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# Ian Macneil and the Relational Theory of Contract

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# Ian Macneil and the Relational Theory of Contract

***David Campbell***[1]

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## 1. Introduction

In 1999, the career of Ian Macneil was celebrated by Northwestern University Law School, where Macneil did the largest part of his teaching, which held a Symposium in his honour on

[1] Professor of Law, Cardiff Law School and BRASS (ESRC Research Centre for Business Relationships, Accountability Sustainability, and Society), Cardiff University. A seminar based on this introduction was given to the Faculty of Management, Erasmus University Rotterdam, The Netherlands, and April 2000. I should like to thank participants in that seminar for their comments. I should also like to thank Hugh Beale, Kevin Dowd, Donald Harris, Peter Vincent-Jones and Bill Whitford for their extensive comments. This paper was published as Chapter 1 of THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL (Sweet & Maxwell, 2001). It was also presented at the Workshop on Macneil's Relational Contract Theory and its Development held by CDAMS (Research Center for Legal Dynamics of Advanced Market Societies) at Kobe

‘Relational Contract Theory’.[2] Though Macneil has done much other valuable work, particularly in arbitration (Macneil 1992; Macneil, Speidel and Stipanowich 1994) and legal (Macneil 1981c) and political (Macneil 1990) philosophy, his principal achievement has been that in thirty or so of the more than fifty books and articles he has published since 1960 he has set out the principal formulation[3] of what has come to be known as “the relational theory” of the law of contract. That theory is the most promising basis for the construction of the alternative jurisprudence of market transactions now widely recognised to be necessary following the “death” of “the classical law of contract.” Macneil’s accounts of those extensive elements of contract which cannot be brought under any other than his relational view are the fundamental achievement of his work. Their empirical plausibility and depth of comprehension of the law provide the major resource for the reconstruction of contract jurisprudence. They are coupled to a sophisticated social philosophy which Macneil calls “the relational theory of exchange” which is itself of great originality. In this introduction, I hope to guide the reader through this selection of Macneil’s works by describing his critique of the classical law of contract (and, later, his critique of the contract scholarship influenced by Chicagoan law and economics after Posner), his alternative, relational theory of contract, and his background relational theory of exchange.

In so doing, I hope to stress the following point. There is a sharp contrast between the profundity of Macneil’s work and the, as he himself recognises, still disappointing reception of that work. So far as this is an intellectual matter, it can largely be put down to the widespread interpretation of Macneil that he claims there is a separate “relational” category of contracts. This is, at best, thought to be a claim about a perhaps interesting but certainly marginal category

University in February 2004.

[2] (2000) 94 (3) *Northwestern University Law Review*.

[3] The other formulations which might be thought comparable to Macneil’s are those of Goetz and Scott (Goetz and Scott 1981; 1983; Scott 1987) and, less clearly, Goldberg (1980) and Schwartz (1992).

of contracts other than classical or discrete contracts. Macneil is widely thought to have described a "spectrum" on which relational contracts are placed at the opposite pole to classical or discrete contracts. But though there certainly is warrant for this interpretation of Macneil, the main intended thrust of his work is not so much to distinguish the relational from the discrete contract but to reveal the relational constitution of all contracts.

## 2. The critique of the classical law of contract

Macneil's first publication (1960a) gave clear notice of what was to follow. It was a review of what would now be called a socio-legal work on freedom of contract in which he noted that maintaining the existence of that freedom "in an age of [standard] forms and concentration of economic and social power" was "surely one of the most pressing of all contract problems" (Macneil 1960a, 177). Macneil's other writings on contract prior to 1968 focused on the specific problems, particularly the (lack of) reality of the "agreement" secured by the rules of acceptance (Macneil 1968q, 1395-433), agreement of remedies (Macneil 1962) and hire-purchase (Macneil 1966b; 1966c), in which the failure of the classical law of contract (Macneil 1968b-d, f-q) was then being acutely manifested. He later summed up the position that can be taken from these early works thus:

> the limited extent to which it is possible for people to consent to all the terms of a transaction, even a relatively simple and very discrete one, soon forces the development of legal fictions expanding the scope of 'consent' far beyond anything remotely close to what the parties had in mind. The greatest of these … is the objective theory of contract. The classical … contract is founded not upon actual consent but upon objective manifestations of consent. Moreover, in [the] classical law[,] manifestations of intent include whole masses of contract consent one, or even both, of the parties did not know in fact (Macneil 1978a, 883-4).

In 1968, Macneil published his first casebook, which he began with a statement of what

had become his general dissatisfaction with the classical law. Having referred his students to the principal standard English contract textbooks, he continued:

> it is not unfair to say that all the standard texts on English law reflect a notion that the law of contract litigation is a relatively neat and logical structure of rules. The author of this book believes this idea to be inaccurate … Contract law is hardly a neat and logical structure of rules, but like all law a social instrument designed to accomplish the goals of man (Macneil 1968e, 2).

He further observed that:

> this book deals with contracts, and the standard texts deal largely with the law as defined by the outcome of contract litigation (and by statutes), or more specifically with the outcome of appellate decisions in contract litigation. Contracts and contract litigation are not the same thing (Macneil 1968e, 1)

Macneil accordingly uses the term "contract" to embrace the formal doctrine condensed in textbooks or derived from the proper study of cases and statute, but only when these sources of the law are placed within the social normative structure of "contract" as a legal institution which has the economic "function of projecting exchange into the future" (Macneil 1980, xiii).

Macneil's emphasis here on English, rather than US, textbooks arose in that this casebook was written for the purposes of his teaching at University College, Dar Es Salaam, Tanzania, where he took sabbatical leave from Cornell between 1965-7.[4] The contract law of East Africa, including Kenya and Uganda as well as Tanzania, was derived from the English law, and students from all three countries studyied law at Dar Es Salaam. The even then more critical attitude to the classical law of contract in US jurisprudence (in which realism has played a far larger part than in the English) had led to wide currency being given to the argument, which Gilmore (1974) expressed most forcefully (Macneil 1978a, n. 101), that there was no law of "contract" at all. Rather, the complexity of exchanges meant that there had to be a set of

[4] For details of Macneil's life see the Biographical Note in this volume.

different laws of "contracts" adequate to that complexity. In a paper on the teaching of contracts addressed to a student audience at the 1967 meeting of American Association of Law Students, Macneil acknowledged the power of this argument but ultimately rejected it:

> Is there such a thing as contracts? My friends teaching such courses as Contracts 201 (Sales), Contracts 202 (Negotiable Instruments), Contracts 307 (Creditors' Rights), Contracts 312 (Labour Law), Contracts 313 (Corporations) and Contracts 319 (Trade Regulation) delight in telling me there is no such thing as contracts. There are, they say, sales contracts, negotiable instruments, secured transactions and bankruptcy, collective bargaining agreements, insurance contracts, real estate transactions and a host of other contract-types, but contracts-in-gross there ain't. Having earlier rejected childhood beliefs in the higher abstractions of Samuel Williston's metaphysics, I almost came to believe them. But a personal vested economic interest in the existence of contracts-in-gross caused me to search further. Since you too share that vested interest you will be pleased to know that I have reached the conclusion that contract exists (Macneil 1969b, 403. Cf. 1987c, 374).

Of course this makes it imperative to show that "a reunification of contract law … is possible [which] might lead to more effective administration of justice than is presently achieved" (Macneil 1974a, 816). Macneil was of the opinion that this was possible:

> I am not convinced that the disappearance of a generalised course in contracts from the law school curriculum would be a disaster on the scale of Waterloo. Nor do I think the Western world would collapse if the generalised concept of contracts ceased altogether to be a way of organising statutes, judicial decisions, administrative action, textbooks, legal digests, etc. I do think, however, that we would lose some of our understanding of the functions and techniques of contracting and of contract law in the various transaction-type areas themselves. In short, recognition that the various transaction types do have common elements of behaviour can lead lawyers, judges, legislators, administrators and even law teachers to a better grasp of and better dealing with each transaction-type itself. To the extent that this is true a generalised contracts course becomes justified, not on the ground that there is a 'law of contracts' but on the ground that the common elements in contracts-in-gross present problems and challenges for the legal system which widely cut across transaction-type lines (Macneil 1969b, 408).

Macneil has never denied that the classical law of contract has been of enormous, and continues to be of substantial, value (Macneil 1987a, n. 19), and he finds "very powerful" the

argument that "[w]hat we have works reasonably well, and we have no assurance that after much expenditure of time and other resources any general law of contract relations we might produce would be better from a practical standpoint" (Macneil 1987a, 36). However, though he is very generous in his evaluation of innovative work broadly within the classical law, such as that of Eisenberg (Macneil 1985a, 544-5), his own work is driven by the belief that a more attractive rival theory of contract is both possible (Macneil 1974a, 807-8; 1985a, 544-5) and necessary to displace the classical law (Macneil 1985a, 542). Certainly, whatever the failings of the classical law, it will not be falsified until the superiority of such a rival is established (Campbell 1992).

Though in his later work Macneil continued, when necessary, to lay bare the classical law's failings as effectively as anyone (Whitford 1985, 546-8),[5] his particular contribution has not so much been to the exposure of the doctrinal incoherence of classical law, exemplified by Gilmore (1974) in the USA and Atiyah (1990, chs. 1-11) in the UK, or to the exposure of the empirical "non-use" in business of the formal contract remedies (Macaulay 1963a; 1963b). Rather, taking these to be the case (Macneil 1969b, 408; 1987a, 35-6), he has sought to reveal the shortcomings of the philosophy articulated by the classical law that produces incoherence and empirical irrelevance. By doing so, he has attempted to construct a coherent and relevant rival law of contract. (Of course, by deepening our understanding of the contract phenomena which the classical law cannot explain, Macneil has increased our perception of the extent of the existing explanatory failures.) It is tremendously to his credit that Macneil saw that, as it is the social philosophical underpinning of the classical law that is ultimately at issue, his attempt to construct a rival theory could not be a matter of narrow,

[5] I shall discuss a special case of this below, Macneil's criticism of the formalistic understanding of contract in Chicagoan law and economics after Posner.

legal scholarship but required him to draw on the resources of other disciplines:

> just as contractual relations exceed the capacities of the neo-classical contract law system, so too the issues exceed the capacities of neo-classical contract law scholars. They must become something else - anthropologists, sociologists, economists, political theorists, and philosophers - to do reasonable justice to the issues raised by contractual relations (Macneil 1978a, n. 137).

## 3. Co-operation and norm in the identification of relational contracts

### *3.1. Co-operation in Macneil's early writings*

Although Macneil's work has come to based on the concept of the "relation," he began to develop his rival account of contract not around that concept but around "co-operation." It is instructive to chart the development of his thinking, not least because co-operation has remained central to his work. This development can be seen as an attempt to flesh out his early belief that contracts are, as he put it in the sub-title of his first casebook, *Instruments for Social Co-operation*. Fundamentally, he maintained in his early writings, contracts are co-operative:

> The first thing to note about contract is the fact that it concerns social behaviour … The next thing to note is that the kind of social behaviour involved is co-operative social behaviour, behaviour characterised by a willingness and ability to work with others … contract involves people affirmatively working together (Macneil 1968e, 14).

He established the existence of this element of co-operation through a sort of lawyer's phenomenology of contract. Empirical examination of contracting revealed that co-operation was the most important common characteristic, one of the five "basic elements" of contract identified in his earlier writings:[6]

> There are … five basic elements of contracts: 1. co-operation; 2. economic exchange; 3. planning for the future; 4. potential external sanctions; and 5. social control and manipulation (Macneil 1969b, 407).

[6] In his later writings these were treated as four "primal roots" (Macneil 1974a, 696-712; 1980b, 1-4) and in his most recent reflection on his work as contract's "essence" (Macneil 2000a, 432).

For Macneil, the recognition that "all mutual planning in transactions … is conflict laden", and indeed may involve "the most brutal kinds of infighting" (1974a, 780), is coupled with a description of co-operation which gives it a rather more central place than that of "external material … of little interest" (1980, 91) typical in the classical law.

Macneil's insistence that "the first thing to note about contract … is that it concerns social behaviour," though sociologically commonplace, has a most serious implication for the classical law of contract, for it runs against the radical individualism of the will theory of contract. As it has been put as recently as 1993: "The distinguishing feature of contractual obligations is that they are not imposed by the law but undertaken by the parties" (Smith 1993, 2). This is right in a sense which must be stressed, for it goes to the heart of the freedom provided by the market. But it is also wrong in a sense, and this sense is far less well understood. It is the explanation of this aspect of contract that is at the heart of what now is interesting in contract scholarship. For parties can make contracts only in certain ways - not by claimed telepathic communication, or through exercise of physical force or fraud, etc. - and this is because they must express their undertakings through social institutions. As Macneil put it in 1960: "contract is an edifice partly built by the parties but also partly built by society, by the law" (Macneil 1960a, 177). To the extent that it remains committed to the pure will theory, the classical law has inevitably become a few remote core principles surrounded by a plethora of exceptions because contract has social features which the will theory ignores. Those social features, however, have explanatory primacy over the individual features on which that theory concentrates. This becomes obvious when the law refuses to give effect to some agreements which it was the will of one or both of the parties should be enforceable, as when agreement was obtained by undue influence or involved a willing party who did not have capacity. But, crucially, this negative aspect is merely the other side of the positive fact that it is the law that

makes possible any contractual agreement at all. After noting some refusals to give effect to agreements, Macneil said:

> These … appear as exceptions to some general rule permitting the parties fully to define their legal status [but] if the role of the law in creating contracts were more completely presented this distortion would not occur, and these matters would be seen not as exceptions to freedom of contract but as simply part of the law's definition of contract (Macneil 1960a, 177. Cf 1990, 154).

Over the almost 40 years since this was written, Macneil has been one of the few who have pursued the coherent, inclusive concept of contract this statement indicates is possible.

### *3.2. Macneil on the normative constitution of contract*

In his later work,[7] Macneil explains the existence of the five basic elements or four primal roots or the essence of contract, and particularly co-operation, through an extremely exhaustive catalogue of the social norms or values which operate in contract. Following *Webster* by taking a norm to be "a principle of right action binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behaviour" (Macneil 1980, 38), Macneil says of contract that:

> [in] the process of projecting exchange into the future … people specialise and exchange, exercise choice, plan to exercise power, and fit all these things together in the society of which they are members. This behaviour gives rise to prescriptive norms, to standards of proper conduct (Macneil 1980b, 36).

Macneil developed his perception of the role of "society" in building the "edifice" of contract into a system of what he came to call the common contract norms. It is, I believe, vital to Macneil's criticism of the classical law that three levels of these norms be distinguished in his

[7] Macneil's earlier work distinguishes three forms of co-operation in terms of the orientations of action that produce those distinct forms (1968b, 14-6) in a way obviously reminiscent of Weber (Weber 1978, 24-6), but this seems to play no role in his later work.

developed argument for the existence of co-operation in contract.

The first level is of the ontologically fundamental social relations within which all human action is constituted, the "social structure" of shared meanings, language, normativity, etc. within which all action is framed. This is the basic sense in which society "is the fundamental root, the base, of contract:"

> Contract without the common needs and tastes created by society is inconceivable … contract without language is impossible; and contract without social structure is - quite literally - rationally unthinkable (Macneil 1980c, 1).

These relations shade into a second level, that constituted by the background polity of bourgeois society which provides the political boundaries for the market economy:

> contract between totally isolated, utility-maximising individuals is not contract, but war … contractual solidarity - the social solidarity making exchange work … at a minimum holds the parties together so that they will not kill and steal in preference to exchanging [This is a matter of the] external god providing social stability, enforcement of promises, and other basic requirements. Within these rigid confines, the parties are free to maximise their individual utilities to their hearts' content (Macneil 1980c, 1, 14).

The "Sovereign imposition of norms" by the "external god" Leviathan (Macneil 1983b, 370) furnishes political and legal security in order that the generalised market might operate.[8] Macneil insists on the necessity of a background social matrix (Macneil 1974a, 710-2) composed of first and second level relations for contracts to take place, and contrasts this to the way the classical law and neo-classical economics take this matrix for granted. The latter:

> assumes the existence of very complex relations between the parties - relations established through society generally, language, law, and societal economic organisation. But once such relations are assumed, the impact of those relations on the analysis is typically ignored. *Ceteris paribus* conquers all … Because economic analysis is analysis of social behaviour, economic man is necessarily in society at all times … potential fallacy lurks in all social analysis starting from the non-social, relation-omitting model of neo-classical

[8] The particular form of this imposition will, of course, substantially affect the way the market operates (Macneil 1980c, 38-9; 1985b, 491-3).

economics (Macneil 1982, 961. Cf. Macneil 1983b, 377).

