RELATIONAL CONTRACT: WHAT WE DO AND DO NOT KNOW

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In this broad-based assessment of contracts scholarship, Professor Macneil argues that relational thinking is a necessary element in any persuasive account of legal and social development. By the term "relational thinking," Professor Macneil denotes an approach emphasizing the complex patterns of human interaction that inform all exchange. He develops theoretical and historical demonstrations of the pervasiveness of relations in exchange. Finally, Professor Macneil offers a comprehensive summary of the influence of relational thought on legal scholarship, assessing the ways in which neoclassical economics, empirical, historical, and critical legal studies scholarship has recognized (and ignored) basic norms of relational thinking.

INTRODUCTION

We must know who "we" are before we can talk about what "we" do and not know about anything, including relational contract. My students, for example, all know that I invented relational contract, and I daresay Stewart Macaulay's students all know that he invented relational contract. Charles Fried knows that relational contract was invented by the Devil. Any good classical neoclassical microeconomist knows there is no such thing as relational contract. All these "wees" happen to be wrong. Or are they? Perhaps for their own purposes, each of these "wees" is correct.

Once we have established the correct "we", we must explain what we mean by "know". Everyone "knows," for example, of the explosion of litigation in this country. But Marc Galanter's article, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about Our Allegedly Contentious and Litigious Society*[1] shows they are wrong. Or does it? It depends upon what we mean by "know;"

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1. 31 UCLA L. REV. 4 (1983).

the very fact that we think we know is itself a form of knowledge,[2] a fact not changed by our preference for some other—and possibly contradictory—form of knowledge about the basic phenomenon allegedly known.[3] Moreover, the very way we organize our thinking is a form of knowledge—one often overlooked, even by lawyers whose stock-in-trade consists largely of such "organizational" knowledge. To take a famous example, Albert Einstein became more knowledgeable about the physical world when he understood the laws of relativity, as did everyone who understood him. This was true as soon as he understood, even though it was many years, if not decades, before "hard" knowledge existed in the form of either physical experiments or pragmatic uses of that knowledge.[4] Similarly, we know more about some aspects of human behavior as a result of the development of neoclassical economics than we did before.[5]

With these thoughts in mind we can proceed cautiously to talk about our—that is, your and my, dear reader—knowledge, or what we think we know, about relational contract. Nevertheless, before we can take stock of relational contract scholarship or suggest directions for future research,[6] we must relate that scholarly dimension to other relational contract dimensions, and delineate various categories of such scholarship.

The relational contract dimensions important in our inquiry are first, the everyday working of exchange relations and transactions, or contract behavior (the behavioral dimension); second, the positive law of the sovereign relating to that behavior (the legal dimension); and third, legal scholarship relating to that behavior (the scholarly dimension).

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2. Whether devout Christians know, in a scientific sense, or only think they know, that Christ is divine is quite irrelevant for most purposes.

3. This is not to suggest that I disagree with Professor Galanter, or think his account of what is actually going on in American courts is not more accurate than the general statements of those whom he criticizes. But by far the most important knowledge he imparts is not his systematically gathered information, but something far more impressionistic, just as impressionistic—although probably more accurate—as the statements of those he criticizes: ". . . courts are ever present as promulgators of symbols of entitlement, enlivening consciousness of rights and heightening expectations of vindication." Galanter, *supra* note 1, at 51.

4. This is not to say, of course, that everything we know or think we know exists apart from our perceptions.

5. Since new knowledge often destroys old, this statement proves nothing about net gain or loss from this new knowledge. As will be seen, I believe we have lost immense quantities of knowledge about contractual relations, because of our enhanced understanding of utilitarian principles gained over the last two centuries.

6. The "taking stock" and "direction" ideas are from the communications to participants in the conference. See *supra* note *.

I. CONTRACT BEHAVIOR

To have even a glimmer of hope of understanding relational contract we must overcome the impact hundreds of years of history have had on our minds. We must start with exchange viewed broadly. By now, we are so brainwashed as to be almost unable to conceive of exchange except in terms of markets and discrete transactions. But exchange is not the product simply of social relations so organized. Rather, exchange is the inevitable product of specialization of labor, however that specialization of labor may occur. Whether in a factory, in a commune, within a corporation, between discrete entities in markets, or within a family, exchange will occur as long as specialization exists. Understanding this is the first step towards freeing ourselves of the Hobbesian and utilitarian intellectual blinders which prevent us from understanding contract behavior and with it relational contract.

In the second step, we must recognize that discrete exchange[7] — which itself is the product of particular kinds of social relations, such as markets permitting and encouraging it—can play only a very limited and specialized function in any economy, no matter how market-oriented that economy may be. That function is the transfer of control of capital[8] and labor, i.e., goods and services,[9] between quasi-independent entities,[10] either individuals or collectives of individuals. That transfer of control of goods and services is one economic function essential to the production[11] of goods and services goes without saying. (But such transfer may or may not be discrete exchange between quasi-independent entitites.)

That discrete exchange can never be the *only* economic function essential to production, distribution, and final consumption of goods

7. As I pointed out most recently in Macneil, *Values in Contract: Internal and External*, 78 NW. U.L. REV. 340 (1983) [hereafter cited as Macneil, *Values*], all exchange is embedded in relations. Discrete exchange here (and throughout this Article) means, therefore, exchange *relatively* free of relations beyond those created by a common language, a system of order (including property and liberty rights), a monetary system, and, for discrete exchanges not accomplished simultaneously, a legal system enforcing promises.

8. Capital is used here to include not only stored labor, my usual preferred definition, but also resources not produced by human effort, although subject to potential or actual human control, such as coal in the ground.

9. The phrase "goods and services" is used in its broadest possible sense to encompass anything with some physical manifestation that people might consider economically valuable.

10. In neoclassical microeconomic theory, but never in reality, the transfer of control is between independent entities. In fact the entities are only quasi-independent because all exchange is embedded in relations, and relations prevent the entities from being entirely independent.

11. Production includes distribution and all work up to final consumption. The latter often includes a great deal of work by ultimate consumers after they have "consumed" the item where the time of consumption is understood to be the time of its acquisition, as is very common in economic analysis, including the national accounts.

and services should also go without saying. But it must be said because the so-called science of neoclassical economics presumes a model treating discrete exchange as the sole economic function essential to production, distribution, and final consumption.[12] And this model or other less sophisticated Hobbesian alternatives dominates the conventional wisdom of Western economic thinking.

But what about the actual tasks of physical production, distribution, and final consumption of goods and services? These discrete exchange cannot accomplish.[13] They occur in only one of two ways: (1) one person applies his hands and mind over time to available tools and materials to change them to more economically useful forms, or (2) a number of people working together do the same. The former is not exchange at all, and the latter is not discrete exchange, but relational exchange. Consider, for example, Adam Smith's famous example of pinmaking:

> One man draws out the wire, another straights it, a third cuts it, a fourth points it, a fifth grinds it at the top for receiving the head; to make the head requires two or three distinct operations; to put it on, is a peculiar business, to whiten the pins is another; it is even a trade by itself to put them into the paper; and the important business of making a pin is, in this manner, divided into about eighteen distinct operations, which, in some manufactories, are all performed by distinct hands, though in others the same man will sometimes perform two or three of them.[14]

Nowhere is the actual production of the pins conducted by discrete exchange. Since, however, exchange obviously does and must occur in the process, it necessarily is relational exchange.[15] Smith's reference to manufactories (and his subsequent discussion) makes plain that relational exchange among the workers through their contributions to the

12. In the neoclassical model of capital and labor, the goods and services are not, of course, omitted. But they are simply inputs and/or outputs on the X and Y axes of a mathematical concept centered on diserete exchange. Moreover, they themselves normally are ultimately reduced entirely to exchange, i.e. their exchange value.

13. Transfer of control by discrete exchange often involves some movement of the goods and services. This movement may be—indeed usually is—productive in the physical sense.

At first thought, one might conclude that knowledge, a good, can be created by discrete exchange, e.g., the sale of a book on carpentry. But, of course, a book is not knowledge, merely a source of it; the production of knowledge comes, alas, from reading, not from acquiring, the book. Knowledge can, however, be created by the processes of relational exchange—witness any classroom.

14. A. SMITH, THE WEALTH OF NATIONS, 4-5 (Mod. Lib. ed. 1937).

15. If it (and much other exchange too) does not occur, all the pinmakers will go hungry.

common enterprise is an essential aspect of the production he describes.[16]

To summarize: when discrete exchange occurs, it does so at interfaces between quasi-independent entities, and is not in itself *physically* productive.[17] Instead, it is productive only because the exchange per se—virtually by definition, and certainly in effect—is expected to enhance the value of the items exchanged. In the discrete exchange the control transferred is usually that described by those seemingly definite, but in fact extremely indefinite terms: ownership or property.[18] While discrete exchange is commonly a prelude to further physical production,[19] and while it enhances value by itself, it does not achieve physical production.[20] This is not to minimize its importance or to denigrate its social value, but to recognize its nature.

We take the third step in understanding the behavioral dimension of relational contract when we recognize the obvious: discrete exchanges are always relatively rare compared to patterns of relational exchange.[21] But why? The answer lies in the two ways resources gain value: their conversion into goods and services and their transfer to people to whom they are more valuable than they are to the transferor(s). Except where a single person consumes without exchange what he produces, *both* processes must occur for goods and services to achieve anything close to their potential value. What, for example,

16. This is true irrespective of the "ownership" of the enterprise or its capital. If, as is likely, there was a capitalist or capitalist-worker owner, who paid wages—time or piecework—there was just as much exchange among the workers as if they owned and operated the enterprise communally. In the former case they would be exchanging the product of their respective capitalized efforts through the owner-capitalist, in the latter through their communal arrangements. Although the social and economic consequences, including the forms of exchange, may differ greatly because of such variant patterns, none of those patterns alters the fact of exchange.

Smith's example is irrelevant to solo production in which an individual produces something without exchange occurring in its physical production. Such production is possible and in fact a good bit of it does occur, e.g., much housework, craftwork, artistic production, single hunting, fishing, and farmwork, some professional work. But solo production by no means necessarily leads to discrete exchange of a finished product. Examples: the housework product of a spouse is typically exchanged with the other spouse in the relational family structure; artists often have ongoing contractual relations with regular agents or consignees.

17. As mentioned above, *supra* note 14, the means of accomplishing the change of control may be physically productive, as in the case of Seller's shipping goods to buyer.

18. *See* Becker, *Property in the Workplace: Labor, Capital, and Crime in the Eighteenth-Century British Woolen and Worsted Industry*, 69 VA. L. REV. 1487 (1983). *See also* Cohen, *The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry*, 32 U. TOR. L. J. 31 (1982).

19. Consumption itself is a form of production, a fact generally ignored in economic analysis.

20. At root, Marxist beliefs that discrete exchange does not enhance value are based on this fact. Marxists are correct in terms of labor theories of value, although not necessarily in terms of other forms of social analysis.

21. Like so many obvious things, people have difficulty seeing this.

could the individual maker of pinheads do with the 48,000 pinheads Adam Smith discusses if he could not exchange them in a way to secure a share of the value of the finished pins? Not much. Discrete exchange will always be a comparatively rare phenomenon because it performs only the transfer of control function and is only minimally related to physical production of goods and services. (Its closest relation to the latter is in the transport of the goods or services from one place to another). Relational exchange also serves the function of transferring control, but it is in addition closely integrated with all aspects of the physical production of goods and services;[22] thus, relational exchange will always be far more common in any given productive system than discrete exchange.

Our final step in understanding relational contract behavior lies in assessing the significance of discrete exchange in the production of the value of goods and services relative to physically productive activities occurring in patterns of relational exchange. There are a number of ways to do this. One is to look at its impact on social, political, and intellectual arenas. Such impact may be immense, as it is in our own society. Another is to assess its importance in the two ways of creating economic value—physical production and exchange, separating the latter into the categories of relational and discrete. This could be done directly only by comparing the value of final output in the production of which no discrete exchange has occurred with that in which some has occurred. Since some relatively discrete exchange probably occurs somewhere in the course of production of most goods and services in Western societies, this will tell us only that discrete exchange adds some value to the final product. It will, not, however, tell us how much value was contributed by each of the three kinds of activities—physical production, relational exchange (whether as part of or in addition to physical production), and discrete exchange.

