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## RELATIONAL CONTRACT THEORY: CHALLENGES AND QUERIES

*Ian R. Macneil\**

**Relational:** of, pertaining to, or characterized by relation;  
having the function of relating one thing to another.

**Relation:** the position which one person holds with another  
by means of social or other mutual connections; the connec-  
tion of people by circumstances, feelings, etc.

NEW SHORTER OXFORD  
ENGLISH DICTIONARY (1993)

Guys like you don't want relationships, all you want  
is exercise.

To John Travolta, in *STAYING ALIVE* (1983)

### INTRODUCTION

The purpose of this Article is both to clarify and to extend the work I have been doing with relational contracts since the mid-1960s.<sup>1</sup> The clarifications include making careful distinctions between (1) descriptions of contract behavior and norms, (2) theories concerning such behavior, (3) descriptions of the law governing such behavior, and (4) prescriptions about the law that should govern.

The clarifications also include making careful distinctions between three *levels* of description and/or theorizing about contract behavior and norms: (1) an umbrella theory encompassing all relational contract theories,<sup>2</sup> (2) what I am calling "essential contract theory," referring specifically to my own relational contract theory based on common contract behavior and norms,<sup>3</sup> and (3) the "relational/as-if-discrete" spectrum or axis in terms

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<sup>1</sup> Parts I-IV of this article follow closely the paper distributed at the Symposium. As the paper of each participant was prepared largely independently, there was little or no interplay among them. Except for an occasional footnote to illustrate a point, I have largely resisted the temptation to change these four Parts to create such interplay.

<sup>2</sup> See *infra* Part II.

<sup>3</sup> See *infra* Part III.

of which contract behavior and norms can be evaluated. The Symposium papers, particularly that of Professor Posner,<sup>4</sup> raised questions concerning a basic proposition of relational contract theory, and these questions are addressed in the Part V of this Article.

## I. CHALLENGES/QUERIES

In the course of discussing this Symposium with its organizer, Richard Speidel, I suggested that we might proceed by having each participant issue one or more challenges in the hope that one or more of the other participants would respond. This idea fell flat. It continued, however, to have an appeal to me, and so I decided to intersperse my own contribution with unanswered challenges<sup>5</sup> and queries. Both the nature and addressees of these vary. One of their main functions is to separate and thus clarify various aspects of my work which both friend and foe have often melded together where no melding was or is intended.

### A. Definitions

1. *Contract*. In this Article, “contract” means relations among people who have exchanged, are exchanging, or expect to be exchanging in the future—in other words, exchange relations.<sup>6</sup> Experience has shown that the very idea of contract as *relations* in which exchange occurs—rather than as specific transactions, specific agreements, specific promises, specific exchanges, and the like—is extremely difficult for many people to grasp.<sup>7</sup> Either that, or they simply refuse to accept that contract *can* be so defined. However difficult such a definition of contract may be, it is that upon which all that follows is grounded. Thus, this Article can be understood only in terms of that definition.

<sup>4</sup> See Eric A. Posner, *A Theory of Contract Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000).

<sup>5</sup> “challenge vb 1 : to demand as due or deserved : REQUIRE . . . 3 : to dispute esp. as being . . . invalid, or outmoded : IMPUGN . . . 5 a : to confront or defy boldly : DARE b : to call out to duel or combat c : to invite into competition 6 : to arouse or stimulate esp. by presenting with difficulties . . .” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 224 (Merriam Webster ed., 1983).

<sup>6</sup> “Contract” refers to such relations, and *the contract* refers to a particular example of such relations. The definition in the text is literally broader than that specified in IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 4 (1980) [hereinafter MACNEIL, *NEW SOCIAL CONTRACT*]: “By contract I mean no more and no less than the relations among parties to the process of projecting exchange into the future.” This reasonably has confused some readers, although I never meant to exclude either the past or present from the concept. Indeed, I do not believe it to be possible for a present exchange to occur without projecting it into the future, since the exchange has at least this future: “Hands off! This is mine now.”

<sup>7</sup> Reasons for this are suggested in Ian R. Macneil, *Barriers to the Idea of Relational Contract*, in *THE COMPLEX LONG-TERM CONTRACT: STRUCTURES & INTERNATIONAL ARBITRATION* 31 (Fritz Nicklisch ed., 1987) [hereinafter Macneil, *Barriers*].

*Challenge/Query No. 1:* Is there a more useful definition of contract? If so, for what purposes, and at what price?

2. *Factual Description, Not Theory.* Upon starting down the road leading to, among many other things, this Symposium, it did not occur to me consciously that I might be developing a theory. Rather, I was simply exploring and trying to make sense of reality, the reality of what people are actually *doing* in the real-life world of exchange.<sup>8</sup>

That exploration has delved into many areas: animal behavior,<sup>9</sup> primitive human behavior,<sup>10</sup> feudal society,<sup>11</sup> England and Scotland from the sixteenth to the eighteenth century,<sup>12</sup> modern East Africa,<sup>13</sup> traditional and modern Polish marriages,<sup>14</sup> political exchange behavior,<sup>15</sup> countless areas of modern socioeconomic life, and even Utopia.<sup>16</sup> Starting with animal behavior and primitive human behavior I perceived four primal roots of contract: (1) a social matrix, (2) specialization of labor and exchange, (3) a sense of choice, and (4) conscious awareness of past, present, and future.<sup>17</sup>

These roots by themselves, however, were too general to summarize contract<sup>18</sup> in what seemed to be a useful manner. Thus, I tried to distill what I was finding into a manageable number of basic behavioral categories growing out of those roots. Since repeated human behavior invariably creates norms, these behavioral categories are also normative categories.

The ten common contract behavioral patterns and norms are (1) role integrity (requiring consistency, involving internal conflict, and being inherently complex); (2) reciprocity (the principle of getting something back for something given); (3) implementation of planning; (4) effectuation of

<sup>8</sup> Ian R. Macneil, *The Many Futures of Contracts*, 47 SO. CAL. L. REV. 691, 693 (1974) [hereinafter Macneil, *Many Futures*] (discussing "the real life of contractual behavior").

<sup>9</sup> See *id.*

<sup>10</sup> See MACNEIL, *NEW SOCIAL CONTRACT*, *supra* note 6; Ian R. Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567 (1986) [hereinafter Macneil, *Exchange Revisited*] (the 1978-79 draft of this article, which contained far more anthropological data than the version finally published, is now lost); Macneil, *Many Futures*, *supra* note 8.

<sup>11</sup> Research is on file with author.

<sup>12</sup> Research is on file with author.

<sup>13</sup> See IAN R. MACNEIL, *CONTRACTS: INSTRUMENTS OF SOCIAL CO-OPERATION—EAST AFRICA* (1968); IAN R. MACNEIL, *The Tanzania Hire-Purchase Act*, 2 E. AFRICAN L.J. 84 (1966).

<sup>14</sup> See Ian R. Macneil, *Relational Contract Theory as Sociology: A Reply to Professors Lindenberg & de Vos*, 143 J. INST. & THEORETICAL ECON. 272 (1987) [hereinafter Macneil, *Sociology*].

<sup>15</sup> See Ian R. Macneil, *Political Exchange as Relational Contract*, in *GENERALIZED POLITICAL EXCHANGE: ANTAGONISTIC COOPERATION AND INTEGRATED POLICY CIRCUITS* 154 (Bernard Marin ed., 1991).

<sup>16</sup> See Macneil, *NEW SOCIAL CONTRACT*, *supra* note 3, at 111-17.

<sup>17</sup> See Macneil, *Many Futures*, *supra* note 8, at 696-720. In this earlier version of the primal roots of contract, I listed the social matrix last—it is hard to escape the individualistic intellectual bias of modern society. See Macneil, *Barriers*, *supra* note 7, at 31.

<sup>18</sup> Which, be it remembered, is used here to mean relations among people who have exchanged, are exchanging, or expect to be exchanging in the future.

consent; (5) flexibility; (6) contractual solidarity; (7) the restitution, reliance, and expectation interests (the “linking norms”); (8) creation and restraint of power (the “power norm”); (9) propriety of means, and (10) harmonization with the social matrix, that is, with supracontract norms.<sup>19</sup> The behavioral and normative categories were not, and are not, intended to be either watertight or overly sophisticated. Nor are they intended to be exhaustive.<sup>20</sup>

*Challenge/Query No. 2:* Are there more accurate, comprehensive descriptions of contract *behavior*? If so, what are they? What are their relative advantages and disadvantages for gaining insights into contract? Can these descriptions be bettered by eliminations, alterations, or supplementation? What other questions should be asked about the subject of contract behavior and norms?

*Challenge/Query No. 3:* Are there more accurate, comprehensive descriptions of the norms prevailing in contract? If so, what are they? What are their relative advantages and disadvantages for gaining insights into contract? Can the above descriptions be bettered by eliminations, alterations and/or supplementation? What other questions should be asked about this subject?

*Challenge/Query No. 4:* The description of common contract behavior and norms presents a more accurate, positivist picture of exchange relations than that presented by formal rational choice theory or game theory.

3. *Theory Added to Description.* Descriptions of common contract behavior and norms can, should, and do stand alone as a subject of investigation. They do not constitute a theory standing alone, however, but are simply descriptions of facts observed.<sup>21</sup> I have, however, added my own

<sup>19</sup> See Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 347 (1983) [hereinafter Macneil, *Values*].

<sup>20</sup> When I first set them out, there were five behavioral categories; see Macneil, *Many Futures*, *supra* note 8, at 809. Then there were six (with some changes); see Ian R. Macneil, *Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 895 (1978) [hereinafter Macneil, *Contracts: Adjustments*]. Then there were nine; see MACNEIL, *NEW SOCIAL CONTRACT*, *supra* note 3. Finally, there were ten; see Macneil, *Values*, *supra* note 19, at 347. These categories are not intended to be exhaustive in the sense of constituting an all-inclusive social theory. They lack at least three elements: (1) local norms (given that every contract is part of a social matrix which almost certainly has behavior patterns and norms that are either not at all or only inadequately encompassed by the ones I have wrinkled out); (2) a theory of history (required by the fact that all contracts are part of a particular historical social matrix); and (3) an all-inclusive theory of personality. See Macneil, *Values*, *supra* note 19, at 343 n.5. For an extensive discussion of the relation between history and relational contract theory, see *id.* at 397-416.

