake are used with varying degree of frequency to relieve parties.<sup>60</sup> More covert techniques such as interpretation or manipulations of technical doctrines such as offer and acceptance and rules governing conditions are also available. But as a general proposition these doctrines aim not at continuing the contractual relations but at picking up the pieces of broken contracts and allocating them between the parties on some basis deemed equitable.

Generally speaking, doctrines of the kind described in the last paragraph achieve such goals as preventing a party from recovering expectation damages when the other party has not performed or preventing unjust enrichment by allowing a party to recover a down payment (restitution) when its purpose in entering the contract has been frustrated. A slowly growing tendency in American law to go farther than this may be discerned. The following sections of the Restatement (Second) of Contracts are illustrative:

Section 292. RELIEF INCLUDING RESTITUTION; SUPPLYING A TERM

(1) In any case governed by the rules stated in this Chapter [Impracticability of Performance and Frustration of Purpose], either party may have a claim for relief including restitution under the rules stated in Section 265. . . .

(2) In any case governed by the rules stated in this Chapter, if those rules . . . will not avoid injustice, the court may, under the

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<sup>58</sup> This is not to suggest the absence of such structures respecting particular kinds of contractual relations. Certainly labor law is not only replete with doctrines centering on such adjustments, but also institutions such as the National Labor Relations Board (NLRB) produce and are affected by those doctrines. The law relating to the internal workings of corporations is another example of legal doctrines centered on constant adjustments of exchange relations.

<sup>59</sup> The cases and problems in MACNEIL, *CASES 2*, *supra* note 16, at 890-927, suggest a range of the kinds of legal issues raised. For more traditional treatment see J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS*, chs. 4 & 5 (2d ed. 1977); J. MURRAY, *supra* note 45, §§ 72-90.

<sup>60</sup> See generally, J. MURRAY, *supra* note 45, §§ 30, 124-30, 197-205. These doctrines are generally keyed back by presentation notions into the status quo of the original contract as the base point, e.g., use of the idea of tacit assumptions about the continued existence of property being transferred under the contract.

rule stated in Section 230, supply a term which is reasonable in the circumstances.<sup>61</sup>

**Section 230. SUPPLYING AN OMITTED ESSENTIAL TERM**  
When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.<sup>62</sup>

To the extent that the courts apply these rules in a suit, they will begin to provide a legal framework for continuing contractual relations in spite of major changes in circumstances. More explicit on this score are Uniform Commercial Code sections 2-614, 2-615, and 2-616.

Section 2-614 requires tender and acceptance of commercially reasonable substitute berthing, loading or unloading facilities, type of carrier or manner of delivery where those agreed upon become commercially impracticable without fault of either party. It also permits, in certain circumstances, alternative means of payment from those agreed upon. Section 2-615 requires a seller unable to meet his obligations because of specified changed circumstances to allocate his production among his customers (including, at his option, regular customers not under contract) in any manner fair and reasonable. If he does so and gives proper notice, he has not breached his duty under the contract. Under section 2-616 the buyer may then either terminate the contract (thereby discharging any unexecuted portion) or modify the contract by agreeing to take his available quota in substitution for the originally agreed-upon amount. The process under sections 2-615 and 2-616 is something more than simply a voluntary agreement adjusting the situation, since the seller must make the allocation; and the buyer refuses a proper allocation only at the expense of a discharge of the seller.

In summary, two themes may be seen in the development of neo-classical contract law. One is a gradually increasing willingness to recognize conflict between specific planning and subsequent changes in circumstances and to do something about them. The other is a more truncated recognition of the possibility of doing something when such conflicts occur beyond simply picking up the pieces of a dead contract by awarding monetary judgments to someone or refusing to do so. The latter theme merges into the more general issue of continuing relations in the face of trouble, the subject of the following section.

### *Planning for Nondisruptive Dispute Settlement: The Neoclassical System and Prevention of Disruption*

The common presumption of human institutions is that internal conflict, even quite serious conflict, does not necessarily terminate the

<sup>61</sup> RESTATEMENT (SECOND) OF CONTRACTS § 292 (Tent. Draft No. 9, 1974).

<sup>62</sup> RESTATEMENT (SECOND) OF CONTRACTS § 230 (Tent. Draft Nos. 1-7, 1973).



institution; indeed, only the most basic and grievous of conflict, if that, will do so.<sup>63</sup> In this respect, the classical contract, along with the discrete transaction it parallels, is a sport. Generally speaking, a serious conflict, even quite a minor one such as an objection to a harmlessly late tender of the delivery of goods, terminates the discrete contract as a live one and leaves nothing but a conflict over money damages to be settled by a lawsuit. Such a result fits neatly the norms of enhancing discreteness and intensifying and expanding presentation. These norms never, however, completely dominated classical law and certainly do not completely dominate neoclassical law.<sup>64</sup> Nevertheless, the thrust, even of the neo-classical system, is such that explicit planning is often necessary if the participants in a contractual relation desire to continue in the face of serious conflict or even in the face of some kinds of minor conflict.

In light of the above, it often behooves contract planners to plan for continuing relations in the face of conflict. A major example is the "no strike" clause very common in collective bargaining agreements. Normally a "no lockout" clause binding management parallels the "no strike" clause, and grievance procedures and arbitration for disputes accompany them.<sup>65</sup> Another example is found in United States government procurement contracts. The typical disputes clause in such contracts not only provides a mechanism for dispute resolution,<sup>66</sup> but also provides: "Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."<sup>67</sup> The widely used construction contract forms of the American Institute of Architects (AIA) contain a similar provision: "Unless otherwise agreed in writing, the Contractor shall carry on the Work and maintain its progress during any arbitration proceedings, and the Owner shall continue to make payments to the Contractor in accordance with the Contract Documents."<sup>68</sup>

<sup>63</sup> Witness our surviving our own Civil War or the conflict in the interrelation of church and state in any given area in the Middle Ages.

<sup>64</sup> For example, prevailing rules respecting conditions go a long way to keep the relation going in the face of dispute.

<sup>65</sup> The collective bargaining relation typically would continue even if a strike or lockout occurs; what such clauses preserve is the normal operating relation. For a strong statement of employees' duties to perform as commanded and to grieve later, see Dean Shulman's arbitration decision in *Ford Motor Co.*, 3 LAB. ARB. 779 (1944), quoted in A. COX, D. BOK, & R. GORMAN, *CASES & MATERIALS ON LABOR LAW* 571-72 (8th ed. 1977).

<sup>66</sup> The initial decision is by the Contracting Officer, with a right to appeal to a Board of Contracts Appeals (an administrative court). Further appeal is possible in some circumstances, usually to the Court of Claims. This is an oversimplified statement of an immensely complex procedural structure. See *S. & E. Contractors, Inc. v. United States*, 406 U.S. 1 (1972); 4 Report of the Commission on Government Procurement (1972).

<sup>67</sup> Dispute clause required by Armed Services Procurement Regulations, 32 C.F.R. § 7-103.12 (1976). See Vacketta & Wheeler, *A Government Contractor's Right to Abandon Performance*, 65 GEO. L.J. 27 (1976).

<sup>68</sup> AMERICAN INSTITUTE OF ARCHITECTS, *GENERAL CONDITIONS OF THE CONTRACT FOR*

Methods of enforcing provisions such as the foregoing vary. Injunctions are granted against strikes and lockouts carried out in violation of no-strike and no-lockout clauses.<sup>69</sup> Conceivably, the provisions in the federal government contracts and in the AIA forms could be enforced specifically. But the government seldom takes that route. And efforts to enforce the AIA provision specifically would run into the general reluctance of American courts to grant specific performance of complicated construction contracts.<sup>70</sup> While this reluctance seems to be diminishing,<sup>71</sup> it has not disappeared. In principle, provisions of this nature should be enforceable specifically by American courts whenever the other requisites for securing specific performance are met, *e.g.*, inadequacy of damage remedies. Indeed, the reluctance to step into complex situations may be less evident where the court views the relief as merely interim relief granted while the main issue is resolved in another forum, such as arbitration.<sup>72</sup>

Provisions such as those discussed above also can be enforced through damage remedies. Violations of no-strike clauses, for example, give rise to rights to damages.<sup>73</sup> Likewise, failure of a contractor to continue performance in spite of a dispute appears to constitute a default irrespective of the merits of the dispute. Presumably similar remedies would be available for breach of other such clauses. Thus, if a contractor quits over a dispute on a construction contract, the owner should be able to recover damages for losses resulting from the quitting irrespective of the merits of the dispute itself.<sup>74</sup> While damage remedies operate retrospectively and, where actually used, do not keep the relation going, the *threat* of their being used may do so.