Comparisons based on costs, however, are possible. We can ascertain the costs of labor and capital going into physically making and physically distributing the various components of the pertinent goods and services, including any relational exchange connected with those processes. We can determine the costs of transfers of control—relational or discrete—required to achieve the ultimate acquisition of the goods and services by the final consumer. We can then compare the costs of the discrete-exchange-transfers of control with all the other costs. That will enable us to compare input costs of discrete transfers of

22. Except where the producer consumes his or her own product, a common, but seldom socially dominant pattern among humans. *See supra* note 18.

control to those of physical production and relational exchange[23] in the the overall production of, for example, pin-value in that operation and society.[24]

Were we to acquire such information on a large scale, we would surely find that even in those societies most heavily dependent on discrete exchange, the bulk of resources used in productive efforts go into the physical production and distribution of goods and services and relational transfers of control over those goods and services. In contrast, only a relatively small proportion of resources could conceivably go into discrete exchanges between quasi-independent entities.[25]

To help understand why only a small part of capital and labor will be devoted in any given society to conducting discrete exchange, consider the nature of the most discretely organized economy imaginable. Each productive person is a specialist, each is a solo owner-worker, each acquires all the goods and services needed for production through discrete exchanges, and each produces a good or service which can be disposed of through discrete exchanges with other specialists. There must be enough specialists of each kind so that the discrete exchanges remain discrete and do not slip into relational patterns through repeated exchanges. Of course, no employment is possible, nor forward contracts, nor services involving relations that cannot be divided into discrete transactions, nor countless other relations to be found in every real economy, including those created by sovereign law, monetary systems, and the like. The denizens of such a mythical discrete economy would be mighty busy exchanging things, and the costs in labor and capital of those discrete transactions might rival or even surpass the costs of physical production itself. Consider, for example, Adam Smith's pinmakers. In this mythical discrete economy the process he described could have been carried out by *A*'s purchase of metal from

23. It would be harder, if not impossible, to make such cost comparisons between physical production and relational transfers of control because they are so closely meshed.

24. For the purpose of understanding relational contract it is probably unnecessary to deal with the troubling questions about the relative importance of labor and capital, labor value, and the like, as long as we use the same measure, e.g. market cost, for inputs into both physical production and exchange. Only if physical production took different proportions of capital and labor (however measured) from conducting discrete exchanges, would these become difficult issues. And since the only point here concerns no more than a very rough idea of relative input, reference to cost in the market sense is adequate.

Aside: One of the many ill effeets of the common failure to recognize that costs of exchanging are a cost of production as fundamental as costs of physical production (capital and labor) is the irony that, because no costs are assigned to exchange costs, they can be treated as somehow different from capital and labor, and presto!, as *the* creator of value!

25. In the course of quite extensive, if casual, study of history and anthropology I have never come across any society where this did not appear to be the case. Certainly it has never been the case in the Western world during what we think of as the heyday of laissez faire.

which to draw the wire, his drawing it in his own one-man plant and then selling the drawn wire to *B*, who straights it in his own one-man plant, and then sells it to *C*, who cuts it in his own one-man plant, and then sells it to *D*, who points it in his own one-man plant, etc. through eighteen individual efforts and sales. But, to be discrete, each sale would have to be conducted through markets with enough similar sellers, e.g. pin wire cutters, and similar buyers, e.g. pin pointers, so that relations between individual sellers and buyers did not convert repeated transactions of this kind into complex ongoing relations.[26] Such a discrete economy would have such low productive capacity, such severe limitations on the kinds of goods and services it could produce, and such immense transaction costs, that nothing even remotely approaching it will be found outside the imagination.[27]

In sum, for us to "know" contract behavior (the first dimension of relational contract) we must recognize that physical production of goods and services is not carried out by discrete exchange. Instead, it is done sometimes by one person applying hands and mind to tools and materials, but more commonly by people doing the same in patterns involving relational exchange. We must also recognize that the sole function of discrete exchange is the transfer of control of capital and labor, of goods and services. This is a limited economic function, albeit one essential to the physical production itself of goods and services and necessary for enhancing the value of those goods and services.[28] Because of the limited nature of this function and because it can be and is also carried on by relational exchange, discrete exchange is always rare compared to relational exchange; it is inevitably a relatively small part of the overall economic activities of any given society.

Since we shall focus on what we know about relational contract in American law and scholarship, I should emphasize that no period in American history provides any evidence contrary to what has been said. In the very heyday of laissez-faire, wherever there were sales of wheat in markets, there were banks financing every step from the fields

26. Note that we still do not find such examples in spite of infinitely increased intensification of specialization since Smith's day. It is plausible that each of the pinmaking steps might now be carried out by separate enterprises dealing through discrete exchanges. But if that were the case, each enterprise would almost surely be a collectivity of workers drawing hundreds or thousands of tons of wire, straightening it, cutting it, etc., respectively, and it would be the collectivity—in this country probably a corporation—selling it to the next entity. Moreover, it is very unlikely that large scale specialists like this would be so numerous as to avoid the development of complex ongoing relations between sellers and buyers. So we would revert to a great deal of relational exchange within and among those specializing quasi-independent entities.

27. There are many other reasons as well, such as the unsatisfactory social nature of such patterns.

28. It is essential that transfer of control occur when specialists exist, but not that it be accomplished discretely.

themselves to final delivery, family farms growing the wheat, harvester teams harvesting it, private companies or cooperatives storing it, railroads and carters moving it, mills milling it, and baking companies and families baking it. All these entities carried on their operations in internal patterns of relational exchange, most of them including employment relations, not only for physical production, but for both classes of the necessary changes of control—those among individuals within the entities, and those required to accomplish discrete exchanges (when they were discrete exchanges) between the entities. Unquestionably, the many discrete exchanges which did occur between quasi-independent entities had a tremendous impact on America's economy and society. Nevertheless, that impact cannot be allowed to obscure the limited economic functions of those exchanges if we wish to understand relational contract in the real life of the Republic.

II. Positive Law of the Sovereign

The second dimension of relational contract to be considered is the positive law of the sovereign[29] interacting with the behavioral dimension of contract. I turn now to just a few highlights from one specific place and two specific eras: America of approximately 1865-1933 and 1933 to date. As I have suggested, the America of the first of these periods was inevitably a world dominated by relational contract. But it was one in which discrete exchange was nevertheless commonplace, exercising tremendous influence throughout the society in every conceivable way.

Given such a situation, we might expect to find Leviathan responding with law supportive of both relational and discrete exchange. And so we do. We know that property, the prerequisite of discrete exchange, was the legal fundament throughout the period, followed closely by liberty, at least insofar as the sale of labor was concerned.[30] A well-developed law of discrete contract (including rules concerning sales) existed, although at the beginning of the period it lacked the baroque systemization it was to acquire later, particularly at the hands of Samuel Williston. Its underlying principle of freedom of contract (really power of contract) is an essential element of any law supporting discrete exchange.

29. Sovereign and Leviathan are used in the singular throughout, although in the American context, especially in the first era to be discussed, plurals would have been more precise.

30. This point is especially debatable with respect to the South, especially concerning black labor, but not beeause blacks were not theoretically legally free to sell their labor in relatively discrete exchange.

At the same time the sovereign's law supported relational exchange. Property law permitted unlimited aggregations of capital (property) by anyone who could lay his hands on it without too egregious violations of certain kinds of criminal laws. The ensuing aggregations inevitably required employment, an extremely relational contract, no matter how strenuously a party attempts to make it discrete. Freedom of contract—that great element in discrete exchange—also extended to relations between such aggregators of capital and everyone with whom they dealt, including their labor forces. Its presence did not convert relations such as employment or corporate control and ownership into discrete transactions, however, but into extremely hierarchical contractual relations. Furthermore, the principle of legally unlimited aggregation of capital was extended to groups of individuals, particularly through the corporation. And the corporation itself is one of the greatest relational contracts ever.

The sovereign aided relational contract in numerous other ways: laws of principal and agent (including master and servant and partnerships); trusts; family law (including inheritance); and the law of associations. These of course were in addition to more obvious forms of assistance such as land grants to homesteaders and aid to hierarchical contractual relationships, especially corporations, through subsidies of various kinds, such as land grants to railroads. And even in those days of relatively limited governmental activity, the government itself constituted extensive contractual relations.[31]

In contrast, since 1933 the increasing intervention of the sovereign into almost all aspects of the socioeconomy, has effected two changes in the foregoing picture. First, the expansion of the sovereign's role has largely eliminated predominantly discrete exchanges.[32] (It would be more accurate to say that, since all exchanges, even the most discrete, are embedded in relations, the intervention reduced the discreteness of all exchanges by introducing the relational element of regulation.) Virtually no type of contract exists in which this has not occurred.[33]

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31. Space does not permit detailed examination of these points. That is unfortunate, since the same intellectual blinders that cause people to think nothing existed in 19th century America except God, Mother, and Market—or Devil, Father, and Market—also causes them to think that American law was nothing but Liberty, Property, and Freedom of Contract. (The family farm, the country store, the railroad, and steamboat do not fit the picture, and must therefore be relegated to Currier & Ives.) Of course even if it had been, that would have sufficed, with capital aggregations, especially corporate, to yield the mixture of highly relational and highly discrete contract and contract law we see in that era.

32. That is, rising intervention eliminated such exchange insofar as sovereign law is concerned, although not necessarily in contract behavior itself.

33. The closest thing to an exception is sexual relations, but even there the state is heavily involved through the welfare and health systems, as well as in developments such as palimony and increased intervention in family affairs respecting physical and psychological abuse.

Second, increasing intervention has changed significantly the substantive and procedural content of contractual relations.[34] This has not necessarily made them any more relational, however. For example, even hourly wage employment was very relational before Leviathan lent its aid to collective bargaining. Corporations have always been exchange relations writ large; thus, legal protection of shareholder rights did not convert them from a series of discrete exchanges into relations, but simply changed the nature of those relations. Indeed, since Leviathan intervenes through positive bureaucratic law, and since bureaucratic law's specificity creates a type of discreteness, such intervention has actually increased discreteness in collective bargaining and corporate relations.[35]

This account of these periods in American history demonstrates that relational contract law did not magically materialize within the last half-century. Instead, relational contract law was always present; since 1933 the sovereign's intervention has merely expanded its domain to include areas previously governed by discrete contract law, thereby aiding their conversion to relational patterns.[36] Simultaneously, relational contract law has expanded beyond its earlier base—a primarily facilitative law of property, contract and associations, particularly corporations—to a second, rapidly growing base concerning regulation and other sovereign intervention into relations. Again, I do not here claim to present an exhaustive historical account of relational contract, but only a sufficiently clear outline of the essential changes in the American law of relational contract.[37]

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34. This is discussed more extensively in Macneil, *Bureaucracy, America, the Legal Profession, and Community*, 79 NW. U.L. REV. (forthcoming) (1985) [hereafter Macneil, *Bureaucracy*].

35. The bureaucratic nature of the law of Leviathan is discussed in Macneil, *Values*, *supra* note 7, at 379-82, and Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5, 24-28 (1984).

36. Leviathan could not have done this job all by itself. Indeed, in many ways it was not even the prime mover. A host of technological and "private" institutional developments, such as advertising of brand names and, most important of all, vastly increased bureaucratization of "private" economic activity were more significant. For an account of the latter see A. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977). For a critique of the limitations of Chandler's analysis from the CLS standpoint, see Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 83-85 (1984).

37. It should be noted that the law discussed here is "real law"—real in the sense that it is the law to be found in legislation, judicial decisions, administrative rule and reported administrative action, including quasi-judicial. It is not the law developed by the scholarly synthesizer, the third dimension to be discussed. The even more "real law" of the lower court, the policeman, the sheriff, the ward leader, and now of the ubiquitous civil servant, major and minor, may have been, and may be, different from what is discussed here. But if so, it is a safe bet that such informal law was more relational in the 19th century than the law I have described here, and that, in the 20th century, informal law simply changes the nature of relations in contracts; it surely does not make them more discrete.