<sup>21</sup> I think this is what Harold Berman had in mind when he said twenty years ago at a presentation I gave to the Harvard Law School faculty that I did not have a theory. The notion that repetitive behavior

theory to the descriptions of the common contract behavior and norms—this is the “essential contract theory” treated in Part III.

Now I turn to what is unquestionably a theory,<sup>22</sup> the core propositions of *all* relational contract theories.

## II. THE CORE OF RELATIONAL CONTRACT THEORIES

### *A. Four Core Propositions: Introduction*

A relational contract theory may be defined as any theory based on the following four core propositions:<sup>23</sup>

First, every transaction is embedded in complex relations.<sup>24</sup>

Second, understanding any transaction requires understanding all essential elements of its enveloping relations.

Third, effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly.

Fourth, combined contextual analysis of relations and transactions is more efficient<sup>25</sup> and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of transactions.

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creates norms could, I suppose, be thought to be “theoretical,” but I consider it simply to be a reasonably provable observation about human behavior. Berman’s comment ignored the theoretical additions to descriptions treated in Parts III and IV below.

<sup>22</sup> Except perhaps in the minds of formal modelists.

<sup>23</sup> A very short and undeveloped version of this propositional core of relational contract theories appeared in Ian R. Macneil, *A Brief Comment on Farnsworth’s “Suggestion for the Future,”* 38 J. LEGAL EDUC. 301, 302 (1988).

<sup>24</sup> A transaction in this sense is any event possessing discreteness sufficient to distinguish it from the flow of contractual relations of which it is part but which can be thought of as somehow separate from that flow. Many events shade off into the remaining relations in such a way that endless dispute could be had about whether they are “transactions.” For example, a boss’s casual remark to a white employee might give rise to serious dispute whether it was part of an alleged transaction in which the employee was given a pay raise at the expense of a black employee. This fuzziness, however, raises no problems for relational contract theory as a theory. Indeed any such difficulty simply reinforces the proposition that transactions occur only within relations. It is difficult even to conceive of a transaction occurring totally outside any relation. The Vikings’ decision to raid or trade, depending on which appeared more profitable at any given moment, may come as close as anything outside of theoretical models.

<sup>25</sup> “Efficient” is used here in its normal sense of effective or productive without waste, not in the bizarre and solipsistic technical senses of rational choice theory.

For purposes of this Article, relational contract theory means these four propositions, nothing more and nothing less.<sup>26</sup>

1. *Provability.* It may be noted that the provability of these propositions varies considerably. The first is a virtually indisputable observation of universal human intercourse. The last, particularly the claim to greater efficiency, would be difficult if not impossible to prove empirically, even though much evidence can be marshalled in its support. It thus comes closer to an article of faith than a provable proposition, to be placed alongside other great articles of faith, such as the belief that rational choice theory has more relation to reality than any competing theories. The middle two propositions lie somewhere in between on the scale of provability.

2. *Applicability.* I believe that these propositions apply to any analysis of any contract or any part of any contract. Nonetheless, I shall exclude from the claims made in this Article matters pertaining primarily to the substance of contracts. Thus, the focus here is on what might, for lack of a better term, be called the behavioral aspects of contracts, as distinct from their substance.<sup>27</sup> In particular, these propositions apply to any law, whether sovereign or otherwise, and to any rules or norms, irrespective of their origin, in any way relating in any significant manner to contracts.

3. *Individualistic Analysis and Relational Contract Theory.* Theories founded essentially on the capitalist system as such are likely to be so influenced by individualist concepts as not to be relational in the foregoing terms. Consider, for example, the modern liberal belief that political and governmental institutions can sift through information, make informed decisions, and, where the decisions so indicate, improve on the status quo and market effects by regulation and wealth redistribution. This liberal pragmatism is no less a theory simply because it may seem nontheoretical to legal academics currently steeped in a great variety of esoteric theories.

Although in academic eclipse, at least in American law schools, liberal pragmatism is essentially the theory of democratic government in its modern context.<sup>28</sup> More than that, it is hands down the primary legal theory

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<sup>26</sup> Where more specific relational contract theories are being considered in this Article, I shall clearly differentiate them.

<sup>27</sup> "Substance" and "behavior" are, of course, neither clearly separate categories nor independent of each other. Nonetheless, even though it may be difficult to label the categories, we know the categorical difference between prices, plans for bridges, specification of software functions, and golden handshakes, on the one hand, and processes of agreement, corporate governance structures, arbitration provisions, and specification of completion dates, on the other.

<sup>28</sup> In this day when one must have a "theory" to survive in the legal academic rat race, there is singularly little recognition that liberal pragmatism is a theory. Woe be unto the young—or maybe even older—liberal academic whose work, however fine (indeed, even superb) fails to gussy up this pragmatic theory into some convoluted, over-intellectualized, and essentially obscurantist "theory." None-

prevailing in the work of legislatures, courts, executive and administrative agencies, and practicing lawyers. This liberal pragmatic theory is obviously highly relational. Yet it is, as radicals love to point out, founded fundamentally on individualistic, market notions, and hence is not a relational contract theory as the term is used here.

Before going further, it should be noted that relational contracts unquestionably can be and regularly are analyzed by use of nonrelational contract theories.<sup>29</sup> The most common of these nonrelational theories in modern American academia is rational choice theory, which can be applied with or without taking transaction costs into account. Game theory is another such tool. Both rational choice theory without transaction costs and game theory sweep away all relations, except pure competition with the broom of *ceteris paribus* (i.e., “other things being equal”). Transaction cost analysis introduces whatever relational elements the rational choice theorist might discuss. Nonetheless, as its name suggests, rational choice theory remains transactionally based and individually, rather than relationally, oriented.

*4. Relation of the Four Core Propositions to More Specific Relational Contract Theories.* It is certainly possible simply to stop and to go no further with relational contract theory than the four propositions set out above. These four propositions represent a quantum step from contract approaches based on transactions, agreements, promises, specific exchanges, and the like. Moreover, a strong case can be made for the merit of the four propositions standing alone, irrespective of what further theories may or may not be founded on them.

Nonetheless, these propositions form no more than an overarching theory,<sup>30</sup> only a framework to accommodate more specific relational contract theories. The propositions thus stand on their own feet and do not depend on the validity of any particular relational contract theory that I or anyone else has developed.

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theless, liberal pragmatism underlay the work of the likes of Arthur Corbin and Karl Llewellyn and the many other drafters of the Uniform Commercial Code. And it continues to underlie the work of scholars like Lawrence Tribe, of institutions like the American Law Institute (to a limited degree), and, as noted below, of legislatures and courts throughout the country. Liberal pragmatism may seem passé in legal academia at the moment, because so many “isms” and specific intellectual theories like rational choice theory, game theory, critical race theory, and others have become the dominating fashions. Many of these “isms” and intellectual theories are, however, either little more than rationalizations for this regulatory theory or, as is typically the case with rational choice theory economics, little more than rationalizations for the exact opposite.

<sup>29</sup> The converse may be true too, of course; explicitly individualistic approaches may be quietly founded in relational theory—witness Adam Smith’s moral philosophy.

<sup>30</sup> See Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998).



*B. Analysis of the Four Core Propositions*

1. *Every Transaction is Embedded in Complex Relations.* It is difficult to see how anyone could dispute this first proposition of relational contract theory. Apart from theoretical transactions, such as those of rational choice theory, nonembedded transactions are virtually impossible to find. Exchange of any importance is impossible outside a society. Even the purest "discrete" exchange postulates a social matrix providing at least the following: (1) a means of communication understandable to both parties; (2) a system of order so that the parties exchange instead of killing and stealing; (3) typically, in modern times, a system of money; and (4) in the case of exchanges promised, an effective mechanism to enforce promises. This social matrix is, of course, the minimum necessary for exchange; it takes great imagination to produce examples, in any society, of exchange characterized by only the minimum degree of relationality.<sup>31</sup>

*Challenge/Query No. 5:* Does anyone dispute this proposition?

2. *Understanding Any Transaction Requires Understanding All Elements of its Enveloping Relations that Might Affect the Transaction Significantly.* Although this proposition may at first glance appear to be controversial, it is, again, difficult to see how anyone could seriously disagree with it. It is the application of the proposition rather than the proposition itself that is likely to give rise to controversy—that is, one might ask which, if any, elements do affect any given transaction significantly.

It should also be noted that the second core proposition of relational contract theory requires only that the enveloping relations be understood, not that they necessarily be accorded recognition or further consideration in conducting analysis.<sup>32</sup> The latter is the realm of the third proposition.

*Challenge/Query No. 6:* Does anyone dispute this proposition?

3. *Effective Analysis of Any Transaction Requires Recognition and Consideration of All Significant Relational Elements.* It is with this third proposition that the fur may begin to fly. Before defending the proposition, however, clarification is in order. Recognition and consideration of all the significant relational elements of a transaction does *not* mean reinventing the wheel every time any given transaction or type of transaction is analyzed. Common sense and normal practices of building knowledge on the

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<sup>31</sup> Macneil, *Values*, *supra* note 19, at 344.

<sup>32</sup> The separation is somewhat artificial and the two could be combined since understanding is the first step toward recognition and possibly further consideration. Nonetheless, separation is useful in order to strip out what is seriously controversial in relational contract theory and what is not.

basis of past experience are as much in order in analyzing contracts as in any other human endeavor.

Consider, for example, an analysis of the effect on demand of relatively small increases or decreases in the price of bananas in supermarkets. Such sales of bananas occur in extremely complicated supermarket-consumer relationships. The sale of any one product is part of an integrated web of sophisticated supermarket management of the sale of all of its products. In supermarket-consumer relationships, among other things, goods are competing with each other for limited and varying display space, limited consumer attention, and expenditure of limited consumer resources. Elements of these relationships are of such a nature that even small changes in the price of a fairly simple product may send vibrations through other parts of the web, vibrations likely to reverberate back.