When one recalls the silly rhetoric in which populist neo-liberalism insisted "there is no society," and the cast of mind of and to which it spoke, this point arguably needs to be made. However, we should allow that the existence of these first and second level relations is not in itself necessarily embarrassing for the classical law, which has adopted (at least some statements of) such relations as boundary statements for the operation of its neo-classical economic assumptions. The perennial problem, indeed paradox (Hegel 1967, secs. 182-208), of bourgeois political theory - generally referred to as the Hobbesian problem of order (Parsons 1968, 89-94) - follows from the very positive valuation that capitalism places on individual acquisitiveness. Neo-classical economics assumes that rational economic action is motivated by a form of pure selfishness which it terms rational individual utility maximisation (Gossen 1983, 3-4). The individuals motivated in this way nevertheless must co-exist, but, of course, the positive attitude towards others necessary for co-existence is undermined by generalised, selfish motivation. However, the central claim of economic liberalism (Nozick 1974, 155-60) is that, when confined within certain conditions broadly of peacefulness (von Mises 1982, 36) guaranteed by Leviathan (Hobbes 1968, ch. 13), economic action, though motivated by individual utility maximisation, spontaneously will produce social order (Hayek 1976, ch. 9). The concept of general competitive equilibrium at the heart of neo-classical economics (Arrow and Debreu 1984) is a highly sophisticated methematical demonstration that an optimally efficient allocation of goods (Pareto 1971, ch. 6, sec. 33) will tend to be produced by a market conforming to the assumptions of those economics (Walras 1977, lesson 12). However, the sociological point at issue has never been better expressed than it originally was (Keynes 1973, 358-9) as the transformation of "private vices" into

"public benefits" (Mandeville 1970) through the operation of the "invisible hand" (Smith 1976, 412). The invisible hand is, it is important to recognise, a tremendously powerful argument that unconscious but nevertheless effective co-operation will, as it were naturally, be produced by economic action.

Macneil has indeed acknowledged (1969, 405) that the self-interest of the rational utility maximiser must bring about a certain element of co-operation between the parties if their separate goals are to be realised through mutual performances. However, such "co-operation" does not require commitment to the goal of the other party and indeed may, within prudential limits, be inimical to it. But it is not the first and second level relations which carry the thrust of Macneil's criticism of the classical law (Macneil 1985b, 491-3). Rather it is a third level, that of relations articulating co-operation external and internal to the conduct of contracting parties. It is the way these relations express the co-operative influences of the first two levels and also themselves generate co-operation *within the fundamental unit of economic analysis of contract* that supplants neo-classical assumptions (Macneil 1980c, pref). It is this alteration of the "fundamental unit" of the analysis of contract that is the core of the relational theory of contract.

Having described the common sociality essential for all human activity (Macneil 1980, 1) and the political limits to self-interest which prevent economic competition from decaying into war (Macneil 1980c, 1) or parasitism (Macneil 1980c, 42) as the background social matrix of contract, Macneil crucially then goes on to argue that "law contributes more than general stability, it is directly facilitative in [that] it provides for the accomplishment of co-operation [and the] continuation of interdependence" (1980, 93) through external and internal (1980, 36-7; 1983b, 367; 1987a, 31-2) "values of contract behaviour … generated … in billions of contractual relations" (Macneil 1983b, 351).

*External* norms are imposed, not only, nor even necessarily (Macneil 1980, 37), by "the positive law of the sovereign, but also from many other sources [including] private law, such as that imposed on … businesses by trade associations." Not only are there such relatively "vertical impositions", but there is also the "more horizontal imposition of external values, such as those arising from … customs of a trade" (Macneil 1983b, 367-8). These foster co-operation by reducing the "choice of a party which is reciprocating too little, is too powerful, is terminating relations, or is following arbitrary or other procedures viewed as inadequate" (Macneil 1983b, 379).

Finally, and most importantly, *internal* norms intimately linked to the external ones orient "both [the] actual behaviour and [the] principles of right action" (Macneil 1980c, 38) of contracting parties. Macneil describes, in his last formulation, ten common contract norms which underpin all contracting by generating a (to various degrees, as will be seen below) co-operative attitude which respects "solidarity and reciprocity" (Macneil 1983b, 348):

> The ten common contract norms are (1) role integrity … (2) reciprocity (simply stated as the principle of getting something back for something given), (3) implementation of planning, (4) effectuation of 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) harmonisation with the social matrix (Macneil 1983b, 347. Cf. Macneil 1974a, 808-9; 1978a, 895; 1980, 40).

This normative schema is rather elaborate and expressed in terms to which Macneil typically gives rather unconventional meanings, and I will not set it out fully here. Though it has been used by others than Macneil for detailed analysis of specific contracts (Brown and Feinman 1991, 350-1), its detail would seem mainly to hold interest for the sociologist (Lindenberg and de Vos 1985) seeking to flesh out how the law of contract represents what Durkheim (1984, ch. 3) calls the "organic" solidarity of modern societies (Macneil 1980c, 93-102; 1986, 583-8). For

present purposes, one need focus only on the very idea of identifying a normative structure in relation to contract.

### *3.3. Complexity, duration and the concept of the relational contract*

Though I will argue that the first impression he gives is rather misleading, Macneil's work does, in the first instance, draw our attention to the highly planned, very extensive inter-firm contracts between large, legally independent but economically interdependent firms which have become far more significant with the increase in the scale of production over the course of capitalist economic development (Macneil 1974a, 694-6. Cf. Gottlieb 1983). Contracts of this sort involve substantial "asset specific" (Willaimson 1985, 52-6) or "idiosyncratic" (Williamson 1986, 105-10) investment which cannot be reallocated to other contracts without uncompensatable loss. It is exemplified by buyers having taken great pains to bring their suppliers up to standard by extensive (and expensive) joint quality assurance programmes. Such investment is, by definition, non-transferable in the event of complete termination of contractual relations, but it would be extremely difficult to claim adequate compensation in damages for its loss as it is very likely to be substantially uncertain and remote. Such contracts also are too complex (including what would be an infinite number of terms were an attempt made *ex ante* to express those terms, being of long duration under uncertain circumstances, etc.) to be fully specified during pre-contractual negotiations and so require the parties to be prepared to adjust, *ex post*, in ways unspecifiable in advance, both their expectations and obligations during and at the conclusion of performance. Any substantial building works contract produced by any of the trade bodies, in which the precise quantification of the amount of work, time taken, and materials needed can really be revealed only in the course of actually doing the work, contains extensive price and time adjustment provisions in recognition of this.

Contracts of this nature are not efficiently governable by the classical law of contract. That law typically turns on the imposition of strict liabilities. Breach leads to the award of purportedly precisely quantified damages in compensation of certain, foreseeable losses. This remedy cannot efficiently govern contracts characterised by complex (*ex ante* unspecifiable) obligations and asset specific (*ex post* non-compensatable) investments (Campbell and Clay 1995, 3-19). Rather, they can be governed efficiently only if the parties adopt a consciously co-operative attitude (Campbell and Harris 1993; Deakin, Lane and Wilkinson 1994). The norms Macneil identifies create such an attitude, setting the boundaries within which legitimate negotiation and competition are allowed. Any legitimate competition is bounded by an integral acceptance of co-operation as operative within the contract:

> The word 'solidarity' (or 'trust') is not inappropriate to describe this web of interdependence, externally reinforced as well as self-supporting, and expected future co-operation. The most important aspect of solidarity … is the extent to which it produces similarity of selfish interests, whereby what increases (decreases) the utility of one participant also increases (decreases) the utility of the other … Seldom, if ever, is this merger of interests complete, but it is omnipresent, immensely significant, and, in a vast range of circumstances, complete for most practical purposes … [S]imilarity of interests may be produced by external forces such as sovereign law. But … solidarity may and does arise internally in relations (Macneil 1981, 1034).

This co-operative attitude makes the notion of the individual utility maximiser inappropriate to certain contracts which, as they turn on co-operative awareness of the value of the relation legally expressed in the contract between the parties, Macneil calls *relational contracts*:

> An individual utility maximiser may be perfectly well aware of the fact that the deal he makes creates exchange-surplus, but his *sole* concern about that utility is to grab as much of it for himself as he can. He will feel nothing but regret at whatever amount is snared by the other party and nothing but happiness that the other failed to secure more of it. That is not, however, the case in relational exchange … Relational exchange … creates circumstances where the long-run *individual* economic (material) interests of each party conflict with any short run desires to maximise individual utility respecting the goods in any particular exchange; the more relational the exchange, the more

> artificial becomes the idea of maximisation. The capacity of an exchange to produce exchange-surplus … constitutes a pool of wealth which can be shared as well as grabbed, shared not to make a gift but out of deep economic self-interest … Over time, exchanges made with … long-run motivations produce norms to which the participants expect to adhere and to which they expect adherence from other parties (Macneil 1986, 578-9).

In relational contracts, we should note:

> there can be present a 'sense of productive increase from the relationship which can dwarf variations in expectation, or of long-term anticipations of mutual benefit that dwarf variations in shares received by parties.' This anticipatory, commonly held 'sense' of the parties may virtually obliterate any present separation as maximisers, thereby making them effectively a single maximiser (Macneil 1981b, 1023-4).[9]

It is Macneil's major achievement (Eisenberg 1995, 303; Whitford 1985) to have shown that open minded analysis of contracting reveals a class of relational contracts in which action predominantly is so oriented in the minds of the parties towards conscious co-operation that a contract of this class "no longer stands alone as in the discrete transaction, but is part of a relational web" (Macneil 1974b, 595). All the negotiating tactics adopted by parties, concerning formation (Macneil 1974a, 726-35, 753-80; 1975b, 666-76; 1981b, 1044-6), performance (Macneil 1974a, 780-2; 1975b, 651-6; 1981b, 1047-8), variation (Macneil 1978a, 886-98), termination (Macneil 1974a, 750-3; 1978a, 899-900; 1981b, 1041-3) and application of remedies (Macneil 1975b, 676-702), can be explained only as being informed by this co-operative attitude. Therefore, at the heart of the analysis it is no longer possible to work with the assumptions of classical contract, for they cannot plausibly be thought to describe the attitudes of the parties to relational contracts and it is those contracts which now are most significant forms of market exchange:

> Somewhere along the line of increasing duration and complexity, trying to force changes into a pattern of original consent becomes both too difficult and too unrewarding to justify the effort, and the contractual relation escapes the

[9] Macneil is quoting from a letter sent to him by S. T. Lowry (Macneil 1981, 1020 n. 3).

> bounds of the [classical] system. That system is replaced by very different adjustment processes of an on-going administrative kind … Moreover, the substantive relation of change to the status quo has now altered from what happens in some kind of market external to the contract to what can be achieved through the political and social processes of the relation, internal and external. This includes internal and external dispute resolution structures. At this point, the relation has become a mini-society with an array of norms beyond the norms centred on exchange and its immediate processes (Macneil 1978a, 901).

Macneil gives the following hypothetical example[10] which it is worthwhile to quote at length of how "a smelting operation - Smelter - might secure the coal needed for its operations." Smelter might, of course, make a "[s]pot purchase from a stranger of 500 tons in a market of many sellers, Seller's agents delivering the coal by truck dumped at Smelter's yard, cash paid on delivery of each load." Of course, Smelter has no security of future supply under this arrangement and, if this valued, a more complex, long-term arrangement is needed, though it will have to deal, *inter alia*, with variations in price and possible problems with delivery over the term specified. At the other extreme to the spot contract is the vertical integration in which Smelter integrates supply into its own firm by buying a coal mine (or other source of secure supply). Between these extremes, however, is a range of alternative, relatively complex, relational contracts:

> [1] Smelter contracts with Coal Mine to buy all the coal it requires during one year; the specified price is subject to a quarterly escalator clause based on a designated market. [2] Same … except that in addition to the escalator clause there is a provision: 'Should a party become dissatisfied with the price, the parties agree to negotiate about a new price and, in the absence of agreement, to refer the matter to X as arbitrator to determine a fair and equitable price.' [3] Same … except that the latest contract, entered into this year, is for 20 years rather than one; requires Coal Mine periodically: to provide Smelter with extensive cost information; to allow Smelter's experts to monitor mining operations; and to receive from Smelter recommendations respecting new equipment, improved methods of management and the like. Smelter and Coal

[10] For empirical examples see Macneil (1978b).

> Mine also agree to build and operate a conveyer belt system from minehead to smelting plant, sharing the capital costs equally and operating the conveyer system jointly. As part of the deal Smelter gives Coal Mine a five-year loan to cover part of Coal Mine's costs of the conveyer system and, in order to satisfy other lenders, guarantees Coal Mine's half of a 20-year mortgage loan on the conveyer system. [4] Same … except that the payment by Smelter to Coal Mine is in return for 20% of Coal Mine's shares rather than a loan; Smelter is guaranteed two seats on Coal Mine's Board of Directors (Macneil 1981b, 1025-6).

Macneil's account of such relational contracts is, as I have said elsewhere, "a most substantial contribution to the economic and social theory of the capitalist economy" (Campbell 1990, 82). It is interesting to compare its reception to that of an oeuvre of similar status in another discipline. A. D. Chandler's (1962; 1976; 1990) authoritative descriptions of the actual form of the most important business organisations as giant administrative hierarchies rather than transparent processors of market signals have had an enormous impact on business history and management studies. In his descriptions of the relational contract, Macneil has given a similarly authoritative account of the growth of what Chandler has called "the visible hand." Macneil parallels Chandler's description of the way "that modern business took the place of market mechanisms in co-ordinating the activities of the economy and allocating its resources" (Chandler 1976, 1) within firms with an account of the relational market exchanges that are the means of planned production between firms. One should not be unduly surprised that Chandler's (and similar) empirical findings remain marginal to the core of neo-classical economics, but Chandler has at least been given appropriate recognition in his own discipline. Macneil as yet has not.

## 4. The discrete and relational contract norms

### *4.1. Co-operation and competition*

Of course, this account of co-operation in relational contracting makes it imperative to give a compatible account of competition, and in his developed work Macneil does so in two ways

(which I will distinguish though he runs them together (Macneil 1980, 59-61)) based on his concepts of the discrete and the relational contract norms and of presentiation. I shall take up the former here and the latter in a later section. I have so far discussed relational contracting in the way it most obviously strikes the reader of Macneil's work - as a specific class of contracts. "Relational" is, however, a very complicated (and, it must be said, overall confusingly expressed) term in that work. It must be understood - though it forgivably has not - that Macneil's developed view of contractual relations does not identify the relational elements in only one particular class of contracts (Feinman 1987, n. 56. Cf. Macneil 1988a, n. 5. *Pace* McKendrick 1995). Competition plays almost as important a role as co-operation in Macneil's full account of the relational aspect of contracting, for the full sense of "relational" contracting cannot be appreciated in isolation from its opposite in Macneil's thinking, "discrete" contracting.

Though, as we have seen, Macneil rests all contract on the common contract norms, some of these norms are, as it were, relatively "particularistic" or "discrete" (Macneil 1980, 59-60) and some relatively "common" or "relational" (Macneil 1980, 65). Relatively discrete and relatively relational forms of contract can be devised within the common norms depending on the differing emphasis which is given to particular norms in particular contracts. Discrete contract emphasises the common norms of a competitive character (Macneil 1983b, 360), such as the attempt closely to specify (and impose strict liability for) performance which Macneil calls the "implementation of planning" (Macneil 1980c, 47). Relational contract emphasises the common norms of a co-operative character (Macneil 1983b, 363-4), such as preservation of the relation in "contractual solidarity" (even to the point of adjusting obligations by waiving strict liabilities).

In order to realise the efficiencies which may follow from concentration on detailed,

specialised tasks, it may, Macneil argues, be appropriate to ignore the wider ramifications of an exchange, including aspects of the personalities of the parties involved (other than those essential to their being a buyer and a seller), and create a discrete exchange, discreteness being "the separation of a transaction from all else between the participants at the same time and before and after" (Macneil 1980, 60). To do this, the parties orient their action to enhance the relatively discrete norms:

> Enhancing discreteness requires ignoring the identity of parties to a transaction, lest relations begin to creep in … discreteness [also] calls for avoiding multiple parties … Since the ideal subjects of the discrete transaction are money on the one hand and an easily measured commodity on the other, discreteness is enhanced by treating the subject of exchange as much like commodities as possible … In determining the content of a transaction, discreteness calls for strictly limiting the sources of communication and the substantive content of the transaction, in order to sharpen the focus as much as possible. Ideally, planning and consent should occur only through formal, specific communication; non-linguistic communication or the setting in which the transaction occurs should be considered as irrelevant as the identity of the parties. Clear recognition of when a deal is on and when a deal is not on is required, with no halfway stations, such as that created in law by doctrines like promissory estoppel (Macneil 1980, 61-2).

On the other hand, in circumstances where contract takes place through "behaviour that does occur in relations, must occur if relations are to continue, and hence ought to occur so long as [the relations'] continuance is valued" (Macneil 1980, 64), contract action will enhance the relatively relational norms. Typically:

> relations are of significant duration (for example, franchising). Close whole person relations form an integral aspect of the relation (employment). The object of exchange typically includes both easily measured quantities (wages) and quantities not easily measured (the projection of personality by an airline stewardess). Many individuals with individual and collective poles of interest are involved in the relation (industrial relations). Future co-operative behaviour is anticipated (the players and management of the Oakland Raiders). The benefits and burdens of the relation are to be shared rather than divided and allocated (a law partnership). The bindingness of the relation is limited (again a law partnership in which in theory each member is free to quit almost at will). The entangling strings of friendship, reputation, interdependence, morality and altruistic desires are integral parts of the relation (a theatrical agent and his clients). Trouble is expected as a matter of course (a collective

> bargaining agreement). Finally the participants … view the relation as an ongoing integration of behaviour which will grow and vary with events in a largely unforeseeable future (a marriage, a family business) (Macneil 1974b, 595).