III. AMERICAN LEGAL SCHOLARSHIP

Subject-specific relational scholarship. In America alone, a broad range of legal scholarship necessarily concerns relational contract.[38] It includes all writing on collective bargaining, employment, corporate law, pensions, condominiums, construction contracts, computer leasing, landlord and tenant law, and consumer law, to mention just a few areas.[39] Some of that subject-specific writing is explicitly conscious of relations as such and of their effect outside the particular area.[40] The latter works tend to merge intellectually with a far smaller but broader-based body of writing concerned with contractual relations as a genus cutting across subject-specific areas. This Article focuses on such general scholarship.

General relational contract scholarship. If one wishes to "know" this general scholarship, one must always be conscious of the subject-specific scholarship. In many ways the general scholarship merely collects ideas, principles, rules, and—above all—information about behavior, emanating from those specific areas of human and legal activity. In this sense, the general relational contract scholarship is not at all new.[41] Its originality lies only in its synthesis of these and other ideas.

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38. To make this Article reasonably manageable it is necessary to limit severely the meaning of legal scholarship dealing with contractual relations. I have adopted a pragmatic approach, limiting it to that scholarship which commonly makes its way into publications typically found in law school libraries. But even this brings in things it has been necessary to exclude, such as legal anthropology. And, of course, the limitation to legal scholarship itself omits vast worlds of scholarship pertinent to our "knowing" about relational contract. The subject areas surveyed in a recent Ph.D. thesis suggest some of those omissions: (1) the economic perspective (microeconomics, firm and institutional economics, transaction cost economics, agency theory, game theory); (2) the behavioral perspective (prime exchange, organizations, groups, social identity, and normative structures, exchange, conflict, and residual hostility); (3) the marketing perspective (marketing and exchange, marketing and conflict, interorganizational exchange-based analytical frameworks). P. Kaufman, Relational Exchange and Conflict Behavior: An Investigation of their Relationship to Hostility in the Conflict Aftermath (June 1985) (available in Northwestern University Library). (Kaufman also treats the legal perspective.) However unavoidable, these are serious omissions indeed, as is the parochial limitation to American legal scholarship. For example, the patterns of relational contract in both Japan and China have attracted considerable Western interest. *See* Dore, *Goodwill and the Spirit of Market Capitalism*, 34 BR. J. SOC. 459 (1983); Macneil, *Contract Law and Practice in the People's Republic of China* 37 STAN. L. REV. (forthcoming) (1985) (by Roderick Macneil).

39. Since all contracts are significantly relational, even work on quite discrete contracts necessarily concerns in part relational contract. Thus, the vast body of neoclassical contracts scholarship, including everything on UCC Article 2, is partially relational.

40. One thinks, for example, of Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969), and, of course, Lon Fuller's work in labor relations, such as Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3.

41. Russell Hardin recently called my attention to a quotation from Maine's era suggesting just how old some of our supposedly more recent thoughts on contracts are:

Nevertheless, unless otherwise noted, "scholarship" will mean this general scholarship, not subject-specific scholarship.

This scholarship of contractual relations may be divided into five categories defined by the base upon which the work is founded: promise (divided into neoclassical microeconomics and neoclassical contract); formal empirical studies; historical; critical principles; and non-radical relational principles. Although this taxonomy oversimplifies and distorts the work in these general categories, it is a useful tool for our "knowing" of relational contract.

A. Promise-centered

1. NEOCLASSICAL MICROECONOMICS

Goetz and Scott have nicely distinguished two traditions in economic analysis of contract. The first evolves "from the pioneering work on bargaining by Coase and others" in which "'bargain model' theorists have constructed models of contract behavior under conditions of low transaction costs to examine the influence of different legal rules in environments where parties are able to allocate all relevant risks at the time of contracting."[42] The second is that of the "transaction costs" theorists who "have focused on methods of reducing transaction costs in complex contractual relationships. They assume that uncertainty and complexity often *prevent* parties from accurately allocating all relevant risks at the time of contracting."[43] Although, as I have pointed out elsewhere, transaction cost analysis is not in itself neoclassical microeconomic analysis,[44] it is nevertheless so closely associated with such analysis—and is so essential to endow microeconomic analysis with some degree of both sense and reality—that the two often go hand in hand in analyzing contract, especially relational contract.[45] Thus it is

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> The real course of development has been first from status to contract, then from contract to a new kind of status determined by the law,—or, in other words, from unregulated to regulated contract.

A. TOYNBEE, LECTURES ON THE INDUSTRIAL REVOLUTION 31 (David & Charles reprint series 1969) (1st ed. 1884).

42. Goetz & Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967-68 n.5 (1983). The fallacies of this approach when applied to relational contract have been explored in Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U.L. REV. 1018 (1981) [hereafter Macneil, *Economic Analysis*]. *See also* Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982) [hereafter, Macneil, *Efficient Breach*].

43. Goetz & Scott, *supra* note 42, at 969 n.5.

44. Macneil, *Economic Analysis*, *supra* note 42, at 1022-24.

45. Indeed, as Goetz and Scott point out, they have worked both sides of the street, Goetz & Scott, *supra* note 40, at 968-69 n.5, evidently without great intellectual discomfort. I,

appropriate to include the transaction cost school under the heading of neoclassical microeconomics. Most prominent among scholars employing relational ideas in microeconomic analysis recognizing the importance of relations in contract are Oliver Williamson,[46] Victor Goldberg,[47] Benjamin Klein and his collaborators,[48] and Charles Goetz and Robert Scott.[49] Henry Butler and Barry Baysinger have recently aimed at a synthesis of the transaction cost approach with other relational contract theory and with organizational theory.[50] An interesting forthcoming addition is Ronald Gilson and Robert Mnookin's study of profit splitting in corporate law firms.[51] These writers' approaches vary considerably, particularly respecting the degree to which they escape from the microeconomic model and pile their analysis onto the eclectic transaction-cost bandwagon.[52]

2. NEOCLASSICAL CONTRACT

Promise-centered contracts scholarship takes promise as the central focus of contract. This focus does not, of course, mean that nonpromissory aspects are omitted—that would be impossible—nor even that promise may not in the end be swamped by the nonpromissory aspects, although it may mean that. Rather it means that the nonpromissory aspects have to be fitted around promise—whether in behavior, in sovereign law, or in intellectual organization. Thus, in promise-centered contracts scholarship, promise establishes the arena and the focus, and nonpromissory aspects are organized accordingly.

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however, felt just a twinge of discomfort to be identified with transaction cost theory in their footnote. While microeconomic analysis of contract omitting transaction costs seems to me largely abstract nonsense, microeconomic analysis of contract with transaction costs included may not. Nevertheless, I believe that the transactions costs approach is far too unrelational a starting point in analyzing relational contract.

46. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979) [hereafter Williamson, *Contractual Relations*]. Professor Williamson's latest work of this kind focuses on corporate governance. Williamson, *Corporate Governance*, 93 YALE L.J. 1197 (1984).

47. Goldberg, *Regulation and Administered Contracts*, 7 BELL J. ECON. 426 (1976).

48. Klein, Crawford, & Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297 (1978).

49. Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1983).

50. Butler & Baysinger, *Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transaction-Cost Economics and Organization Theory*, 32 EMORY L.J. 1009 (1983). *See also* Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521 (1985).

51. Gilson & Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985).

52. For comments on Williamson in this respect, see Dugger, *The Transaction Cost Analysis of Oliver E. Williamson: A New Synthesis?* 17 J. ECON. ISSUES 95 (1983).

All promise-centered contracts scholarship must cope with relational contract, because all contract is relational. It could cope, of course, by ignoring the relational character, and go on from there. But American promise-centered contracts scholarship has for many decades increasingly recognized contracts' relational elements. Landmarks along the way were the first Restatement's recognition of promissory estoppel, Lon Fuller's article on the reliance interest in contract damages,[53] Karl Llewellyn's work culminating in Article 2 of the UCC,[54] and *Restatement (Second) of Contracts.* Such promise-centered scholarship dealing with relational contract is, except for subject-specific work, by far the largest body of American relational contracts scholarship. It is also by far the most respectable and established category of scholarship. Anyone wishing to challenge it faces multiple hurdles. The most prominent ones are intellectual and linguistic,[55] but underlying them are class and other special interests.[56]

The past 10 years or so have seen a considerable outpouring of this kind of work. This is not, however, a discontinuity; promise-centered scholarship dealing with relational contract has never really quieted down since the 1920s. During the apparently quiet period following World War II, leading contract scholars dealt expansively with promise-centered scholarship in innovative casebooks.[57] Later they tried to cope with the impact of UCC Article 2's many relational features. In

53. Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936); Fuller & Perdue, *The Relience Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937).

54. Some of this is subject-specific, but its influence outside the sale of goods has made it much more than that.

55. Referring to "our still-reigning contract theory," Roberto Unger says:

> First, there are the exclusions: whole areas of law, like family law, labor law, antitrust, corporate law, and perhaps even international law, that were once regarded as branches of unified contract theory but gradually came to be seen as requiring a specific set of categories unassimilable to that theory. Then there are the exceptions: bodies of law and social practice such as fiduciary relationships that come under an anomalous set of principles within the central area of contract. Finally, there are the repressions: problems like those of long-term contractual dealings that, though resistant to the solutions provided by a theory oriented primarily toward the one-shot, arm's length, and low-trust transaction, are nevertheless more often dealt with by ad hoc deviations from the dominant rules and ideas than by clearly distinct norms. When you add up the exclusions, the exceptions, and the repressions, you begin to wonder in just what sense traditional contract theory dominates at all. It seems like an empire whose claimed or perceived authority vastly outreaches its actual power. Yet this theory continues to rule in at least one important sense: it compels all other modes of thought to define themselves negatively, by contrast to it.

Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 617 (1983).

56. As Unger says, "This intellectual dominance turns out to have important practical consequences." *Id.* Indeed it does.

57. Karl Klare has reviewed the development of contracts casebooks in this period and later in Book Review, 54 N.Y.U. L. REV. 876 (1979).

1961, Harold Havighurst came along with *The Nature of Private Contract*,[58] a modest book, but one with many insights into the relational aspects of promise-centered contract. And the contribution of these sporadically appearing general works was augmented by numerous subject-specific works. Indeed, the latter may have been more important. For example, the 1950s and early 1960s saw a great deal of broad-gauge, partially promise-centered work on labor relations[59] when more general promise-centered relational contract scholarship was relatively dormant.

The largest single recent body of promise-centered relational work consists of *Restatement (Second) of Contracts* and the secondary work it has stimulated.[60] Specific relational concepts such as unconscionability, duress, good faith, and "best efforts"[61] all have also been explored extensively within the context of a promise-centered system.

In addition to the institutional effort of *Restatement (Second)*, its progeny, and specific-concept treatments of relational contract, scholars have produced a number of promise-centered syntheses. Most prominent among these is Charles Fried's *Contract as Promise*.[62] Since it has attracted a great deal of attention,[63] including some from explicitly relational standpoints,[64] I shall focus here on a more recent synthesis: Joel Levin and Banks McDowell's *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*.[65] In this fairly lengthy

58. H. HAVIGHURST, THE NATURE OF PRIVATE CONTRACT (1961).

59. Harry Shulman, Archibald Cox, Lon Fuller, and later, Clyde Summers are particularly obvious examples. *See* Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Fuller, *supra* note 40; Summers, *supra* note 40.

60. *See, e.g., Symposium on the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1 (1983); *Symposium: The Restatement (Second) of Contracts*, 67 CORNELL L.Q. 631 (1982).

61. Allan Farnsworth has been one of the most prolific explorers of relational contract while remaining steadfastly within the confines of the neoclassical structure. His most recent work of this kind: Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1 (1984).

62. C. FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATIONS (1981).

63. *See, e.g.*, Atiyah, Book Review, 95 HARV. L. REV. 509 (1981); Farber, Book Review, 66 MINN. L. REV. 561 (1982).