Thus, even a modest price analysis calls for at least the following: (1) a statement that this is an area of extremely complicated contractual relations; (2) a brief description of these relations with suggestions, where available and appropriate, of further sources of information; (3) an explanation of why the analyst has concluded that the relations will not affect the outcome of his or her narrow price study; and (4) a conclusion that *ceteris paribus* is therefore appropriate in such a case and constitutes adequate consideration of these relational impacts. Stating conclusions (3) and (4) explicitly empowers the reader to respond, "Sure," or "Oh Yeah?," or "I'll reserve judgment," or whatever, and to put the analysis in its appropriate place in light of his or her own view of the relational situation.

Such treatment is essential before any discrete analysis can be undertaken or described. It is even more important as part of the conclusions drawn from the analysis, lest they be overstated.

There will always be a question of where to stop with even such modest recognition and consideration of elements of the enveloping relations. Continuing with our example, banana relations are phenomenally complex. Their sale is entwined in a particularly tangled international marketing and power structure. It involves monopolistic outfits like Chiquita International Brand, a variety of conflicting third-world interests (Latin American countries, Chiquita and Chiquita-lookalike producers vs. small Caribbean island countries, particularly non-Chiquita-like producers), and European vs. American foreign policy, to say nothing of Chiquita as a symbol of American imperialism, environmentally damaging practices, big money politics, the global capitalistic market generally, and Bill Clinton's zipper problems.<sup>33</sup>

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<sup>33</sup> Recently these issues have blossomed into threats of a full blown trade-war with the United States moving to impose 100% tariffs on some European imports to compensate for the alleged trade loss not to itself, but for the benefit of United States multinationals dominating Latin American banana industries. See *Banana Row May Trigger Trade War*, THE SCOTSMAN, Dec. 16, 1998, at 22; Gary Duncan, *Banana Trade War Will Hit UK Hardest*, THE SCOTSMAN, Dec. 22, 1998, at 21; William Chisholm, *Clinton Friend Blamed over Borders Cashmere Jobs Crisis—Tycoon 'Pressured US Politicians to Retaliate in Banana Trade War'*, THE SCOTSMAN, Jan. 8, 1999.

These elements are, however, further removed from the effect on demand of small variations in the price of supermarket sales of bananas than is the supermarket-consumer relation. Moreover, the effect, if any, that these elements have on a narrow price question is likely to be mediated through the supermarket-consumer relation.<sup>34</sup> To the extent this is the case, no need exists to go beyond this relation in dealing with the issue at hand. Probably all that can be said generally about where to stop is that those enamored with relational contract theory<sup>35</sup> will probably see important connections, and hence the need for their treatment, where those enamored with discrete analytical methods will not.<sup>36</sup>

It may be argued that there are instances where even such casual recognition of the relations enveloping transactions is unnecessary, that the relations are simply just too well known to bother mentioning them. And in everyday life, that is precisely how we behave most of the time in familiar situations. The problem is, however, that what is simply just too well known is all too often simply just forgotten. This is especially true respecting subjects of mental exercises. Thus, judges, administrators, and academics can ill afford to be so casual.<sup>37</sup> Even in the most clear-cut situations, it is a salutary and cautionary thing for them to remind themselves that it is relations, not just isolated transactions, with which they work. They are like surgeons who need often to remind themselves that it is patients, not just organs that they are carving up.

Such reminders may do far more than provide an appropriate relational tonic. There will be times when the mere recollection of the obvious will suggest that it is not so obvious after all. When this happens, the actor will recognize that some further attention does need to be paid to relations after all. Moreover, in the case of judges, such reminders will have salutary consequences by helping to limit the precedential effect of their decisions to situations where the relations resemble each other enough for them to be properly ignored for purposes of analysis.<sup>38</sup> This, of course, happens in legal theory without the reminders, since precedential effect is always limited to the facts of a case. But, as every lawyer knows, what the "facts of a case" are is always highly debatable. Reminders that the court is focusing only

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<sup>34</sup> But not always. For example, consumer boycotts of particular products, whether for political reasons or for health fears or other reasons, may originate largely outside the supermarket-consumer relation but nevertheless have immense effect on it.

<sup>35</sup> Hereinafter called "relationists" (although the other participants in this Symposium prefer "relationalists").

<sup>36</sup> Hereinafter called "discretists." As will be seen in Part V.A, we all now seem to be relationists until it comes to the law. Since, however, we are dealing only with legal analysts, it is unnecessary to use a more precise term: "legal discretists."

<sup>37</sup> Neither can legislators, but the nature of their occupation makes them far less prone to forget about relations. Nonetheless, there are many issues where they tend to do so.

<sup>38</sup> Something analogous would occur in academic analysis, whether relational contract theory, game theory, or legal analysis of discrete contract law.

on discrete elements, and ignoring relations, should help future courts better to tease out what were and what were not the “facts of a case.”

The foregoing is, of course, the *minimum* treatment that should accompany discrete analysis of transactions. Where recognition of the enveloping relations suggests that they might indeed have some significant impact on any proposed transactional analysis, then relational contract theory calls for more. That impact must be analyzed to whatever extent it is significant, no matter how difficult or messy the task may be. Failure to give such consideration renders any transactional analysis suspect at best, and totally defective at worst. No sweeping application of *ceteris paribus* or anything like it in such circumstances is appropriate respecting those aspects of the relations.

Even where there is agreement to the foregoing in principle, there is always room for dispute about when relations are likely to have an impact on particular transactions and where they are not. Unquestionably, “relationists” will often see impact when “discretetists,” such as rational choice or game theorists, would not. It is in such circumstances that a practice of insisting upon overt recognition of the enveloping relations by both sides of the debate becomes particularly valuable. Such recognition will require discretetists to state clearly that the enveloping relations do not affect the transactional analysis, and this in turn facilitates challenges to such a conclusion. As illustrated by the banana price example, relational contract theory calls for recognition and consideration of all significant relational elements irrespective of the goal of the analysis. Thus, it applies to price and other substantive aspects of contractual relations. Nonetheless, the assertions of this Article are, as noted earlier,<sup>39</sup> limited to nonsubstantive, behavioral aspects of contractual relations.

Recognition and consideration of all significant relational elements becomes particularly essential where the subject of examination is behavioral aspects, such as the structuring of contractual relations in which transactions occur, including all questions of law pertinent to them. This is partly because, unlike such things as dollars and bananas, behavioral aspects are phenomenally easy for most people to overlook. They tend to be taken for granted, taken as given, taken as unimportant, taken as if they were somehow bestowed by nature, taken as free goods—you name it. Nowhere is this more true than in the Queen of the Social Sciences, Economics. Thus, the need for such recognition and consideration is especially important in that branch of study called law and economics.<sup>40</sup>

<sup>39</sup> See *supra* note 27.

<sup>40</sup> A recognition of relations does seem, belatedly, to be coming into that branch of the social sciences. I was amused to learn that law and economics has finally discovered norms. See Ellickson, *supra* note 30, at 537. I was less amused to read that “[l]ike virtually all legal scholars, the founders of classical law and economics featured unsocialized individuals in their analyses of hypothetical legal problems. *Id.* at 540 (emphasis added). Virtually all? How many is that? I introduced the notion of socialized individuals in teaching-connected publications over thirty years ago and to formal legal

*Challenge/Query No. 7:* Defend the proposition that effective analysis of a transaction can be accomplished without recognition and consideration of all significant relational elements.

4. *Combined Contextual Analysis of Relations and Transactions is More Efficient and Produces a More Complete and Sure Final Analytical Product than Does Commencing with Non-Contextual Analysis of Transactions.* Assuming that both enveloping relations and transactions are to be analyzed,<sup>41</sup> two basic ways to go about the analysis are available. One is the relational approach, and the other is to start at the transaction end and work from there into the remainder of the relations.

a. *Relational Approach.*—The relational approach requires three steps: (1) acquiring an overall grasp of the essential relations of which the transactions are an integral part; (2) working through the interaction of the pertinent transactions with the remainder of the relations until the limitations of transactional analysis are firmly established, and (3) engaging in whatever detailed discrete analysis is desired, subject to whatever constraints the first steps suggest. Although the steps need to be taken in the order suggested, in any complex situation they may be repeated many times, whenever each step reveals inadequacies in the information derived from a prior step.<sup>42</sup>

Before considering the relative merits of the relational and transaction-end approaches, it should be noted that, as ordinarily applied, neither rational choice theory (when applied without transaction cost analysis) nor

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scholarship in two articles in 1974. The major one, see Macneil, *Many Futures*, *supra* note 8, was published in the *Southern California Law Review* while Ellickson was a faculty member at U.S.C. Since then, I have published THE NEW SOCIAL CONTRACT, *supra* note 6, and no less than fifteen articles, largely in American law reviews, all dealing with socialized individuals. Casual searches through Westlaw revealed 495 citations for the decade starting at the beginning of 1990. What kind of scholarship uses the term “virtually all” in this context? Ellickson went on to castigate law-and-society scholars as being admired “more for grubbing for facts than for building overarching theory.” Ellickson, *supra* note 30, at 546. A neat trick, to ignore the one person identified with a group who *has* developed an overarching theory, and then chastise the whole group for failing to produce one! Ah, well, why should I complain? After all, Ellickson does acknowledge me elsewhere; see Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 686 (1986) (citing Macneil, *Many Futures*, *supra* 8). Ellickson’s work is in fact one of the major vindications of essential contract theory, the norms of which resonate throughout Ellickson’s findings. Ellickson cites *Many Futures* in the final footnote for the limited proposition that “[c]ontracts scholars have long known that norms are likely to be especially influential when disputants share a continuing relationship.” *Id.* at 686.

<sup>41</sup> As required by the first three propositions whenever it is concluded that the relations will have an impact on the transactional analysis.