In such a case, contracting is, as we have seen, guided by the relational norms which emphasise preservation of the relation and co-operative adjustment of obligations in order to do so.

### *4.2. The discrete contract*

Given that even discrete contract rests on the common norms, the possibility of treating an exchange as discrete can "properly arise only after a recognition … that a decision is being made to treat the pertinent aspect of exchange relations as if it were discrete, although in fact it is not, in short to ignore the non-discrete aspect of the relation" (Macneil 1987, 277). Macneil is perfectly well aware that, as a technique, neo-classical economics makes such defensible, indeed highly useful, decisions (Macneil 1988b, 9). To insist on awareness of relations:

> is not to say that some kinds of limited social analysis based on Hobbesian assumptions can never be correct. For example, if all a social inquirer cares about is what will happen to the consumption of milk in a chain of supermarkets if there are price changes of a fairly normal sort, the assumption of a 100% selfishness respecting price in sales of milk will not distort the results of the analysis sufficiently to be of concern. The reason is not that consumers act entirely selfishly in going through a supermarket and buying milk. It is because their particular forms of self-sacrificing behaviour, such as refraining from shoplifting or changing price labels, co-operating with other customers by queuing, etc., do not happen to be affected by normal price changes in that product (Macneil 1990, 152-3).

The point is that discrete contract has a coherent place within Macneil's theory. Though I believe it fair to say that any sophisticated contract scholar would now allow that there must be some acknowledgement given to co-operation in contracting (Adams and Brownsword 1995, ch. 9), resistance continues to be made to that acknowledgment because it is felt that allowing it will undercut the role of competition, and, it is correctly felt, competitive contracting is too valuable

an institution to lose. As Lord Ackner has put it in relationship to the concept of a general duty of good faith:

> the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations...A duty of good faith is...inherently inconsistent with the position of a negotiating party (*Walford* v. *Miles* 461).

Were relational contract identified with trying to impose highly co-operative forms of negotiation on all contracts, it would be wrong. However, Macneil does *not* want to do this and has strongly attacked that critical legal scholarship in which it arguably is the case that discrete contract is rejected merely for being discrete:

> the Critical Legal Studies movement … has avoided facing up to what it means to incorporate the discreteness universally found in material relations into [the] general principles and law of such relations. They seem most often to prefer pointing out the obvious limitation of the discrete general law of contract only in terms of a limited set of relational concerns. These are mainly concerns relating to equality and participation of individuals in relations affecting their lives [but] we must have *some* law dealing with discreteness in contractual relations (Macneil 1987a, 37).

It would seem clear that some exchanges are best carried out through highly competitive negotiation, for it would undercut the efficiency of some commercial bargaining were there to be no incentive to enter into negotiations with superior information (Kronman 1978). It is very arguable that a general duty of complete disclosure would logically mean that exchanges had to take place on standard terms ultimately set by the state, and no-one wants this. Share dealing seems as clear an example of arguably productive highly competitive contracting as we are going to find (Macneil 1986, 593). The valuation of corporate securities in "risk arbitrage" works only by the adoption of the narrowest view of returns to an individual investor. Securities' prices can be determined according to the "fundamental theorem of asset price," on which the "efficient stock market hypothesis" is based (Black and Scholes 1973), only on radically simplifying maximising assumptions

(Black 1989, 67) and, by implication, by allowing trade on this basis.[11] The normative permission of narrowly selfish behaviour is, then, integral to the working of a stock exchange. But this is (or should be seen to be) normatively constituted behaviour which has clear limits. To the extent it can be said to work, risk arbitrage works only by reliance on a system of communication the integrity of which is extensively (if manifestly inadequately) protected (Carlton and Fischel 1983). Investors or dealers interfering with the accuracy of the information system, say by insider dealing or publication of misleading information about a company, theoretically should incur a severe sanction from the same trading system that encourages them to seek no other end but the purely speculative expansion of capital with no regard to its social consequences (Macneil 1987a, 33-4).

The point emerges clearly, I think, from one of Macneil's common examples, the football game (Macneil 1980c, 59). The football game requires behaviour according to the, by analogy discrete, norm of physical competitiveness, and it would appear that a considerable part of American wealth is devoted to the production of young men who are trained to act most destructively in the game. But the 350lb tackle who legitimately may throw his entire body weight at an opponent in broken field play cannot even shrug at that opponent at the line of scrimmage. The very possibility of competitiveness emerges only because of the common norms which constitute the game. Most tellingly, a player who consistently cheats out of unrestrained will to win defeats the object, and should incur a sanction, for failure to follow the rules in the correct spirit is *not to play the game*.[12] As

[11] Actually productive industrial investment decisions are far more complex than merely speculative financial ones.

[12] I drafted this shortly after a driver escaped meaningful sanction for attempting to win the Formula 1 World Motor Racing Championship by deliberately crashing into an opponent, arguably the second time he has done

Wittgenstein (1968, sec 564) has it, a game "has not only rules but also a *point*," and, we would add, the point is constituted by a common norm.

When he stresses that his relational view does not preclude relatively discrete exchanges (Macneil 1983b, 364-6), Macneil is trying, quite properly, to guard his view from being regarded as inevitably leading to an emphasis on macro-economic planning by hierarchical bureaucracies (Macneil 1984; 1984-5), about which he is righly profoundly suspicious.[13] Macneil tells us that: "those who read relational contract theory as necessarily or presumptively supporting great sovereign intervention are mistaken" (Macneil 1983b, 410). Even in the fully relational view, there will, as we have seen, be room for relatively discrete contracts. A consistent emphasis on relations does not necessarily involve the rejection of broadly market solutions to economic allocative issues (nor of libertarian solutions to political ones). Equally, of course, we should choose more co-operative forms of contracting in the right circumstances (Eisenberg 1982; Trebilcock 1980), and Macneil's schema allows us to do so (Campbell 1996b).

### *4.3. The perception of discreteness in the classical law*

By distinguishing the discrete and the relational norms, Macneil offers an account of contract which allows us to place the various forms of contract action, ranging from the highly competitive to the highly co-operative, within one integrated framework based on the common contract norms. To be frank, one feels that the normative schema ultimately becomes somewhat convoluted and pleonastic (Williamson 1986, 103), but the fundamental

so. Of course, such is the commodification of this and other sports that they are under constant threat of becoming, as a distinguished sports journalist has it, "non-sport."

[13] Eg:

> Human beings have an inordinate love of power, of being able to move their brethren and sistren in directions other than those in which the siblings would otherwise go. At no time is this love more dangerous than when it is meshed with pure reason. And of all the human social institutions in existence, bureaucracy most exemplifes - even though it corrupts - pure

point is that it is basically sound and is able to incorporate all the various forms of contract action, including those with which the classical law signally has not been able to deal. Focused as it is on the discrete contract, the will theory is faced with a truly vast number of exceptions. That number is most obviously represented in the astronomical growth in the size of the textbooks that has been needed to accommodate all these exceptions. To take what admittedly is the worst example, the discussion of consideration in the latest edition of *Treitel* is 85 pages long, but not 10 of these are occupied with the positive statement of the doctrine (Treitel 1999, ch.3).[14] It should, of course, be remembered that this growth has taken place over the same period in which the proper treatment of "the exception" of consumer law (and many related topics) has been hived off from the "general principles" of contract and placed in separate books!

A doctrine which can be expressed only through the simultaneous expression of its myriad exceptions is one characterised by the quite unprincipled "reasoning" needed to accommodate those exceptions (Macneil 1987c, 373). The post-war history of the classical law of contract can, indeed, be seen as a continuous but desperate attempt to incorporate doctrinal refinements which will allow it to deal with the awkward facts presented by relational contracting (Macneil 1974a, 815. Cf. Campbell 1992). Macneil has, as I have said, not paid particular attention to these doctrinal shifts, which he clearly regards as superficial responses to the failures of the classical law, or, indeed, as counter-productive. However, Macneil has always insisted upon the value of good doctrinal work (Macneil 1988c, 1195), and, significantly, has said that legal education develops "an increased capacity for sustained

reason (Macneil 1984-5, 26-7).

[14] I do not include the 12 pages given to intention to create legally binding relations, itself an exception to the

rational thought:"

> Some of the purposes of the case method were summarised recently as 'training students to think clearly and exactly, to analyse and synthesise, to sift the relevant from the irrelevant, to beware of overgeneralising.' I … suspect that nowhere else in American education can as sustained, across-the-curriculum demands for this kind of thinking be found as in the first year of law school (Macneil 1965, 427).

But all this, of course, assumes that the doctrinal work is taking place within a basically sound framework. In such a framework, it can confine itself to the type of broadly deductive task it can best perform. Outside such a framework, it is prone to reduction either to "mindless bureaucratic formalism" (Macneil 1992, viii) if it rests content with itself, or is driven to perform self-ridiculing miracles of logomachy in order to address most real problems from within its present unrealistic framework.

Macneil has, however, spent a great deal of time engaging one form of the refinement of the classical law, one which most directly has posed questions about the doctrinal framework of that law. This is the discussion of contract within Chicagoan law and economics after Posner, which undoubtedly has been the most significant theoretical intervention in the subject since realism. I will now turn to Macneil's evaluation of this intervention.

## 5. Macneil and the law and economics of contract

### *5.1. The discrete contract in neo-classical economics*

As a body of law with fairly directly "economic" concerns, contract, and particularly remedies, is particularly amenable to discussion within law and economics, and it is only right to say at the outset that law and economics recently has produced at least as many insights into the law of contract as any other form of general jurisprudence, including the

claim that sufficient consideration identifies enforceability.

sociology of law to which Macneil should be seen as having made one of the most substantial post-war contributions.

Macneil has been at pains to acknowledge the value of contract scholarship within law and economics when surveying the contract literature in a highly original way which turns on the concept he has developed of a "spectrum" of contracts. He has argued that discrete exchanges and relational contract form an axis (Macneil 1974a, 736-7), and along this axis runs a spectrum (Macneil 1978b, 12) of contractual phenomena. At one pole (Macneil 1978a, 902) is the discrete transaction exemplified by the spot sale (Macneil 1975b, 594; 1978a, 855 n. 2), and at the other the intertwined relation (Macneil 1981b, 1021; 1987b, 276) exemplified by a web of long-term commercial relations between a number of parties (Macneil 1974a, 738-40).[15] Particular contracts can, of course, fall at particular points along the spectrum depending on, to put it this way, how relational they are: "Exchange occurs in various patterns along a spectrum ranging from highly discrete to highly relational" (Macneil 1987b, 275). I will discuss the spectrum as such later. For the moment, let us look at how he uses it to analyse the contract literature.

Macneil has claimed that different theories of contract are appropriate to the different types of contract found at various points along the spectrum. At the extremely discrete end of the spectrum is the classical law; at the extremely relational end is the relational theory. The relational theory bids fair to so extend along its axis as to take over much the greater part of the spectrum, leaving only what we shall see is the vexed possibility of the purely discrete contract to the classical law, and that it does not do so is because in later work Macneil

[15] In earlier versions of the spectrum, the discrete pole was called the "extreme transactional" pole (Macneil 1978b, 14-6. Cf. 1974a, 738-40).

distinguishes a third form of contractual theory, the “neo-classical law” (Macneil 1981b, 865-86).

Macneil somewhat confusingly uses the term “neo-classical” to capture both the neo-classical economics that are the foundation of the classical law of contract and the neo-classical law that he believes is an improvement on that law (ie. it is a distinct form of traditional contract law from the classical law (Macneil 1978b n. 2)). The classical law is, of course, typically expressed in formal doctrinal terms to which, as has been said, Macneil does not pay particular attention. However, he describes writing on contract by law and economics scholars as the elaboration of the economic foundation of the classical law. The individualism of the will theory of contract (the classical law) (Macneil 1983b, 390-7) is the individualism of rational individual utility maximisation (neo-classical economics and Posnerian law and economics) and is exemplified by the discrete contract:

> It is quite true that the discrete [contract] fits very well the concepts of efficiency developed in the neo-classical microeconomic model. Indeed, that is a tautology, since the discrete transaction is the basis of that model (Macneil 1980c, 63).

In a way which we will see is not without its difficulties, Macneil criticises not so much the model of the discrete contract as the way that law and economics believes this model can cover all contracts on the spectrum of contract, tending to identify the discrete contract as contract as such, when this identification is indefensible (Posner 1978a, n. 52):

> The existence of relations … raises theoretical problems for the neo-classical microeconomic model founded on the discrete transaction. Even putting aside the theoretical difficulties, however, a range of practical problems precludes effective, simple application of the model to relations of any complexity. At the very least this includes a large percentage of real-life contractual relations (Macneil 1981b, 1062).

Macneil’s theoretical criticism of this view of contract is that it does not take into account the co-operative, relational phenomena to which he draws our attention. As well as

taking up the social philosophical issues involved in this, he makes this point in respect of many contract doctrines, such as the regulation of penalty clauses (1981b, 1056-62) and (other) standard terms (Macneil 1984-5, 917-9), the adjustment of formally strict liabilities (Macneil 1983b) and the nature of breach. The last of these is particularly instructive, for it does not turn on any welfarist considerations but solely on "economic efficiency."

It has been argued that a contract can "efficiently" be breached if doing so realises sufficient profit in excess of that expected under the original contract. Resources freed by the breach can be used to compensate the non-breaching party whilst leaving leaving a larger than originally expected profit for the party in breach. In what Macneil calls the "simple" version of this notion exemplified by Posner (Macneil 1982, 949. Cf. Posner 1994, ch. 4) all this is set out as analytically true, as indeed one may, for the purposes of argument, allow it is. [16] But to turn this into a policy prescription for real world situations, as Posner unproblematically does, is quite absurd. One needs to know a great deal about the transaction costs of switching allocations in the given situations of both parties before one can say anything about the efficiency of such a breach. Important considerations include whether the breach is easily recognisable and a remedy for it will easily be forthcoming, whether damages will fully compensate the non-breaching party (or will there be certainty or proximity problems, etc.), whether there will be a reputational effect, and so on. Macneil puts the point this way:

> [T]he broad scope of the inquiry required before even slightly definitive conclusions could be suggested should be stressed. The pertinent transaction costs cannot be limited to one or two supplemental matters. Rather the inquiry must be addressed to *all* transaction costs … This includes some costs of initial planning in the *first* contract (including negotiations essential to the

[16] Macneil himself (1982, 950-3) does not does not allow this.

> mutual planning required in contracting), costs of planning (again including negotiations) after the new opportunity comes along, costs of potential or actual litigation (including costs of delay), information costs, costs of inertia, costs of uncertainty, relational costs, such as damage to reputation and loss of future opportunities to deal, and undoubtedly others (Macneil 1982, 957-8).

From this he draws the following conclusion (which he later applied to a range of other abstract "efficiency" analyses of remedies rules (Macneil 1988b)):

> The microeconomic model assumes the existence of very complex relations between the parties … But once such relations are assumed, the impact of those relations on the analysis is typically ignored. *Ceteris paribus* conquers all. Thus, it is extremely easy to introduce selected transaction costs to show that the model 'proves' what the modeller wants it to prove, while ignoring countless other transaction costs of equal or greater pertinence in the real world … the ease of slipping in some but not all, transaction costs is a problem … within the model. There is a fundamental intellectual flaw in using a model based on man-outside society to analyse the behaviour of man-in-society … The particular fallacy of the simple-efficient-breach theory is relatively easy to uncover but potential fallacy lurks in all social analysis starting from the non-social, relation-omitting model of neo-classical economics (Macneil 1982b, 961).

### *5.2. Posner's evaluation of Macneil*

Macneil has not been completely ignored by the proponents of the law and economics of the classical law, who have made two distinct responses to his views, though both amount to a rejection of those views. The first is to deny that Macneil's view of contract is accurate. As Posner has put it: "I do not think … Professor Macneil a reliable guide to the nature and problems of modern American contract law" (Posner 1993, n. 20). What really is at issue here is the extraordinary extent to which law and economics after Posner works with the most formal notions of contract doctrine, ones which by no means would now be maintained in the best black-letter scholarship. Macneil has recounted the following event which, on the basis of my own experience, I suspect captures a quite common experience:

> To refer to someone as a Willistonian is to describe them as addicted to discrete general contract law. In January 1986 at a panel of the Association of

> American Law Schools, I referred to a particular view as Willistonian, and for the first time in decades heard a defence of Williston! Although I was taken aback at the time, I also recall musing on many occasions about the failure of those law and economic scholars habitually defending what are in fact Willistonian views to resurrect his sainthood (Macneil 1987a, n. 19).

Comment here is superfluous on criticisms of Macneil that are not informed by an awareness of the difficulties of the classical law. To critics without such an awareness, his work must, indeed, seem outlandish (Feinman 1990, 1299-1300).