64. Lightsey, *A Critique of the Promise Model of Contract*, 24 WM. & MARY L. REV. 45 (1984); Macneil, *Values*, *supra* note 7; Cassels, Book Review, 27 MCGILL L.J. 591 (1982).

65. Levin & McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 MCGILL L.J. 24 (1983). Although it appears in a Canadian journal, this is an American article by American law teachers.

Another candidate for analysis would, of course, be Melvin Eisenberg's work: Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982); Eisenberg, *The Bargain Principles and Its Limits*, 95 HARV. L. REV. 741 (1982); Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979). A number of reasons favor examining Levin & McDowell's balance-theory rather than Eisenberg's more substantial and subtle work. First, Eisenberg has not yet completed his system; second, Eisenberg's system is too rich and complex for treatment in a part of this relatively short Article; and third, Levin and McDowell's theory probably better reflects the materials used in the

examination, I propose to demonstrate the limitations and problems I believe to be inherent in any effort to explain relational contract by an essentially promise-oriented system of analysis.

Levin and McDowell start by defining a contract:

> A legally binding contract exists where an obligation has been voluntarily assumed, is reasonably fair to the party against whom it is enforced, is consistent with society's contractual expectations, and gives rise to no administrative difficulties barring enforcement.[66]

They derive four conceptual elements from this definition: (1) voluntariness, (2) fairness, (3) society's contractual expectations, and (4) absence of administrative difficulties. The last two are described as constants,[67] independent of both the other elements and policy concerns. The first two elements form the core of the "balance-theory." The authors use that label for their synthesis because the relative importance of voluntariness and fairness varies. That is, the more voluntary an assumption of an obligation is the more likely it will be enforced, even though its fairness is in question, and the more fair such an assumption is, the less voluntary it need be for the law to enforce it. But there are limits:

> This is not strictly a weighing test, however, for too great a disparity between voluntariness and fairness will vitiate the contract. Equitable but coerced or paternalistic contracts are not enforced. A threshold amount of each element is necessary.[68]

"typical" American first-year contracts classroom than does Eisenberg's. Professor Eisenberg's fourth article, Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107 (1984), does complete the series sufficiently to permit a proper critique. A quick examination suggests that it may be subject to some of the same criticisms as Levin and McDowell's theory, but it was received too late for further treatment here.

66. Levin & McDowell, *supra* note 65, at 25-26.

67.

> By calling them constants, we mean that they apply to all contract situations in just the same way. If reasons of evidence, of policy, or of floodgate worries bar recovery in one situation, they will bar recovery generally. The Statutes of Frauds and of Limitations demonstrate this constancy.

Id. at 26.

68. *Id.* Levin and McDowell also say: "Put in terms of an equation, our thesis states that some threshold of voluntariness plus some threshold of fairness, the requisite consistency with society's contractual expectations, and the requisite administrative convenience give one a legally binding contract." *Id.* This seems inconsistent with the idea that voluntariness and fairness are variables, that as voluntariness goes down fairness must go up or the contract will not be enforced, and vice-versa. Putting the matter in the form of symbolic logic in a footnote does not help remove this apparent inconsistency.

The authors refine the concept of voluntariness by saying that "an obligation is voluntary to the degree that it is consciously and willingly chosen by the obligor."[69] Their use of this concept however, may be somewhat inconsistent, because later they say "before contract discussion is possible, there must be the possibility of real voluntariness, actual and realistic alternatives."[70] As the definition implies, "voluntariness admits of degree, the greater the amount in any particular contract, the greater the likelihood of enforcement."[71]

Levin and McDowell also define fairness:

> The standard we suggest for fairness is tied to knowledge and foresight rather than to result. The standard states that a transaction is fair if it is one which the parties would have reached had they had sufficient knowledge to understand all relevant aspects of the contract and one where the obligor is not a 'bargaining dwarf.'[72]

Nevertheless,

> Fairness according to the balance theory is not just that which would have been considered fair by the parties at the time of contract formation. . . . The standard is objective, rather than subjective or dependent upon the individual parties. Thus, where a weak-minded or ignorant party makes a contract that he has considered thoroughly, the contract's fairness remains an issue.[73]

After rejecting reliance as a subconcept of fairness,[74] Levin and McDowell incorporate into fairness two subconcepts, capacity and mistake.[75]

For our purposes, the Levin and McDowell balance-theory raises two questions: First, what is my justification for describing it as a promise-centered approach to relational contract? Second, does the balance-theory help us to "know" relational contract or relational contract law better?

(1) The balance-theory is a promise-centered synthesis. Although their definition of contract requires that an obligation be assumed for a contract to exist, Levin and McDowell omit assumption of obligation

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69. *Id.* at 28.
70. *Id.* at 44.
71. *Id.* at 29.
72. *Id.* at 31.
73. *Id.* at 45.
74. "It is a subconcept that is a matter for tort law, and, we believe, ought to be handled there and only there." *Id.* at 46.
75. *Id.* at 47-48.

from their list of "conceptual elements" of their balance-theory.[76] They do, however, reinsert it through a discussion of obligation which curiously (and silently) appears to concern assumption more than it does obligation. At any rate, this is how they describe the omitted conceptual element:

> What is important in our definition, but only marginal in others, is the element of obligation. Obligation is not meant to be a substitute for promise, nor do we wish to convey the impression that contracts are made by individuals who intentionally obligate themselves so as to be put under contractual duties. Certainly, a voluntary act, which can reasonably be expected to create an obligation, is necessary. However, one need not make express promises, believe, or even realize that contractual duties have arisen. The obligation here stands simply for a voluntary act that a reasonable person can assume will bind him or her. The subjective state of mind of an obligor who fails to understand the consequences of his act is irrelevant. Our definition supposes that one engages voluntarily in an act that objectively imposes an obligation.[77]

Levin and McDowell eschew the word "promise" because it "artificially divides contracts into express and implied-in-fact, a distinction without a difference."[78] This is indeed a pitfall to be avoided; nevertheless I see no distinction between their definition of obligation—more accurately, of assumption of obligation—and the definition of promise in Restatement (Second):

> A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.[79]

Even though it is omitted from their list of "conceptual elements," assumption of obligation is the axis of Levin and McDowell's balance-theory. Without an assumption of an obligation, nothing exists to be classed as voluntary or involuntary, fair or unfair, insofar as that theory is concerned. Since assumption of obligation is indistinguishable

76. This is curious; not only is assumption essential to their theory, but voluntariness—which is one of their two key conceptual elements—floats about like a lost ghost unless we know what the human conduct to be evaluated for its voluntariness is.

77. *Id.* at 27. (Note that the word "assume" is used here not to mean undertake, but understand.)

78. *Id.*

79. RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981).

from promise, balance-theory is simply another promise-centered theory.[80]

I shall leave it to others to decide whether balance-theory is or is not an improvement on other purportedly comprehensive promise-centered theories, such as Professor Fried's contract-as-promise, or the eclectic "theory" underlying UCC Article 2 and *Restatement (Second) of Contracts*, or Professor Eisenberg's work, for analyzing relatively discrete contracts. My concern is with the usefulness of balance-theory in developing knowledge of relational contract.

(2) Balance-theory does not help us to "know" relational contract. Because promise is the axis around which the whole theory turns, balance-theory relegates relational aspects of contractual relations to dependent, secondary status. This may not greatly hinder the understanding of relatively discrete contracts on which promise-centered theories are modeled; the sale of goods, for example, really has managed quite well under UCC Article 2, and (pace Karl Llewellyn's ghost) even under earlier commercial law. But it certainly does hinder understanding of more relational contracts.

One problem is that we cannot even understand a promise outside its relational context. Consider "I promise you $400 a week." It means one thing when a personnel manager says it to a newly hired employee receiving a weekly wage, something else when a foreman says it to an hourly employee who has been complaining about short working hours, something else when said by a sales manager to a commission salesman, again something different when said by a salesman of video games to the owner of a video game arcade. And yet a promise of so many dollars is one of the clearest, least-affected-by-context promises to be found. Most promises, even those concerning the sale of goods, are far less understandable freed of their relational context. What is a chicken?[81] No one can answer that question without knowing the relational context of the contract at issue. The closer we are to the sale of goods, especially those goods familiar to us, the more we already know about the relevant context, and the more confident we may be that we

80. Substituting "assumption of obligation" for "promise" might have the salutary effect of reducing the possibility of narrow interpretations of promise as limited to explicit promise.

81. *See* Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965). This little gem of an article was one of Arthur Corbin's last works. Its contents first appeared in the 1964 pocket parts to his treatise, CORBIN ON CONTRACTS (1950). Knowing that it was likely to perish from human sight if Corbin did not live long enough and remain in good enough health to incorporate its content into a revised volume, I suggested to Roger Weiss, then Editor-in-Chief of the Cornell Law Quarterly, that he ask Corbin to permit consolidation and reprinting as an article. Fortunately, Weiss is a man with wit enough not to be bound by a rule—a good law review does not publish reprints—when it defeats a good purpose, and the article duly appeared.

know enough to make the judgments about meaning required by balance-theory and other promise-centered theories. But, unless we are specialized experts (and often not even then) the more relational the contractual setting, the less we know what the promises in those settings mean to the often multiple parties involved.

A second problem with balance-theory's ability to deal with complex contractual relations lies in the very concept of "a voluntary act that a reasonable person can assume will bind him or her."[82] In complex relations, obligations, often heavily binding ones, arise simply out of day to day operations, habits, customs, etc., which occur with precious little thought by anyone about the obligations they might entail, or about their possible consequences. These can be, and often are, even more fundamental than the more explicitly understood obligations to which Levin and McDowell refer. Moreover, as key elements in the relations, the everyday events often determine wholly or partially how those more explicit obligations will be understood.

A third class of problems with using balance-theory obtains because the relational factors it does incorporate—voluntariness and fairness—are simply inadequate. For one thing, they are far too narrow to encompass such basic relational norms as role integrity, reciprocity, contractual solidarity, balancing power in acceptable ways, propriety of means (doing things the right way), and harmonizing the relations with the external social matrix[83] in which they occur. It is not that either voluntariness or fairness fails to encompass at least some aspects of some of these essential elements of successful relational contracts. The problem is that balance-theory treats the various relational norms only interstitially and not comprehensively. This flaw is shared by every purportedly global promise-centered theory of contract law which includes contractual relations in its scope.

Other difficulties result from the discrete treatment of what are essentially relational norms. Consider first the voluntariness of the assumption of obligation. This notion presumes the capacity to choose, but choice in exchange transactions and relations, as anywhere else, is by its nature pressured, not voluntary: if one does not assume the obligation, one does not get what one wants.[84] As is readily apparent from

82. Levin & McDowell, *supra* note 65, at 27.

83. These concepts are explored in some detail in Macneil, *Values*, *supra* note 7, and works cited there.

84. See Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943), for an excellent discussion of the duress inherent in exercising choice in contracts. Hale's point is nicely summarized in a student note:

> The free will concept, . . . has serious shortcomings. Because both normal contracts and those formed under duress result from a choice between alternative evils, it is impossible

reading Levin and McDowell's description of voluntariness, that "conceptual element" boils down to the amount and nature of the pressure and the circumstances in which it occurs. Consider, for example, the following statement:

> Financially pressed businessmen should generally not be thought of as lacking in voluntariness when they renegotiate debts on very disadvantageous terms. They almost always have made a series of voluntary choices in the past leading to the situation in which they assume the very onerous obligation. If they exercised bad business judgment in the past, it is no part of the law of contracts to protect them at this stage. In contrast, an employee who, due to an economic recession, has lost his job may be under enormous background duress for which he has no responsibility. A prospective employer or creditor might impose a very harsh obligation under these circumstances and, if there are disputes, a court might well come to the conclusion that the relative lack of voluntariness should lead them [sic] to scrutinize the transaction very carefully for fairness.[85]

In terms of any idea of "real voluntariness, actual and realistic alternatives,"[86] the distinctions made are absurd. The position of everyone—businessman, employee, or any other person—at any given time is a cumulation of prior choices, wise and unwise, all made under varying kinds and amounts of pressure and in a variety of circumstances, along with countless other factors over which they exercised no choice, such as economic recessions.[87] All of these produce current pressures to make contractual arrangements with others, pressures which "coerce" people into those arrangements, irrespective of how they happen to have reached their present circumstances. "Real voluntariness" is useless in guiding decisions about relieving them or not relieving them or how much to relieve them of obligations they have assumed. We may or may not want to relieve the overstretched businessman or the unemployed worker who makes onerous arrangements. But our decision de-

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to distinguish one situation from the other on the basis of any difference in the freedom of the consent.