<sup>42</sup> In this respect relational analysis is not unlike the work of litigators in unraveling complex factual situations intertwined with complex law. As more knowledge is gathered about the facts, new legal strands appear requiring more knowledge about the law. And as more knowledge is gathered about the law, inadequacies in knowledge about the facts appear requiring more factual investigation.

game theory is pertinent here. Such applications typically reject the third relational core proposition,<sup>43</sup> and thus deal only with transactions as such, sweeping away all relational elements by express or implicit use of *ceteris paribus*. The points made respecting the fourth core proposition are pertinent to such approaches only in that they further demonstrate the debilitating weaknesses of ordinary applications of rational choice theory and game theory from the viewpoint of any relational contract theory.

This is not to say that rational choice theory and/or game theory *cannot* be applied consistently with relational contract theory. In this they are analogous to classical contract law,<sup>44</sup> which can and often does play a vital role in relations characterized by high levels of discreteness, such as transactions in organized futures markets.<sup>45</sup> But like the application of any kind of discrete contract analysis, theirs too requires to be circumscribed by the relations.<sup>46</sup>

It should also be recalled that, as suggested in the discussion of the third proposition,<sup>47</sup> starting analysis with an overall picture of relations and their interaction with transactions may in some circumstances lead rapidly to the conclusion that the enveloping relations do not affect the transactional analysis at hand. The banana-price question discussed earlier is an example. We are thus here concerned only with those situations where significant interaction between transactions and their enveloping relations is both anticipated and understood to require analysis as a part of transactional analysis. The assumption is that before the job is done the essentials of *both* the transactions and the relations must be analyzed, and the only question is how to go about it.

*b. The Transaction-End Approach: Transaction Cost Analysis.*—The technique typically used when starting with transactions is transaction cost analysis.<sup>48</sup> To be entirely logical, anyone engaging in such analysis

<sup>43</sup> See *supra* Part II.A.

<sup>44</sup> And to neo-classical contract law, although less so.

<sup>45</sup> Another example is highly detailed wage scales found in some collective bargaining agreements.

<sup>46</sup> I do not believe rational choice theory *without* transaction cost analysis can ever tell us *anything* about large areas of the non-substantive behavioral aspects of contracts or transactions. See Ian R. Macneil, *Contract Remedies: A Need for Better Efficiency Analysis*, 144 J. INST. & THEORETICAL ECON. 6 (1988) [hereinafter Macneil, *Better Efficiency*]; Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982) [hereinafter Macneil, *Efficient Breach*]. While these articles advance this proposition respecting only efficient breach, I believe the principles explored there apply to all non-substantive behavioral aspects of contracts related to such matters as consent and the structuring of contracts, and all of the law of contracts pertaining thereto. Those principles would not apply, however, to law or other controls aimed directly at deterring, regulating, or requiring particular substantive contractual conduct, such as prohibition of sales of drugs, prohibiting racial discrimination in employment, or requiring airbags in cars.

<sup>47</sup> Understanding any transaction requires understanding all essential elements of its enveloping relations. See Part II.B.3.

<sup>48</sup> Transaction cost analysis has been associated with rational choice theory ever since R. H. Coase published *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960), and it is the keystone of the institu-

would start by looking at the transaction alone and then trying to infer from the transaction itself what kind and amount of information costs, communication costs, negotiation costs, transfer costs, monitoring costs, enforcement costs, renegotiation costs, "external" costs, and so on may be involved. Theoretically, such a process carried out with the utmost of thoroughness would ultimately result in uncovering all significant aspects of the enveloping relations and their interplay with the transactions being studied.

Needless to say, people are generally sensible rather than completely logical. No one engages in such a Herculean task as that resulting from starting analysis free of *all* relational information. Instead, transaction cost analysis normally starts only after the analyst already knows and/or has gathered a considerable but finite amount of information, real or imagined, about the contractual relations in question.<sup>49</sup> Such information channels the analyst both in seeing what transaction costs are likely to occur and in determining which are important enough to examine and which are not.

*c. Comparing the Relational and Transaction Cost Approaches.*—The difference between transaction cost analysis and the three steps of relational analysis is partly, but only partly, one of degree. Thus, transaction cost analysis also requires initial acquisition of some knowledge of the essential relations in order to pick out transaction costs, which is the first step of relational analysis. Since, however, transaction cost analysis starts at the "wrong" end in relational terms, acquiring such knowledge is a practical necessity rather than a theoretical requirement. Thus, the knowledge acquired of the relations can be, and tends to be, casual rather than the systematic overall grasp called for by relational contract theory.<sup>50</sup> Moreover, it involves high risk of omitting major factors.<sup>51</sup>

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tional school of economics exemplified by Oliver Williamson, who refers to it as transaction cost economics. See, e.g., Oliver E. Williamson, *Transaction Cost Economics Meets Posnerian Law and Economics*, 149 J. INST. & THEORETICAL ECON. 99 (1993). To the extent, however, that economics is equated only with pure rational choice theory, it is clear that any worthwhile transaction cost analysis is not economics at all. It is straightforward, untheoretical empiricism, determining as a matter of existential fact just what the costs are of exchanging things of value in particular ways—sociology. Perish the thought! But it happens to be true.

<sup>49</sup> It is thus already partly relational, irrespective of its name.

<sup>50</sup> This is illustrated by the term "efficient breach," used by transaction cost analysts right along with rational choice theorists who show little interest in transaction costs. The term is far too narrow, because it virtually ensures that important transaction costs will be missed from the analysis. In those situations to which its advocates apply it, anything short of thinking in terms of "efficient nonperformance of contract" will almost certainly guarantee such omissions. See Macneil, *Better Efficiency*, *supra* note 46; Macneil, *Efficient Breach*, *supra* note 46.

<sup>51</sup> The risk is not, however, as great as it is respecting non-transaction cost discrete analysis. The simplistic view of life held by even the very best and brightest of discretists is, to put it mildly, sometimes amazing. For example, in his contribution to the Symposium, Professor Posner said:

Even something as transitory as a stock transaction is constrained by nonlegal sanctions. The buyer and seller in the secondary market do not deal with each other. They both deal with a mid-

The second step of relational analysis—working through the interaction of the pertinent transactions with the remainder of the relations until the limitations of transactional analysis are firmly established—tends to be severely truncated in a transaction cost analysis. In transaction cost analysis, once what appear to be the key transaction costs are identified, they take over as surrogates for the real interaction between the relations and the transaction.

The third step is stated the same way in both true relational contract analysis and transaction cost analysis: engagement in whatever detailed transactional analysis is desired, subject to whatever constraints the first steps suggest. The differences in the first steps, however, cause differences in the constraints, and hence differences in results.

Relational contract theory advances the proposition that it is both more efficient and more sure to engage in combined contextual analysis of relations and transactions than to commence with noncontextual analysis of transactions. As shown above, transaction cost analysis adheres in considerable measure, but by no means entirely, to this proposition.

Whichever approach is used there will always be a considerable degree of subjectivity in deciding what needs treatment, and how much, and what needs none. It is also quite possible, if unlikely, that an analyst starting from the transaction end but also blessed with knowledge, common sense, imagination, subtlety, and skill may do both a more efficient and more complete and sure job than an analyst less blessed but diligently following

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dleman, the broker, who takes pains to develop a reputation for honesty, and who usually is employed by a firm with a brand name, built up over years.

Posner, *supra* note 4, at 756.

A stock transaction in the secondary market epitomizing transitory contract? In fact, of course, it epitomizes the exact opposite—embeddedness, both nonlegal and legal. First, the subject of the exchange is not an apple to be eaten immediately upon acquisition. Its subject is a “commodity,” which has neither existence nor meaning except as part of the incredibly complex relations of modern corporations. Thus, the transaction makes no sense whatever if understood to be transitory. The exchange itself is embedded not only in the bit of broker relation described by Professor Posner, but in a wide range of relations, both nonlegal and legal, particularly the latter. Even the most transitory customers now have complex relations with their brokers. Gone is the day when one can walk into a broker’s office and simply buy or sell something. Various kinds of regulation force an extensive relationship on the parties whether they want it or not, including fiduciary obligations on the broker. Moreover, there are at least two brokers, buying and selling, and often more, who also have non-legal and legal relations with each other that all impact on the “transitory” transaction. All are performing under the umbrella relations of one or more self-regulatory organizations, in turn under the constant scrutiny of the Securities Exchange Commission.

The relational nature of “transitory” share transactions was vividly demonstrated by the failure of the London Stock Exchange computer on April 5, 2000. The resulting collapse of the market laid startlingly bare the intimate connection of each transaction to all the others, not just as to prices, but as to their being able to occur at all. Moreover, since April 5 was the last day of the United Kingdom’s tax year, the relation of these transactions to the public fisc was revealed. There was an immediate clamorous demand that the government extend the 1999-2000 tax year; fortunately, this demand was quickly rejected.



the relational route. Moreover, it is by no means uncommon to find mixtures of the two approaches.<sup>52</sup>

As noted earlier, the final proposition is the least provable of the four core propositions of relational contract theory.<sup>53</sup> The only way to “prove” it would be to survey a very large body of work on contract, most of which would be at least nominally thought to be transaction cost analysis. The survey would be aimed primarily at attempting to establish how complete and sure the various analyses were. As to the efficiency of the various analyses, it could probably only be inferred from conclusions respecting completeness and sureness. In short, proof of this proposition is a virtually impossible task, akin, perhaps to trying to navigate the Suud in a small boat without a compass on a starless, moonless night.<sup>54</sup>

With regard to the fourth core proposition of relational contract theory, then, there is no challenge or query. Believe it or not, as you like it.

### III. ESSENTIAL CONTRACT THEORY

#### A. Terminology

The core propositions of all relational contract theories constitute what should appropriately be called relational contract theory. Using the phrase “relational contract theory” as a title for any one such theory not only in effect purloins the title from its many owners, but also may lead to confusion of one relational contract theory with another.<sup>55</sup> For that reason, I propose hereafter to refer to the ideas growing out of my own descriptions of com-

<sup>52</sup> See, e.g., Fred O. Boadu, *Relational Characteristics of Transboundary Water Treaties: Lesotho's Water Transfer Treaty with the Republic of South Africa*, 38 NAT. RESOURCES J. 381 (1998).