Apart from providing explicitly for relations to continue during conflicts, the parties may plan processes or agree to substantive terms tending to have that effect. An example of the latter would be a provision

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CONSTRUCTION, AIA Document A201, art. 7.9.3 (1976).

<sup>69</sup> The provisions of federal and state labor laws prohibiting the issuance of injunctions in labor disputes do not necessarily apply to injunctions enforcing no-strike clauses. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). How effective such injunctions are is another matter.

<sup>70</sup> D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 12.22 (1973).

<sup>71</sup> *Id.* But some of the cases reflecting this change have involved enforcement of arbitrators' orders to perform specifically, and normally no such order will be available when the owner seeks relief against a contractor under Article 7.9.3 during the pendency of the arbitration proceedings.

<sup>72</sup> If the clause provided for continuation of performance while the parties battled their disputes out in court rather than before an arbitrator this reason would not be pertinent. I have never seen such a contract provision, but some are probably lurking out there somewhere.

<sup>73</sup> *See, e.g., Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) (no-strike clause inferred from presence of compulsory binding arbitration provision).

<sup>74</sup> The owner's claim would, under the AIA form contract, be subject to arbitration, just as the original dispute was subject to arbitration.

in a sale and installation of complicated machinery giving the seller ninety days after installation in which to adjust the machinery and cure any problems. Provisions for meeting together to discuss problems, for mediation in event of a dispute, and for arbitration are all examples of planning which tends to keep relations going, even without a statement that the parties will do so.<sup>75</sup> The neoclassical contract system provides its normal enforcement mechanisms for such provisions, including limited availability of specific performance.<sup>76</sup> In the case of arbitration, under modern statutes, the system strongly reinforces the process,<sup>77</sup> although reinforcement of arbitration itself does not necessarily mean that the relation will continue.<sup>78</sup>

Where party planning fails to focus on maintaining the relation in the face of conflict, many factors may nevertheless keep it going while the parties iron out disputes. This is, of course, the common human experience, since self-interest, custom, morality, and many other factors may make it more desirable to do so than to terminate the relation. In addition, the neoclassical contract law system offers a range of assistance. Specific performance is the most obvious means, but in spite of expansion in the availability of specific performance in the past decades, it is hardly the primary neoclassical contract remedy.<sup>79</sup> The existence of any contract law remedy tends to have this effect of maintaining the relation. To whatever extent a party is unsure of the legal correctness of his position in a dispute, he will have some desire to continue performing to avoid liability should he turn out to be wrong.<sup>80</sup> Certainly the importance of this in governing a party's actions will depend upon the effectiveness of the remedy.

Some substantive legal rules focus quite particularly on this subject, for example, the general contract principle that the victim of a contract breach cannot recover damages avoidable "through the exercise of reasonable diligence, and without incurring undue risk, expense, or humiliation."<sup>81</sup> In some circumstances this may prevent recovery of damages

<sup>75</sup> See *Primer*, *supra* note 34, at 681-91.

<sup>76</sup> See text accompanying note 79 *infra*.

<sup>77</sup> See *Primer*, *supra* note 34, at 685-91.

<sup>78</sup> If the arbitrators award specific performance and the court enforces the award effectively, this will, of course continue the relation. See, e.g., *In re Staklinski and Pyramid Elec. Co.*, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959).

<sup>79</sup> For an expression of hope that it will become so by one of the leading neoclassical contract scholars, see Braucher, *Contracts*, in N.Y.U. SCHOOL OF LAW, *AMERICAN LAW: THE THIRD CENTURY—THE LAW BICENTENNIAL VOLUME* 121, 127 (B. Schwartz ed. 1976).

<sup>80</sup> This applies to duties from whatever source derived, not just from those agreed upon. For example, an employer who discharges an employee for activity that may be protected by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975), not only must reinstate the employee but also must pay back pay if the discharge is later held to be an unfair labor practice.

<sup>81</sup> J. MURRAY, *supra* note 45, at § 227 (footnote omitted). See Hillman, *Keeping the Deal*

avoidable by continuing the relation. Another example, in the Uniform Commercial Code, provides that a seller aggrieved by a buyer's breach respecting unfinished goods may

in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.<sup>82</sup>

This section permits the seller unilaterally to maintain the relation in spite of the dispute, since identification of the goods to the contract will, within limits, permit the seller to recover the price of the goods<sup>83</sup> rather than merely damages for the breach. (The latter may be far less in amount and more difficult to prove.)

In summary, both planning by parties and the neoclassical system acting in either a supplementary or independent manner, can provide extensively for the continuance of relations even in the face of serious disputes. When, however, self-interest or other motives of the parties are inadequate to accomplish continuation, the reinforcement of the neoclassical contract law system often proves inadequate to the task. We should not, however, sell short that system as a supporter of customs and habits of behavior internalized in such a way that motives to "keep on with it" will prevail.

### *Terminating Economic Activities and Allocating Losses from Termination*

As noted earlier, planning for the termination of economic relations is simply a particular kind of planning for flexibility. For that reason, all the techniques for planning of flexibility discussed before are available for the purpose of planning terminations as well. In addition, the simple technique of putting a time limit on the duration of the contract is not only available, but fits very well with the concept of the discrete transaction, a fixed duration being fundamental to the concept of discreteness. Since discreteness underlies the concepts of the neoclassical contract law structure, some of the kinds of legal difficulties respecting flexibility discussed earlier will not affect provisions respecting termination. For example, a court that might be very reluctant to effectuate a provision giving a seller complete freedom to fix the price would have little doctrinal trouble with a provision allowing the seller complete freedom to terminate the contract.

The generality of the foregoing comments must be limited in certain respects. First, one-sided powers to terminate the relations give rise to

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*Together after Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553 (1976).

<sup>82</sup> U.C.C. § 2-704.

<sup>83</sup> U.C.C. § 2-709.

problems of mutuality and to questions of enforceability. For example, suppose that Seller agrees to supply Buyer with all Buyer's requirements for transistors for a five-year period, and Buyer agrees to buy all its requirements for transistors during a five-year period with an option to terminate the relation at any time after the first year upon sixty days notice. The contract establishing this one-sided arrangement could be drafted clearly enough so that a court would enforce it in spite of the absence of substantial mutuality of obligations after the first year. But careless draftsmanship could easily permit a court to hold the contract divisible into two parts: (1) the first year (and perhaps sixty days) during which there was mutuality of obligation and therefore consideration for seller's promise; and (2) the remainder of the time, during which buyer had promised nothing. Under such an analysis, after the first year (and maybe sixty days), consideration for a seller's promise would be lacking and its promise would not be enforceable.<sup>84</sup>

The doctrine of consideration as applied above may be viewed as a regulatory control discouraging parties from providing for unilateral rights of termination of agreements. Occasionally, in contracts where one party is more powerful than the other, American law has gone farther than simply discouraging provisions for such rights. For example, a federal statute<sup>85</sup> confers upon an automobile dealer rights to sue the manufacturer for "failure . . . to act in good faith in . . . terminating, canceling, or not renewing the franchise with said dealer . . . ."<sup>86</sup> This language supersedes any rights, however carefully planned, the manufacturer would otherwise possess to terminate at will. Specific legislation of this kind is relatively rare,<sup>87</sup> although legislation governing employment may have similar effect. For example, civil servants typically have great protection of tenure in their positions, and unemployment insurance schemes imposed on private employers by statute may inhibit discharging employees. Moreover, since collective bargaining almost invariably leads

<sup>84</sup> The technique used results in neither being bound, not in both being bound. It is therefore consistent with notions of discreteness, since it shortens the relation.

<sup>85</sup> Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976). While this statute might be viewed as outside the system of neoclassical law, its approach is so consonant with the structure of that system that it may sensibly be viewed as an internal development respecting a particular kind of contract.

<sup>86</sup> 15 U.S.C. § 1222 (1976). The statute also includes the following language: "Provided, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith." *Id.* (emphasis in original).

This statute and its relative lack of effectiveness are discussed extensively in Macaulay, *The Standardized Contracts of United States Automobile Manufacturers*, in 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 3, 18 (1974). For a recent dealer victory see *Shor-Line Rambler, Inc. v. American Motors Sales Corp.*, 543 F.2d 601 (7th Cir. 1976); for a recent dealer loss, see *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901 (9th Cir. 1978).