Note, *Economic Duress after the Demise of Free Will Theory: A Proposed Tort Analysis*, 53 IOWA L. REV. 892, 894 (1968).

85. Levin & McDowell, *supra* note 65, at 32 n.19.

86. *Id.* at 44.

87. Is the businessman responsible for the farm recession which has strapped his farm equipment business? What about the employee's failure to move a year or so ago when he was offered a steadier job than the one he had, or his spending to the limits of his credit when times were good?

pends on the nature and amounts of pressure they are under as well as many other circumstances, not on any concept of "real voluntariness." Levin and McDowell seem to reach their conclusions by consulting their intuitive views of such things, without explicit examination of relational factors which should be taken into account. For example, how can it be ascertained whether the obligation is harsh without looking at relational factors such as reciprocity[88] or without evaluating the means the creditor has used? How can we tell whether protecting the creditor's interests accords with prevailing social mores without considering what those mores are? Simply referring to voluntariness is a way of deciding relational issues without analyzing them.

Moreover, the balance-theory's second factor, fairness, cannot overcome the inability of voluntariness to comprehend the relational world. Indeed, fairness introduces its own shortcomings. Obviously, "fairness" at its broadest could encompass all aspects of contractual relations. Such broad usage offers little guidance, however, and Levin and McDowell limit the word's meaning severely.[89] By limiting fairness to describe only (or all) arrangements the parties would have reached if they had had sufficient knowledge (and ability) to understand all relevant aspects of the contract, their balance-theory is on the horns of a dilemma when it is employed as a guide to complex contractual relations. If McDowell and Levin's definition of fairness is taken literally, their objective parties would have accounted for all relational factors. This is unsatisfactory for two reasons: first, it restores to the word "fairness" its broadest (and therefore vaguest) meaning; second, it is inconsistent with McDowell and Levin's own limitations on the meaning of "fairness". On the other hand, to the extent the imputed knowledge of their objective parties is limited to sharpen the focus of their analysis, relational factors will be omitted. For example, if the UAW were to challenge collective bargaining agreements made a few years ago on the grounds of "unfairness" does its knowledge include the more-rapid-than-expected recovery of the automobile companies, and the obscene bonuses managers were to give themselves? If the answer is yes, "fairness" incorporates without identification a good many important relational factors, such as reciprocity, decent handling of power, and role integrity. If the answer is no, then those important factors are omitted from consideration.

88. Reciprocity is "simply stated as the principle of getting something back for something given." Macneil, *Values*, *supra* note 7, at 347. Inevitably it involves some notion of evenness of return. In the case of the loan to the unemployed worker, the reciprocity principle would call for assessing the "onerous terms" not solely in terms of how hard they bear on the borrower, but also in terms of how needed they are to compensate the creditor for the risks.

89. *See supra* text accompanying notes 72-75.

To show how their theory works, Levin and McDowell go through the salutary exercise of applying it to four decided cases.[90] All four are neoclassical contract cases; that is, their facts fit neither the model of classical offer and acceptance of a simply performed exchange between strangers, nor highly relational patterns such as franchise agreements, employment, internal management and shareholder relations in a corporation, or family relations. In the first case a bidder on a sub-contract revokes a bid after the general contractor has used it and has been awarded the prime contract, but has not told the sub-contractor its bid was accepted before the revocation.[91] The second is a suit for the balance of the price under a construction contract which the contractor has substantially, but not completely, performed according to its terms.[92] The third is an English case where a husband seeks a declaration that his shotgun marriage was null and void, the "shotgun" being threats, among others, of imprisonment for corrupting a minor.[93] The fourth involves alleged unconscionability in the sale of goods on credit to a welfare mother.[94]

Again, I do not intend to evaluate the authors' success in trying to show that their balance-theory is superior to other promise-centered alternatives for dealing with these neoclassical cases in neoclassical fashion. That is not the point in considering their theory's ability to deal with relational contracts. The point *is*, however, how helpful the balance-theory would be in dealing with cases and questions like the following: what constitutes a legitimate nondiscriminatory reason for rejecting a university teacher for tenure, and what procedures are proper in making such decisions in the face of allegations of sex discrimination;[95] reconciling conflicts between Title VII rights and industrial organization giving high degrees of autonomy to employee subgroups where racial hostility is a groundnorm of the community from which the employees are drawn;[96] whether an employer has a right to avoid collective bargaining agreements by going into bankruptcy;[97] whether trustees of a multiemployer pension fund can sue employers to

90. *Id.* at 63-80.

91. Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958).

92. Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921). Although a construction contract is a fairly relational contract, the dispute occurred after the building was more or less completed, and hence can be fitted easily into the neoclassical pattern.

93. Buckland v. Buckland, [1967] 2 W.L.R. 1506, 2 All E.R. 300. The marital relation does not, of course, fit neoclassical patterns, but this particular case concerned, or at least was treated as concerning, only neoclassical issues relating to the husband's entering that relation.

94. Williams v. Walker-Thomas Furniture Co., 340 F.2d 445 (D.C. Cir. 1965).

95. Zahorik v. Cornell University, 729 F.2d 85 (2d Cir. 1984).

96. Ellison v. Best Foods, 598 F. Supp. 159 (E.D. Ark. 1984).

97. N.L.R.B. v. Bildisco & Bildisco, 104 S.Ct. 1188 (1984); 11 U.S.C.A. § 1113 (West Supp. 1985).

enforce the trust terms, without first submitting to arbitration underlying questions of interpretation of the collective bargaining agreement establishing the trust;[98] whether retirees, to whom a union owes no duty of fair representation,[99] must exhaust grievance and arbitration procedures under the collective bargaining agreement before bringing an action directly against their former employer to enforce obligations originally created by collective bargaining;[100] the extent to which grievance and arbitration provisions in collective bargaining agreements can and/or should be used in pursuing statutory rights, such as those arising under the National Labor Relations Act and Title VII, instead of or in addition to remedies pursued before administrative agencies or judicially;[101] the effect to be given arbitration decisions where statutory rights may have been involved;[102] rights in divorce proceedings of a spouse who has supported the other spouse through school and how such rights should be enforced;[103] reformation of long-term supply contracts where circumstances change;[104] the extent of the right of a condominum association to alter association rules;[105] the incredibly difficult economic and social issues relating to employment-at-will now being raised regularly in court (and above all in personnel offices and the like); the complexities of modern construction industry practices.[106]

It is not clear to me whether Professors Levin and McDowell in-

98. Schneider Moving & Storage Co. v. Robbins, 104 S.Ct. 1844 (1984).

99. This itself is a legal conclusion based on relational considerations far too complex to be captured by "fairness."

100. Anderson v. Alpha Portland Industries, Inc., 727 F.2d 177 (8th Cir. 1984).

101. *See, e.g.*, Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (Fair Labor Standards Act) and recent changes in the National Labor Relations Board's approach to these questions in United Technologies Corp., 268 N.L.R.B. 557 (1984) and Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984). *See also* Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355 (1985).

102. Wynn v. North American Systems, 34 Fair Empt. Prac. Cas. 1869 (N.D. Ohio 1984).

103. In re Marriage of Washburn, 101 Wash. 2d 168, 677 P.2d 152 (1984).

104. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1 (1984); Gillette, *supra* note 50; Goldberg, *Price Adjustments in Long Term Contracts*, 1985 WIS. L. REV. 527; Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369 (1981); Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471 (1985).

105. *See* Note, *Condominium Rulemaking—Presumptions, Burdens and Abuses: A Call for Substantive Judicial Review in Florida*, 34 U. FLA. L. REV. 219 (1982); Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647 (1981).

106. *See* Symposium, *Construction Management and Design-Build/Fast Track Construction*, 46 LAW & CONTEMP. PROBS. 1 (1983). At the end of the symposium Walter Pratt extended his own analysis beyond the construction industry to other kinds of relational contracts. Pratt, *Afterword: Contracts and Uncertainty*, 46 LAW & CONTEMP. PROBS. 169 (1983).

tend their theory to be applicable to such cases; I rather doubt it.[107] But whatever their intention, balance-theory, like other promise-centered theories, is inadequate to deal with complex contractual relations without distortion and omission.

The value of further promise-centered research on relational contract depends upon its level of specificity. I have already suggested that subject-specific empirical work in relational contract would be valuable. Similarly, examination of subject-specific and specific-concept legal doctrine and rules within the neoclassical structure is daily fare for our law reviews, and will doubtless continue to be so. Indeed, apart perhaps from legal work in specialized contractual relations, such as corporation law and labor law, doctrinal research into neoclassical contract law such as UCC Article 2 and concepts such as good faith are probably the most common forms of contract legal scholarship.

It may or may not be possible to enhance our understanding of the important relational aspects of neoclassical contracts through further work with global promise-centered theories such as Fried's, Eisenberg's, and Levin and McDowell's. My own feeling is that such theories tend to decrease rather than increase our knowledge of relations in neoclassical contract behavior and law by blinding us to our errors and omissions. But that is a view not as widely shared as I think it should be, and I do not press it here. I am, however, morally certain that global promise-centered theories of this kind create mind-sets virtually guaranteeing that we will not understand highly relational contract behavior, and that view I shall press at every opportunity.

B. Formal Empirical Studies

Undoubtedly the most famous and most cited example of formal empirical relational contract scholarship is Stewart Macaulay's 1963 article on the attitudes of manufacturers towards various aspects of

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> The limitation of the field of contract to commercial or market-type transactions which can be fitted into exchange analysis is a major reason that the classical contract theory with its legal equivalent of consideration seems to us no longer useful. There are too many obligations thought of as contract and enforced as contract which do not fit easily into exchange analysis. Furthermore, the expansion of the exchange notion to include all the complexities of long-term ongoing relationships, such as a ten-year requirements contract, or a corporate merger between a supplier and a customer, is in effect the abandonment of the concept of exchange as it has been understood in contract and economic literature.

Levin & McDowell, *supra* note 65, at 62. This seems to suggest that balance-theory ought not to be stretched either, but perhaps the authors view the balance-theory as not an exchange theory.

contract, particularly legal enforcement of contract.[108] The headnote sets out the thrust of the work:

> Preliminary findings indicate that businessmen often fail to plan exchange relationships completely, and seldom use legal sanctions to adjust these relationships or to settle disputes. Planning and legal sanctions are often unnecessary and may have undesirable consequences. Transactions are planned and legal sanctions are used when the gains are thought to outweigh the costs. The power to decide whether the gains from using contract outweigh the costs will be held by individuals having different occupational roles. The occupational role influences the decision that is made.[109]

In the development of relational contract theory, this article was important as a demolition effort. We cannot reach the question of what holds together the various transactions in which manufacturers engage until we explode the myth that legal sanctions, or fear of them, constitute *the* social glue. Only then can we ask what replaces legal sanctions, or, as Macaulay put it, why relatively non-contractual practices are so common.[110] Macaulay's tentative answers, although confined to the manufacturers he studied, provide a start on developing more general relational principles.

Macaulay mentions the following factors in manufacturers' ability to get along without paying attention to legal sanctions: genuinely mutual planning resulting from standardized product with descriptions or specifications accepted by professionals on both sides; those professionals' knowledge of industry customs which fill gaps in express agreements; testability of products and absence of questions of taste or judgment on which people can differ in good faith; availability of techniques of risk avoidance and spreading, such as insurance; non-legal sanctions resulting from widely accepted norms prohibiting welshing and encouraging one to produce good products and stand behind them; internal sanctions; personal and business relations across the organization boundaries; and finally the desire to continue successfully in business and to avoid conduct which might interfere with achieving that goal.[111]

Macaulay also addressed a second question: Why do relatively contractual practices ever exist? (It should be noted that by "contrac-

108. Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55 (1963) [hereafter cited as Macaulay, *Non-Contractual*]; Macaulay, *The Use and Non-use of Contracts in the Manufacturing Industry*, 9 PRAC. LAW., Nov. 1963, at 13.