<sup>53</sup> See *supra* Part II.A.1.

<sup>54</sup> Where broad studies are impracticable, a case study may nonetheless be highly illuminating. A first draft is in hand dealing with one effort, Professor Bernstein's article on the resolution of disputes among members of the National Grain and Feed Association (NGFA). See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) [hereinafter Bernstein, *Merchant Law*].

<sup>55</sup> I seem to have started this unfortunate phenomenon by using “relational contract theory” to refer to my own work. At least the first use of the phrase found in a Westlaw search on January 19, 1999 is in Macneil, *Values*, *supra* note 19. That search produced 112 articles using the phrase or its plural. Three of the earliest four of the 112 articles are my own. TP-ALL is unfortunately far from an ideal database for searches of this kind: the number of publications covered are extremely limited until well into the 1980s, additions of journals have been made prospectively only, and it still omits many of the more academic journals.

There are other ill consequences of my use of the phrase. First, it tended to force my factual descriptions about contract behavior, and the norms they generate, into becoming a theory, whereas, as noted above, they stand separately as descriptions. This has led to the wrong question (Is the theory any good?) being asked about the descriptions. The proper question is, Are the descriptions accurate and, if so, useful for gaining insight into contract? Second, calling all my work “relational contract theory” confuses three different theories: (1) that defined by the core propositions, see Part II, (2) essential contract theory (treated here) and (3) relational/as-if-discrete theory, see Part IV.

mon contract behavior and norms as *essential contract theory*. This label is appropriate for two reasons. First, I believe that the theory captures the essential elements of exchange relations. Second, I believe that analysis of this type is essential to understanding contract.

### B. Essential Contract Theory Defined

Essential contract theory<sup>56</sup> is the proposition that the common contract behavioral patterns and norms described earlier<sup>57</sup> constitute a highly effective vehicle for satisfying the core propositions of relational contract theory. Those patterns and norms supply a checklist for isolating all elements of the enveloping relations that might affect any transaction significantly. They supply a framework both for understanding those relations and for analyzing them. Finally, I believe they provide a highly effective mechanism for combined contextual analysis of transactions and the relations in which they are enveloped.

Essential contract theory also postulates that where the common contract norms are inadequately served, exchange relations of whatever kind fall apart. Note, however, that essential contract theory does *not* postulate that exchange relations should never fall apart. Whether they do or not depends upon whether common behavior and norms continue with sufficient strength, not on whether they should or should not continue for some reason or other.<sup>58</sup>

In essential contract theory there is a somewhat general assumption that typically the law will more or less track the common contract behavior and norms. This should not, however, be overread. There may often be good reasons why the law should not track the common contract behavior and norms.

Finally, essential contract theory appears to fly in the face of the principles of law and economics (without transaction costs), rational choice theory, and game theory. The appearance is, however, deceiving. Essential contract theory eliminates the use of neither of these theories. It merely requires that their principles be applied only interstitially, within the relations rather than as the single analytical tool, either theoretically or practically.<sup>59</sup>

*Challenge/Query No. 8:* Are there more effective tools for satisfying the core propositions of relational contract theory than use of the common contract behavioral patterns and norms on which essential contract theory relies? If so, what are they? What are their relative advantages and

<sup>56</sup> It appears most fully as a theory in MACNEIL, *NEW SOCIAL CONTRACT*, *supra* note 6, and in Macneil, *Values*, *supra* note 19.

<sup>57</sup> See Part I.A.2.

<sup>58</sup> See *infra* text accompanying note 80.

<sup>59</sup> Insofar as rational choice theory is concerned its defects suggest that it can be so used only in very limited ways. See discussion *supra* note 42.

disadvantages in achieving surer and more complete insights into contract? Do responses to Challenges 2 and 3 suggest that the common contract behavioral patterns and norms can be bettered for these purposes by eliminations, alterations and/or supplementation?<sup>60</sup>

The *common* contract behavior and norms are the end of neither the descriptive nor the theoretical story. I also combined these behavioral patterns and norms with something else, namely the idea of two polar types of contracts, discrete<sup>61</sup> and relational.<sup>62</sup> They, too, are descriptive. Both their nature and their relation to theory are discussed in Part IV.

#### IV. THE RELATIONAL/AS-IF-DISCRETE SPECTRUM

Probably the most recognized aspect of my work in contract is the use of a spectrum of contractual behavior and norms with poles, labeled relational and discrete, respectively. As with the broader arena, this spectrum too reflects both descriptions of contract behavior and norms and is the basis for a theory emanating from those descriptions.<sup>63</sup>

##### A. Terminological Difficulties

Two terminological difficulties have emerged respecting this discrete-relational spectrum, one for each term.

1. *The Dual Meaning of Relational.* First, use of the root "relation" to describe two separate things causes confusion. One use, seen above, encompasses all relations in which exchange occurs. Since even the most discrete exchange occurs in relations, discrete exchange is relational in this sense. The other use refers particularly to relational contract, which is found at the opposite end of a discrete-relational spectrum. The confusion arises because contracts labeled relational in the second sense are already relational in the first sense (as are all discrete contracts), although the obvious implication of describing one pole as relational is that contracts at the other (discrete) pole are *not* relational.

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<sup>60</sup> In Macneil, *Values*, *supra* note 19, at 415 n.236, I expressed the hope that "the umbrella relational theory would be relational contract theory not unlike that described . . . [but that] it certainly need not be, and probably will not be." (The word "umbrella" meant a comprehensive or better essential contract theory, not the core propositions of relational contract theories discussed in Part II here.) I went on to suggest that it might need to be richer, for example in economic analysis, in institutional thinking, in conflict and decisionmaking theory, and in philosophy. See discussion *supra* note 19.

<sup>61</sup> Hereinafter, for reasons discussed below, this type is referred to as "as-if-discrete."

<sup>62</sup> Initially I used the word "transactional" for "discrete," but that was fairly easy to change.

<sup>63</sup> This spectrum of contractual behavior is sometimes treated as a relational contract theory in itself, although even as a theory it is only an adjunct to essential contract theory.

In light of the foregoing problem, I decided, in one of my last articles on contract before being diverted to other activities,<sup>64</sup> to refer to the spectrum of exchange relations as being discrete at one end and intertwined (rather than relational) at the other.<sup>65</sup> This effort has been unsuccessful respecting the work of others, and I have reached several conclusions. One is that it is too late to change.<sup>66</sup> Another is that most often the context will prevent the ambiguity from causing too much trouble. Yet another is that a terminological change at the other end of the spectrum will help alleviate the problem.

2. *As-If-Discreteness*. The word “discrete” too raises a problem. Since all discrete transactions are embedded in relations, they are relational and not truly discrete.<sup>67</sup> To use the label “discrete” to identify that end of the spectrum appears to be a denial of this fact about some transactions. This might not be a serious problem, were it not for the mesmerizing, indeed paralyzing, influence that the idea of discrete transactions has come to have in the Western mind.<sup>68</sup> Nowhere is this influence greater than in intellectual endeavors. One consequence of this overpowering effect is that people really do act and think as if discrete transactions exist outside of relations. In fact, what we think of as discrete transactions are something quite different: they are the deliberate or habitual treatment within complex relations of certain events *as if* they were discrete transactions.

Our extensive ability to engage in such treatment of events is an extraordinarily powerful and useful economic and social device, one absolutely indispensable in the modern world.<sup>69</sup> Like all extraordinarily

<sup>64</sup> For over a decade, my scholarly work has been on arbitration law.

<sup>65</sup> See Macneil, *Sociology*, *supra* note 14, at 276.

<sup>66</sup> Because “intertwined” is close to being a synonym for “relational” the change was somewhat cosmetic anyway.

<sup>67</sup> Much of the discreteness they demonstrate relates to *how* they are embedded in relations, not to *whether* they are so embedded.

<sup>68</sup> See Macneil, *Barriers*, *supra* note 7. For “Western,” now read “virtually worldwide.”

<sup>69</sup> However important openness to change is in economic relations, there will nevertheless always be a great need for fixed and reliable planning. Or, in the terms emphasized here, presentation will always occur in economic relations, since it tends to follow planning as a matter of course. (To presentiate is “to make or render present in place or time; to cause to be perceived or realized as present.” 8 OXFORD ENGLISH DICTIONARY 1306 (1933) (*quoted in* Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589 (1974)).) Nor does a modern technological economy permit the demise of discreteness. Highly specialized products and services, the hallmark of such an economy, produce a high degree of discreteness of behavior, even though their production and use are closely integrated into ongoing relations. When, for example, an automobile manufacturer orders thousands of piston rings of a specified size from another manufacturer with which it regularly deals, no amount of relational softening of discreteness and presentation will obscure the disaster occurring if the wrong size shows up on the assembly line. Nor would the disaster be any less if the failure had occurred in an even more relational pattern (*e.g.*, if the rings had been ordered from another division of the auto manufacturer). Both discreteness and presentation must be served in such an economic process, whether it be carried out between firms by discrete separate orders, between firms under long-

powerful and useful things, however, it is extraordinarily dangerous. Not the least danger of the idea of discrete transactions is its amazing ability to capture the intellect completely.<sup>70</sup> When this happens, the “as if” of reality becomes the “is” of intellectual analysis, and the relations in which the as-if-discrete events actually occur disappear altogether.

There are a number of reasons for adding “as if” to the terminology. One is to achieve consistency among descriptions of common contract behavior and norms, essential contract theory, and the relational/as-if-discrete spectra. More important is to press home at all times the point that there is *no such thing* in real life as a discrete transaction.<sup>71</sup> What makes them appear to exist is that we treat certain events in large degree as if they were discrete transactions. This treatment, at odds with reality, is properly emphasized by including the phrase “as if” as part of the concept of discreteness.