<sup>87</sup> A leading state example is Wisconsin's Fair Dealership Law, WIS. STAT. §§ 135.01-.07 (1975). See *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818 (6th Cir. 1977).

to job security for individual employees, the many statutory reinforcements of collective bargaining may reasonably be viewed as legislation of similar nature.

Moving in similar directions are cases such as *Shell Oil Co. v. Marinello*,<sup>88</sup> requiring good cause for the termination of a service station lease-franchise relation. This particular decision was influenced by a New Jersey statute so providing, although, because of its effective date, inapplicable to the dispute in question.<sup>89</sup> No such statute, however, was involved in a recent federal case applying Missouri law.<sup>90</sup> It held that while a franchise agreement silent as to duration is normally terminable at will, the franchisor cannot terminate for a reasonable time from its formation—a reasonable time being long enough to allow franchisee to recover its initial investment and expenses. The court held that in the circumstances of the case eight or nine years was long enough. Also moving in similar direction are common law cases “interpreting” employment contracts without specified duration as being terminable by the employer only for cause<sup>91</sup> and those cases prohibiting terminations or refusals to renew contractual relations for “improper reasons.”<sup>92</sup>

Unlike the consideration and mutuality limitations discussed earlier, the foregoing kinds of legal intervention are anti-discrete, since, where effective, they lengthen rather than shorten enforceable contractual relations. Thus, interstitially and gradually, increasingly tight limits are being

<sup>88</sup> 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974).

<sup>89</sup> In *William C. Cornitius, Inc. v. Wheeler*, 276 Or. 747, 556 P.2d 666 (1976), the Oregon Supreme Court refused to follow the decision in *Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974). The court described *Marinello* as the only case holding that service station lease-franchises must be renewable (except for good cause for refusal) and distinguished cases holding unenforceable reserved rights to terminate service station lease-franchises without good cause, *e.g.*, *Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433 (W. Va. 1976). *Cornitius* held that the service station owner could omit renewal terms from its leases, the court stating that it was not considering “enforceability of a one-sided cancellation clause in a contract of adhesion.” 556 P.2d at 670-71. Careful drafting should enable franchisors in Oregon to avoid ever having such an issue raised against them; they need simply omit renewal provisions, even though renewal will be the normal procedure.

<sup>90</sup> *Lockewill, Inc. v. United States Shoe Corp.*, 547 F.2d 1024 (8th Cir. 1976), *cert. denied*, 431 U.S. 956 (1977).

<sup>91</sup> *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1 (1st Cir. 1977) (applying New Hampshire law).

<sup>92</sup> *E.g.*, *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) (refusal to renew medical malpractice policy because policyholder testified for plaintiff in a malpractice case); *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W.2d 297 (1970) (eviction of tenant for making a complaint to authorities about housing violations). The Oregon Supreme Court refused to apply the principle in *William C. Cornitius, Inc. v. Wheeler*, 276 Or. 747, 556 P.2d 666 (1976), without recognizing that this principle is not limited to residential leases and ignoring the court's own recent decision holding tortious the firing of an employee for requesting jury duty after being told not to do so. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). See note on improper motivations in *MACNEIL*, CASES 2, *supra* note 16, at 514-15.

imposed on the general principle that parties may plan for unilateral termination of contractual relations and that the courts will effectuate their planning.

Apart from legislatively imposed requirements, unilateral rights to terminate may be exercised leaving losses to fall where they happen to fall. This is analogous to what happens in a system of very discrete transactions, in which most risks of change have to be borne within the firm rather than being shifted to the other party or somehow shared. The difference lies in the option available to the party enjoying the right to terminate unilaterally; with the longer term relational contract that party has the advantages both of the security of the longer term and of short-term discreteness. Parties are, of course, often fully aware of this and may, rather than having the disadvantaged party charge more to cover the added risk, allocate in advance the costs of termination. Perhaps the most complex provisions of this kind are found in the great administrative structure built around the federal government's right to terminate contracts for its convenience.<sup>93</sup> A very general summary of these provisions is that costs incurred in performance of the contract, including overhead and profit on work performed, are allowed, but profit on the parts of the contract not performed because of the termination is not. Franchise agreements giving the franchisor rights to terminate often provide another example of advance allocation of costs so that not all of the costs of termination otherwise falling on the franchisee remain there.<sup>94</sup>

Thus, in summary, the neoclassical system generally poses few doctrinal hurdles to termination, even unilateral termination, if carefully enough planned. But relational limits on unilateral termination are creeping into the neoclassical system.

### *Overview of the Limits of a Neoclassical Contract Law System*

As noted earlier, the two special norms of a classical contract law system are enhancement of discreteness, and expansion and intensification of presentation. Both of these norms aim toward ideals no social or legal system could ever come close to achieving; pure discreteness is an impossibility, as is pure presentation. Thus even the purest classical contract law system is itself a compromise; its spirit and its conceptual structures may be those of pure discreteness and presentation, but its details and its application never can be.

Even apart from these theoretical limitations of a classical contract law system, the limited extent to which it is possible for people to consent

<sup>93</sup> Armed Services Procurement Regulations, 32 C.F.R. §§ 8-000 to 8-406, 8-701 to 8-712 (1976). Quite similar rights are reserved by blanket supply contracts automobile manufacturers enter with their suppliers. See Macaulay, note 86 *supra*.

<sup>94</sup> See generally E. MCGUIRE, FRANCHISED DISTRIBUTION (The Conference Board, publ., 1971).

to all the terms of a transaction, even a relatively simple and very discrete one, soon forces the development of legal fictions expanding the scope of "consent" far beyond anything remotely close to what the parties ever had in mind. The greatest of these in American law is the objective theory of contract. The classical American contract is founded not upon actual consent but upon objective manifestations of intent. Moreover, in classical law manifestations of intent include whole masses of contract content one, or even both, parties did not know in fact. For example, ordinary run-of-the-mill purchasers of insurance are, in classical law, deemed to have consented not only to all the terms in the policy, which they did not read and could not have understood if they had, but also to all the interpretations the law would make of those terms. While in theory this enhances presentation (the law presumably being perfectly clear or at least struggling to be so), and may indeed have done so for the insurer, for the insured it commonly has precisely the opposite effect. Nevertheless, it is necessary to cram such absurdities into "objective consent" in order to avoid recognizing the relational characteristics of the system.

Neoclassical contract law partially, but only partially, frees itself of the foregoing difficulties. The freeing comes in the details, not in the overall structure. As suggested above, for example, the neoclassical system displays a good bit of flexibility in adjusting to change, and by no means always does so in terms of fictions about the original intent of the parties. Perhaps one of the most vivid examples of this is Restatement (Second) of Contracts, sections 266 and 267.<sup>95</sup> These define when a failure to perform is material and when unperformed duties under a contract are discharged by the other party's uncured material failure to perform (or offer to perform).<sup>96</sup> Section 267 lists seven circumstances significant in determining the time when the injured party is discharged:

1. the extent to which the injured party will be deprived of the benefit which he reasonably expected;
2. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
3. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
4. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
5. the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing;
6. the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements;
7. the extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to per-

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<sup>95</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 266-67 (Tent. Draft No. 8, 1973).

<sup>96</sup> *Id.* For other examples, see *Presentation*, *supra* note 2, at 603-06.



form on a stated day does not of itself discharge the other party's remaining duties unless the circumstances, including the language of the agreement, indicate that performance or tender by that day is important.<sup>97</sup>

Of the seven factors, four (3, 4, 5, and 6) clearly focus on circumstances at the time of the difficulties, rather than following the presentation approach and trying to key back to the original agreement. An element of that is also present in the others. In 1 and 2 "the benefit he reasonably expected" appears to permit more consideration of post-agreement circumstances than would, for example, the phrase "what he was promised." And 7 puts a burden on the injured party to show that timely performance was important beyond simply providing initially in the contract that performance be without delay. (That is only one of the circumstances to be considered.) This too is anti-presentation.

The burgeoning concept of good faith, in large measure within the neoclassical framework, is another largely anti-presentiating, and very much anti-discrete, concept.<sup>98</sup>

But neoclassical contract law can free itself only partially from the limitations posed by obedience to the twin classical goals of discreteness and presentation. This obedience is imposed by adherence to an overall structure founded on full consent at the time of initial contracting.<sup>99</sup> As long as such adherence continues, *i.e.*, as long as it remains a neoclassical system, there are limits to the ignoring of discreteness and presentation in favor, for example, of such factors as those listed above respecting Restatement (Second) of Contracts § 267.<sup>100</sup> Nevertheless, the constantly increasing role of ongoing contractual relations in the American economy continues to put immense pressure on the legal system to respond in relational ways.