109. Macaulay, *Non-Contractual*, *supra* note 108, at 55.

110. *Id.* at 62.

111. *Id.* at 62-65.

tual" he here means planning and negotiating influenced by the possibility of future litigation.) These factors include internal jockeying in which one part of an organization may want legal obligation, particularly risky transactions, failure of non-legal sanctions to settle disputes coupled with potential gain from using the legal route, and pride.

Although Macaulay's article is full of gems for anyone who has already adopted a relational perspective, he does not purport to theorize or generalize, either outside the manufacturing industry[112] or within it. Work of this kind since the Macaulay article appeared—and it is rather modest in quantity[113] —has also tended to be subject-specific both in its fact gathering and in the scope of the generalizations derived from the facts. I am unaware of any work yet published empirically testing generalizations made by non-empiricists in any of the other categories of American relational contract scholarship.[114] Thus, to the extent that we equate "knowing" with systematic empirical work, we know very little about relational contract or relational contract law beyond that relating to subject-specific behavior.[115]

A number of useful routes of future legal scholarship of this kind are open. The most obvious are empirical studies like Macaulay's, throwing light on the behavior of people involved in various areas of

112. Except with an occasional example, as in the case of franchises, *Id.* at 65-66.

113. Macaulay himself has done quite a bit. *See, e.g.*, S. MACAULAY, LAW AND THE BALANCE OF POWER (1966); Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115 (1979); Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966). The work of William Whitford, one of the most productive empirical scholars laboring in a contract field, also comes to mind. *See, e.g.*, Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607. So does that of Julius Getman, Stephen Goldberg, & Jeanne Herman, in J. GETMAN, S. GOLDBERG & S. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976), and Philip Selznick, *e.g.*, P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (1969). *See also* Goldberg, Getman & Brett, *The Relationship Between Free Choice and Labor Board Doctrine: Differing Empirical Approaches*, 79 NW. U.L. REV. 721 (1984), replying to Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organiztion Under the NLRA*, 96 HARV. L. REV. 1769 (1983). A recent cxample in this tradition is Cooper, *Authorization Cards and Union Representative Election Outcome: An Empirical Asscssment of the Assumption Underlying the Supreme Court's Gissel Decision*, 79 NW. U. L. REV. 87 (1984). For a discussion of CLS empirical work see Gordon, *supra* note 36, at 80-91. Outside of "legal scholarship" there are, of course, numerous systematic empirical studies dealing with employee behavior and "work" generally, *e.g.*, T. CAPLOW, THE SOCIOLOGY OF WORK (1954), as well as consumer behavior, marketing, and undoubtedly many more areas of which I am unaware.

114. Patrick Kaufman's Ph.D. thesis, *supra* note 38, is the only such work of which I am aware.

115. I do not myself make that equation. Most human knowledge, even in the rationalistic empirical present, is casually empirical, and we could not live otherwisc. (Even the ready availability of sources of systematic knowledge does not mean that such knowledge is actually acquired and used, or once it is acquired, that it is remembered in ways rendering its subsequent recall anything but casual.) Casual empiricism, therefore, cannot be discarded from our calculus, particularly respecting social knowledge.

subject-specific relational contract.[116] Like Macaulay's work, these studies would not be general inquiries into relational contract, but would nevertheless yield insights, as did his, transcending the particular area of contracting studied. Additionally, scholars might review existing empirical studies. Although there are comparatively few of these in the legal literature, such work is quite extensive in disciplines such as marketing, industrial psychology, sociology of work, and others. Such cross-disciplinary study of existing empirical work might yield new ways of looking at relational contract, while providing a way to test existing theories and outlooks.

C. Historical

Leading historical works such as Hurst's in 1956[117] and Friedman's a decade later,[118] both empirically oriented, are important landmarks in general relational contracts scholarship.[119] The leading recent example of American historical work aimed explicitly at general relational contract is in Morton Horwitz' 1977 work, *The Transformation of American Law 1780-1860*.[120] Chapter 6, entitled "The Triumph of Contract", is largely a reprint of his 1974 article, *The Historical Foundations of Modern Contract Law*,[121] with added sections on custom and contract and tort and contract. In this work, which could be called the decline and fall of relational contract law, he advances his belief that 18th century American law was dominated by an "equitable conception" of contract. In England, Patrick Atiyah has advanced a somewhat similar thesis also focusing on restitution and reliance in *The Rise and Fall of Freedom of Contract*.[122] Neither of these works has gone unchallenged,[123] and we need a great deal more study of these

116. Two other examples are Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952), and Note, *Another Look at Construction Bidding and Contracts at Formation*, 53 VA. L. REV. 1720 (1967).

117. W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956). For critical reviews of later Hurst work, see *Review Symposium: The Work of J. Willard Hurst*, 1985 AM. B. FOUND. RESEARCH J. 112 (1985).

118. L. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY (1965).

119. Examples of American historical work aimed at specific kinds of relational contract, such as that of Alfred DuPont Chandler, Jr., *supra* note 36, and of the Genoveses, *e.g.*, E. & E. GENOVESE, FRUITS OF MERCHANT CAPITAL; SLAVERY AND BOURGEOIS PROPERTY IN THE RISE AND EXPANSION OF CAPITALISM (1983), are far too numerous to do more than allude to here.

120. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).

121. 87 HARV. L. REV. 917 (1974).

122. P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

123. *See*, for example, Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979); Baker, Book Review, 43 MOD. L. REV. 467 (1980); McGovern, Book Review, 66 MINN. L. REV. 550 (1982).

essentially unproved and questionable hypotheses which are nevertheless cited regularly, as if they were established fact.[124] Such work would include detailed studies of the actual operation of the courts, such as Clinton Francis's current project on the central English courts in the period 1740-1840,[125] and Harry Arthurs' work on the courts of requests in the 19th century.[126] Both these studies are of marked importance for any historical account of the development of contract law during the eras Francis and Arthurs have investigated. Such work is especially necessary for the 18th century and earlier, since both Horwitz's and Atiyah's theories rest firmly on questionable and inadequately supported descriptions of 18th century and to some extent earlier English and American economies.[127]

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124. For example:

> The dominance of the bargain principle in contract law in the nineteenth century has obscured what historical scholarship has only recently revealed—that in the eighteenth century promises were often enforced primarily because the promisee had relied on the promise to her detriment or to the promisor's benefit. In the nineteenth century, the rise of the bargain principle pushed benefit-based recovery to the peripheral field of quasi-contract and drove reliance-based recovery underground.

Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 679 (1984). The citation to the part of the sentence referring to the eighteenth century is to Atiyah and Horwitz. Professor Feinman's cautious use of the word "often" is not enough to change the thrust of his implication that Atiyah and Horwitz have demonstrated that eighteenth century contract law was benefit and reliance based, with bargain on the sidelines.

Another example:

> [S]upporting a point initially made by Morton Horwitz, Atiyah argues that the classical view represented a marked departure from eighteenth-century legal paternalism. In the eighteenth century judges felt obliged not to enforce explicitly stated rights, but to do a substantive justice which was still conceived to be simultaneously moral and objective. This concern with substantive justice characterized equity courts in particular, where the majority of contract cases were heard; but it also influenced common law courts and the practice of juries, who were given broad discretion over damage awards. Legal paternalism meant the imposition of standards of good faith on contract negotiations and a refusal to enforce oppressive bargains. Within this tradition contract was not wholly distinct from tort: Obligations were in large measure defined by the customary duties inherent in a semi-feudal, hierarchical society. Similarly, damages were awarded to compensate actual reliance losses (or to prevent unjust enrichment), not to redress lost expectations. Courts thus viewed promises less as a source of liability than as evidence of a pre-existing obligation upon which the plaintiff could reasonably have relied.

Mensch, Book Review, 33 STAN. L. REV. 753, 756 (1981). Footnote nine contains the statement: "Atiyah's book provides detailed and convincing evidence that Horwitz was right."

125. Francis, *Law as Part of the Material Base: Debt Collection in the English Common Law Courts 1740-1840*, 80 NW. U. L. REV. (forthcoming) (1985).

126. H. ARTHURS, 'WITHOUT THE LAW': ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH CENTURY ENGLAND (1985).

127. Both Atiyah and Horwitz postulate economies relying primarily on subsistence rather than trade. Professor Gordon's comment on Horwitz bears noting here:

> To my mind, however, the permanent importance of this book to scholarship lies in its subtlety and richness as a history of legal *ideology*—an aspect of Horwitz's argument that the many hostile reviewers who have pointed out its very real vulnerabilities as social and economic history have chosen to ignore almost completely.

Historical investigation of relational contract in the market-saturated 19th and early 20th centuries would also be fruitful. Earlier I made some sweeping statements about the dominance of relational contract in the economic life of the nation, even during the heyday of "laissez faire." However accurate I know these statements to be, many contract and contract law scholars do not "know" their accuracy. That era needs investigation by an historically minded Stewart Macaulay to demonstrate systematically a truth so self evident as to be commonly unseen.[128] Closely related would be systematic investigation of relational contract law of that era, a survey uninhibited by doctrinal boundaries, since much of that law will be found in the law of property, of trusts, of corporations, of master and servant, of other principals and agents, of family law, and other areas of relational contract, not merely in law called the "law of contract." Such studies should investigate not only doctrine, but the facts of cases. Those facts are worth study, both as sociological data in their own right and for what they show about the actual working of doctrines at appellate levels. Similarly profitable work could also be done with trial court records. That is, however, a far more daunting task, necessary not to show the dominance of relational patterns[129] (which can be proved more easily in other ways) but to illustrate in more accurate detail how those patterns worked.

D. Critical Principles

Critical legal studies (CLS) are invariably relational studies, because CLS scholars always insist on holistic, historical social analy-

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Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 96-97 n.92 (1984). It is, of course, perfectly possible for a work to fail as good economic history and still constitute a reasonably good history of ideology. It is also possible, although probably harder, to serve up accurate history of ideology while failing in accuracy respecting other aspects of social history, such as law. Thus, Douglas Hay's ideological thesis in *Albion's Fatal Tree* is dented a bit but far from destroyed by John Langbein's attack, because the inaecuracies and inadequacies Langbein points out largely fail to undermine Hay's claims about the ideological effect of what remains unquestioned by Professor Langbein. *See* Langbein, *Albion's Fatal Flaws*, 98 PAST & PRESENT 96 (1983). Nevertheless, no matter how subtle and rich a history of ideology may be it remains of dubious value if it misconstrues what the writings (or other social artifacts) evidencing the alleged ideology were, mistakes how they were understood at the time in question, ignores other equally prominent ideological writings and artifacts, or distorts the writings and other artifacts by inaccuracies pertaining to their "social and economic" setting. Therefore, we cannot afford to ignore the criticisms of Professor Horwitz in assessing his work as history of ideology. This is true even where the critics themselves have largely ignored that aim, perhaps the main aim of the work. If their criticisms are accurate, their indirect shots may indeed hit Horwitz-as-historian-of-ideology.