### B. Description, Not Theory

Just as the common contract behavioral patterns and norms constitute descriptions, so too do the behaviors and norms singled out by the relational/as-if-discrete spectrum.

1. *Common Contract Behavior and Norms.* Because of their universal nature in contract, that is, in exchange relations, common contract behavioral patterns and norms occur all along the relational/as-if-discrete spectrum. Certain of them, however, are intensified at one end and others at the other end. In the case of relational contracts in particular, some are considerably transformed. There is, however, a caveat: like the ends of rainbows, the ends of the relational/as-if-discrete spectrum are mythical.<sup>72</sup>

2. *As-if-Discrete Transactions.* As-if-discrete transactions give rise to an intensification in exchange relations of two common contract behaviors—implementation of planning and effectuation of consent—and hence to an intensification of the norms arising out of these behaviors. When so intensified, these transactions may usefully be labeled as following the as-if-discrete norm, and thus as enhancing discreteness and presentation.

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established blanket orders, or within the firm. See Macneil, *Contracts: Adjustments*, *supra* note 20, at 854. Mention of the modern world should not obscure the fact that as-if-discreteness is, and always has been, an essential part of human behavior. See Macneil, *Exchange Revisited*, *supra* note 10; Macneil, *Many Futures*, *supra* note 8, at 701-10.

<sup>70</sup> This is most certainly not an exaggeration. Indeed, anyone who thinks it is has almost certainly been captured completely!

<sup>71</sup> It is difficult even to conceive of one theoretically, although discretists regularly seem to think they have done so in using as-if-discrete models.

<sup>72</sup> The reason for this lies in basic human nature. See Macneil, *Exchange Revisited*, *supra* note 10.

3. *Relational Contracts.* Relational contracts, by contrast, give rise to an intensification in exchange relations of several other common contract behaviors, and hence to their norms. Primary among these are (1) role integrity, (2) contractual solidarity, and (3) harmonization with the social matrix, especially the internal social matrix.<sup>73</sup>

In addition, relational contexts affect the nature of other common contract norms. For example, flexibility in relations is at least partially an internal, rather than an entirely external norm as it is (in theory) in as-if-discrete transactions. Hence, flexibility comes into partial conflict with the planning and consent norms in ways not occurring in as-if-discrete transactions. Reciprocity also becomes an important internal matter, lest the relation break down. Power is also an important internal matter in relations.<sup>74</sup>

*Challenge/Query No. 9:* Are there more accurate descriptions of contract behavior and norms differentiated along a spectrum of relational/as-if-discreteness? If so, what are they? What are their relative advantages and disadvantages for gaining insights into this dimension of contract? Can the above descriptions be bettered by eliminations, alterations, and/or supplementation?

4. *The Law of Relational Contracts.* Another observation pertinent to the relational/as-if-discrete spectrum concerns relational contract law, that is, law which takes into significant account the fact that it is treating contracts towards the relational end of the relational/as-if-discrete spectrum. Since the world abounds with relational contract, the world necessarily abounds with relational contract law.

Relational contract law is so all-pervasive that one feels almost foolish in giving examples. A few examples from but one type of contractual relation, employment, will do: workmen's compensation, numerous anti-discrimination laws, social security taxation and benefits, ERISA, OSHA, other workplace regulations, wage and hours legislation. All of these are relational contract law. And all are part of almost any American employment relation. To which needs to be added where collective bargaining is in place, the NLRA, LMRA, and a wide range of law governing unions and other aspects of collective bargaining. Note that the foregoing is an observation, not a prescription.<sup>75</sup>

5. *Other Dimensions?* It has often occurred to me that there are surely other dimensions beside that of relational/as-if-discreteness that could aid our understanding of contract. For example, in *The New Social Contract I*

<sup>73</sup> Unlike as-if-discrete transactions, relational contracts generate extensive internal social matrices.

<sup>74</sup> Macneil, *Values*, *supra* note 19, at 350-51.

<sup>75</sup> For prescription, see *infra* Part IV.C.

explored this spectrum in both primitive and modern contractual relations.<sup>76</sup> But what about the dimension of primitive and modern itself? The dimension of feudal-and-guild and modern? Small and large? Informal and formal?

*Challenge/Query No. 10:* Are there other dimensions besides the relational/as-if-discrete spectrum which could add to our understanding of contract?<sup>77</sup>

### *C. The Relational/As-If-Discrete Spectrum and Essential Contract Theory*

The spectrum of relational/as-if-discrete behavior thus far discussed is entirely descriptive. The spectrum is, however, also an important refinement of essential contract theory as described above in Part III. As noted in Part IV.B, both relational contracts and as-if-discrete contracts are characterized by intensifications of the common contract behavior and norms that are elements of essential contract theory. That being the case, essential contract theory could get along without teasing out the particularly relational and particularly as-if-discrete behavior and norms for special treatment. I believe, however, that separating them out adds greatly to the usefulness of essential contract theory as an application of the core propositions of relational contract theory.

### *D. Relational Contract Law for Relational Contracts?*

So far nothing said about common contract behavior or norms, about essential contract theory, or about the relational/as-if-discrete spectrum has been prescriptive respecting the content of the law governing relational contracts. Nonetheless, the observation made earlier that a great deal of relational contract law exists has been misconstrued so often that clarification is needed as to what it does and does *not* mean.

This observation means that, irrespective of whether one likes or does not like any particular relational contract law, analysis of contracts subject to it cannot safely ignore that law. This observation does *not* mean that relational contracts can never be dealt with by relatively discrete contract law. Indeed, the discrete elements in contractual relations tend to assure that they

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<sup>76</sup> MACNEIL, *NEW SOCIAL CONTRACT*, *supra* note 6.

<sup>77</sup> One weakness that I have always perceived in the relational/as-if-discrete spectrum is that it seems to fit most uneasily with contractual situations that are both heavily relational and heavy with as-if-discreteness. (This was an important aspect of the above comparison of primitive contractual relations with modern contractual relations.) As this combination is universal in modern bureaucratic society, I have always found this troubling. In principle, it is not problematic, since the use of multiple factors along what are really multiple spectra always presupposes combinations where some factors are towards one end and some towards the other. On the other hand, the pattern is so important in modern life that I wonder whether it may not require something more than the relational/as-if-discrete spectrum.

will be.<sup>78</sup> It does mean, however, that discrete contract law can never be the beginning and the end of the law applicable to relational contracts. Nor does the observation mean that the applicable relational contract law should necessarily *always* track closely the behavior and norms of the exchange relations in question.<sup>79</sup>

Finally, this observation does not mean that relational contract law should always aim to preserve relations, or even should have some presumption that such an aim is the starting point. As noted in the initial discussion of essential contract theory, it contains no such postulate.<sup>80</sup> Whether contractual relations continue or fall apart depends upon whether the common behavior and norms continue with sufficient strength. Where they do not, relational contract law may or may not appropriately step in.

*Challenge/Query No. 11:* I challenge to a duel anyone who, after this notice, persists in converting my descriptions of relational contract law into prescriptions of what the law should be, particularly prescriptions of some universal application of relational contract law.

<sup>78</sup> Both discretists and relationists quite regularly misinterpret the role of discreteness in essential contract theory. As an example of the former, Professor Posner describes situations where “the initial contract will most likely have *nothing* to say about events occurring many years later.” Posner, *supra* note 4, at 751 (emphasis added). The fact is, of course, that only in the rarest of situations where there is something identifiable as an “initial contract” will that contract have *nothing* to say about events, even many years later. The Constitution of the United States is an example of such an initial contract; it has a great deal to say about events even centuries later, in spite of the initial contract’s having obvious and extreme limitations due to intervening change. Posner goes on:

One of Macneil’s contributions was to help legal scholars to see that the traditional model, however convenient it was from a methodological perspective, was simply inadequate for analyzing this important side of contractual behavior. But having acknowledged this, we must proceed with some sort of analysis.

*Id.* Unfortunately, what Posner means by “this important side of contractual behavior” refers to circumstances where the “initial contract” has no role whatever—an essentially empty set. It is a particularly empty set in the areas of commercial law that most discretists, including Professor Posner, use to discredit essential contract theory. Use of this empty set then permits a denial of any role for discreteness in essential contract theory:

If Macneil is right, and courts cannot resolve contractual disputes by discovering initial contractual intentions on the basis of documents and other evidence, cannot use such intentions (even if they exist) to guide behavior late in the life of a relational contract, cannot enforce contracts in a way that maximizes their value *ex ante*, cannot fill in gaps by imagining the hypothetical bargain—then, what should the courts do?

*Id.* The answer is, of course, that the courts will seldom, if ever, have to face such a question. What they will have to do is fill in gaps where it is patent that the initial intentions are patently no longer enough *standing alone* to sustain a sensible decision in the face of later change.

<sup>79</sup> I have touched on this in *Values*, *supra* note 19, at 370-72 (discussing the transformation of norms when they are imposed by law rather than as generated within the contract). Bernstein deals extensively with this issue in *Merchant Law*, *supra* note 54. I am in the course of preparing an article centered on Bernstein’s article as an example of both relational and non-relational analysis.

<sup>80</sup> See *supra* text accompanying note 58.



Notwithstanding the challenge just offered, in my work I have gone beyond observation and included two types of prescription respecting relational contract law, being very careful to separate each prescription from the other. One is entirely personal to my perceptions of the good life.<sup>81</sup> While those perceptions undoubtedly are partially influenced by my understanding of contractual relations, they are highly personal glosses on essential contract theory and the relational/as-if-discrete dimension. Their merits or lack thereof have no place in assessments of the subjects of this Article.<sup>82</sup>

The other type of prescription is not personal, but rather what I have thought of as basically neutral.<sup>83</sup> The most important of these is a general idea that relational contract law should generally track the relational behavior and norms found in the relations to which it applies.<sup>84</sup> I have long recognized limitations on this idea.<sup>85</sup> Nonetheless, it seemed to me a generally sound notion. This idea has come under attack,<sup>86</sup> and more attacks may be in the offing.<sup>87</sup>

*Challenge/Query No. 12:* Is the idea that contract law should track the relational behavior and norms of the contracts in question ever sound as a starting principle? If so, is it sound just sometimes? Generally? Under what circumstances? If generally, what, if any, exceptions are there?