A second response has been to register some of the difficulties of the classical law but to say that Macneil's work does not assist in coming to terms with them. Posner puts the point this way:

> Macneil believes that contract law has been too much concerned with spot contracts to the exclusion of contracts embedded in an ongoing relationship between the contracting parties … unfortunately, although all too commonly when one is speaking of legal 'theories' that lack a foundation in economics, Macneil's theory of contracts has very little content … If [Macneil] means that we must recognise the problems and opportunities that arise when parties have a continuing relation rather than merely meeting in a spot market, I agree. Such a relation may make contracts self-enforcing, because each party stands to lose if the relation terminates. Conversely, it may create temptations to opportunistic[ally] breach - maybe one party's performance precedes the other's - or problems of bilateral monopoly, which can be acute in cases in which one party seeks modification of a contract, because the parties can deal only with each other. These are problems on which economics has a strong grip; so far as I am able to determine, neither Macneil nor any other 'legal theorist' has anything to contribute to their solution (Posner 1993, 84).

All one can say is that one is obliged to follow the line indicated by Macneil if one seeks to frame one's answers to such problems as they are understood by the parties and dealt with by empirical contractual practices. Of course, one can substitute for these facts formal economic assumptions of remote relationship to the understandings of the parties and formal contractual doctrines which are quite inaccurate accounts of business practice. One really must make a choice about the approach one finds superior. More fairly, Trebilcock allows that "Macneil's

approach … accurately … describes reality" but "does not yield determinate legal principles for governing the allocation of unassigned risks" (Trebilcock 1993, 141). By "determinate" Trebilcock means tractable in terms of neo-classical economic principles and, presumably, therefore ultimately translatable into classical contract doctrine. The circularity of his position surely is manifest. The strength of the grip such principles provide is indeed strong. It has the strength which can follow from being formally abstract, and the clarity of explanation this furnishes is valuable. But it therefore is a grip which, if maintained insensitively, can fasten on very little that exists in the real world of contract.[17]

In what Macneil calls "neo-classical contract," the account of legal doctrine is very much refined to take account of the problems of the classical law. The most live current example in the UK is the recognition of "practical benefit" in the case of use of an existing obligation as consideration. That "practical benefit" flatly contradicts the existing obligation rule is the truth that cannot be admitted in such scholarship. But allowing practical benefit is undoubtedly superior, in the practical sense of resolving disputes if not in the theoretical sense of developing coherent law, to insensitive maintenance of the classical law of insufficiency. Such neo-classical law is the law of any decent legal scholarship, and, as we have seen, it has a very clear and defensible place in such scholarship.

### *5.3. Williamson's evaluation of Macneil*

The economic corollary of such scholarship is the "new institutional economics". It has been mentioned that neo-classical economics has, at its core, a demonstration that a market in

[17] Trebilcock's book on *The Limits to the Freedom of Contract* in which this criticism of Macneil is maintained is, accordingly, one in which the basic principle of freedom of contract is maintained by the argument that the exceptions to it in modern contract as merely that principle's "limits." As Trebilcock is knowledgeable and fair, the overwhelming accumulation of exceptions dwarfs the indeed limited principle.

which economic action conformed to the assumptions of rational individual utility maximisation is perfectly efficient. However, general economic equilibrium requires economic actors to have complete knowledge of the state of the world in which they make their exchanges and that those exchanges are perfectly easy to make. That is to say, exchange must be completely costless or, following Coase (1986, 114-9), involve zero transaction costs. Of course, any empirical exchange involves positive transaction costs, and the new institutional economics seeks to identify the institutions which facilitate exchanges by keeping those costs as low as possible (though they cannot be driven to zero) (Coase 1994, ch. 1; North 1990; Williamson 1996, pt. 1). In capitalist economies, the principal such institutions are the various legal frameworks of enterprise. In institutional economics (which, of course, are congruent with good law and economics), the conditions of the application of neo-classical economic analysis are carefully specified by descriptions of the economic institutions within which economic action takes place. The market (at various levels of competitive organisation) is one such institution. So, however, is the firm and the state (and a range of "hybrid" institutions).

It is obvious that if one is at all prepared to draw on social sciences other than neo-classical economics to undertake the description of the various institutional settings of economic action, then Macneil's work can serve the same function with regard to understanding the realities of contract as, say, H. A. Simon's (1976) work can with regard to the "black box" conception of the structure of the firm. Williamson has been generous in his reference to the influence Macneil's work has had in the formulation of his conception of the internal and external determinants of a firm's decision making:

> Although the law was obviously relevant to what I was doing … its more general significance was not obvious to me until Victor Goldberg …

> suggested that I examine some of Ian Macneil's recent work on contract law. Macneil's treatment of contract was much more expansive, nuanced, and interdisciplinary (mainly combining law and sociology) than I had seen previously … This invited a more general formulation in which law, economics and organisation were joined in the effort to assess the governance of contractual relations (Williamson 1996, 355-6).

Williamson has made repeated productive use of Macneil's distinction of different types of contracts at different points of the spectrum (Williamson 1985, 68-73; 1986, 102-5). He has identified many issues in the discussion of what Macneil would call relational contracting by drawing on his (Macneil's) work to show that "contracts are a good deal more varied and complex than is commonly realised [and] that the institutional matrix within which transactions are negotiated and executed [varies] with the nature of the transaction" (Williamson 1986, 105). The subtitle of what remains Williamson's most ambitious work - *The Economic Institutions of Capitalism* - is *Firms, Markets, Relational Contracting*.

Macneil has welcomed the development of transaction cost analysis in new institutional economics for the obvious reason: "Because it is impossible to conduct exchange without transaction costs … Any sensible application of these costs requires the inclusion of these costs" (Macneil 1981b, 1022). He has particularly welcomed Williamson's contributions. At one point, Williamson criticised one of Macneil's comparisons of discrete and relational contract as so "rich" as to be difficult to apply (Williamson 1986, 103). As this particular "classificatory apparatus" involved 12 "concepts" (and as many sub-concepts) as points of comparison (Macneil 1978a, 902-5. Cf. 1974a, 738-40), this was a perfectly fair point. Macneil has been good enough to acknowledge this (Macneil 1981b, n. 26). However, he ultimately has sought to argue that the richness of his work follows from his attempt to capture the sense of co-operation that will always escape even Williamson's reasoning from what remain neo-classical assumptions of individual utility maximisation, even though Williamson may attempt to model such co-operation in broadly game-theoretical, and

increasingly complex (Macneil 1981b, 1062), terms:

> A key element in neo-classical microeconomic analysis is exchange between maximising units. In his discussion of transaction costs and their effect on choice of contract governance structures, Williamson [in cases of 'asset specific' or 'idiosyncratic' investment creating opportunities for opportunistic behaviour] treats the parties not as separate exchangers, but as if they comprised a *single maximising unit* … This, according to Williamson, leads in such circumstances to the parties making arrangements for either trilateral governance, such as contractual enforcement in courts, or to unified governance - the firm. This is not neo-classical microeconomic analysis, since there is by hypothesis no exchange transaction to analyse … That Williamson is treating buyer and seller as a maximising unit, and not making a neo-classical analysis of their separate individual choices of governance structures, may be obscured by … his concern [with] the prevention of their subsequently acting as separate maximisers [by] the limiting of opportunism. But his treatment of transaction costs and governance in a non-neo-classical manner bears out [the] point [that in] relational exchange there can be present a 'sense of productive increase from the relationship which can dwarf variations in expectation, or of long-term anticipations of mutual benefit that dwarf variations in shares received by partie.' This anticipatory, commonly held 'sense' of the parties may virtually obliterate any present separation as maximisers, thereby making them effectively a single maximiser (Macneil 1981b, 1023-4).[4]

Macneil's relational theory turns on the suggestion that a different view of the nature of economic action than that assumed in neo-classical economics and in the new institutional economics which more accords with the reality of contract. Certainly, though I hope I have made it clear where Macneil's work is so elaborate as to be confusing, it deals with that reality with considerably more explanatory economy than does Williamson's own work, the most marked characteristic of which is an even greater degree of terminological elaboration (Campbell and Harris 1993, 175). In terms of Macneil's distinction of three types of contract theory, the neo-classical and the relational very substantially overlap,[18] for the new institutional economics is at one with the relational theory in attempting to explain

[18] Indeed, the metaphor of the spectrum with different types of contract and contract theory at different points

“relational” phenomena rather than Posnerite law and economics, which attempts to explain them away. However, there is, at bottom, a profound difference over what the “phenomena” described as transaction costs are:

> The only way anything more of material relations [than is seen by concentration on the discrete contract] is seen by analysis related to microeconomics is by looking through a relatively new and very different lens called transaction costs. If taken seriously, transaction costs could, of course, theoretically become so all encompassing as to constitute a genuine examination of solidarity and reciprocal material relations. But they are seldom taken with such seriousness, and if they were, would soon cease to be denominated ‘transaction costs’ (Macneil 1987a, n. 11).

Though Macneil does not tell us what they would be called, it is, I suggest, clear enough that, if we look only at market transactions, they would be called something like the social relations constituting economic action. The securing of social and political stability, the ability to communicate, the ability to rely on promises, etc. are all costs of market exchange. But they are also the social relations which indispensably facilitate those exchange. Such relations cannot be viewed *only* as costs, for, the point is, they are not so much the friction which impedes fully contingent contracting but the relations which make any contracting possible. In Macneil’s terms, they are the first and second level relations which constitute the social matrix and the third level relations based on the common contract norms through which parties are able to agree (discrete) competitive contracts or (complex) consciously co-operative contracts. In the light of this insight of Macneil’s, the technical function of transaction cost analysis must be subsumed to, and reinterpreted in the light of, understanding the relations which the costs represent. If I may be allowed to quote myself:

> Coase (and Williamson *et al*) readily concede - in fact it is more fair to say that they centrally urge the recognition - that transactions at zero cost will never empirically obtain, but the point is to approximate towards that ideal [of a fully contingent contract]. However, this is a paradoxical and confusing goal

along its axes breaks down.

> because they do not fully understand why the goal is unrealisable. The negotiating, information gathering, organising, etc. within which transactions take place are not *only* costs, they are also the social relations which are essentially facilitative of the transaction. Negotiation is a cost, but what contract could be made without language? Information gathering is a cost, but what contract could be made in complete ignorance? All actions, including all transactions, can take place only within constitutive social relations. The stress on the reduction of transaction costs has a *technical* function but inevitably is carried too far if that technical function is confused, as it typically is in law and economics, with a basic analysis of the ontological character of economic action. If one really took away *all* the costs of exchanging, the exchange would not take place cost free, it would not take place; and this should tell us that though the transaction cost approach certainly has a very important *technical* function, it cannot *begin* to stand as an *understanding* of economic actions (Campbell 1997a, 230-1).

Macneil's work is by far the most substantial working out of a theory of contract in which this point is taken, and in any reputable social theory of which I am aware other than neo-classical economics, that point is allowed to be sound.

## 6. The discrete contract and the critique of presentiation

### *6.1. The concept of presentiation*

The argument that the classical law articulates a "market-individualist ideology" now enjoys a wide currency in critical contract scholarship (eg. Adams and Brownsword 1994). This is right, and that the classical law *is* market-individualist is not worth disputing. When they can be pressed to move away from technical formalism and discuss their values, those committed to the classical law themselves insist upon the market-individualist character of at least the core of their subject (e.g. Beatson 1998, ch. 1, sec. I(a). Cf. Atiyah 1990, ch. 12). However, the use of the word "ideology" typically is intended to connote that market-individualism is wrong,[19] and

[19] So, having told us in their contracts casebook that "Contract ideas form part of the ideology of capitalism," Macaulay and his colleagues in the Wisconsin Contracts Group, then say "We use the term 'ideology' rather than political philososphy because ideology connotes a system accepted and assumed rather than a thought-out

something of this sort obviously is Macneil's position (Macneil 1987a, 37). This is, of course, a matter of legitimate dispute, and Macneil's position on this is rather complex.

The crucial point about the invisible hand is that it is invisible. It works by ordering the actions of individuals who are not conscious of it, and so, of course, do not frame their agreements to express it. Consequently, the classical law of contract's principal doctrines articulate a denial of the parties' co-operation at exactly the same time as those doctrines bring that co-operation about. It is Macneil's argument that though:

> We … think of economic exchange as being extremely individualistic and selfish, rather than co-operative [it] is the fact that exchange represents a species of human co-operation. In the first case it is a kind of social behaviour - the true lone wolf has no one with whom to exchange goods or services … exchange involves a *mutual* goal of the parties, namely the reciprocal transfer of values. And this is true however strongly the 'economic man' - the 'as-much-as-possible-for-as-little-as-possible-in-return-man' - may dominate the motivations of both parties to an exchange (Macneil 1969b, 405. Cf. 1968e, 14).

Any purported refutation of an incorrect belief must, to hope for complete success, account for that belief's enjoying sufficient currency to make it worth refuting (Campbell 1996a, ch. 3), and so a rigorous insistence on the relational basis of all contract must involve giving a relational explanation of the existence in contracting of perceptions of complete discreteness and of narrowly individualistic conduct based on those perceptions. Macneil, most perceptively, attempts to explain how the classical law's mistakenly individualistic understanding of contract could arise. He says the following of parties' subjective understandings of their contract behaviour in terms of narrow individualism:

> The discrete transaction is the perfect setting for maximising recognition of exchange and its motivations. The narrow focus of the … transactional planning, the monetisation and measuring of what is exchanged, the minimum need for co-operation in planning and performance, the discreteness of the incidence of benefits and burdens, the specificity of obligation and the nature

view" (Macaulay *et al* 1995, 19 n. 9).

> of potential sanctions, all go to guarantee the absence of room for anything but exchange and its motivations … Recognition by the parties of the prevalence and exclusivity of exchange motivations is inevitable in such … circumstances (Macneil 1974a, 795).

The way in which the discrete view emerges is through "presentiation," a rendering of past and particularly future events or structures influencing present allocative decisions as if they were present. By this Macneil means, in the context of contract negotiation, the pursuit of an "ideal" (Macneil 1980, 60), of which "traditional contract systems are among the greatest intellectual expressions" (Macneil 1974b, 590-1). It entails bringing all relevant dimensions of a contract to the notice of the parties at the time of making the contract so that that contract can properly be said to be the product of the parties' intentions:

> The aim was to establish, in so far as the law could, the entire relation at the time of the expressions of mutual assent. Total presentiation through 100% predictability was sought as of the time of something called 'acceptance of the offer' (Macneil 1974b, 593).

This is a strikingly accurate fleshing out in contract doctrine of the assumption of a complete knowledge of the state of the world at the time of the contract necessary for the fully contingent contract of general equilibrium theory which is the more remarkable in that Macneil seems to have developed it through a sense of the practice of contracting rather than by drawing on information economics.

Of course, the ideal of "100% consent as well as 100% planning" is "never achieved in life" (Macneil 1980, 60-1). This is manifest in longer-term contracts which of necessity postulate continuing, consciously co-operative relations to deal with the impact of future developments on present allocations of resources. To try to bring these sophisticated relational plans within the concepts of the classical law is, as Macneil overwhelmingly demonstrates, manifestly absurd (Macneil 1975; 1978a). Macneil's most substantial achievement in contract

scholarship narrowly understood is his second casebook, *Contracts: Exchange Transactions and Relations* (1978b), in which his early expansion of the meaning of "contract" to include far more than contract litigation is developed into an ordering of the material found in a contract course around the concept of contract planning. This ordering places that material in a practically determined sequence dealing with negotiation of terms of performance, provision of contractual mechanisms for assuring performance, and arranging ways of dealing with failure to perform (both of the last two including adjustment of performance).

This ordering principle is concisely stated in a 1975 paper which uses the organisation of, and linking passages from, the casebook (Macneil 1978b, 16 n. 1) to provide, 'A Primer of Contract Planning' (Macneil 1975b).[20] In this inclusive, empirically and practically plausible description of the functions of contract, the pursuit of a remedy through litigation has a subordinate but integrated part in contract planning. This approach is of incomparably more practical value[21] than the concentration on logical problems and on litigation typical of casebooks and textbooks. Litigation appears only as the third possible way of resolving disputes after self-help (itself divided into refusing to perform and suspending or stopping performance, forfeit of securities (of various forms), and seeking assurances), and forms of alternative dispute resolution. Planning for dispute resolution itself appears only last in a list of topics that good legal advice should seek to incorporate in a complex contract to avoid such disputes. That all these matters are essential to contract would not be denied by those who promulgate the classical

[20] The bridging sections of *Contracts, Exchange Transactions and Relations* which bear more on the social theory of relational exchange than on the analysis of contract more narrowly understood are reworked as an integrated essay in 'Essays on the Nature of Contract' (Macneil 1980a). This relatively little known piece is the most complete statement of Macneil's views prior to 1979, when he then gave the Rosenthal lectures which were written up as *The New Social Contract*.

[21] Assuming that the function of the commercial lawyer is to assist, in an economic, efficient and effective fashion, in the prevention or resolution of disputes. There is considerable empirical evidence that this assumption does not necessarily hold (e.g. Wheeler 1991).

law (especially if they practise). But it is principally in Macneil[22] that one finds these matters not stated as ancillary material to the formal and, it transpires, rather irrelevant general principles, but rather integrated into an overall account of contracting.