128. A review of published work would almost surely suffice.

129. Relational patterns do not, of course, preclude high levels of discreteness, since much discreteness may be embedded in the relations.

sis.[130] Hence anything written on contracts from the CLS standpoint always concerns relations. Since contract is one of the central pillars of liberalism, the bête noire of CLS, CLS scholars have devoted considerable attention to contract. The CLS movement has been largely limited literally to criticism, and has not yet attempted comprehensive synthesis of social theory; thus, CLS work is aimed largely at pointing out liberal contract doctrine's various weaknesses, and at exploring particular threads of favored CLS beliefs, such as paternalism and a particular brand of highly ego-centered equalitarianism, which by themselves are insufficient to weave into a social tapestry of any kind.[131]

CLS scholars do not necessarily consider their failure to weave some kind of desired social tapestry a defect. Indeed, Mark Tushnet describes such efforts as "blueprintism," and a thing CLS scholars should avoid.[132]

> One does not side with the party of humanity because its program will lead to human emancipation; there is no such thing as a transcendent humanity lying around waiting to be emancipated, or even to emancipate itself. One sides with the party of humanity because it is defined as the party in opposition to what exists.[133]

Because there is far too much CLS contracts scholarship to review here completely, and because CLS work is complex at best, and opaque at worst, I shall simply mention briefly some recent efforts.[134]

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130. This is not to suggest that non-CLS scholars would necessarily agree with what constitutes a holistic, historical analysis, or even that there would be agreement on that score among CLS scholars. It is merely to say that, however defined, holistic, historical scholarship is necessarily not discrete, but relational.

131. Duncan Kennedy and Karl Klare have recently published a useful CLS bibliography. Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984). For "light" on CLS see the eclectic symposium in *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

132. Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1398-1402 (1984).

133. *Id.* at 1398. Elsewhere Tushnet defines the self-flattering term "party of humanity" as meaning "progressive social forces." *Id.* at 1364. This seems narrower than the definition quoted in the text. The phrase "progressive social forces" is not further defined (except in terms of opposition). It seems to mean whoever is opposed to whatever it is that the writer does not like in the world. Certainly that includes many aspects of liberalism. Does it also mean state socialism? And what about opposition to "progressive social forces" themselves, because they too exist? I find it all quite confusing, but one thing is not: Tushnet is opposed to the "party of humanity's" engaging in blueprinting.

134. In addition, there is considerable CLS work on specific types of contractual relations, *e.g.* Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978), and Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981). Both of the latter are severely criticized in Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984). Another example is Gerald Frug's work on cities, *The City as a Legal*

An example of the strictly critical style is Jay Feinman's *Critical Approaches to Contract Law*,[135] which analyzes "modern contract law"[136] from a perspective regarding contract as "a device by which a dominant class imposes and perpetuates a hierarchical capitalist economy on society."[137] But Professor Feinman acknowledges that he has no theory, "no compelling utopian vision,"[138] and states that

> Ultimately and immediately, the problem is one of praxis, the interaction of theory and experience in struggle which is necessary to change the world. In law, as in every other realm of activity, a better world can be realized only through continuing struggle—struggle which is attentive both to vision and to reality. The essence of the critical message about contract law is not that the struggle will be successful, but that it is possible and worthwhile.[139]

Before so concluding, however, Professor Feinman does provide an idea of the goal:

> "Freedom of contract" in the utopian vision requires a social order in which people possess the practical ability to connect with each other to find meaning in their lives through common endeavour, a freedom that denies the life and death power of distant corporate managers over workers and their town. "Expectation" and "reliance" are not principles for delimiting "reciprocal measured exchange[s];" they are elements of people's interaction for their collective benefit not defined by the arithmetic sum of their individual "welfares." "Contractual obligation" is not parceled out grudgingly as compensation for a wrong committed; it represents instead the

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Concept, 93 HARV. L. REV. 1057 (1980), which evoked Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982), then Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589 (1982), and Ellickson, *A Reply to Michelman and Frug*, 130 U. PA. L. REV. 1602 (1982). For CLS scholarship ranging over wide areas of subject matter, see THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982). Professor Kelman provides an account of a range of "affirmative" CLS academic work. Kelman, *Trashing*, 36 STAN. L. REV. 293, 298-304 (1984).

135. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983).

136. To Professor Feinman, "modern contract law" is what I have called in this Article "neoclassical contract law," the exemplar of which is the *Restatement (Second) of Contracts*. For a recent CLS attack on such law, see Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.S. 997 (1985).

137. Feinman, *supra* note 135, at 849.

138. *Id.* at 860.

139. *Id.*

> free assumption by social beings of the responsibilities for others with whom they interact.[140]

Duncan Kennedy has written two articles, each combining both kinds of CLS approaches mentioned above: criticism of the liberal approach to contracts and affirmative development of a single thread of his desired social tapestry. In the first of these[141] the single thread is altruism and in the second it is paternalism, defined in terms of empathy or love.[142]

The work most nearly avoiding the critical scholars' tendency to produce threads rather than tapestries of relational contract is probably Roberto Unger's treatment of contract in *The Critical Legal Studies Movement*.[143] But even Unger's work is couched in terms of a countervision—with emphasis on counter in the manner of presentation—which makes it quite difficult to summarize Unger's views of what critical relational contract might be, in contrast to what it is not. The following paragraph seems to capture his central point:

> [The countervision] implies that obligations do arise primarily from relationships of mutual dependence that have been only incompletely shaped by state-imposed duties or explicit or perfected bargains. The situations in which either of these shaping factors operates alone to generate obligations are, on this alternative view, merely the extreme positions of a spectrum. Toward the center of this spectrum, deliberate agreement and state-made or state-recognized duties become less important, though they never disappear entirely. The closer one approaches the center, the more clearly do rights acquire a two-staged definition: the initial tentative definition of any entitlement must now be completed by a second stage. Here the boundaries are drawn and redrawn in context according to judgments of both the expectations generated by the specific situation of interdependence and the impact that a

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140. *Id.*

141. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereafter Kennedy, *Form and Substance*].

142. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982). For an interesting analysis of Kennedy, *Form and Substance*, *supra* note 140, and of Gabel, *Intention and Structure in Contractual Relations: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977), see Note, *Critical Legal Studies: Beyond Skeptical Jurisprudence*, 11 J. CONTEMP. LAW 345 (1984).

143. 96 HARV. L. REV. 561, 616-48 (1983).

> particular exercise of a right might have upon other parties to the relationship or upon the relationship itself.[144]

While more may be woven out of Professor Unger's arguments, his tapestry depicting relations in contract remains hazily impressionistic, if not expressionistic, with a hint of the Holy Grail woven into its silver threads.

An engaging recent article on contract reliance by CLS scholar Jay Feinman[145] deserves comment here. Among other things, it illustrates the richness that criticism alone can produce. Professor Feinman criticizes both the traditional logical (doctrinal) and functional analyses of the rise of reliance doctrine because they fail to interpret the history of reliance instead of seeking vainly for causal explanations. He then suggests some of the factors which, in addition to doctrine (writ large), are essential to interpretation of the development of the reliance doctrine: (1) "critiques of legal reasoning, the role of courts, and methods of judicial decision. The controversies over legal realism, process jurisprudence, judicial activism, situation sense, and purposive adjudication, ...";[146] (2) the processes going into the reliance doctrine, such as "Karl Llewellyn's fourteen 'steadying factors' on appellate decision, such as the system of precedent, the collegiality of appellate courts, and adversarial advocacy.";[147] (3) increased awareness of the importance of relations; (4) the role of television in illustrating and influencing the "ambiguous role of the individual in society," in increasing the sense of belonging and alienation, with concomitant effects on our conceptions of individuals and institutions; (5) the effect of increasing scales of enterprise heightening the "contradiction between the individual as isolate and the individual as member of a community."[148] These are merely illustrative of elements needed to interpret the "choices of participants in legal discourse and decision-making."

Although I am not at all sure I agree, Professor Feinman himself deprecates his conclusions (based on the absence of multiplexity in the traditional analyses) as merely "having laid waste to all elements of traditional legal thought."[149] Discontented with this, he moves forward to "focus on the *choices* of legal decision-makers and the meaning

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144. *Id.* at 639-40.

145. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373.

146. *Id.* at 1383.

147. *Id.*

148. *Id.* at 1384.

149. *Id.*at 1385. The context of this quotation is of interest:

> It is about at this point that critical legal studies articles, including my own, usually stop. Having laid waste to all elements of traditional legal thought, we issue a call for

of those choices to those decision-makers."[150] This task starts out with further criticism of the reliance doctrine: while it has produced a more concrete and attractive reality and ideal in contract, it continues to represent the real world as if it were the ideal, "presenting a false image of a just economic sphere regulated by moral principles while failing to effect a change to such a world."[151] This criticizing stance continues in Professor Feinman's brief foray into the role of reliance doctrine in employment relations. But in the last few paragraphs of the article he engages in something perilously close to Professor Tushnet's forbidden "blueprinting." First, he suggests reliance must be looked at broadly, not merely in terms of employer promises and employee reliance thereon. Second, he argues that we should seek greater involvement in lawmaking of those subject to the law (presumably both employers and employees) beyond roles as litigant or citizen. Third, he calls for "intensive and extensive consideration of the range of norms involved in the contracting process," since reliance is more about mutuality, solidarity, and power in particular relations and in society than it is about actions induced by promises. He concludes by suggesting some of the possibilities such an approach might suggest:

> Perhaps reliance doctrine should be extended to grant employees the right to a safe workplace, reasonable benefits, fair treatment, and the tenure of employment during good behavior. Perhaps reliance doctrine ought to provide protection against plant closings. Perhaps it even should provide a cause of action against the state requiring adequate training for employment and a fulfilling job.[152]

While Professor Feinman's article is far from a full blown relational contract theory, it is also far less impressionistic than Professor Unger's vision. It offers those not entirely unsympathetic to CLS criticisms of the liberal state something affirmative to consider.

The richness of Professor Feinman's brief foray against the reliance doctrine suggests that CLS scholars have far from exhausted the

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reconstruction among the ruins and then depart the scene. But something more is in order.

Id.

150. *Id.* at 1385.

151. *Id.* at 1387. In CLS jargon, while the reliance doctrine helps dereify contract, the dereification is not what really matters: "counterhegemonic rereification." One of the refreshing things about some CLS writing, including Feinman's, is that it often recognizes its own jargon, and explains it carefully.

152. *Id.* at 1389. I have elsewhere commented on the conflict between the bureaucratization implied by such proposals and CLS goals, which are anti-bureaucratic. Macneil, *Bureaucracy, supra* note 34.

contributions they might make to relational contract simply by criticizing. Nevertheless, converts to the cause are likely to be limited so long as CLS scholars confine themselves to this activity, no matter how rich it may be, nor how much it may provide starting points for others who wish to build. If CLS wishes to lead more people to greater "knowledge" of relational contract it will have to broaden its appeal by becoming both more realistic—particularly about the permanence of bureaucracy[153] —and more synthetic by offering something more than praxis—Feinman—or a kind of core vision—Unger. Professor Feinman's latest article may be a hopeful sign.

E. Non-CLS Relational Principles

This category poses several difficulties. The first, arising from its eclectic nature, is naming it. In addition to CLS relational principles, countless other varieties are possible. These include radical, Marxist and non-Marxist, communitarian, liberal, pragmatically instrumental, combinations of any or all of the above, and perhaps theories ignoring all of them.[154] But this conceptual difficulty will not hinder analysis, unless one inadvertently omits an important relational approach from the grab-bag. And, indeed, some, such as various aspects of European Marxism, are omitted here because they have not crossed the Atlantic into American legal scholarship.[155]

The second difficulty is in deciding what belongs here and what belongs elsewhere in this review article. Sometimes the answer is clear, as in the case of Charles Fried's work.[156] While Professor Fried necessarily introduces many relational principles, they are not part of contractual relations proper, which in his view feature promise as the sole moral principle in contract.[157] Instead, relational principles are relegated somewhere outside of contract.[158] For example, in discussing the problem of gaps in contract (matters not encompassed by the promises) and the irrationality of ignoring them, he says:

> The gaps cannot be filled, the adjustments cannot be governed, by the promise principle. We have already encountered the two competing principles of civil obligation that *take over when promise gives out*: the tort principle to compensate for

153. *See* Macneil, *Bureaucracy*, *supra* note 34.

154. *See*, for example, L. Graziano, A Conceptual Framework for the Study of Clientelism (1975) (Cornell Univ. Western Societies Prog. Occasional Papers #2).

155. Except to the extent they may have crept into the eclectic CLS scholarship.

156. C. FRIED, *supra* note 62.

157. *Id.* at 1.

158. *See* Lightsey, *supra* note 64.