## V. SYMPOSIUM POSTSCRIPT

### A. *We're All Relationists Now!*

The most striking thing to me about the Symposium was the unanimity of recognition among the participants of the relational nature of contract. I had, of course, expected such recognition from Professors Bernstein, Feinman, Macaulay, and Speidel. I had not, however, expected Professor Pos-

<sup>81</sup> See, e.g., Macneil, *Values*, *supra* note 19, at 416-18 (attack on excessive bureaucratization of modern life). For another example, visit the mythical land of Post-Technique in Macneil, *NEW SOCIAL CONTRACT*, *supra* note 6, at 112-16.

<sup>82</sup> Such personal excursions have given hostages to discretists, who have treated them as part of essential contract theory as a way of attacking it, sometimes in a manner more worthy of political debate than of intellectual exchange. See, e.g., Richard A. Posner, *The New Institutional Economics Meets Law and Economics*, 149 J. INST. & THEORETICAL ECON. 73, 84 (1993). Something must have touched a nerve there!

<sup>83</sup> It always bears repeating my firm belief that no social analysis of any kind can be validly separated from the observer's psyche in such a way as to make it positivist in the sense we mean when speaking of physical sciences.

<sup>84</sup> This proposition is not limited to relational contract; it is part of the broader proposition that contract law should generally track the behavior and norms found in any contract to which it applies.

<sup>85</sup> See Macneil, *Values*, *supra* note 19.

<sup>86</sup> See, e.g., Bernstein, *Merchant Law*, *supra* note 54.

<sup>87</sup> This was written *before* I saw Professor Posner's paper for the Symposium, which is clearly such an attack.

ner to write that “[t]his, I hope, will be understood as a vindication of the relational contract approach,” or that “[t]his is a first step to understanding the role of courts, once we acknowledge that we live in a relational world.”<sup>88</sup> Nor had I really expected Professor Scott to make this comment (though I probably should have):

The debate that divides the academics who think about these questions is not over the nature of *contract* as an institution. We are all relationalists now. In that sense Macneil and Macaulay have swept the field. Contract, we now know, is complex and subjective and synthetic in every sense of those terms. The debate, rather, is over the proper nature of *contract law*. All contracts are relational, complex and subjective.<sup>89</sup>

Moreover, no one disputed the application to “living contracts”<sup>90</sup> of the first three core propositions of relational contract theories.<sup>91</sup> Indeed, it may be said that even the most discretist contribution to this Symposium, that of Professor Posner, reflects all three of these principles insofar as his living-contract hypothetical is concerned. There also appeared to be no overt challenge to the fourth core proposition,<sup>92</sup> although I would hardly go so far as to claim unanimous agreement with it.

For reasons expressed below, I believe that if this about-face respecting relational contract in the tiny Symposium sample of discretist thought is widespread among discretists generally, serious problems lie ahead for the future of academic “discretism.”<sup>93</sup>

### B. But Not When It Comes to Law

1. *Introduction.* The unanimous acceptance of the relational character of all living contracts, was, needless to say, not paralleled by unanimous acceptance of relational principles for contracts-at-law. In varying degrees

<sup>88</sup> Posner, *supra* note 4, at 4.

<sup>89</sup> Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 852 (2000).

<sup>90</sup> “Living contracts” is the best term I have been able to conjure to describe contractual relations (*i.e.*, all contracts) as they exist outside the dispute mechanisms of the legal system (*i.e.*, the contract-at-law). The separation is necessarily somewhat artificial, since living contracts always live at least in the shadow of their counterpart, the contract-at-law. Indeed, as discussed below, contract-at-law penetrates every element of the essential socioeconomic matrix with which every contract is irretrievably intermixed.

<sup>91</sup> See *supra* Part II.A.

<sup>92</sup> Combined contextual analysis of relations and transactions is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of transactions. See *supra* Part II.

<sup>93</sup> The adjective “academic” requires stress. Discretism is an incredibly handy tool for an unlimited range of social, economic, and political purposes, including particularly as a smokescreen and apologia for the exercise of raw power, *e.g.*, eulogies to “the market.” Needless to say, such uses will not disappear just because academics come to their senses and acknowledge its limits.

those with discretist tendencies plumped for discrete approaches to contracts-at-law.

2. *Definition.* At the definitional level, Professor Scott came down four-square for the most discrete contract law of all, classical contract law.<sup>94</sup> The debate is over the proper nature of contract law, and the point, in his view, is that while all contracts are relational, complex and subjective, contract law—whether we like it or not—is not. It is formal, classical (to use that terminology), and simple. The normative issue is whether or not the failure of contract law to be coextensive with our more complex understanding of contract as an institution is a good idea or a bad idea. Professor Scott thus limits his concept of contract law to the formality and simplicity of classical contract law. Probably most discretists would, however, grudgingly include neoclassical contract law, or at least some of it.<sup>95</sup>

Similarly, Professor Eisenberg views the relational idea of founding contract-at-law in exchange and reciprocity as a “sort of imperialistic view of contract.” Instead, he would base contract-at-law on promise: “There are many areas of life where obligations and even legal obligations are properly imposed on the basis of exchange and reciprocity that I simply wouldn’t see as contract law.”<sup>96</sup>

Neither of these definitional positions, of course, necessarily prevents heavily relational approaches to the law of relations involving exchange and reciprocity. All they necessarily do is to separate the law of such relations into the part encompassed by narrowly defined contract law and all the rest of the law applicable to the relations.<sup>97</sup> Justice Frankfurter, for example, took this position in *Lewis v. Benedict Coal Co.*<sup>98</sup> respecting the complex

<sup>94</sup> Scott, *supra* note 89.

<sup>95</sup> Discretists tend to have much trouble with such neo-classical ideas as unconscionability, good faith, and assurances of performance. I have no doubt that Professor Scott, who is both a relationist and a discretist, would in other circumstances expand his definition to include neo-classical contract law, but that is not what he said at the Symposium.

<sup>96</sup> Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805 (2000). Professor Eisenberg appeared to have the idea that acceptance of relational contract principles would require legal enforcement of, for example, tacit household patterns about who takes out the garbage and who cooks the meals. Of course they do not, any more than neo-classical contract law requires enforcement of more explicit promises about such matters. As Professor Feinman says:

Because its paradigmatic unit of inquiry is the extensive relation rather than the discrete transaction, relational contract focuses on the necessity and desirability of trust, mutual responsibility, and connection. Not all of these bonds should be legally enforceable, but beginning analysis by recognizing them is likely to produce a broader set of obligations.

Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 748 (2000).

<sup>97</sup> Presumably there will be some relations involving exchange and reciprocity where there is no sovereign contract law under such definitions, leaving the legal governance entirely to other kinds of law.

<sup>98</sup> *Lewis v. Benedict Coal Co.*, 361 U.S. 459 (1960). For a discussion of this case, see Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory—“Real” Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909, 916-17 (2000).

multiparty patterns created by national pension funds in the collective bargaining context. For him, there was contract law (heavily classical) and there was all the rest of the phenomenally complex law—the National Labor Relations Act, for example—that governs those relations.

Nonetheless, definitions and the creation of categories matter. Justice Frankfurter's unwillingness to think of the law in relational terms almost certainly kept him from seeing the absurdity of his interpretation of highly discrete contract law and his application of it to the multiparty context of *Lewis v. Benedict Coal Co.*<sup>99</sup>

3. *Analysis and Substance.* Among the participants in the Symposium, Professor Posner was the most discretist respecting both the analysis and the substance of contract-at-law. The approach in his contribution is contrary in varying degrees to the last three of the relational propositions.<sup>100</sup>

Such a rejection of relational principles in contract-at-law, coupled with an acceptance of the relational character of all living contracts, brings us directly to the final Challenge/Query in this Article:

*Challenge/Query No. 13:* Relational contract law should generally track the relational behavior and norms found in the relations to which it applies.<sup>101</sup> Indeed, I would go further and say that, on the whole, the law must generally do this, for reasons discussed below.

Discretist disharmonization between what happens in living contracts and what happens in contracts-at-law may or may not constitute a real challenge to this proposition.<sup>102</sup> As observed in discussion of the proposition earlier, I have myself noted serious limitations on it,<sup>103</sup> particularly relating to the changes occurring in behavior and norms when shifted from living contracts to the bureaucratic processes of contract-at-law.<sup>104</sup>

<sup>99</sup> This is not to say that his end-position was necessarily motivated primarily by his beliefs about contract doctrine; they may, of course, have been partially or even wholly rationalizations for the substantive result he thought proper.

<sup>100</sup> See *supra* Part II.A.

<sup>101</sup> As noted *supra* note 77, this proposition is part of a broader one that contract law should generally track the behavior and norms found in any contract to which it applies. See *supra* Part IV.D.

<sup>102</sup> Since none of the participants in the Symposium couched their positions as general responses to any of my Challenges/Queries, however, it is unclear just how far they would go in opposition to my position.

<sup>103</sup> See *supra* note 85 and accompanying text.

<sup>104</sup> For example, I have noted that

[s]overeign imposition of norms on contract, in contrast to their generation within the contract, results in a transformation of the contract's values. That is, the values of imposing contract norms—whether common, discrete, or relational—are not identical to the values reflected by their internal generation. Not only is a[] . . . norm [imposed by contract-at-law] theoretically different—respecting consent, for example—but it will be practically different as well.

Macneil, *Values*, *supra* note 19, at 370.