In the past such pressures have led to the spin-off of many subject areas from the classical, and later the neoclassical, contract law system, *e.g.*, much of corporate law and collective bargaining (to say nothing of marriage, which was never really in). They have thus led to a vast shrinkage of the areas of socioeconomic activity to which the neoclassical system applies.<sup>101</sup> As the earlier discussion in this paper indicates, they

<sup>97</sup> RESTATEMENT (SECOND) OF CONTRACTS § 267 (Tent. Draft No. 8, 1973). The first five circumstances are from § 266, where they determine materiality of the failure to perform.

<sup>98</sup> See generally Summers, *supra* note 46.

<sup>99</sup> This characteristic of the neoclassical system is explored in *Presentation*, note 2 *supra*.

<sup>100</sup> RESTATEMENT (SECOND) OF CONTRACTS § 267 (Tent. Draft No. 8, 1973).

<sup>101</sup> See L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965); Macneil, *Whither Contracts?*, 21 J. LEGAL EDUC. 403 (1969). The mistake is sometimes made of concluding that because a subject area has spun off and is widely considered to be a special area, that all elements underlying the classical or neoclassical system disappear from the area. There are hints, or more, of this in G. GILMORE, *THE DEATH OF CONTRACT* (1974), and Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805.

have also led to very significant changes leading to the transformation of the Willistonian classical system to what might be called the Realist neoclassical system. The spin-offs can and will continue.

Equally likely, the neoclassical system will continue to evolve in relational directions, while courts and scholars still strive to keep it within the overall classical structure. (This is especially likely in first-year contracts courses in many American law schools and in the casebooks and texts aimed at first-year contracts students and their teachers.) The spin-offs will, however, render the system, as a total system, of less and less practical interest.<sup>102</sup> At the same time, trying to squeeze increasing relational content into the neoclassical system will encounter the same kinds of strains some of my generation are finding in trying to put on the older parts of their wardrobes. Thus, rewards of expanding the neoclassical system will decrease at the same time that intellectual and perhaps other costs of doing so increase.

Elsewhere, I have suggested the possibility that a more encompassing conceptual structure of contract jurisprudence may emerge from the situation just described.<sup>103</sup> Part of such a structure must focus on the issues raised by this paper, adjustment of long-term contractual relations. The concluding section of this paper will deal with some of the consequences of slipping the bounds of the classical contract system altogether, of reducing discreteness and presentation from dominant roles to roles equal or often subordinate to relational norms such as preserving the relation and harmonization of all aspects of the relation, whether discrete or relational.

#### CONTRACTUAL RELATIONS: RELATIONAL CONTRACT LAW

The introduction to the preceding section carefully limits that section

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(Probably the most extreme view I have found along this line is Lowry, *supra* note 16, at 16-17.) Nothing could be farther from the truth. Discreteness and presentation are ever with us in the modern world and will continue to be so; the fact that we now recognize them as integrated into ongoing relations does not eliminate them. Nor does it eliminate the need to respond to them as particular facets of ongoing relations. And such response very often will be to enhance them and give them full effect. In such instances, not just neoclassical contract law, but sometimes good old-fashioned classical contract law, may supply the best solutions. But those solutions will be "best" because the overall relational circumstances so indicate, not because of the general dominance of jurisprudential systems based on enhancing discreteness and presentation.

<sup>102</sup> Relatively little of "the action" in contractual transactions and relations lies in that system now, as the examination of any law school curriculum will demonstrate. Not only is the first-year neoclassical course shrinking in semester hours in many schools, but also the major part of the teaching of contracts in law school is to be found in subject-specific courses such as commercial law, corporations, labor law, securities regulation, and creditors' rights.

<sup>103</sup> *Many Futures*, note 9 *supra*; *Presentation*, *supra* note 2, at 608-10. Work such as that of Eisenberg, Goldberg, Williamson, and others reinforces my feeling that surely a structure not only is possible, but that some of its outlines are starting to emerge.

to situations where "it is clear that" the long-term economic relations in question are "*between* firms rather than *within* a firm." The situations treated there were, "even in traditional terms, contracts." Such a limitation is unnecessary in introducing the present section. Interfirm contractual relations follow the kinds of patterns discussed here—*e.g.*, in a long-term consortium—but more typical relations of this nature would include such structures as the internal workings of corporations, including relations among management, employees, and stockholders. Corporate relations with long- and short-term creditors, law firms, accounting firms, and managerial and financial consultants may also acquire many of the characteristics discussed and increasingly seem to do so. Collective bargaining, franchising, condominiums, universities, trade unions themselves, large shopping centers, and retirement villages with common facilities of many kinds are other examples now existent. If present trends continue, undoubtedly we shall see new examples, now perhaps entirely unforeseen.

As noted earlier,<sup>104</sup> discreteness and presentation do not disappear from life or law simply because ongoing contractual relations become the organizational mode dominating economic activity. Because they remain with us and because they drastically affect contractual relations, this section will start with an analysis of their role in ongoing relations.

#### *Presentation and Discreteness in Contractual Relations*

However important flexibility for change becomes in economic relations, great need will nevertheless always remain for fixed and reliable planning. Or in the terms emphasized here, presentation will always occur in economic relations, since it tends to follow planning as a matter of course. Nor does a modern technological economy permit the demise of discreteness. Very specialized products and services, the hallmark of such an economy, produce a high degree of discreteness of behavior, even though their production and use are closely integrated into ongoing relations. When, for example, an automobile manufacturer orders from another manufacturer with which it regularly deals, thousands of piston rings of a specified size, no amount of relational softening of discreteness and presentation will obscure the disaster occurring if the wrong size shows up on the auto assembly line. Nor would the disaster be any less if the failure had occurred in an even more relational pattern, *e.g.*, if the rings had been ordered from another division of the auto manufacturer. Both discreteness and presentation must be served in such an economic process, whether it is carried out between firms by discrete separate orders, between firms under long-established blanket contracts, or within the firm.<sup>105</sup>

<sup>104</sup> See note 100 *supra*.

<sup>105</sup> It would take the imagination of a good science-fiction writer to dream up a technological economy in which this was not true.

Even apart from high demands for reliable planning in a technological society, discreteness is a characteristic inherent in human perception. Moreover, as I have suggested elsewhere, any given "present situation," no matter what its origin, tends to be perceived as highly discrete compared to what lies in the past and what is to come in the future.<sup>106</sup> Thus, the status quo, whatever it is, inevitably has about it a fairly high level of discreteness. This fact, coupled with the human propensity to presentiate on the basis of what is currently in the forefront of the mind, creates strong expectations of the future consistent with the status quo. Such expectations tend to be very strong. It is impossible to overstress this phenomenon—it describes not only the conservatism of the nineteenth century Russian peasant but also the intense commitment to change and growth where patterns of change and growth constitute the status quo, *e.g.*, the tenacity in America to patterns of constantly increasing energy consumption.

Expectations created by the above processes can be, and often are, of a magnitude and tenacity as great or greater than those created by good, old-fashioned discrete transactional contracts. Thus, when the phenomenon occurs in contractual relations, any tolerable contract law system must necessarily pay attention to at least some implementation of this kind of discreteness and presentation.

In view of the foregoing, the need for a contract law system enhancing discreteness and presentation will never disappear.<sup>107</sup> Moreover, it is possible, even likely, that a neoclassical contract law system will continue in existence to deal with those genuine needs. Such a system will, however, continue to rub in an unnecessarily abrasive manner against the realities of coexistence with relational needs for flexibility and change. Only when the parts of the contract law system implementing discreteness and presentation are perceived, intellectually and otherwise, not as an independent system, but only as integral parts of much larger systems, will unnecessary abrasion disappear. By no means will all abrasion disappear, of course, because real conflict exists between the need for reliability of planning and the need for flexibility in economic relations.<sup>108</sup> What will disappear is the abrasion resulting from application of contract law founded on the assumption that all of a contractual relation is encompassed in some original assent to it, where that assumption is manifestly false. The elimination of that assumption not only would eliminate the unnecessary abrasion but also would remove the

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<sup>106</sup> *Many Futures*, *supra* note 9, at 754-56.

<sup>107</sup> A formal, sovereign-imposed system conceivably could disappear, if contractual relations develop extensively enough to be able to depend entirely on self-generated internal legal systems. But the internal systems too will need to serve these needs.