### *6.2. The non-existence of the discrete contract*

It is precisely here, however, that, over the course of its development, Macneil's relational theory of contract seems to have displayed an ambiguity (Macneil 1987b, 276-7) which, in my opinion (Campbell 1990), has handicapped the admittedly restricted reception (Macneil 1985a, 541; 1987a, 36; 1988a, n. 5) of his work. Throughout that work there are statements in which Macneil has stressed the "existence of relations in all real-life transactions" (Macneil 1981, 1062), and that, consequently, it is an error to believe that "entirely discrete transactions … could occur at all" (Macneil 1978a, 856) because "pure discreteness is an impossibility" (Macneil 1981b, 883). This is to say, Macneil repeatedly denies that there are *any* truly discrete contracts. In a 1987 retrospective paper, having flatly stated that "All exchange occurs in relations," Macneil amplified the point in this way:

> Even the purest discrete exchange necessarily 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 (Macneil 1987b, n. 5).

On the other hand, there are also passages in which he does seem to allow that one could conceive there are discrete exchanges as such:

[22] Though see the review of the "contracts casebooks…that changed the very definition of the field" by the Wisconsin Contracts Group (Macaulay *et al* 1995, 25-8). The Group's own effort should be included in this set of mould-breaking American works. On the British work to similar effect, see Campbell (1997b).

> A *truly* discrete exchange transaction would be entirely separate not only from all other present relations but from all past and future relations as well. In short, it could occur, if at all, only between total strangers, brought together by chance … Moreover, each party would have to be completely sure of never again seeing or having anything else to do with one another. … Moreover, everything must happen quickly lest the parties should develop some kind of relation impacting on the transaction so as to deprive it of discreteness (Macneil 1978a, 856).

In this passage Macneil is at pains to stress how abstract and fanciful this notion of the purely discrete exchange is, but I do believe it is right to say that he *has* allowed a theoretical limiting case of a transactional exchange which is discrete (Macneil 1978a, 856-7), and gives an example of this in modern contract:

> The gas purchase is a transactional event in the sense that, except for the expectation of the driver that the station would have gasoline available and the expectation of the station that any driver stopping would have some means of paying, the exchange has no past. There are no precedent relations between the parties. Nor will there be any future relations between the parties. As to the present, two general characteristics dominate the transaction: it is short; it is limited in scope. A few minutes measure its duration, and no one, even the most gregarious, enters into anything approaching a total human relationship in such a situation. In such a transaction the measured exchange, gallons/dollars, is what matters. Without it, the pleasantries, the little extras of service and courtesies have no real meaning; with it those immeasurables are an added fillip and no more (Macneil 1974a, 720-1).

I emphasise that Macneil stresses that a social matrix *is* necessary for even this transaction (Macneil 1978a, n. 10), which therefore in an important sense only *seems* discrete (Macneil 1983b, 344). But this matrix is constituted only of first and second level relations and not, he allows, third level ones. In terms of the third level, *internal* relations, Macneil seems to allow the possibility of a discrete exchange between persons so unrelated, so much "total strangers," as each to have "as much feeling for the other as a Viking trading with a Saxon" (Macneil 1974b, 633).

These two positions carry very different implications for the analysis of discreteness and presentiation. The first, that there are *no* discrete contracts, is obviously most consistent with the

claim for the existence of the common contract norms if the internal aspect of those norms is accepted (Feinman 1990, 1301). On this first position, the discrete contract of neo-classical economics and the classical law of contract *is* an ideology. It contains a misdescription of itself in the sense that it denies the relational dimensions which it *does* possess:

> Although the intellectual concepts of the market exchange economy took - and still have - a stranglehold on Western thinking, it is a mistake of incredible magnitude to think that any economy has ever been a market exchange economy in the sense suggested by formal economic analysis, a mistake regularly made by the intellectual left, right and middle. Market exchange in the utilitarian model is exchange in discrete transactions in which relations between the parties are seemingly assumed not to exist. This is as empty a social set in a nineteenth century market economy or modern twentieth century economy as it is in primitive economies. Not only has market exchange always been heavily embedded in social relations, but discrete (relatively) exchange patterns have always occupied only limited sectors of market economies as well (Macneil 1986, 591-2).

This position is a radical one, for in an important way it involves denying that there ever has been a truly *laissez-faire* economy (Campbell 1987, 213-7). Such an economy *must* (Macneil 1985b, 485-91; 1986, 591) have been relationally constituted, though perceived, for reasons which must be explained, as composed of discrete exchanges. In essence, "[n]o one can ever understand discrete elements in contractual relations without understanding the relations themselves" (Macneil 1988a, 302).

Macneil does allow that something can be gained in the explanation of the ideology of discrete contract from recognition of the interests that ideology serves: "the market-oriented political right … finds the ideology of the discrete transaction useful in achieving its goals" (Macneil 1987a, 37), and he has made strenuous efforts (Macneil 1981b, 1049-62) to include analysis of the power exercised through patterns of exchange in his later work (Macneil 1987b, n. 4). This, as we shall see, has led to some powerful critiques of forms of exchange which basically are opportunities for the exercise of inequalities of bargaining power. Though such

critiques clearly have their origin in his early perception of the implausibility of classical contract's notions of agreement, this focus on power and ideology is not really, however, the characteristic direction of Macneil's thought. He seeks to show why perceptions of discreteness *are* plausible, and incorporates the reasons for that plausibility in his relational theory largely through his concept of presentiation.

It seems that the interpretation of Macneil's work has not so much been guided by working out the implications of the common contract norms but by a rather literal reading of the spectrum of contracts. The problem with the metaphor of a spectrum is that it allows, as Macneil has recognised (Macneil 1987b, 276), an interpretation which tends to confine relations to only the relational end, and this is not easily reconcilable with Macneil's general relational claim about contracting. We have seen that Macneil argues that the contracts to be found at particular points on this spectrum have attracted one of three types of legal and economic theory. Towards the discrete exchange end, the explanation has tended to be the classical law of contract and neo-classical economics (and simple law and economics). Neo-classical contract, including new institional economics, forms an intermediate category which we will not discuss again. At the other end of the spectrum, Macneil says fully relational law is appropriate, and claims that this latter theory is of the greater importance because it covers more of the spectrum.

Central to Macneil's work is the claim that "discrete exchanges are always relatively rare compared to patterns of relational exchange" (Macneil 1985b, 487) and that therefore relational contracting rather than discrete exchanges should be the central unit of the economic analysis of contract. The classical law of contract underpinned by neo-classical economics systematically fails to recognise that "contractual relations, not discrete contract, always have and always will be the dominant form of exchange behaviour in society" (Macneil 1985a, 451), and it therefore should be superseded by a relational view able to slip "the bounds of the classical contract

system altogether [by] reducing [norms of] discreteness … from dominant roles to roles equal or often subordinate to relational norms" (Macneil 1978a, 886). Macneil has weighed the amount of attention which must be paid to relational as opposed to discrete aspects in the explanation of contract, correctly argued that the former is far greater than the latter, and concluded that we must stress the relational dimension in contract. It is a question of balancing discrete exchange and contractual relations, but only in the sense of balance which follows after one accepts the manifest empirical evidence (Macneil 1985b, 487 n. 21) that there is a great imbalance in favour of the latter between the importance of these two elements in determining contract (Macneil 1985b, 498-508).

I have claimed above that the relational aspects of contract are more apparent in contracts at the relational pole of the spectrum (Macneil 1981, 1040-1). Long-term, variable and open-ended contracts clearly display their relational character (Macneil 1974b, 595), and this encourages the perception of relations in all contracts right down to spot sales. Equally, such long-term contracts tend strictly to prohibit opportunistic behaviour (Macneil 1986, 578), and this leads towards grasping the element of co-operation in all contracts. It is the growth of these relational phenomena that has mainly imposed the stresses on the classical law that has caused the law so unacceptably to twist and turn to try to accommodate that growth (Macneil 1974a, 815).

But how accurate is the presentiated perception of discreteness for the short-term exchange exemplified by the spot sale? Dwelling on the common contract norms would lead one to conclude that it is not accurate, for there are no truly discrete contracts. However, one can, as we have seen, also find various passages in which Macneil holds that "[a] high degree of presentiation is possible in truly discrete transactions" (Macneil 1974b, 594). I am afraid one

must conclude that he cannot consistently be saying both of these things.

It obviously does not help that Macneil has used the key term “relational” in two different ways. He means it to encompass the relational aspects of all, including discrete, contracts, and also to mean relational as opposed to discrete contracts. That he has done this is surprising as one complaint a reader may make about his writing with some justice is that his imagination is very fecund indeed when it comes to inventing schemes of classification and terms to fill them out. In his later writing, he has advanced the term “intertwined” to deal with relational in the sense of contracting under the relational norms (Macneil 1987b, 276-7). I personally believe that “complex” is a better term for this (Campbell 1996b, 59-61). Whatever one’s opinion of this, the coherent use of either term in preference to the second of Macneils’s uses of “relational” avoids a substantial confusion. One then can clearly see that, as his work matured, Macneil’s essential claim about the co-operative function of contract came to be stated as the claim that relations underpin all exchanges in order to embrace competition within the relational framework by explaining it as discrete contracting.

One concerned with the law of contract more narrowly understood could leave the matter here. Unfortunately, the ambiguity is not merely terminological, contrary to what appear to be Macneil’s own views (Macneil 1987b, 276-7). To assess both why this ambiguity arose and how far it can be removed, we must turn from relational contract to the social philosophy Macneil intends to underpin it, his relational theory of exchange.

## 7. Macneil’s social theory

### *7.1. The relational theory of exchange*

The ambiguity over Macneil’s account of the nature of the discrete contract arises because, though his contract work overall requires some sort of denial that there are any truly discrete exchanges, he also wishes to find a central place for both exchange and discreteness in his social

theory of relational exchange. As we have seen, Macneil's stress on contract as an instrument for social co-operation is intended to reject the individualist understanding of exchange. But, it is essential to note, he also wishes to retain the classical category of exchange itself (cf. Feinman 1983, 833), and indeed it plays an even larger role in his work than in law and economics.

It will be recalled that the early Macneil identified "economic exchange" as the second basic element of contract, and, in his mature work, it features as the second primal root. He defines exchange in a most general fashion, as "simply the way … specialists distribute their work products among themselves in a reciprocal manner" (Macneil 1980b, 160). This is to say, on Macneil's view, any "[s]pecialisation of labour presupposes exchange" (Macneil 1974a, 697), so that, certainly, the modern "division of labour always does presuppose exchange" (Macneil, 1980c, 2 n. 6). Macneil defines the very general idea of exchange this implies as "the giving up of something in return for receiving something else" (Macneil 1986, 567). The only really essential element of this concept of exchange is "reciprocity," but as reciprocity was given just the same definition as exchange when set out as the second common contract norm (Macneil 1983b, 347), this obviously is reciprocity understood in a somewhat special way.

By reciprocity, Macneil does not mean what he calls "monetised exchange," that is to say, the generalised commodity exchange mediated by the universal commodity of money developed under capitalism:

> let me emphasise that 'exchange' as used here is most certainly not 'measured reciprocal payment,' a common usage of the term by both Marxist and non-Marxist writers. 'Exchange' here encompasses much more. In particular it does not necessarily require measurement of reciprocity or conscious desires to gain by exchange, all of which are patent or latent elements of 'measured reciprocal payment.' Nor is payment necessarily involved if that word implies the use of money (Macneil 1974a, 700).

All that is left of reciprocity is "not equality" but "some kind of evenness" (Macneil 19809b, 44).

Under this definition, if someone threatens forcibly to take a good from another, and the good is surrendered without actual conflict, this is an exchange, for there has been an exchange of a possibility of injuring in return for a good. This specifically is not what is meant by capitalist exchange. Nor is it an exchange in the capitalist sense if one gives up something of great value in return for something of little value, or even for nothing in return but the pleasure of another's gratification. These phenomena are robbery, fraud and sentimentality, not exchange. Macneil looks all this in the face and accepts it:

> [I insist] upon including in the concept one-sided and abusive exchange relations … the presence of such characteristics in relations does not somehow magically wipe out the element of exchange … seldom are such relations so rigidly coercive, one-sided and abusive 'as to leave no realm whatever for the apparent exercise of some moderately pressured choice' … the failure to include highly coercive, one-sided, and abusive relations creates the need for an entirely arbitrary dividing line between what is sufficiently coercive to exclude the relation from the realm of exchange relations and what is not (Macneil 1990, 154-5 (quoting from Macneil 1974a, 703)).

It is obvious that such a concept of exchange will "apply to all societies," and this is so over the widest moral range, including "plantation slavery" and "Stalin's labour camps" (Macneil 1990, 155); the widest geographical range, "including the nineteenth-twentieth century market economies and all segments of today's world economy" (Macneil 1986, 570); and the widest historical range, including primitive as well as all traditional and modern societies (Macneil 1986). Indeed, Macneil also often intimates that animal societies - from primate (Macneil 1981b, n. 44) to insect (Macneil 1974a, 697-8) - come under the scope of his concept of exchange.

With reciprocity and exchange defined in this way, it cannot easily be said that what Macneil brings under "exchange" is a smaller set than what is usually understood as social action. In Weber's definition, for example, action is behaviour to which "the acting individual attaches a subjective meaning," and action is social "insofar as its subjective meaning takes account of the behaviour of others and is thereby oriented in its course" (Weber, 1978, 4).

(Indeed, if we take Macneil's remarks about animals at face value, his concept is far wider than Weber's, obviously approximating to sociobiology after Wilson (1975)). This is to say, the social theory of relational exchange is a general social theory in the widest sense (Elliot 1981, 351. *Pace* Macneil 1983b, n. 5. Cf. Macneil 1990, 161-2).[23] Macneil does allow that people may be placed under such total compulsion as to negate their real participation in an exchange, but the type of utter powerlessness which he thinks necessary for this would reduce that action to (a low species of) "merely reactive behaviour" in Weber's terms (Weber 1978, 4). There is something "economic" about Macneil's exchange (Macneil 1986, 570), but it is much wider than Weber's concept of economic action, for the latter turns on rational calculation in pursuit "the satisfaction of a desire for 'utilities'" (Weber 1978, 63). Macneil's concept of exchange is explicitly intended to include reciprocity calculated much less precisely and involves a much wider range of concerns than utility (Macneil 1974a, 797-8).

It has been objected that all this is so wide as to lose determinate content (Campbell 1990, 87-8; Foster 1982, 146). But if the generality of Macneil's concept of exchange is its principal feature, this does not mean that it lacks some determinate features, and these are the heart of the social theory of exchange. It is, indeed, the extreme width of Macneil's notion of reciprocity through exchange that is itself intended to convey what "surely must be the most forgotten fact in the modern study of contracts" (Macneil 1980c, 1), the fact that human life is social. The basic claim is that co-operation is an integral part of any sort of society displaying an at all settled diversity of roles (ie. leaving aside essentially hypothetical pathological forms

[23] Macneil has continually (e.g. 1969, n. 3; 1974a, nn. 78, 92, 797; 1986 n. 42) shown an interest in the "exchange theory" literature traceable to Becker (1956) and Homans (1958) but of which Blau's (1964) *Exchange and Power in Social Life* is now the best remembered example. This literature also seeks to expand exchange into a ubiquitous human phenomenon (Macneil 1978b, 177-81). Of course, attempts to give a central importance to reciprocity in social relations, which in some sense it undoubtedly has, predate Becker and Homans, and indeed are to be found in

(Macneil 1986, 567) such as prolonged utter isolation or (approximations to) the war of all against all):

> One form of exchange, the measured reciprocal exchange … is clearly an exchange under anyone's definition. But discrete exchange is *not* the primal root of contract. Whilst it has far deeper historical and prehistorical antecedents than is sometimes recognised, discrete exchange is but one of the subspecies forming the exchange part of this second primal root [of contract]. The broad generic concept of exchange traceable far back into history and prehistory simply recognises that specialisation requires some process of reciprocal distribution of product for the specialisation to be worthwhile … *How* such exchange occurs is irrelevant to this foundation notion of the concept and to understanding it as a basic root of contract. Exchange can happen in countless ways other than measured reciprocal exchange, ways such as following custom, the Pharaoh's feeding of the pyramid-building slaves, a socialist centralised rationing system, or the intricacies of complex employment relations. But whatever the particular technique of exchange, without it the system of specialisation will come to a grinding halt (Macneil 1980c, 2-3).

More than this, some types of exchange will more adequately express the basic reciprocity of exchange than others. Macneil is anxious to allow conflict ridden exchange into the domain of exchange, but only there to condemn it as bad exchange. Having argued for the inclusion of "highly pressured situations within the domain of contract," Macneil goes on to say that this:

> should not, of course, be taken to suggest that a highly coerced pattern is … the ideal prototype of contract … Clearly slavery in an Arabian satrapy is not as 'contractual' a relationship as is a contract to work in an American corporation (at whatever level), nor is an adhesion contract for goods sold by a high-pressured door-to-door salesman in the ghetto as 'contractual' as a contract to sell a used car between one consumer and another. But all have significant contractual elements. Twisted 18 inch specimens near the final tree line are usefully called 'trees' just as are their straight 150 foot cousins on the lower slope; so too with twisted little specimens of contract living too close to the harsh winds of tyranny (Macneil 1974a, 705).