Professor Posner's paper might be viewed as simply picking out a specific and relatively small area of human endeavor where an exception to the proposition is appropriate. Indeed, it might be viewed as simply an example of the transformation of norms when submitted to bureaucratic processes. The tone of his paper, however, as well as its extension far beyond the narrow facts of its basic hypothetical to encompass all the law of contracts, suggests something more. It has the earmarks of a major argument against the general proposition.<sup>105</sup> If this is correct, then Professor Posner's treatment of contract-at-law appears to undermine his acknowledgement that we live in a relational world.<sup>106</sup>

For a number of reasons, however, Professor Posner's paper is, at its broadest, at most only a pinprick attack on the principle that contract law should generally track the relational behavior and norms found in the relations to which it applies. First, Professor Posner's analysis is limited to repeat trading transactions among merchants. Transactions of this type, along with long-term supply contracts are typically about as far as discretists go when promoting the superiority of discretism over "relationism" in law. Such contracts are far indeed from being the paradigms of relational contract that discretists seem typically to view them as being.

Nor, as Professor Feinman's paper demonstrates, are highly relational contracts all that is omitted from the subject matter of Professor Posner's analysis. Professor Feinman picks out from countless possible examples three important areas where relational contract law has developed around mid-range relational contracts: insurance, landlord-tenant, and products liability. In each instance, the relational contract law is attuned to legislative and judicial perceptions of what the living norms of the relationship are. This is true not only of such relational principles as good faith, reasonable expectations arising from the nature of the relationship, and the like, but also of those discrete parts of the relations that the parties genuinely expect to be discrete. Thus, for example, in the absence of rent control, the rent in the contract-at-law is the same as that agreed in the living contract, as is the premium and coverage in insurance contracts.<sup>107</sup>

Thus, repeat-trading transactions among merchants hardly supply a reasonable basis for considering what are or should be general legal responses to relational contracts. Except respecting incautious generalizations far beyond the hypothetical facts at hand, such analyses taken individually have little pertinence to the general principle that relational contracts call for the application of relational contract law.

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<sup>105</sup> Even though it does not address it specifically.

<sup>106</sup> See *supra* text accompanying note 88.

<sup>107</sup> This is particularly interesting relative to third party liability coverage. Normally the discrete policy limits apply, but not if the insurer violates its duty of good faith in negotiating settlements, in which case the limits may disappear altogether.

A second reason why Professor Posner's paper does little to erode the principle that contract law should track relational behavior and norms is that his proposal of a system of massive and highly speculative litigational penalties for breakdown of relations irrespective of fault is limited to cases where the parties purportedly intend such penalties to be imposed in the event of breakdown.<sup>108</sup> Intentions to have more or less draconian remedies are, of course, the essence of all agreed-upon penalty provisions. Thus, Professor Posner strays no further than the consensual aspects of contractual relations. One might guess that, like the "facts" of *The Merchant of Venice*, such hazardous game-playing will be something of a rarity in the real world. As Justice Musmanno once said: "A contract is not to be regarded as a Kamikaze plane in which the parties seal themselves for mutual destruction."<sup>109</sup> Why not? Because volunteers for Kamikaze duty are a rare species.

Third, Professor Posner's paper is limited to the legal consequences of complete breakdown of living-contract relations. Complete breakdowns always transform contracts, very often in discrete directions and in other ways disharmonious with the behavior and norms of the living-contracts. Professor Posner's paper thus poses no particularly special challenge to the general proposition.

Fourth, complete breakdowns, upon the occurrence of which the sole function of the law is to pick up broken pieces, are far from the only or even the most important arena of disputes in contracts-at-law. Partial breakdowns leading to legal intervention are legion.<sup>110</sup> And it is those where it is most essential that relational law follows generally the norms of living con-

<sup>108</sup> As interpreted by Professor Posner; others may have their doubts.

<sup>109</sup> *Nash v. Atlantic White Tower Sys., Inc.*, 170 A.2d 341, 343 (Pa. 1961).

<sup>110</sup> Professor Posner's narrow focus on repeat commercial transactions, where legal intervention into partial breakdowns is generally rare, makes it is easy for him to ignore them. Nonetheless, even in relations characterized by fairly discrete, but repeat transactions, partial breakdowns do occur, as illustrated, for example, by Professor Bernstein's field studies, particularly where arbitration is in use. See discussion *supra* note 54.

A personal example: Plaintiff (buyer) and defendant (seller) in an arbitration involving breach of a printing contract were happily discussing various aspects of their current contracts as I (arbitrator) walked into the room. When the hearing started, the defendant conceded that the single contract in dispute in the arbitration had been breached. He also conceded that, for some time, the plaintiff had not been receiving the timely performances he needed. In the course of the hearing the plaintiff said, "The only reason I am here is to get this son-of-a-bitch's attention." Plaintiff presented no evidence of damages from the breach, but it was obvious that the late performances were causing him non-negligible losses and other kinds of serious problems. The only question left for me to decide was whether a quite draconian agreed-upon damages clause was enforceable under the governing law, a strictly yes-or-no question. Neither yes nor no harmonized, however, with the behavior and norms of the parties' generally successful and clearly continuing contractual relationship. I told the parties that I could make an award of only zero or of the specified amount and of nothing in between. I suggested that neither might be the best thing for their business relations, and asked them if they wanted to talk about a compromise. Receiving an affirmative answer, I left the room. Five minutes later they called me back, gave me a modest figure, and that was the amount I awarded.

tracts. Thus, for example, arbitrators must deal with labor or commercial disputes that the parties have been unable to resolve by negotiation; administrative boards must deal with a host of unfair labor practices afflicting troubled collective bargaining relations; family courts must divide up support, custody, and visiting obligations respecting children; and bankruptcy courts must reorganize businesses. In all such cases, failure to pay attention to the behavior and norms of the living contract is likely to be fatal to the remedial effort.<sup>111</sup>

Fifth, Professor Posner's paper is limited to a narrow part of the legal system: courts of general jurisdiction with their nonspecialist judges and juries. Even in equity, such courts are relatively poorly equipped to deal with implementation of living-contract norms, as compared to mediators, arbitrators, or specialist administrative agencies.<sup>112</sup> An investigation so limited cannot serve as a basis for rejecting the general principle that relational contract law should typically track the relational behavior and norms found in the relations to which it applies.

Finally, closely related to the fifth point is that Professor Posner's hypothesis applies only to that small part of contract-at-law relating to dispute resolution.<sup>113</sup> This limitation results in omission of the socioeconomic matrix in which contracts always occur.<sup>114</sup> Yet that matrix is by far the most important aspect of all contracts, not only making them possible, but shaping their every aspect, including consent. That matrix is legal as well as socioeconomic. Consent and the law relating to it are but relatively small parts of that matrix which the vast substance of the social matrix to fruition in any given instances.

Whatever may be true of the law of consent, what matters respecting the law of the socioeconomic matrix in which it occurs is not primarily dispute resolution. What matters is the law which is part of the deep structure of that socioeconomic matrix. This is the law of property, the law of liberty, the law(s) of organization, the law of torts, the law of regulation, the

<sup>111</sup> Professor Bernstein's work suggests that, in certain quite limited circumstances, the parties may wish to adhere to literal contractual terms in dispute resolution, even though they would not normally do so in the living contract. Bernstein, *Merchant Law*, *supra* note 54.

<sup>112</sup> Professor Bernstein's work describes situations where the parties do not want even apparently highly qualified arbitrators to implement such norms. *Id.*

<sup>113</sup> This is paralleled by discretist definitions of contract law, which permit easy and effectively hidden elimination from the picture of all nonconsensual aspects of the law governing contractual transactions and relations. Thus, in classical contract law the consent principle is so central that all regulation, except illegality and fraud, is a foreign world totally excluded from the contract picture. This remains true in part of neoclassical contract law, except for such peripheral principles as unconscionability, good faith, and the like. These tend to hover around the fringes, as indeed they should in the consent-centered structure of neoclassical contract law. Thus, discretists can easily appear to be analyzing the law of contracts, when in fact they are analyzing only the consent part of contracts.

<sup>114</sup> Not only could they not occur without such a matrix, but they cannot even be understood without knowledge of the social matrix. What, for example, does a bid of "5,000" at an auction mean if you do not know whether the currency is lira or dollars and, if the latter, which kind of dollars?

law of taxation, the law of subsidies, the law of civil rights, the law of employment, the law(s) of crime—the list is endless. These, rather than the law of consent, are the laws without which contract cannot exist. It is particularly with respect to these laws that the legal behavior and norms must run in parallel streams with human behavior and norms. When they do not, one or the other necessarily must give way: either the forces of law bring human behavior into compliance, or the noncomplying legal aspects fall into desuetude or malfunction of some kind.

In sum, in spite of its apparently sweeping nature, Professor Posner's paper presents little real challenge to the relational proposition that relational contract law should generally track the relational behavior and norms found in the relations to which it applies.

4. *The General Impact of the Discretist Surrender to Relationism of Everything Outside the Law.* Discretists seem to have no idea how much ground they lose when they concede to relationism all the field of living-contract other than its legal aspects. The ramparts of Castle Law standing alone offer pitifully little defense for discretism. Indeed, although surely not so intended, such concessions in effect concede the intellectual war.

More important, the concessions lose the high ground in the contract-at-law war, both theoretically and practically. The concessions in effect recognize that, in theoretical terms, discretist legal theories such as rational choice theory and game theory can be no more than, at best, important elements in some kind of overarching relational legal approach.<sup>115</sup> Relational attacks are thus no longer irrelevant or beyond the boundaries of some theoretical Pale. In practical terms, this leaves any discretist legal analysis particularly vulnerable to attack for omissions and commissions revealed by relational approaches. No longer, as in the past, can such attacks be casually dismissed as ignoring the main point, namely the precepts of whatever discretist model is in use. No longer can the cop-out of *ceteris paribus* be used to ignore essential relational factors. Moreover, classical and neo-classical contract law can be seen as only a part—however important—of any overarching relational jurisprudence.

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<sup>115</sup> That is, of course, unless it is claimed that the discretist legal theory can somehow capture all the essential elements of the contract-at-law. That, however, would be entirely inconsistent with the initial concession. None of the participants in the Symposium made such a claim overtly and, as shown above, a paper such as Professor Posner's is hardly a step in that direction.