<sup>108</sup> A point nicely brought out in the context of particular kinds of contracts by Goldberg, *supra* note 34, at 441-42 (university food service contracts) and Williamson, note 34 *supra*.

penultimate classical characteristic justifying calling a contract law system neoclassical.<sup>109</sup>

What replaces the neoclassical system when, and if, all that remains of classical contract law are discreteness and presentation-enhancing segments of far larger systems, segments perhaps often playing roles subordinate to countless other goals, including those of achieving flexibility and change? The remainder of this paper is an introduction to possible answers to that question.

### *Processes for Flexibility and Change in Contractual Relations*

Change, whether caused by forces beyond social control or actively sought, appears to be a permanent characteristic of modern technological societies. Willy-nilly, flexibility comes along with the phenomenon, since the only alternative is a breakdown of the society. But there are processes of flexibility beyond simply bending with each wind of change on an ad hoc basis. Indeed, we have already seen many such processes respecting contracts and have explored the response to them of a neoclassical legal system. We shall look at them again here to see the response of a legal system which is more frankly relational and which has cast off conceptual obeisance to discreteness and presentation by some all-encompassing original assent. Although no such system as yet exists in American law, I shall speak in the present tense; this is justified, perhaps, by the existence of specific terms of contract law, such as collective bargaining, coming close to the patterns described.

The most important processes used for maintaining flexibility are those of exchange itself, whether the sharply focused bargaining characteristic of labor contract renewals or the subtle interplays of day-to-day activities, or a host of other forms taken by exchange. These patterns of exchange take place against the power and normative positions in which the parties find themselves.<sup>110</sup> This means that exchange patterns occur, *inter alia*, against the background of the discrete and presented aspects of the relations, whether those aspects were created by explicit prior

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<sup>109</sup> Penultimate, not ultimate. If we think of the classical contract law system as the antithesis of the status contractual relations of primitive societies—as I believe Maine did in his famous statement about the move from status to contract—one vital characteristic of the classical contract system will remain: the great effect given to planning. Rightly or wrongly we do not think of primitive societies as engaging in a great deal of planning beyond that arising from habit, custom, mores, and customary law of the society. However accurate or inaccurate this view of primitive societies may be, it is a completely inaccurate view of modern technological society with its immense, indeed insatiable, demands for planning and performance of planning. Thus, as already noted, a relational, post-neoclassical contract law system will necessarily retain *in context* a large measure of the respect for presentation and discreteness shown by the classical system.

<sup>110</sup> See generally Eisenberg, *Private Ordering through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

planning, other existential circumstances, or combinations thereof.<sup>111</sup> This requires harmonization of changes with such a status quo but does not require doctrines such as the doctrine of consideration or the more discrete formulations of concepts like executory accord and accords intended as satisfactions. Instead questions like those raised previously are appropriate.<sup>112</sup> There is, however, a substantial difference. In the neoclassical system, the reference point for those questions about the change tends to be the original agreement. In a truly relational approach the reference point is the entire relation as it had developed to the time of the change in question (and in many instances as it has developed since the change). This may or may not include an "original agreement;" and if it does, may or may not result in great deference being given it.

Since contractual relations, such as the employment relation, commonly involve vertical or command-and-subordinate positions<sup>113</sup> of an ongoing nature, *e.g.*, the vice-president in charge of plant operations and his subordinates, much change is brought about by command. As the commands inevitably relate to exchange, as in an order to an employee to report for overtime work, they are techniques for achieving change through nonhorizontal processes, in contrast to those of agreed-upon, horizontal exchange.<sup>114</sup> Again, a relational contract system implements, modifies, or refuses to implement such commands only in the overall context of the whole relation.

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<sup>111</sup> *Cf. id.* at 672-80 (exchange patterns in a context of dependence).

<sup>112</sup> See text accompanying note 57 *supra*.

The 1978 American Law Institute meeting approved Restatement (Second) of Contracts (Tent. Draft No. 13, 1978), which, consistent with the overall neoclassical pattern of Restatement (Second) deals with changes in contracts in a chapter entitled "Discharge by Assent or Alteration." Its only black-letter doctrinal tool is consideration, although relational notions such as good faith do creep into the comments occasionally, *e.g.*, § 351, Comment d. At one point the old battle about *Foakes v. Beer*, 9 App. Cas. 605 (1884), the principle of which is approved in § 348, almost led to a motion not only to revise § 348, but also the more basic section dealing with the pre-existing duty rule, § 76A, approved by the Institute over a decade earlier. I had a strong feeling that passage of such a motion might well have led ultimately to the complete unraveling of Restatement (Second), the most current tapestry of American neoclassical contract law. But so, I suspect, did others who would have greeted that occurrence with less enthusiasm, and the dangerous moment passed without the motion being made.

<sup>113</sup> As does, of course, not only the discrete transactional technique of allowing one side to specify terms but also any contract as to the rights conferred thereby. The horizontal nature of the formation of contracts and the fact that both sides have rights, too, often is allowed to obscure their command nature once formed.

<sup>114</sup> I do not adhere to the Coasian view recently espoused by Posner, differentiating contract from the firm, *i.e.*, from the command structure. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 386 n.5, 390-91 (1937); R. POSNER, *supra* note 52, at § 14.1. The corporate firm is no more and no less, in my view, than an immensely complex bundle of ongoing contractual relations. See note 33 *supra* for an expansion of this view. But as is suggested above, those relations are also command relations.

When the conflict levels in exchange processes, wherever they may lie on the command-horizontal spectrum, exceed the resolution capacity of bargaining and other exchange processes, other techniques of dispute resolution must be utilized. Here we find the most dramatic change from the classical or even neoclassical litigation (or rights arbitration<sup>115</sup>) models. Their function is to put an end to the dispute; and, since resolution of the dispute is all that remains of the discrete transaction, the process is a relatively simple and clean one. This process is rather like the discrete transaction itself: sharp in (by commencing suit) and sharp out (by judgment for defendant or collection of a money judgment by plaintiff).<sup>116</sup> Professor Chayes has recently described this model:

- (1) The lawsuit is *bipolar*. Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.
- (2) Litigation is *retrospective*. The controversy is about an identified set of completed events: whether they occurred, and if so, with what consequences for the legal relations of the parties.
- (3) *Right and remedy are interdependent*. The scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty—in contract by giving plaintiff the money he would have had absent the breach; in tort by paying the value of the damage caused.
- (4) The lawsuit is a *self-contained* episode. The impact of the judgment is confined to the parties. If plaintiff prevails there is a simple compensatory transfer, usually of money, but occasionally the return of a thing or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court's involvement.
- (5) The process is *party-initiated* and *party-controlled*. The case is organized and the issues defined by exchanges between the parties. Responsibility for fact development is theirs. The trial judge is a neutral arbiter of their interactions who decides questions of law only if they are put in issue by an appropriate move of a party.<sup>117</sup>

Naturally, no such model will do when the relation is supposed to continue in spite of the dispute, and where a main goal must always be its successful carrying on after the dispute is resolved or otherwise eliminated or avoided.

Professor Chayes went on to develop a morphology of what he terms

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<sup>115</sup> See note 39 and accompanying text *supra*.

<sup>116</sup> This is, of course, a parody, especially the very last point. Contrary to the fantasies of the law school classroom, the real beginning of many contract dispute cases won by plaintiffs comes *after* rendering of a judgment. Then the deficiencies of execution, and with it the legal remedial system itself, become apparent.

<sup>117</sup> Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976) (footnotes omitted) (emphasis in original). For critical comments concerning the developments Chayes describes, see Kirkham, *Complex Civil Litigation: Have Good Intentions Gone Awry?*, 3 LAW & LIBERTY 1 (Winter 1977).

“public law litigation.”<sup>118</sup> Although he does not direct this morphology at contract disputes, I have found it helpful in organizing my thoughts about the processes of dispute resolution in contractual relations. (So modified it focuses on the processes of change in such relations when bargaining and other exchange processes fail.) The following is his morphology, modified where appropriate for use in contractual relations.