> harm done, and the restitution principle for benefits conferred. Each of these has some application, but only a limited or puzzling one, to the . . . [gaps]. . . . In such situations a distinct third principle for apportioning loss and gain comes into play: the principle of sharing. . . . The sharing principle comes into play where no agreement obtains, no one in the relationship is at fault, and no one has conferred a benefit. . . . By engaging in a contractual relation A and B become no longer strangers to each other. They stand closer than those who are merely members of the same political community. . . . [T]hey are joined in a common enterprise, and therefore they have some obligation to share unexpected benefits and losses in the case of an accident in the course of that enterprise. . . .
>
> A contractual relation is a good example of a concrete relation that may give rise to a more focused duty to share another's good or ill fortune. The relation is, after all, freely chosen. . . .[159]

This is excellent relational thinking, but as the emphasized words suggest and the overall thrust of the book makes plain, Professor Fried does not merge the three relational principles into his promise-centered idea of "contractual relation." Instead they are separate and lesser principles relevant only when promise fails, not principles integrated with promise while nevertheless competing with it. Professor Fried's work is also promise-centered in that it entirely omits from the world of contract competing principles, such as wealth redistribution, which liberals (as distinguished from libertarians) normally accord as great or greater social weight than they grant to promise. Since Professor Fried elsewhere affirms the propriety of wealth redistribution,[160] this omission cannot be attributed to his rejection of that liberal tenet, but can only be understood in terms of his unwavering devotion to a promise-centered concept of contract.

Conversely, other works, while promise-centered because they define contract in terms of promise, nevertheless accord other principles both an equal theoretical position and a part in contract itself. Anthony Kronman's *Contract Law and Distributive Justice*[161] is an example. After defining contracts as "legally binding agreements that provide for

159. *Id.* at 69-73 (emphasis added).

160. C. FRIED, RIGHT AND WRONG 143-50 (1978).

161. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) [hereafter Kronman, *Distributive Justice*].

the exchange of property on terms fixed by the parties,"[162] a narrow, essentially promise-centered definition, Professor Kronman goes on to incorporate into the world of contract principles of distributive justice. He gives a similar treatment to the principle of paternalism in *Paternalism and the Law of Contracts.*[163] Work such as this falls short of escaping promise-centered contract largely by default. Since it fails to establish any overarching concept of contract encompassing both promise and whatever other principles it treats, promise remains the axis around which the other principle or principles turn. This is not the result of some inevitable logic, but rather because of our (and the writer's and his readers') intellectual heritage which simply accords promise the primary position, even at the very moment that we are offering a supposedly equal competitor. Another reason that promise retains a peculiar primacy in such writing lies in the failure to juxtapose with promise *all* the key principles with which it must compete. Work of this kind is obviously a world apart from that of Charles Fried, yet it continues to give unnecessary and unenlightening hostages to promise.

Treatments of omission and changed circumstances (gaps) offer illustrations both of promise-centered work obscuring relational contract as well as more revealing work. The best example of the foregoing is a category rather than a particular work: the rigorous adherence in much of law-and-economic analysis to the expectation principle in contract remedies.[164] But some of this work frankly recognizes that in some circumstances the dimensions of the relationship have simply exceeded the scope of the original promises. Thus, those promises must be removed from the dominant position they occupy in the neoclassical model and included as merely one factor in a far more complex situation. Richard Speidel's *Restatement Second: Omitted Terms and Contract Method*[165] and *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*[166] exemplify this kind of work.

The subject of good faith is of particular interest in terms of perceiving the degree to which scholarly work is promise-centered rather

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162. *Id.* at 472.

163. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) [hereafter Kronman, *Paternalism*].

164. Except, of course, when such remedies might really work, as in specific performance, at which time a strange edginess often appears in the form of inconsistencies and ignoring of important factors. *See* MACNEIL, *Efficient Breach, supra* note 42.

To my mind, even the "best risk bearer" argument is but a sophisticated way of forcing everything into an initial promise. At any rate, there can be no doubt that that argument typically looks at who is the best risk bearer only in terms of information available as of the time of the promise.

165. 67 CORNELL L. REV. 785 (1982).

166. Speidel, *supra* note 104.

than relationally-centered, because we find two conflicting views, apparently reflecting differing degrees of promise-orientation. Steven Burton advances a promise-centered case: "courts generally do not use the good faith performance doctrine to override the agreement of the parties. Rather, the good faith performance doctrine is used to effectuate the intentions of the parties, or to protect their reasonable expectations, through interpretation and implication."[167] Robert Summers' view, on the other hand, is far more relational. He favors a "contractual morality" approach "of a piece" with other such morality as the "unconscionability doctrine and various general equitable principles."[168] The good faith idea also supplies us with an even less promise-centered discourse in the work of Barry Reiter, who incorporates ideas of good faith directly into relational contract theory.[169]

The foregoing discussions of omissions and good faith suggest that in terms of "knowing"—the focus of this Article—we should ask not to which category a work belongs, but how much it clarifies and how much it obscures relational contract. An article like Lon Fuller's *Reliance Interest in Contract Damages*[170] is promise-centered, but is nevertheless one of the most enlightening articles ever written about relational contract. And although a writer may eschew broader generalizations about nonpromissory aspects of relational contract, his work on paternalism,[171] distributive justice,[172] good faith,[173] keeping the relation together,[174] and other relational characteristics[175] may nevertheless make major contributions to our understanding of relational contract. Nor does the value of such contributions depend upon how much the writer relates subject-specific relational analysis and/or synthesis to broader ranges of human activities. Neither Phillip Selznick's *Law, Society, and Industrial Justice*[176] nor David Feller's *A General*

167. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 499 (1984).

168. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 811 (1982) [hereafter Summers, *General Duty*]. Professor Summers' departure from the promise-center becomes even more evident when one examines the details of the kinds of "bad faith" he believes are excluded by the doctrine of good faith in American law. *See* Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968) [hereafter Summers, *Good Faith*].

169. Reiter, *Good Faith in Contracts*, 17 VAL. U.L. REV. 705 (1983).

170. Fuller & Perdue, *supra* note 53.

171. Kronman, *Paternalism*, *supra* note 163.

172. Kronman, *Distributive Justice*, *supra* note 161.

173. Summers, *Good Faith*, *supra* note 168.

174. Williamson, *Contractual Relations*, *supra* note 46.

175. Cohen, *supra* note 18.

176. Selznick, *supra* note 113.

Theory of the Collective Bargaining Agreement[177] contributes less to our knowledge of relational contract in industrial settings because the author did not extend his study into other kinds of contractual relations.[178]

One subject-specific area—family law—by its very nature generates broad-based, relational thinking, and has recently yielded more general relational approaches to contracts. I have particularly in mind the work of Mary Ann Glendon, whose combined analysis of family and employment[179] has led to a synthesis she refers to as the new property, which—like feudal, or indeed post-feudal[180] property—is essentially a form of relational contract.[181]

Margaret Radin's work focusing on the relationship between property and personhood should also be mentioned.[182] While she does not focus on exchange relations except indirectly, since exchange relations both presuppose some idea of property[183] and always involve personhood, work developing understanding of the relationship between them is an important contribution to our knowledge of relational contract.

With the possible exception of Mary Ann Glendon's work, the only non-CLS American work purporting to be a global relational contract theory is, so far as I know, my own.[184] In this theory, the realm of contract encompasses all relations among people in the course of exchanging and projecting exchange into the future.[185] The essence of the theory lies in a description of (1) the elements of behavior essential to

177. 61 CALIF. L. REV. 663 (1973).

178. Professor Selznick started with a broader analysis—of association and contracts of limited commitment. But after relating them to industrial justice, he did not take the reverse journey of relating industrial justice extensively to other kinds of contractual relations.

179. And of the landlord and tenant relation.

180. *See* Mensch, *supra* note 124.

181. M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981). *See also* Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982).

182. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

183. The word property is used here in its broadest possible sense of any relation among people relative to anything of value to them of which someone(s) has some control that another someone(s) does not. In terms of exchange relations it is the surrender of such control to someone else which permits us to speak of exchange.

184. My latest overview is Macneil, *Values*, *supra* note 7. Gidon Gottlieb's work should be mentioned here, as it develops a global relational theory of modern society analogous in some respects to my global relational theory of contract. Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567 (1983).

185. Earlier I defined the "contract dimension" as "the relations among people in the course of projecting exchange in the future." Macneil, *Values*, *supra* note 7, at 341. The inclusion now of present exchanging is not intended to effect a substantive change of definition but to avoid possible misunderstanding. Because so-called present exchanges always, in my view, involve some projection of exchange into the future, I slipped into using a careless phrasing which has confused at least some readers.

the existence of exchange relations and of the norms such behavior yields,[186] and (2) the variants of these elements as they occur in a spectrum of exchange behavior from extreme discreteness to extremely relational patterns.[187] Although my own preferences are communitarian,[188] I have argued that this theory can accommodate liberal relational theory in the broad sense[189] as well as CLS and other radical theory, at least within very wide limits.

The foregoing discussion suggests that we already "know" a great deal about relational contracts as viewed in this final eclectic category of overtly relational work. What more might we know? It has already been suggested that empirical work could throw light on various aspects of relational contract, as has, for example, that of Julius Getman, Stephen Goldberg, and Jeanne Herman in labor relations,[190] and Gilson and Mnookin on law firm economics.[191] And the field is wide open for additions, challenges, new formulations, re-formulations, and the like, whether relating to subject-specific areas or to limited subjects, or of a more comprehensive nature.

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186. These behavioral norms consist of (1) role integrity, (2) reciprocity, (3) implementation of planning, (4) effectuation of consent, (5) flexibility, (6) contractual solidarity, (7) the linking norms of restitution, reliance, and expectation interests, (8) the power norm (creation and restraint of power), (9) propriety of means (doing things the "right way"), and (10) harmonization with the social matrix. *See* Macneil, *Values, supra* note 7.

187. In both discrete transactions and relational contracts, particular common contract norms become intensified. Implementation of planning and effectuation of consent become dominant in discrete transactions, whereas role integrity, contractual solidarity, and harmonization with the social matrix acquire added intensity and complexity in contractual relations.

Although one can almost describe the almost-pure-discrete end of the spectrum, it is not possible, contrary to the implied suggestion of Professor Kornhauser, to describe anything approaching a "pure relation." Kornhauser, Book Review, 82 COLUM. L. REV. 184, 190 (1982). The participant in the almost-pure-discrete transaction is an artificial construct: Hobbes' individual, microeconomics' maximizer. The participant in a relation is a live human being with all its confusions, conflicts, and inconsistencies, interacting with one or more others of similar nature. Only if we could fully describe multivariant human nature in its interactions with other multivariant human natures could we even start thinking about what a "pure relational transaction" might start to look like. As Eliza Doolittle was fond of saying, "Bloody likely!"

188. Without, however, the commitment to the kind of equalitarianism, especially extremely individualist equalitarianism, characterizing much communitarian thinking, such as that of the CLS scholars.

189. Unrealistic promise-centered liberal theories, such as those discussed earlier, do not fit neatly into this (or any other) relational theory, because they either deny the existence of relations or endeavour to put themselves outside relations. But, since this relational theory accommodates the inevitable discreteness and presentiality which occurs in human existence, it can accommodate the essence of those theories, albeit not on their terms.

190. J. GETMAN, S. GOLDBERG, & J. HERMAN, *supra* note 113.

191. Gilson & Mnookin, *supra* note 51. *See also* Kaufman, *supra* note 38.

CONCLUSION

We know a great deal about relational contract, yet are quite ignorant of it. We know much more about subject-specific relational contracts than we do about relational contract either as a class of behavior patterns or as a general concept. Our knowledge of the latter is hindered in part by the immense intellectual barriers we put in the way of its acquisition, particularly those created by our addiction to promise. Nevertheless, in spite of these barriers, the struggle to acquire greater knowledge of these essential human social patterns is going forward on many fronts. We can and we shall learn a great deal more about relational contract.[192]

192. In the course of this we can and will lose knowledge, but I think there will be a net gain.