Macneil's initial emphasis on the co-operative dimension of contracts had the (natural) corollary that consideration of the asymmetries of power in contract was relatively

antiquity. Gouldner (1975, ch. 8).

underemphasised. When later taking up questions of power (Macneil 1981b, n. 44), Macneil used the distinction his concept of exchange generates, between good contract expressive of reciprocity and bad contract expressive of coercion, to categorise exchanges marked by asymmetries of power as bad or, as he very tellingly puts it, “inadequate” (Macneil 1983b, 379) or “inappropriate” (Macneil 1986, 568). His most substantial work in this vein has been on the use of standard forms by large firms is such a way as to turn them into contracts of adhesion and thereby make consumers’ “agreement” “a very poor joke” (Macneil 1984, 6. Cf. Macneil 1984-5). At one point Macneil seems to contradict himself by denying that slave labour camps (which we have seen him insist are examples of exchange) are contractual, but, without denying the slip, the way he frames this denial is instructive:

> One example of how sovereign [interference] destroys contract is the generally conceded inefficiency of slave labour camps; the levels of reciprocity in such camps are simply too low for effective contractual relations to exist (Macneil 1983b 369).

Such exchanges are inadequate to the ideal exchange Macneil has fashioned.

This, I think, brings us to the key to Macneil’s thinking, which is his view that, properly understood, the concept of exchange is *the* key to a grasp of the core of human character and social institutions. To be such, it must be freed from the previous misunderstandings which have either given monetised exchange either too much or too little importance:

> our thinking … is also influenced by the deification of exchange by Nineteenth (and Twentieth) century *laissez faire* political economists, and the countervailing consignment of exchange to the works of the devil by Karl Marx and at least some of his successors (Macneil 1969b, 405).

For Macneil, exchange (and with it the spectrum of contractual phenomena) is the fundamental feature revealed by philosophic analysis of the nature of human beings. Its general quality is the product of the contradictory yet ineluctable presence of what he describes as the individualist

(discrete) and the communalist (relational) elements in the character of humankind:

> men are individuals born and dying one by one, each suffering his or her own hunger pains and enjoying his or her own full stomach, yet each individual absolutely requiring other human beings even to exist physically and psychologically, much less to become an ordinary, whole human being. The consequence is that humans are - cannot otherwise be - inconsistently selfish and socially committed at the same time. No amount of close community can ever do away with this fundamental individuality; and no separation can ever do away with this living through others (Macneil 1986, 568).

The way in which Macneil understands this, to my mind perfectly accurate, description, is somewhat singular. He takes it as evidence of an irrational schizophrenia at the core of human nature, which attempts to understand that nature must accept and come to terms with:

> As students of man in society, we are faced with an illogicality. Man is both an entirely selfish creature and an entirely social creature in that man puts the interests of his fellows ahead of his own interests at the same time that he puts his own interests first. Such a creature is schizophrenic, and will, to the extent that it does anything except vibrate in utter frustration, constantly alternate between inconsistent behaviours - selfish one-second and self-sacrificing the next. Man is, in the most fundamental sense of the word, irrational (Macneil 1983b, 348).

Exchange, with its combination of discrete and relational elements, is the institution which can express this schizophrenia, whereas the extreme individualism of neo-classical economics and the extreme communalism of command economics both extinguish it (though each in a different way). Against unduly individualist perceptions of exchange, Macneil's polemical point is that: "*no* pattern of exchange merely enhances individual utility … and *all* patterns of exchange accepted by all parties enhance social solidarity" (Macneil 1986, 568). He equally insists that the logical endpoint of unduly communalist perceptions, with their implications of technically determined perfection in the arrangement of human affairs is unacceptable totalitarianism:

> Technical Man is inevitably a perfectionist. Whether it is objects, institutions, or people, nothing Technical Man touches can escape the aim of perfection … Perfection in humans naturally varies with the tastes of Technical Man; in Stalinist Russia it was Stakhanov, the coal mining dynamo; in America it is

> the flawless, unblemished centrefold Playmate of the month; in China it is the perfect co-ordination of 10,000 gymnasts in a stadium. In an imperfect world where most miners, most women and most gymnasts have the usual quota of imperfections, Technical Man is constantly frustrated with actual human beings. But if he cannot perfect them - at least not yet - then he can try to perfect their institutions … Our glimpses into the misty future of Technical Man are often nightmares. Two apocalyptic visions occur, the constructive and the destructive. The destructive ends … in a bang … The constructive variation is far more frightening - the system continues with the crushing of all that is human in man, 1984 or worse. Given either of these apocalyptic visions, there is no sense in talking about relational contract law (Macneil 1980b, 109-12).

As it is more or less fully developed by the time of *The New Social Contract*, Macneil's argument, that beneath the perceptions of self-interest which motivate exchange, contracts fundamentally effect co-operation, is built up into the claim that, *properly regarded*, exchange is an adequate form of human co-operation. Exchange is regarded as a proper expression of human nature because it deals with the contradictory character of that nature, combining both individualism, by fostering individual utility maximisation, and communalism, by fostering solidarity.

Macneil's critique of the very form of the classical law of contract is shaped by his perception of the productive schizophrenia of exchange. We have seen above how Macneil rejects the formalism of the classical law because "contract law is hardly a neat and logical structure of rules, but like all law is a social instrument designed to accomplish the goals of man." However, this is not merely a most useful insistence on the weakness of treating social problems as matters of deracinated deduction but turns on the belief that, as human life is irrational, then it is mistaken to "believe that useful, complete, and internally logical systems can ever be developed respecting human behaviour or human societies" (Macneil 1983b, n. 5):

> Man is, in the most fundamental sense of the word, irrational, and no amount

> of reasoning, no matter how sophisticated, will produce a complete and consistent account of human behaviour, customs, or institutions (Macneil 1983b, 348).

On this basis, Macneil's view of contract reasoning is as follows:

> Once you see the law as a useful social instrument for accomplishment of human goals you will see clearly why it is not a neat and logical package. It is because neither individuals nor their societies are neat and logical packages. Man is full of conflicting motives and conflicting actions. He seeks security and yearns for adventure. He wants companionship and privacy at the same time. He seeks peace and he makes war. He punishes those he loves and weeps over the graves of his enemies. How, except by a denial of human nature, could any legal system devised and used by such a creature be a neat and logical structure? (Macneil 1968e, 2).

### *7.2. The relationship of Macneil's theories of contract and exchange*

I do not wish to say anything about the social theory of exchange as such here but would like to say something about its relationship to the relational theory of contract. It will be recalled that the principal ambiguity of the latter theory turns on whether Macneil allows that there are such things as actually discrete contracts, and that, consistently, he should deny that there are. This would set up one relational theory of contract rather than a theory which seems not to apply to all contracts. In a retrospective essay, he captured the issue strikingly by insisting that he had sought to identify "a *Grundnorm* recognising the imbeddedness in exchange of all relations." However, on the very next page, returning to the metaphor of the spectrum and of theories appropriate to the different parts of the spectrum, Macneil gives up the unified approach turning on a *Grundnorm*:

> Let me add that both neo-classical economic analysis and neo-classical contract law have proper, although limited, roles in social analysis … (These limited roles are intellectually difficult to deal with, because both are closed systems which deny, yet inconsistently postulate, an external social structure in which they operate) (Macneil 1985a, 543).

Analytically, there cannot be two *Grundnormen*. *Why* Macneil effectively says here that there is hopefully now is clear. He ultimately does not want to eliminate the incoherence

produced by retention of the concepts of the classical law which he identifies as appropriate to discrete contracts, for the relational theory of exchange needs to keep these if it is to set up the description of human nature as illogical. The position which is revealed at the bottom of the theory of exchange is a celebration of contradiction, an insistence on the "fundamental fact [of] the essential logical inconsistency of man", the "very contradiction" which means that "we are, in part, eternally absurd" (Macneil 1986, 568-9). What Macneil means by this is that human beings are the products of the individualism of neo-classical assumptions and the communalism of some hellishly egalitarian anti-individualistic utopia (Macneil 1984-5, 919-29). He wishes to claim that a "tension arises from the inevitable conflicts between participants' desires to enhance individual utilities … and their desires to enhance social solidarity" (Macneil 1986, 580). That is to say, he wishes to emphasise the tension between individuality and sociality which is an unquestioned aspect of all interesting modern political theory.

But a tension is not an "illogicality", a "contradiction" or an "absurdity". These are the properties of a theory which describes tension as the product of an individualism which denies sociality and a communalism which denies individuality. Macneil intends to bring neo-classicism and communalism into his theory, and to combine them to produce a contradiction both in his general social theory and, in the form an intertwining of discreteness and relations along the spectrum of contractual phenomena, in his core work (Macneil 1987, 276). However, *these specific constructions* of individuality as individualism and sociality as communalism, cannot be combined, even to produce a contradiction.

"Man," we have seen Macneil tell us, "is both an entirely selfish creature and an entirely social creature," but, of course, what Macneil shows us is that human beings are *never* entirely either. To take only individualism, it knows no contradiction for it denies all

sociality. To be sure, it very quickly runs out of explanatory productivity because of this denial. Recognising this, Macneil then purports to include individualism in a contradiction with communalism. But in so doing he has thereby begun to change complete individualism into an individualism which, by holding that "the idea of man-the-atom is always 50% utter nonsense" (Macneil 1984-5, 934), acknowledges the tension involved in recognising sociality. This nonsense is the very idea that he purports to work with. However, to use it he has to change it. In changed form, it invites the development of possible political philosophical ways of handling the tension with communalism, such as the community in which "the non-existent Hobbesian atomistic individual becomes the real-life human being ridden with the conflicts of desires for self-gain and self-loss at the same time" (Macneil 1984-5, 935) which Macneil himself suggests.

The denial of this shift from the extant individualism of discrete exchange to an individuality produced by ideal exchange produces the confusion we have seen in Macneil's theory of contract, for the reworking of individualism into socially conscious individuality is necessarily only partial in a purportedly "half-Hobbesian" (Macneil 1987a, 42; 1988b, 6) theory which retains certain characteristics of individualism to produce an existential contradiction. As we have seen Macneil say, "[t]here is a fundamental intellectual flaw in using a model based on man-outside-society to analyse the behaviour of man-in-society" (Macneil 1982, 961). The individualism of the assumptions of neo-classical economics is not reconcilable with relations; it is an individualism which, as we have seen Macneil repeatedly state throughout his work, denies relations. If individuality is (as it has) to be brought into a relational account, it cannot be as this individualism, for there cannot be a "half-Hobbesian" account.

The point emerges when one considers a specific example of encouraging discrete contracting as an economic and legal policy. For example, one can agree, as I do, with Coase's belief (Coase 1994, 62-3) that general planning structures have been extended too far and

conceive of spheres of allocation which could more efficiently be handled by a market of private (if regulated) producers selling to consumers - in essence, allowing the case for the privatisation of some of the formerly nationalised utilities. However, on a relational view, to base policy on this belief is not a question of freeing the innate efficiency of a deregulated and therefore assumedly optimal market. It requires rather the improvement of the social structures of consumer education and protection, of product availability and comparability, and corporate accountability. This will facilitate the necessary micro-level transactions by making choice and consumer sovereignty real rather than, as we have seen him memorably put it, “a very poor joke.” Such success and failure as privatisation has encountered very much turn on whether the necessary relations (and the institutions which embody them) have or have not been established; as in the UK they arguably have over the competitive selling of telephone services but as they manifestly have not over the remuneration of the senior management of the privatised utility companies. This lesson has truly been learned the hard way in the former communist countries, which have recklessly smashed their command economies in pursuit of capitalist reconstruction which has been conceived merely negatively as a process of deregulation. As a consequence of their scant regard for the positive development of the normative institutions necessary for a welfare enhancing market, there has been a disastrous growth in gangsterism to the point where it dominates the now decentralised economies of these countries.

The conception of consumer sovereignty outlined above is not really akin to the perception of discreteness in classical law and neo-classical economics. Although it is discussing the micro-economic allocations they take as paradigmatic, it understands those allocations in an entirely different way. The understanding is that even these allocations are relationally constituted, and this is specifically what is denied in the legal and economic analysis which

works with the discrete exchange as a fundamental unit of analysis. When Macneil speaks of micro-allocation through the operation of a discrete norm within the range of common contract norms, he is not talking of a discrete transaction as viewed by neo-classicism. This view entirely denies relations. In Macneil's terms it ignores the common contract norms, and indeed, unless we stretch the sense of "normative" a great deal, its attitude to discrete exchanges is not normative at all. It is a view based on pure individual utility maximisation. The presentiated view, as Macneil says, cannot ever actually presentiate, but those holding it believe that it does, and it is this mistake that Macneil has intended his entire work on relational contracts to correct. That Macneil has had to allow that that view is accurate for some phenomena along the contractual spectrum has diluted the most important thrust of his work.

The fundamental reason this dilution has occurred is one to which Macneil himself alluded when making some perceptive remarks on the philosophy of science in one of his retrospective papers (1985a, 542). There he correctly insisted that no theory can embrace two mutually exclusive approaches, and that any theory which appears to do so really calls for its own replacement by a more adequate one. Building on these remarks, we can see that this is because the two approaches call for a third which can specify the conditions under which either of the first two come into play. When this is developed, the first two are shown to be reconcilable and their antagonistic features rejected as errors, leaving the third, now all-embracing, theory (cf. Lakatos 1980, ch. 1).

The curious feature of Macneil's work has been that he has, in the above terms, at different times been committed to one of the two mutually exclusive approaches *and* the third reconciling approach. When counterposing relational to truly discrete contracts as ends of the spectrum of contracts, he has put forward the relational (as opposed to the classical) law as one of two mutually exclusive approaches. When stressing the common contract norms, and the

relational constitution of relational (in the sense of complex or intertwined) *and* discrete contracts, he has put forward the third approach. In his own essays reflecting on his work, he undoubtedly has attempted to sort this out. How far he can be successful whilst he remains committed to the schizophrenic positions of the relational theory of exchange must be open to doubt, for schizophrenia requires incoherence, not the removal of incoherence.

All this is of little account, however. In the positions he has clearly established, Macneil has taken the law of contract to a simply qualitatively different level of social theoretical profundity than can be found in the bulk of the scholarship. The principal task facing contract scholarship now is to come to terms with what he has done.

# Bibliography

## Complete Bibliography of the Writing of Ian Macneil

Whilst this bibliography was in press, a third edition of Macneil's Second Casebook has appeared: I.R Macneil and P.J. Gudel (2001) *Contracts: Exchange Transactions and Relations.* 3rd edn., New York (USA), Foundation Press.