1. The scope of the dispute is not exogenously given by contract terms but is shaped by both the parties and the resolver of the dispute—*e.g.*, the arbitrator—and by the entire relation as it has developed and is developing.
2. The party structure is not rigidly bilateral but sprawling and amorphous.
3. The fact inquiry is not only historical and adjudicative but also predictive and legislative.<sup>119</sup>
4. Relief is not conceived primarily (or sometimes at all) as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is in great (or even entire) measure forward-looking, fashioned *ad hoc* on flexible and broadly remedial lines, often having important consequences for many persons, including absentees.
5. The remedy is not imposed but negotiated and mediated.
6. The award does not terminate the dispute-resolver's role in the relation; instead, the award will require continuing administration by this or other similarly situated dispute-resolvers.
7. The dispute-resolver is not passive, that is, his function is not limited to analysis and statement of governing rules; he is active, with responsibility not only for credible fact evaluation but also for organizing and shaping the dispute processes to ensure a just and viable outcome.
8. The subject matter of the dispute is not between private individuals about private rights but is a grievance about the operation of policies of the overall contractual relation.<sup>120</sup>

In almost every respect the foregoing approaches contrast sharply with a classical contract law system and with the conceptual assumptions of a neoclassical system. For example, two ways by which a classical

<sup>118</sup> This is an unfortunately narrow choice of words. His summary appears in Chayes, *supra* note 117, at 1302.

<sup>119</sup> Chayes states this one: “The fact inquiry is not historical and adjudicative but predictive and legislative.” *Id.* In his context this seems to me an overstatement; I have no doubt it is if applied to contractual relations.

<sup>120</sup> Readers who examine the chart in the Appendix *infra* will probably have a sense of déjà vu here, as will those familiar with the long-standing debate about the role of the labor arbitrator, and as will readers with a background in legal anthropology. The latter are likely to recognize a kind of neotribalism in the process described, and the labor law experts will see the statement as a generalizing of views expressed by Dean Shulman.



contract law system implements its goals of enhancing discreteness and presentation are by limiting strictly the sources considered in establishing the substantive content of the transaction in resolving disputes and by utilizing strictly defined (and narrow) remedies.<sup>121</sup> Both of these methods sharply conflict with the relational approaches outlined above. Similarly, although the neoclassical system can accomplish some of the flexibility of these relational patterns, and utilizes some of them, in toto the patterns go far beyond it. In the neoclassical system the parol evidence rule is hardly dead; the fact inquiry is nowhere nearly as wide-ranging; development of flexible and broad remedies is modest indeed; at the end of the day, remedies are imposed, rather than simply negotiated and mediated until some kind of uneasy (and probably temporary) consensus is reached; more often than not a dispute-resolver does expect to wipe his hands of the matter after the appropriate remedy has been determined; the dispute-resolver, at least when he is a judge, tends to remain passive; and the subject matter of dispute often tends to remain, at least formally and often more substantially, between clear poles of interest and polar rights, rather than overall policies of the contractual relation.

The sharp contrast between the classical (and even neoclassical) limitation of sources of substantive content mentioned above and the broad ranging inquiries of a relational system brings us to a key question concerning the interplay of presentiated and discrete aspects of relations with their nondiscrete, nonpresentiated aspects. The premise of the classical system is that no interplay could occur, because all aspects of the contract are presentiated and discrete. This premise continues to underlie the structure of the neoclassical system, but in actual operation that system shifts to a presumption in favor of limitation, although one subject to considerable erosion. In implementing their premises both classical and neoclassical contract law establish hierarchies for determining content (as noted earlier). Formal communications such as writings control informal communications; linguistic communications control nonlinguistic communications; communicated circumstances control noncommunicated circumstances; and finally utilization of noncommunicated circumstances is always suspect.

Do such hierarchies continue in a relational system? The answer is both yes and no. To the extent that presentiated and discrete aspects of contractual relations are created by written documents, they may reflect very sharp focus of party attention and strong intentions to be governed by them in the future. Certainly the wage and seniority structures in most collective bargaining agreements exemplify this. Thus, such documents may occupy very dominant positions in the priorities of values of the relation. When this is the case, something analogous to the classical notions previously set out may very properly be applied by the dispute-

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<sup>121</sup> See text accompanying note 27 *supra*.

resolver. There is, however, one big difference. In a system of relational contract law the simple existence of formal communications does not automatically trigger application of the neoclassical hierarchy of presumptions. Rather, a preliminary question must always be asked: do the formal communications indeed reflect the sharp past focus and strong intentions necessary to put these communications high in the priorities of values created by the contractual relation? This question can be answered only by looking at the whole relation, not in the grudging manner of the neoclassical system, but as the very foundation for proceeding further with the hierarchical assumptions, or without them, or with other hierarchies. (An example of the latter occurs in marital disputes: nonlinguistic conduct and informal communications typically far outweigh in importance for resolving such disputes any formal agreements—except sometimes as to property—the parties may have made.)

I feel some temptation to think of the written parts of contractual relations, especially very formal parts, such as collective bargaining agreements and corporate charters and bylaws, as constitutions establishing legislative and administrative processes for the relation.<sup>122</sup> Indeed, that is what many of them are. Nevertheless, danger lurks in this formulation. The danger lies in reintroducing into the law of contractual relations<sup>123</sup> such things as the hierarchies discussed above—not on an ad hoc basis but as a matter of general principle emanating from the concept of “constitution.” If that concept or terminology is used to resurrect “constitutions” long decayed and made obsolete by less formally established patterns of communications and behavior, we are, as a matter of principle, back to a relationally dysfunctional neoclassicism.<sup>124</sup> Moreover, only one party or class of parties may know the content of these “constitutions,” and they may suffer from other adhesion characteristics. In such circumstances giving them constitutional weight may be very dubious indeed.

<sup>122</sup> This is hardly an original thought. See, e.g., Fuller, *supra* note 43, at 5. See also Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490-93, 1498-1501 (1959); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1004-05 (1955).

<sup>123</sup> I mean by this term law not only of the sovereign, but also both internal law of the relation—e.g., that established by agreement or internal bodies such as boards of directors—and external law other than that of the sovereign, such as trade association rules.

<sup>124</sup> The following language from *IBM v. Catamore Enterprises, Inc.*, 548 F.2d 1065, 1073 (1st Cir. 1976), *cert. denied*, 431 U.S. 960 (1977), while appropriate enough to the facts of the case, is the kind that can be sadly misused in the face of long time erosion of “constitutions” of contractual relations:

The first is the substantive principle that when, in the course of business transactions between people or corporations, free and uncoerced understandings purporting to be comprehensive are solemnized by documents which both parties sign and concede to be their agreement, such documents are not easily bypassed or given restrictive interpretations.

In fact, over time, parties to complex relations do “easily bypass” such agreements and give them “restrictive” (or expansive) interpretations. Courts not recognizing this are likely to reach unsatisfactory results.

This brief treatment of processes of flexibility and change in contractual relations can now serve as a background for consideration of characteristics of substantive change in contractual relations.

### *The Substance of Change in Contractual Relations*

All aspects of contractual relations are subject to the norms characterizing contracts generally, whether they are discrete or relational. As noted earlier<sup>125</sup> these are: (1) permitting and encouraging participation in exchange, (2) promoting reciprocity, (3) reinforcing role patterns appropriate to the various particular kinds of contracts, (4) providing limited freedom for exercise of choice, (5) effectuating planning, and (6) harmonizing the internal and external matrixes of particular contracts. These norms affect change in contractual relations just as they affect all their other aspects.

In addition, I have identified two norms particularly applicable to contractual relations:<sup>126</sup> (1) harmonizing conflict within the internal matrix of the relation, including especially, discrete and presentiated behavior with nondiscrete and nonpresentiated behavior; and (2) preservation of the relation.<sup>127</sup> These norms affect change in contractual relations, just as they affect all their aspects.

A great deal of change in ongoing contractual relations comes about glacially, through small-scale, day-to-day adjustments resulting from an interplay of horizontally arranged exchange—*e.g.*, workers creating new ways of cooperatively defining their work or minor changes in the way in which deliveries are made—and from the flow of day-to-day commands through the vertical patterns of the relation. In addition, within a broad range, change will come about through commands of a more sweeping nature, *e.g.*, to sell the appliance division of the firm or develop a major new line of products. This is, of course, focused change and raises all kinds of problems, not the least of which involve the two relational norms. Moreover, command changes of this magnitude in a modern society almost invariably overlap areas that must be dealt with by horizontal arrangements, *e.g.*, the terms of the collective bargaining agreement governing severance or transfer of old employees and the hiring of new employees. Finally, there are horizontal changes in contractual

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<sup>125</sup> See text accompanying note 23 *supra*; *Many Futures*, *supra* note 9, at 808-16. The word norm is used here generally to include the way people actually behave, the "oughts" that their behavior generates vis-à-vis each other, and the "oughts" their behavior generates externally to their relation, *e.g.*, in sovereign contract law. There may, of course, be occasion to differentiate, but commonly this usage is fine enough.

<sup>126</sup> See note 24 *supra*.