Alexander, L. ed. (1991) *Contract Law (International Library of Essays in Law and Legal Theory),* vol.1, New York (USA): New York University Press

Bouckaert, B. and De Geest, G., eds. (2000) Encyclopaedia of Law and Economics, vol.1, Aldershot(U.K.), Edward Elgar and Ghent (Netherlands): University of Ghent Press

Burrows, P. and Veljanovski, C.J., eds. (1991) *The Economic Approach to Law,* London (U.K.): Butterworths

Macneil, I.R. (1960a) "Review of H. Shepherd and B.D. Sher, *Law in Society: An Introduction to Freedom of Contract*" 46 *Cornell Law Quarterly* 176-9

(1960b) "Settlement of Personal Injury Claims of Minors: A Proposal" 3 (October) *New Hampshire Bar Journal* 10-7

(1962) "Power of Contract and Agreed Remedies" 47 *Cornell Law Quarterly* 495-528

(1963) "Exercise in Contract Damages: *City of Memphis v. Ford Motor Company*" 4 *Boston College Industrial and Commercial Law Review* 331

(1964) "Time of Acceptance: Too Many Problems for a Single Rule" 112 *University of Pennsylvania Law Review* 947-79 (revised in Macneil 1968q, 1395-433)

(1965) "The Master of Arts in Law" 17 *Journal of Legal Education* 423-31

(1966a) *Bankruptcy Law in East Africa*, Nairobi (Kenya): Legal Publications

(1966b) “The Tanzania Hire-Purchase Act 1966” 2 *East African Law Journal* 84-104

(1966c) “You and the Hire-Purchase Act 1966” no 11 *The Nationalist* (Dar Es Salaam)14-5

(1967) “Rseach in East African Law” 3 *East African Law Journal* 47-78

(1968a) “Academic Safari in East Africa” 19 (3) *Harvard Law School Bulletin* 12

(1968b) “Acceptance by Silence”, in Schlesinger, ed. (1968, 1073-111)

(1968c) “Acceptance or Acknowledgment of Receipt of Offer”, in Schlesinger, ed. (1968, 1049-55)

(1968d) “Communication of the Offer”, in Schlesinger, ed. (1968, 683-90)

(1968e) Contracts: Instruments for Social Co-operation—E Africa, South Hackensack (USA): Fred B. Rothman

(1968f) “Definiteness of Terms”, in Schlesinger, ed. (1968, 433-64)

(1968h) “Is Communication of Acceptance Necessary”, in Schlesinger, ed. (1968, 1301-7)

(1968i) “Late Acceptance”, in Schlesinger, ed (1968, 1549-55)

(1968j) “Means of Declaring and Communicating Acceptance”, in Schlesinger, ed. (1968, 1349-58)

(1968k) “Offer or Invitation to Deal?” Schlesinger, ed. (1968, 327-42)

(1968l) “Offers to the Public”, in Schlesinger, ed. (1968. 647-53)

(1968m) “Rejection and Return Offers", in Schlesinger, ed. (1968, 1005-12)

(1968n) “Revocable and Irrevocable Offers”, in Schlesinger, ed. (1968, 747-63)

(1968o) “Sale at Auction”, in Schlesinger, ed. (1968, 391-402)

(1968p) “Time Limit for Acceptance”, in Schlesinger, ed. (1968, 1497-506)

(1968q) “When Acceptance Becomes Effective”, in Schlesinger, ed. (1968, 1393-433) (includes revised version of Macneil 1964)

(1969a) “Contracts, Bankruptcy and Insurance: Teaching in Tanzania” 10 (1) *Foreign Exchange Bulletin* 3

(1969b) “Whither Contracts?” 21 *Journal of Legal Education* 403-18 (see also 618)

(1970) “Law and Human Values in the Countdown to Environmental Disaster” 22 (4) *Cornell Law Forum* 2

(197la) *Contracts: Exchange Transactions and Relations*, Mineola (USA): Foundation Press (2nd. edn. Macneil (1978b))

(197lb) Review of A. Sawyerr and J. Hiller, “The Doctrine of Precedent in the Court of Appeals for East Africa” no.5 *African Studies* 99 (simultaneously published as Macneil (197lc))

(197lc) Review of A. Sawyerr and J. Hiller. “The Doctrine of Precedent in the Court of Appeals for East Africa” 4 *East Africa Law Review* 289 (simultaneously published as Macneil (197lb))

(1974a) “The Many Futures of Contract” 47 *Southern California Law Review* 691-896

(1974b) “Restatement (Second) of Contracts and Presentiation” 60 *Virginia Law Review* 589-704

(1975a) “Contracts and the Big, Wide World” 12(Spring) Cornell Law Forum

(1975b) “A Primer of Contract Planning” 48 Southern California Law Review 627-704

(1975c) *Report of Director of Priorities Study*, mimeo, Cornell Universiry

(1976) “The Wheel and the Hearth” 12 (Spring) *Cornell Law Forum* (reprinted as Macneil (1977))

(1977) “The Wheel and the Hearth” 29 *Journal of Legal Education* 1-5 (reprint of Macneil(1976))

(1978a) “Contracts: Adjustment of Longterm Economic Relations Under Classical,

Neoclassical and Relational Contract Law" 72 *Northwestern University Law Review* 854-905

(1978b) *Contracts: Exchange Transactions and Relations*, 2nd. edn., Mineola (USA): Foundation Press (2nd. edn. of Macneil (197la))

(1980a) "Envy Not La Salle Street Nor Main Street" no 67 (Fall) *The Reporter* (Northwestern University School of Law) 11

(1980b) "Essays on the Nature of Contract" 10 *South Carolina Central Law Journal* 159-200

(1980c) *The New Social Contract: An Inquiry into Modern Contractual Relations*, New Haven (USA): Yale University Press

(1980d) "Power, Contract and the Economic Model" 14 *Journal of Economic Issues* 909-23 (revised in Macneil (1981b))

(1981a) "Economic Analysis of Contractual Relations", in Burrows and Veljanovski, eds. (1981, 61-92) (revised in Macneil (1981b))

(1981b) "Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a '"Rich Classificatory Apparatus"" 75 *Northwestern University Law Review* 1018-63 (this paper is formed by the revision of Macneil (1980b) and Macnei[ (1981a))

(1981c) "Lon Fuller: Nexusist" 26 *American Journal of Jurisprudence* 219-27

(1982) "Efficient Breach: Circles in the Sky" 68 *Virginia Law Review* 947-969 (reprinted as Macneil (199la))

(1983a) "The Future of the Supreme Court of Canada as the Final Appellate Tribunal in Private Law Litigation: A View from the South" 7 *Canadian Business Law Journal* 426-41

(1983b) “Values in Contract: Internal and External” 78 *Northwestern University Law Review* 340-418 (reprinted as Macneil (1991b))

(1984) “Bureaucracy and Contracts of Adhesion” 22 *Osgoode Hall Law Journal* 5-28

(1984-5) “Bureaucracy, Liberalism and Community--American Style” 79 Northwestern University Law Review 900-48

(1985a) “Reflections on Relational Contract” 141 *Journal of Institutional and Theoretical Economics* 541-6

[1985b] “Relational Contract: What We Do and Do Not Know” *Wisconsin Law Review* 483-525

(1986) “Exchange Revisited: Individual Utility and Social Solidarity” 96 *Ethics* 567-93

(1987a) “Barriers to the Idea of Relational Contracts”, in Nicklish, ed. (1987, 31 -46)

(1987b) “Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos” 143 *Journal of Institutional and Theoretical Economics* 272-90

(1987c) “Review of H. Collins, *Law of Contract*” 14 *Journal of Law and Society* 373-80

(1988a) “A Brief Comment on Farnsworth’s ‘“Suggestion for the Future”” 38 *Journal of Legal Education* 301-3

(1988b) “Contract Remedies: A Need for a Better Efficiency Analysis” 144 *Journal of Institutional and Theoretical Economics* 6-30

(1988c) “Contractland Invaded Again: A Comment on Doctrinal Writing and Shell's Ethical Standards” 82 *Northwestern University Law Review* 1195-7

(1990) “Political Exchange as Relational Contract”, in Marin, ed. (1990, 151-72)

(199la) “Efficient Breach: Circles in the Sky", in Alexander, ed. (1991, 329-51) (reprint of Macneil (1982))

(199lb) “Values in Contract: Internal and External”, in Alexander, ed. (1991, 211-89)

(reprint of Macneil (1983b)

(1992)*American Arbitration Law: Reformulation—Nationalisation—Internationalisation*, Oxford: Oxford University Press

(2000a) “Contracting Worlds and Essential Contract Theory” 9 *Social and Legal Studies* 431-8

(2000b) “Other Sociological Approaches and Law and Economics”, in Bouckaert and De Geest, eds. (2000, 674-718)

(2000c) “Relational Contract Theory: Challenges and Queries” (2000) 94 *Northwestern University Law Review* 877-907

Macneil, I. R. and Schlesinger, R. B. (1968) “Some Comments on the Legal System of the United States, with Particular Reference to the Law of Contracts”, in Schlesinger, ed. (1968, 193-209)

Macneil, I. R., Speidel, R.E. and Stipanowich, T. J. (1994) *Federal Arbitration Law: Agreements, Awards and Remedies Under the Federal Arbitration Act*, 5 vols., Boston: Little, Brown

Marin, B., ed. (1990) *Generalised Political Exchange: Antagonistic Co-operation and Integrated Policy Circuits*, Boulder (USA): Westview Press and Frankfurt am Main (Germany): Campus Verlag

Morison, R.S. and Macneil, I. R. (1970) *Students and Decision Making*, Washington DC (USA): Public Affairs Press

Nicklisch, F., ed. (1987) *The Complex Long-term Contract*, Heidelberg (Germany): C.F. Müller Juristischer Verlag

Schlesinger, R.B., ed. (1968) *Formation of Contracts: A Study of the Common Core of Legal*

*Systems*, 2 vols., Dobbs Ferry (USA): Oceana Publications and London: Stevens and Sons

Other works referred to in the text

In this bibliography, I have sometimes referred to versions of works other than those originally used by Macneil in order to avoid making multiple references to the same work and/or to give references to more recent editions. When I have been aware of a later edition of a work cited by Macneil but have been unable to check it against the version he used, I have made a note to this effect.


Adams, J. and Brownsword, R. (1995) Key Issues in Contract, London (U.K.): Butterworths

(2000) *Understanding Contract Law*, 3rd. edn., London (U.K.): Sweet and Maxwell

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

Alchian. A. A. and Demsetz, H. (1972) "Production, Information Costs and Economic Organization" 62 *American Economic Review* 777

Allen, P. (1995) "Contracts in the National Health Service Internal Market" 58 Modern Law Review 321

American Law Institute (1932) *Restatement of the Law of Contracts*, St. Paul (USA): American Law Institute Publishing

Anon. (1950) "Business Practices and the Flexibility of Long-Term Contracts" 36 *Virginia Law Review* 627

Arrighetti, A. et al. (1997) "Contract Law, Social Norms and Inter-Firm Cooperation" 21 *Cambridge Journal of Economics* 171

Arrow, K. J. (1983) *Collected Papers*, vol. 2, Cambridge (USA): Belknap Press

Arrow, K. J. and Debreu G. (1983) "Existence of an Equilibrium for a Competitive Economy", in Arrow (1983, 58)

Atiyah, P. S. (1979) *The Rise and Fall of Freedom of Contract*, Oxford (U.K.): Clarendon University Press

(1990) *Essays on Contract*, rev. edn., Oxford (U.K.), Oxford University Press

Beatson, J. (1998) *Anson's Law of Contract*, 27th. edn., Oxford (U.K.): Oxford University Press

Beatson, J. and Friedmann, D., eds. (1995) *Good Faith and Fault in Contract Law*, Oxford (U.K.): Clarendon Press

Becker, C. (1983) "Property in the Workplace: Labour, Capital and Crime in the Eighteenth Century British Woollen and Worsted Industry" 69 *Virginia Law Review* 1487

Becker, H. S. (1956) *Man in Reciprocity*, New York (USA), Praeger

Belcher, A. (2000) "A Feminist Perspective on Contract Theories From Law and Economics" 8 *Feminist Legal Studies* 29

Bell, J. (1989) "The Effect of Changes in Circumstances on Long-term Contracts", in Harris and Tallon, eds. (1989, 195)

Bennett, C. and Ferlie, E (1996) "Contracting in Theory and in Practice: Some Evidence From the NHS" 74 *Public Administration* 49

Birmingham, R. (1970) "Breach of Contract, Damage Measures, and Economic Efficiency" 24 *Rutgers Law Review* 273

Bishop, W. (1986) "The Choice of Remedy for Breach of Contract" 14 *Journal of Legal Studies* 14

Black, F. (1989) "How to Use the Holes in Black-Scholes" (1989) 4 *Journal of Applied*

*Corporate Finance* 67

Black, F. and M. Scholes (1973) "The Pricing of Options and Corporate Liabilities" 81 *Journal of Political Economy* 637

Blau, P. M. (1964) *Exchange and Power in Social Life*, New York (USA): John Wiley

Broom, L. *et al*, (1981) *Sociology*, 7th. edn., New York (USA): Harper and Row

Brown, P. A. and Feinman, J. M. (1991) "Economic Loss, Commercial Practices and Legal Process: *Spring Motors Distributors Inc v. Ford Motor Co*" 22 *Rutgers Law Journal* 301

Brownsword, R. (1996) "From Co-operative Contracting to a Contract of Co-operation", in Campbell and Vincent-Jones, eds. (1996, 14)

Brownsword, R. (2000) *Contract Law: Themes for the Twenty-First Century*, London (U.K.): Butterworths

Byers, M. (2000) "Woken Up in Seattle" 22(1) *London Review of Books* 16

Calabresi, G. and Melamed. D. (1972) "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" 85 *Harvard Law Review* 1089

Calamari J. D. and Perillo, J. M. (1967) "A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation" 42 *Indiana Law Journal* 333

*The Law of Contracts*, St. Paul (USA): West Publishing (now 4th. ed., 1998)

Campbell, D. (1987) "Review of H. Collins, *The Law of Contract*" 21 *The Law Teacher* 2 12

(1990) "The Social Theory of Relational Contract: Macneil as the Modern Proudhon" 18 *International Journal of the Sociology of Law* 75

(1992) "The Undeath of Contract: A Study in the Degeneration of a Research Programme" 22 *The Hong Kong Law Journal* 20

(1996a) *The Failure of Marxism*, Aldershot (UK): Dartmouth Publishing

(1996b) “The Relational Constitution of the Discrete Contract”, in Campbell and Vincent-Jones, eds. (1996, 40)

(1997a) “The Relational Constitution of Contract and the Limit of ‘“Economics:”’ Kenneth Arrow on the Social Background of Markets,” in Deakin and Michie, eds. (1997, 307)

(1997b) “Socio-Legal Analysis of Contract”, in Thomas, ed. (1997, 239)

(2000) “The Limits of Concept Formation in Legal Science” 9 *Social and Legal Studies* 439

Campbell, D. and Clay, S. (1992) *Long-Term Contracting: A Bibliography and Review of the Literature* Oxford (U.K.): Centre for Socio-Legal Studies

Campbell, D. and Harris, D. (1993) “Flexibility in Long-term Contractual Relationships: The Role of Co-operation” 20 *Journal of Law and Society* 166

Campbell, D. and Vincent-Jones, P., eds. (1996) *Contract and Economic Organisation: Socio-Legal Initiatives*, Aldershot (U.K.): Dartmouth Publishing

Carlton, D. and D. Fischel (1983) “The Regulation of Insider Trading” 35 *Stanford Law Review* 857

Chandler, A. D. (1962) *Strategy and Structure*, Cambridge (USA), MIT Press (1976) *The Visible Hand*, Cambridge (USA), The Belknap Press

(1990) *Scale and Scope*, Cambridge (USA), The Belknap Press

Coase, R. H. (1986) *The Firm, the Market and the Law*, Chicago (USA): University of Chicago Press

Coase, R. H. (1994) *Essays on Economics and Economists*, Chicago (USA): University of Chicago Press

Cohen, D. (1982) “The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry” 32 *University of Totonto Law Journal* 31

Collins, H. (1996) "Competing Norms of Contractual Behaviour", in Campbell and Vincent-Jones, eds. (1996, 67)

(1997) *The Law of Contract*, 3rd. edn., London (U.K.): Butterworths

(1999) *Regulating Contracts*, Oxford (U.K.): Oxford University Press

Cook, K. and Emerson, R. (1978) "Power, Equity, and Commitment in Exchange Networks" 43 *American Sociological Review* 721

Cook, K. *et al*. (1983) "The Distribution of Power in Exchange Networks" 89 *American Journal of Sociology* 275

Cooter, R. and Eisenberg, M. A. (1985) "Damages for Breach of Contract" 38 *California Law Review* 1432

Cooter, R. and Rappoport, P. (1984) "Were the Ordinalists Wrong about Welfare Economics?" 22 *Journal of Economic Literature* 507

Covington, R. N. (1978) "Arbitrators and the Board: A Revised Relationship" 57 *North Carolina Law Review* 91

Cowan, D., ed. (1998) *Housing: Participation and Exclusion*, Aldershot (U.K.): Dartmouth Publishing

Daintith, T. (1986) "The Design and Performance of Long-Term Contracts", in Daintith and Teubner, eds. (1986, 164)

(1987) "Contract Design and Practice in the Natural Resources Sector", in Owen Saunders, ed. (1987, 189)

Daintith, T. and Teubner, G., eds. (1986) *Contract and Organisation*, Berlin (Germany) : de Gruyter

Dalton, C (1985) "An Essay m the Deconstruction of Contract Doctrine" 94 *Yale Law*

*Journal* 997

Deakin, N. and Walsh, K. (1996) "The Enabling State: The Role of Markets and Contracts" 74 *Public Administration* 33

Deakin, S. and Wilkinson, F. (1996) "Contracts, Co-operation and Trust: The Role of the Institutional Framework", in Campbell and Vincent-Jones, eds. (1996, 95)

Deakin, S. and Michie, J., eds., *Contracts, Co-operation, and Competition: Studies in Economics, Management and Law*. Oxford (U.K.): Oxford University Press

Deakin, S. *et al*., (1997) "Contract Law, Trust Relations and Incentives for Cooperation: A Comparative Study", in Deakin and Michie, eds. (1997, 105)

Dickerson, F. (1965) *Fundamentals of Legal Drafting*, Boston (USA): Little, Brown

Domke, M. (1968) *The Law and Practice of Commercial Arbitration*, Mundelein (USA): Callaghan (now rev. edn., Wilmette (USA): Callagan, 1984)

Durkheim, E. (1984) *The Division of Labour in Society*, London (U.K.): Macmillan

Eisenberg, M.A. (1976) "Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking" 89 *Harvard Law Review* 637

(1979) "Donative Promises" 47 *University of Chicago Law Review* 33

(1982a) "The Bargain Principle and its Limits" 95 *Harvard Law Review* 741

(1982b) "The Principles of Consideration" 67 *Cornell Law Review* 640

(1984) "The Responsive Model of Contract Law" 36 *Stanford Law Review* 1107

(1995) "Relational Contracts", in Beatson and Friedmann, eds. (1995, 291)

(2000) "Why There Is No Law of Relational Contracts" 94 *Northwestern University Law Review* 94

Elliott, M. (1981) "Review of I. R. Macneil, *The New Social Contract*" 44 *Modern Law Review* 345

Farnsworth, E. A. (1968) “Disputes Over Omission in Contracts” 68 *Columbia Law Rev.* 860

(1970) “Legal Remedies for Breach of Contract” 70 *Columbia Law Review* 1145

(1987) “A Fable and a Quiz on Contracts” 37*Journal of Legal Education* 206

Feinman, J. M. (1983) “Critical Approaches to Contract Law” 30 U.C.L.A. *Law Review* 829

(1987) “Contract After the Fall” 39 *Stanford Law Review* 1537

(1990) “The Significance of Contract Theory” 58 *University of Cincinnati Law Review* 1283

(1995) *Economic Negligence*, Boston (USA): Little Brown and Co

(1996) “Attorney Liability to Non-clients” 31 *Tort and Insurance Law Journal* 735

(2000) “Relational Contract Theory in Context”, 94 *Northwestern University Law Review* 737

Ferlie, E. (1994) “The Creation and Evolution of Quasi-markets in the Public Sector: Early Evidence from the National Health Service” 22 *Policy and Politics* 105

Flynn, R. and Williams, G., eds. (1997) *Contracting for Health: Quasi-Markets and the National Health Service*, Oxford (U.K.): Oxford University Press

Foster, K. (1982) “Review of I.R. Macneil, *The New Social Contract*” 9 *British Journal of Law and Society* 144

Fried, C. (1981) *Contract as Promise*, Cambridge (USA): Harvard University Press

Fuller, L. L. and Braucher, R. (1964) *Basic Contract Law*, rev. edn., St. Paul (USA): West Publishing Co. (now Fuller and Eisenberg, *Basic Contract Law*, 7th. edn.)'