<sup>127</sup> The discrete norms—enhancing discreteness and presentiation—were not truly separate from the general norms of effectuating planning and exercising choice but were an intensification of these general norms that was so great and opened up so many facets as to justify new labels. This is also true of the relational norms. Both grow out of the last of the general norms and could be treated as part of it.

relations themselves partially or wholly horizontal in origin. If, for example, we consider a collective bargaining agreement as an arrangement separate from the firm itself (by my lights, a somewhat artificial thing to do), the shifting of a major part of a wage increase from cash into layoff compensation would constitute a focused horizontal change.<sup>128</sup> Similarly, a consortium of businesses determining whether to go into a new line of activity would be engaged in horizontally focused change.

We have thus far considered change coming about either through gradual accretion, through command operating within acceptable limits of the relation, or through successful negotiation and agreement. While these offer many problems for a relational contract system and its related legal structure, the big *legal* difficulties come when change is pushed that has failed to come about in those ways. What happens when this occurs?

In answering that question it is well to remember that we are dealing with situations where the desire is to continue the relation, not to terminate it. Moreover, my sense is that normally the most important factor is the status quo; that is to say, that the dispute-resolver will be conservative and will not move far from the status quo. This is borne out by the sense of arbitrators experienced in "interest arbitration" that the base point of such arbitration is the presentiated status quo.<sup>129</sup> Anyone interested in change through the dispute-resolution process has a heavy burden of persuasion. Dispute-resolution processes governed by the norm of continuing the relation are, if this view is correct, essentially conservative.

The foregoing conclusion does not lead to the conclusion that change will not result from this kind of interest-dispute-resolution process. Anyone the least familiar with arbitration of public employee interest disputes knows this.<sup>130</sup> The very fact that a party is willing to press this far suggests in most cases a basis for some change, although bargaining being what it is, probably not as much as the aggressive party tries to get. Moreover, status quo in a dynamic society does not mean a static status quo; as noted earlier in another connection, the status quo itself may very well be one in which changes in a certain direction are expected. If they do not come or come less than expected, then the interest-dispute-resolver is faced with a situation where the status quo calls for change, not for simply sticking to patterns now viewed as obsolete.<sup>131</sup>

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<sup>128</sup> In the growth society of the past 40 years, such patterns have largely dealt with increments to the wage package, and hence their nature as a fundamental change has been somewhat disguised. In a no-growth or slow-growth society, trade-offs may have to be made between existing cash wages and fringe benefits. Such trade-offs will indeed be perceived as changes.

<sup>129</sup> See note 39 *supra*.

<sup>130</sup> I confess to overlooking this obvious point until someone at the Harvard Seminar, see note 1 *supra*, I think it was Professor Chayes, mentioned it.

<sup>131</sup> "In some cases, such as wages, change over time actually becomes the norm, so that a

Exploration of the other relational norm—harmonizing conflicts within the internal social matrix of the relation—reinforces the foregoing conclusions. Such harmonization is unlikely to come through revolutionary changes<sup>132</sup> that conflicting interests have been unable to accede to through negotiation or mediation. Changes typically can be harmonized with the remainder of the relation only by making them consistent with the status quo, again a conservative notion. But it must be noted that if the status quo is a dynamic one moving over time in certain directions—*e.g.*, increasing levels of real wages—change in accord with those patterns is essential to preserve the status quo itself. This is the kind of harmonization we should expect from a dispute-resolver implementing this norm.

My work on developing general contractual norms and relational norms has progressed slowly since *The Many Futures of Contracts*.<sup>133</sup> Certainly other norms besides the two mentioned will have a bearing on change in a system of relational contract law. Two categories should be mentioned, the first of which will have a ring of familiarity to all students of contracts: the restitution, reliance and expectation interests. In a system of discrete transactions, it is now generally accepted that protection of these three interests constitutes a basic norm of contract law. This does not change as we move from classical to neoclassical contract law and on to relational contract law; such interests remain fundamental.

One important change, however, does occur. In classical contract law it is expectations created solely by defined promises and reliance on defined promises that are protected. Only the restitution interest had a broader foundation, and restitution fitted uneasily in the structure of classical contract law, often being conceptualized as not part of that law at all. In neoclassical contract law the expectation and reliance interests remain based primarily on promise, although exceptions do exist. For example, *Drennan v. Star Paving Co.*<sup>134</sup> can be read as holding that reliance on something (industry patterns or common decency?) created the promise rather than the other way around.<sup>135</sup> Restitution, increasingly recognized in neoclassical contract law as an integral part of the system (again perhaps slightly uneasily), stands out as perhaps the least promise-

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party who resists an accustomed change may be perceived as himself the proponent of change." Eisenberg, *supra* note 110, at 676 n.122.

<sup>132</sup> This is to say nothing about the efficacy of revolution for other purposes; soothing conflict within a structure is simply not one of its goals.

<sup>133</sup> Note 9 *supra*.

<sup>134</sup> 51 Cal. 2d 409, 333 P.2d 757 (1958).

<sup>135</sup> More recent examples are: *Lockewill, Inc. v. United States Shoe Corp.*, 547 F.2d 1024 (8th Cir. 1976), *cert. denied*, 431 U.S. 956 (1977) (*see* text accompanying note 90 *supra*); *Carlson v. Olson*, 256 N.W.2d 249 (1977); *Reisman & Sons v. Snyder's Potato Chips*, 32 Somerset Leg. J. 3 (Pa. C.P. Somerset County 1976) (in spite of a holding that a franchisor had no promissory obligation to continue the franchise, the court held that the franchisee's reliance on the relation precluded termination). *Cf.* Sheridan, *The Floating Trust: Mutual Wills*, 15 ALBERTA L. REV. 211 (1977) (agreements to make mutual wills may impose restrictions on revoking or altering the arrangement).

oriented part of the system. In this sense restitution paves the way for treatment of the three contract interests in relational contract law. No longer are those interests bottomed primarily on defined promises, nor are efforts necessary to squeeze them within promissory contexts. In such a system recognition is easily accorded to the creation of such interests arising naturally from *any* behavior patterns within the relation. Substantive changes in relations must therefore take into account the three basic contract interests of restitution, reliance, and expectations, irrespective of their sources.

As illustrative of the foregoing, consider an employee of a small business who has been treated very decently by his employer for thirty years. He quite naturally comes to expect decent treatment throughout the relation including through retirement. Moreover, he relies on that expectation; and if the expectation is not realized, the employer may very well have derived benefits from the reliance by the employee that, in terms of the relation as it existed, are unjustified. We can, and do, infer promises in such situations, but they are far from the defined promises of discrete transactions. Moreover, something besides promise lies behind the social desiderata of seeing that these interests of the employee do not go unprotected. Expectations, as noted earlier, are a form of presentation however they may be created. When they are reasonable under the circumstances, irrespective of how the circumstances were created, societies tend to be very loath to see them thwarted. An already mentioned example is the reluctance of virtually all of American society to accept even the temporary thwarting of post-World War II expectations of continued economic growth.

The final category of relational norm to be considered here is very open-ended. As contractual relations expand, those relations take on more and more the characteristics of minisocieties and ministates. Indeed, even that is an understatement. In the case of huge bundles of contractual relations, such as a major national or multinational corporation, they take on the characteristics of large societies and large states. But whether small or large, the whole range of social and political norms become pertinent *within* the contractual relations. In ongoing contractual relations we find such broad norms as distributive justice, liberty,<sup>136</sup> human dignity, social equality and inequality, and procedural justice, to mention some of the more vital. Changes in such contractual relations must accord with norms established respecting these matters, just as much as they do the more traditional contract norms. Changes made ignoring this fact may be very disruptive indeed.<sup>137</sup>

<sup>136</sup> See D. EWING, *FREEDOM INSIDE THE ORGANIZATION* (1977); *Keeffe Bros. v. Teamsters Local Union No. 592*, 562 F.2d 298 (4th Cir. 1977).

<sup>137</sup> At this point, just as contractual relations exceed the capacities of the neoclassical contract law system, so too the issues exceed the capacities of neoclassical contract law scholars. They must become something else—anthropologists, sociologists, economists,

### *Termination of Contractual Relations*

Termination of contractual relations is an extremely complex subject, far too complex to do more than touch here.<sup>138</sup> Nevertheless a number of points should be made. One is that, unlike discrete transactions, many contractual relations are, for all practical purposes, expected never to end. IBM, the relation between the United Auto Workers and General Motors, and Harvard University are expected to go on forever. Even in the face of great trouble, relations of this kind often do not end, but continue on in new forms; *e.g.*, Northeast Airlines is merged into Delta, or rail passenger service is transferred to Amtrak, along with physical facilities, the labor force, and much of the management. The realities of such transformations often evoke processes very similar to relational patterns of change already discussed, rather than clean-cut application of clear rights and obligations in the discrete transactional tradition.