Fuller, L. L. and Eisenberg, M.A. (1972) *Basic Contract Law*, 3rd. edn., St. Paul (USA): West Publishing Co. (now 7th. edn., 2001)

Galbraith, J. (1985) *The New Industrial State*, 4th. edn., Boston (USA): Houghton Mifflin

Gilmore, G. (1995) *The Death of Contract*, 2nd. edn., Columbus (USA): Ohio State University Press

Glendon. M. (1981) T*he New Family and the New Property*, Boston (USA): Butterworth Publishers Inc

Goetz, C. J. and Scott R. E. (1977) "Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach" 77 *Columbia Law Review* 554

(1981) "Principles of Relational Contracts" 67 *Virginia Law Review* 1089

(1983) "The Mitigation Principle: Toward a General Theory of Contractual Obligation" 69 *Virginia Law Review* 967

Goldberg, V. P. (1976) "Toward an Expanded Economic Theory of Contract" 10 *Journal of Economic Issues* 45

(1980) "Relational Exchange: Economics and Complex Contracts" 23 *American Behavioural Scientist* 337

Gordon, R. (1985) "Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law' *Wisconsin Law Review* 565

Gossen, H. H. (1983) *The Laws of Human Relations*, Cambridge (USA): MIT Press

Gottlieb, G. (1983) "Relationism: Legal Theory for a Relational Society" 50 *University of Chicago Law Review* 567

Gouldner, A. W. (1975) *For Sociology*, Harmondsworth (UK): Penguin

Gurvitch, G (1947) *Sociology of Law*, London (U.K.): Kegan Paul, Trench, Trubner

Hale, R., (1943) "Bargaining, Duress and Economic Liberty' 43 *Columbia Law Review* 603

Harries, A. and Vincent-Jones, P. (2001) "Housing Management in Three Metropolitan Local Authorities: The Impact of CCT and Implications for Best Value" 27 *Local Government*

*Studies*, forthcoming

Harris, D. and Tallon, D., eds. (1989) *Contract Law Today: Anglo-French Comparisons* Oxford (U.K.): Clarendon Press

Havighurst, H. (1961) *The Nature of Private Contract*, Evanston (USA): Northwestem University Press

Hawkes, K. (1977) "Co-operation in Binumarien: Evidence for Sahlin's Model" 12 *Man* 459

Hayek, F. A. (1976) *Law, Legislation and Liberty*, Chicago (USA): University of Chicago Press

Healey, C (1984) "Trade and Sociability: Balance Reciprocity as Generosity in the New Guinea Highlands" 11 *American Ethnologist* 42

Hegel, G. W. F (1967) *Philosophy of Right*, Oxford (U.K. ) Orford University Press

Hillman, R. A. (1988) "The Crisis in Modern Contract Theory" 67 *Texas Law Review* 103

Hirsch, F. (1978) *Social Limits to Growth*, Cambridge (USA): Harvard University Press

Hirschman, A. O. (1970) *Exit, Voice and Loyalty*, Cambridge (USA): Harvard University Press, 1970

Hobbes, T. (1968) *Leviathan*, Harmondsworth (U.K.): Penguin Books

Holmstrom B. (1982) "Moral Hazard in Teams" 13 *Bell Journal of Economics* 324

Homans, G. (1958) "Social Behaviour as Exchange" 65 *American Journal of Sociology* 597

Hondegem. A., ed. (1998) *Ethics and Accountability in a Context of Governance and New Public Management*, Amsterdam (Netherlands): IOS Press

Hughes, D. *et al*. (1996) "Contracts in the NHS? Searching for a Model" in Campbell and Vincent-Jones, eds. (1996, 155)

Hunt A. (1981) "Drchotomy and Contradictron in the Sociology of Law", 8 *British Journal of*

*Law and Society* 44

Keynes, J. M. (1973) *General Theory of Employment, Interest and Money*, London (U.K.): Macmillan

Kingdom, E. (2000) "Cohabitation Contracts and the Democratisation of Personal Relations" 8 *Feminist Legal Studies* 5

Kohler, J. (1914) *Philosophy of Law*, Boston (USA): The Boston Book Company

Kronman, A. (1978) "Mistake Disclosure, Information and the Law of Contracts" 7*Journal of Legal Studies* 1

Lakatos, I. (1980) *Philosophical Papers*, vol. 1, Cambridge (U.K.): Cambridge University Press

Lewis, D. (1969) *Convention: A Philosophical Study*, Cambridge, Harvard University Press

Lindenberg S. and De Vos, M. (1985) "The Limits of Solidarity: Relational Contracting in Perspective and Some Criticism of Traditional Sociology" 141 *Journal of lnstitutional and Theoretical Economics* 558

Linzer, P. (1981) "On the Amorality of Contract Remedies: Efficiency, Equity and the Second Restatement" 81 *Columbia Law Review* 111

Llewellyn, K. (1931) "What Price Contract? --An Essay m Perspective" 40 *Yale Law Journal* 704

Lowry, S.T. (1976) "Bargain and Contract Theory in Law and Economics" 10 *Journal of Economic Issues* 1

Lyons, B. and Mehta, J. (1997) "Private Sector Business Contracts: The Text Between the Lines", in Deakin and Michie, eds. (1997, 43)

Macaulay, S. (1963a) "Non-contractual Relations in Business: A Preliminary Study" 28 *American Sociological Review* 55

(1963b) “The Use and Non-use of Contracts in The Manufacturing Industry” 9 *The Practical Lawyer* 13

(2000) “Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein” 94 *Northwestern University Law Review* 775

Macaulay, S. *et al*. (1995) *Contracts: Law in Action*, Charlottesville (USA). The Michie Company

Mandeville, B. (1970) *The Fable of the Bees*, Harmondsworth (U.K.): Penguin Books

McHale, J. et al. (1997) “Conceptualizing Contractual Disputes in the National Health Service Internal Market” in Deakin and Michie, eds. (1997, 195)

McKendrick, E. (1995) “The Regulation of Long-term Contracts in English Law”, in Beatson and Friedmann, eds.(1995, 305)

Mellinkoff, D. (1963) *The Language of the Law*, Boston (USA): Little Brown

Mertz, E. (2000) “An Afterword: Tapping the Promise of Relational Contract Theory -- ”Real”’ Legal Language and New Legal Realism” 94 *Northwestern University Law Review* 909

Moore, D. R. and Tomlinson, J. (1969) “The Use of Simulated Negotiation to Teach Substantive Law” 21 *Journal of Legal Education* 579

Mulder, J., and Volz, M. (1967) *The Drafting of Partnership Agreements*, 5th. edn., Philadelphia (USA): Committee on Continuing Legal Education of the American Law Institute and the American Bar Association

Murray, J.E. (1974) *Murray on Contracts*, 2nd. edn., Indianapolis, Bobbs-Merrill (now 4th. edn., New York (USA): Lexis Publishers, 2001)

North, D. C. (1990) *Institutions, Institutional Change and Economic Performance*,

Cambridge (U.K.): Cambridge University Press

Nozick, R. (1974) *Anarchy, State and Utopia*, New York (USA): Basic Books

Owen Saunders. J., ed. (1987) *Trading Canada's Natural Resources*, Toronto (Canada): Caswell Legal Publications

Pareto, V. (1971) *Manual of Political Economy*, New York (USA): Augustus M Kelley

Parsons, T. (1968) *The Structure of Social Action*, rev. edn.. Glencoe (USA): Free Press

Parsons, T. and Smelser, N. (1956) *Economy and Society: A Study in the Integration of Economic and Social Theory*, Glencoe (USA): Free Press

Pashukanis, E. B. (1978) *The General Theory of Law and Marxism*, London (U.K.): Ink Links

Passmore, J. (1970) *The Perfectibility of Man*, London (U.K.): Duckworth

Paulin, M. *et al*. (1997) "Relational Contract Norms and the Effectiveness of Commercial Banking Relationships" 8 *International Journal of Service Industry Management* 435

Peterson, J (1978) "Hunter-Gatherer/Farmer Exchange"80 *Amencan Anthropologist* 335

Polanyi, K (1944) *The Great Transformation*, New York, Farrar and Rinehart

Posner, E. A. (2000) "The Theory of Contract Law Under Conditions of Radical Judicial Error" 94 *Northwestern University Law Review* 749

Posner, R.A. (1993) "The New Institutional Economics Meets Law and Economics" 149 *Journal of Institutional and Theoretical Economics* 73

(1998) *Economic Analysis of Law*, 5th. edn., Boston (USA): Aspen

Prattis, I. (1982) "Synthesis, or a New Problematic in Economic Anthropology" 11 *Theory and Society* 205

Rehbinder, M. (1971) "Status, Contract and the Welfare State" 23 *Stanford Law Review* 941

Ritchie, J. (1964) "Legal Education in the United States" 21 *Washington and Lee Law Review*

177

Rogerson, W. (1984) "Efficient Reliance and Damage Measures for Breach of a Contract" *Rand Journal of Economics* 39

Rubin, J.P. (1995) "Take the Money and Stay: Industrial Location Incentives and Relational Contracting" 70 *New York University Law Review* 1277

Sahlins, M. (1974) *Stone Age Economics*, London, Tavistock

Sako, M.(1992) *Prices, Quality and Trust: Inter-Firm Relations in Britain and Japan* (Cambridge (U.K.): Cambridge University Press

Schwartz, A. (1992) "Relational Analysis in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies" 21 *Journal of Legal Studies* 271

Scott, R. E. (1987) "Conflict and Co-operation in Long-Term Contracts" 75 *California Law Review* 2005

(1990) "A Relational Theory of Default Rules for Commercial Contracts" 19 *Journal of Legal Studies* 577

(2000) "The Case for Formalism in Relational Contract" 94 *Northwestern University Law Review* 847

Schrag, P.G. (1969) "Bleak House 1968: A Report on Consumer Test Litigation" 44 *N.Y.U. Law Review* 115

Selznick, P. (1969) *Law Society and Industrial Justice*, New York (USA): Russell Sage Foundation

Shulman, H. (1955) "Reason, Contract and the Law in Labor Relations" 68 *Harvard Law Review* 999

Simon, H.A. (1997) *Administrative Behaviour*, 4th. edn., New York (USA): Free Press

Smith, A. (1976) *The Wealth of Nations*, Oxford (U.K.): Clarendon Press

Smith, J. (1993) *Law of Contract*, 2nd. edn., London (U.K.): Sweet and Maxwell

Speidel, R.E. (2000) "The Characteristics and Challenges of Relational Contracts" 94 *Northwestern Law Review* 823

Sturges, W. A. and Reckson, J. E. (1962) "Common-Law and Statutory Arbitration: Problems Arising from Their Coexistence" 46 *Minnesota Law Review* 819

Teubner, G. (2000) "Contracting Worlds: The Many Autonomies of Private Law" 9 *Social and Legal Studies* 399

Thomas, W. I. and Znaniecki, F. (1958) *The Polish Peasant in Europe and America, The Polish Peasant in Europe and America*, New York (USA): Dover Publications

Thomas, P. A., ed. (1997) *Socio-Legal Studies*, Aldershot (U.K.): Dartmouth Publishing

Trebilcock, M. (1993) *The Limits of Freedom of Contract*, Cambridge (USA): Harvard University Press

Treitel, G. H. (1999) *The Law of Contract*, 10th edn., London (U.K. ) Sweet and Maxwell

Tushnet, M. (1984) "An Essay on Rights" 62 *Texas Law Review* 1363

Ulen, T. S. (1984) "The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies" 83 *Michigan Law Review* 1363

Ullman-Margalit, E. (1977) *The Emergence of Norms*, Oxford (U.K.): Clarendon Press

Vincent-Jones, P. (1994a) "The Limits of Near-contractual Governance: Local Authority Internal Trading Under CCT" 21 *Journal of Law and Society* 214

(1994b) "The Limits of Contractual Order in Public Sector Transacting" 14 *Legal Studies* 364

(1997) "Hybrid Organisation, Contractual Governance, and Compulsory Competitive Tendering in the Provision of Local Authority Services", in Deakin and Michie, eds. (1997,

143)

(2000) “Contractual Governance: Institutional and Organizational Analysis” 20 *Oxford Journal of Legal Studies* 317

Vincent-Jones, P. and Harries, A. (1996a) “Limits of Contract in Internal CCT Transactions: A Comparative Study of Buildings Cleaning and Refuse Collection in Northern Metropolitan”, in Campbell and Vincent-Jones, eds. (1996, 180)

(1996b) “Conflict and Cooperation in Local Authority Quasi-Markets: The Hybrid Organisation of Internal Contracting Under CCT” 22 *Local Government Studies* 187

Vincent-Jones, P. and Harries, A. (1998) “Tenant Participation in Contracting for Housing' Management Services: A Case Study”, in Cowan, ed. (1998, 41)

Vincent-Jones, P. *et al*. (1998) *Local Authority Contracting for Professional Services: A Comparative Study*, End of Award No R000236416 Full Report for ESRC, available from the British Library (DSC Shelfmark: 3739.0605)

von Mises, L. (1981) *Socialism*, Indianapolis (USA): Liberty Classics

Wachter, M. and Williamson, O. E. (1978) “Obligational Markets and the Mechanics of Inflation” 9 *Bell Journal of Economics* 549

Walker, B. and Davis, H. (1999) “Perspectives on Contractual Relationships and the Move to Best Value in Local Authorities” 25 *Local Government Studies* 16

Walras, L. (1977) *Elements of Pure Economics*, London: Allen and Unwin

Walsh, K. (1995) *Public Services and Market Mechanisms: Competition, Contracting and the New Public Management*, Houndsmills (U.K.): Macmillan

Walsh, K. *et al*. (1996) “Contracts for Public Servrces: A Comparative Perspective”, in Campbell and Vincent-Jones, eds. (1996, 212)

Walsh, K. *et al*. (1997) *Contracting for Change: Contracts in Health, Social Care, and Other Local Government Services*, Oxford (U.K.): Oxford University Press

Weber, M. (1978) *Economy and Society*, Berkeley (USA): University of California Press

Weistart, J.C. (1973) "Requirements and Output Contracts: Quantity Variations under the U.C.C." *Duke Law Journal* 599

Wheeler, S. (1991) *Reservation of Title Clauses*, Oxford (U.K.): Clarendon Press

White, H.C. (1983) "Agency as Control", paper presented at a symposium on *Asymetric Information: The Agency Problem in Modern Business Practice*. Harvard University

Whitford, W.C. (1985) "Ian Macneil's Contribution to Contracts Scholarship' *Wisconsin Law Review* 545

Wightman, J. (1996) *Contract: A Critical Commentary*, London (U.K.): Pluto Press (2000) "Intimate Relationships, Relational Contract Theory, and the Reach of Contract" 9 *Feminist Legal Studies* 93

Williamson, O. E. (1985) *The Economic Institutions of Capitalism*, New York (USA) : Free Press

Williamson, O. E. (1986) *Economic Organisation*, Sussex (U.K.), Harvester Wheatsheaf

Williamson, O. E. (1996) *The Mechanisms of Governance*, Oxford (U.K.): Oxford University Press

Williston, S. (1920) *The Law of Contracts*, New York (USA): Baker, Vooher and Co

Wilson, E. O. (1975) *Sociobiology*, Cambridge (USA): Belknap Press

Wistrich, E. (1998) "Contracting in the Public Services: The Case of Transport in the UK", in Hondegem, ed. (1998, 279)

Wittgenstein, L. (1968) *Philososphical Investigations*, Oxford, Basil Blackwell