Of course, many long-term contractual relations are recognized (by outsiders, if not always by the participants) as vulnerable to traumatic termination. Small businesses, branch plant operations of large businesses, and in part, marriages, clubs, and many franchises, serve as illustrations. Depending in part on the relations themselves and in part on such external factors as their importance to the community and the political heft of various of their participants, their termination may or may not be treated by the legal system in relational ways, procedurally or substantively.<sup>139</sup> To the extent that they are treated relationally, their terminations will be similar to those massive contractual relations that had not been expected to end at all.

On the other hand, many long-term contractual relations are, from the start, expected to terminate. A small partnership expecting not to take in new members, or marriage without progeny are examples. Many business consortiums are of this nature. When such relations terminate

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political theorists, and philosophers—to do reasonable justice to the issues raised by contractual relations. Exchange and planning, the basic areas of expertise of the contracts scholar, have now become just two of the many factors in a complete social organism.

<sup>138</sup> For an earlier discussion of this subject, see *Many Futures*, *supra* note 9, at 750-53.

<sup>139</sup> *E.g.*, *McGrath v. Hilding*, 41 N.Y.2d 625, 363 N.E.2d 328, 394 N.Y.S.2d 603 (1977). Plaintiff divorced defendant after three months of marriage and remarried her former husband. During the brief marriage plaintiff contributed money to building an addition to defendant's house relying on an oral premarital promise to give her a tenancy by the entirety. The promise was not performed, and plaintiff sought equitable relief based on a constructive trust. The lower courts rejected as collateral defendant's offer to prove marital misconduct by plaintiff. The New York Court of Appeals remanded for a new trial, stating that whether defendant's enrichment was unjust could not be determined by inquiring only about an "isolated transaction." Rather it must be a "realistic determination based on a broad view of the human setting involved." *Id.* at 629, 363 N.E.2d at 331, 394 N.Y.S.2d at 606.

traumatically early, their treatment will follow patterns already discussed. When they follow the expected course, the legal system will treat their termination as it does other aspects of the relation. Some discrete aspects may be given effect; *e.g.*, legacies to the widow will be enforced explicitly. Some aspects may instead invoke relational norms; *e.g.*, the widow, even by will or maybe even by mutual agreement, cannot be cut out of the estate entirely or lose her rights in community property.

A final point to be made is the distinction between termination of a contractual relation and termination of an individual's participation in a contractual relation. Sometimes the two coincide, *e.g.*, the death of a spouse in a childless marriage. But contractual relations outside the nuclear family tend in modern society to be multiperson and to survive the departure or death of individual participants. Further, typically it is the ongoing relation rather than the individual that is the more powerful of the two.<sup>140</sup> Where, as in employment, this fact is coupled with a high degree of dependency of the individual on the particular relation, we are likely to find considerable protection of that dependency. Such protection may grow up internally (*e.g.*, through collective bargaining), may perhaps be coerced in considerable measure from outside (*e.g.*, labor laws and tax provisions favoring pensions), or may simply be imposed (*e.g.*, mandatory contributions by both employer and employee to Social Security).

In sum, terminations of long-term contractual relations tend to be like other aspects of relations, messily relational rather than cleanly transactional.

#### SUMMARY

A system of discrete transactions and its corresponding classical contract law provides for flexibility and change through the market outside the transactions, rather than within them. This enables the system to work while the transactions themselves remain highly discrete and presentiated, characteristics preserved and enhanced by classical contract law.

A system of more relational contract and its corresponding neoclassical contract law remains theoretically structured on the discrete and classical models, but involves significant changes. Such contracts, being more complex and of greater duration than discrete transactions, become dysfunctional if too rigid, thereby preventing the high level of presentiation of the discrete transaction. Thus, flexibility, often a great deal of it, needs to be planned into such contracts, or gaps need to be left in the planning to be added as needed. The neoclassical system responds to this by a range of techniques. These run from some open evasion of its

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<sup>140</sup> In his later years this appears to have been true even of someone as extraordinarily powerful as Howard Hughes.



primary theoretical commitment to complete presentation through initial consent on to the more common techniques of stretching consent far beyond its actual bounds and by fictions to squeeze later changes within an initial consent framework.

Somewhere along the line of increasing duration and complexity, trying to force changes into a pattern of original consent becomes both too difficult and too unrewarding to justify the effort, and the contractual relation escapes the bounds of the neoclassical system. That system is replaced by very different adjustment processes of an ongoing-administrative kind in which discreteness and presentation become merely two of the factors of decision, not the theoretical touchstones. Moreover, the substantive relation of change to the status quo has now altered from what happens in some kind of a market external to the contract to what can be achieved through the political and social processes of the relation, internal and external. This includes internal and external dispute-resolution structures. At this point, the relation has become a minisociety with a vast array of norms beyond the norms centered on exchange and its immediate processes.

APPENDIX<sup>141</sup>*Transactional and Relational Axes*

CONCEPT	EXTREME TRANSACTIONAL POLE	EXTREME RELATIONAL POLE
1. Overall relation type	Nonprimary	Primary
A. Personal involvement	Segmental, limited, non-unique, transferable	Whole person, unlimited, unique, non-transferable
B. Types of communication	Limited, linguistic, formal	Extensive, deep, not limited to linguistic, informal in addition to or in lieu of formal
C. Subject matter of satisfactions	Simple, monetizable economic exchange only	In addition to economic, complex personal non-economic satisfactions very important; social exchange; non-exchange
2. Measurability and actual measurement of exchange and other factors	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
3. Basic sources of socio-economic support	Apart from exchange motivations themselves, external to the transaction	Internal to the relation, as well as external
4. Duration	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
5. Commencement and termination	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

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<sup>141</sup> From *Many Futures*, *supra* note 9, at 738-40, slightly modified.

6. Planning		
A. Primary focus of planning	Substance of exchanges	Structures and processes of relation; planning of substance of exchanges primarily for initial period
B. Completeness and specificity		
(1) Possible when planning occurs	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
(2) Actual planning accomplished	Very complete and specific; only the practically unplanable (of which there is little) left unplanned	Limited specific planning of substance carried out; extensive planning of structures may or may not occur
C. Sources and forms of mutual planning		
(1) Bargaining and adhesion	Specific consent to price of a good produced unilaterally by seller; short bid-ask bargaining, if any	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"
(2) Tacit assumptions	Inevitably present, but inherently relational and anti-transactional	Recognized aspect of relational planning, without which relations cannot survive
(3) Sources and forms of post-commencement planning	No post-commencement planning	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
D. Bindingness of planning	Planning is entirely binding	Planning may be binding, but often some or all of it is characterized by some degree of tentativeness
E. Conflicts of interest in planning	Enterprise planning can be expressed only through partially zero-sum allocative planning, hence all mutual planning is conflict laden.	Enterprise planning may be separable at least in part from allocative planning, and hence relatively low in conflict; merger of non-allocative enterprise plan-

		ning with allocative planning may occur in ways muting conflict and providing nonnegotiation ways for dealing with it.
7. Future cooperation required in post-commencement planning and actual performance	Almost none required	Success of relation entirely dependent on further cooperation in both performance and further planning
8. Incidence of benefits and burdens	Shifting or other specific assignment of each particular benefit and burden to one party or the other	Undivided sharing of both benefits and burdens
9. Obligations undertaken		
A. Sources of content	Genuinely expressed, communicated and exchanged promises of parties	Relation itself develops obligations which may or may not include genuinely expressed, communicated and exchanged promises of the parties
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 monetized (whether by mutual party planning i.e. promissory or otherwise i.e. by rule)	Nonspecific; nonmeasurable, 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 nonperformance	Transfer likely to be uneconomic and difficult to achieve even when it is not impossible <sup>142</sup>
11. Number of participants	Two	May be as few as two, but likely to be more than two and often large masses
12. Participant views of transaction or relation		
A. Recognition of exchange	High	Low or perhaps even none

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<sup>142</sup> I no longer believe this to be accurate; corporations can, for example, be sold and the work force may go right along. See MACNEIL, CASES 2, *supra* note 16, at 778.

B. Altruistic behavior	None expected or occurring	Significant expectations of occurrence
C. Time-sense	Presentation of the future	Futurizing of the present, i.e. 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
D. Expectations about trouble in performance or among the participants	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