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The New Social Contract: An Inquiry into Modern Contractual Relations

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THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS. By *Ian R. Macneil*. New Haven: Yale University Press. 1980. Pp. xiii, 164. $12.95.

Because modern contractual relations are "intimately interconnected with a larger society of great complexity," they often involve an ongoing series of exchanges among several individuals or institutions as well as "extremely complex specializations of labor and product" (p. 20). Rules designed to govern contracts of "short duration, involving limited personal interactions, and . . . easily measured objects of exchange"[1] are not well suited to these contractual relations. In *The New Social Contract*, Professor Ian Macneil sketches a concept of contract that promises freedom from the conceptual limitations of traditional doctrine and applies that concept to modern contractual relations.

Macneil's first chapter explores the nature of contract in an effort to produce a definition more descriptive of modern exchange. In sharp contrast to the *Restatement*'s law-oriented definition,[2] Macneil defines contract broadly as "the relations among parties to the process of projecting exchange into the future" (p. 4). Macneil argues that exchange occurs along a spectrum of transactional and relational behavior.[3] This spectrum covers the entire range of exchange relations — from the most isolated discrete transaction to the most complex ongoing contractual relationship.

At one end of his spectrum, Macneil places "discrete transactions" between two individuals, the principal subject of classical contract law. Discrete transactions are characterized by careful measurement of what is exchanged, specification of time and manner of performance, comprehensive planning regarding the allocation of burdens and benefits, and little expectation of cooperation outside the scope of the exchange itself. At the other end of Macneil's spec-

1. I. MACNEIL, CONTRACTS 12 (2d ed. 1978).

2. RESTATEMENT (SECOND) OF CONTRACTS § 1 (Tent. Draft 1973): "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty."

3. Macneil has previously outlined his contractual spectrum. *See* I. MACNEIL, *supra* note 1, at 12-16.

trum are contractual relations.[4] Relational contracts, such as the UAW's agreement with General Motors, involve continuing exchange and interaction between the parties. The open-ended nature of contractual relations prevents detailed planning and necessitates cooperation and compromise regarding the incidence of contractual burdens and benefits.

After laying out his contractual spectrum, Macneil identifies contract norms that provide underlying principles for specific legal rules. Some norms apply largely to one end of the spectrum; others are common to both discrete transactions and contractual relations. Macneil's discussion of mutuality illustrates that the strength of these norms varies along the spectrum. According to Macneil, the mutuality norm requires "mutual perception of benefit" and "calls not for equality . . . but for some kind of evenness" in the distribution of exchange surplus (p. 44). The law of discrete transactions, which views conflict of interest as the lifeblood of the bargaining process, generally will not alter contractual allocation of exchange surplus.[5] In contractual relations, however, the legal principles traditionally applied to discrete transactions "can prevail only so long as they sufficiently avoid conflict with other normative principles" (p. 86). For this reason, societal pressures generate legal rules that tend to equalize either bargaining power or the final distribution of exchange surplus.

To illustrate this point, Macneil explores the mutuality norm and the concept of power in employment relations law. Before the advent of collective bargaining, employers dominated discrete transactions with individual employees and dictated employment terms. Because the "law has intervened in countless ways to enhance mutuality and to change balances of power" (p. 87), the current picture is radically different.

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4. Macneil further subdivides contractual relations into "primitive" and "modern" categories. He notes that, increasingly, "modern contractual relations are ridden with measurement and specificity," p. 22, but adds that "the modern contractual relation does not become simply a bunch of discrete transactions. . . . [A]ny modern relation also involves a great deal of exchange that cannot be or is not measured." P. 22.

5. One commentator explains:

> The fundamental premise of economic individualism is that people will create and share out among themselves more wealth if the state refuses either to direct them to work or to force them to share. Given human nature and the limited effectiveness of legal intervention, the attempt to guarantee everyone a high level of welfare . . . would require massive state interference in every aspect of human activity. . . . On the other hand, a regime which convincingly demonstrates that it will let people starve . . . before forcing others to help them will create the most powerful of incentives to production and exchange.

Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1742 (1976).

As the collective bargaining example suggests, modern exchange transactions are overwhelmingly relational. Because neoclassical contract law lacks any "overriding relational foundation" (p. 72), Macneil argues that it cannot solve modern commercial problems. He points, for example, to the Uniform Commercial Code's infamous "Battle-of-the-Forms" provision.[6] U.C.C. Section 2-207 attempts to conform the common-law mirror-image rule to the commercial reality that merchants conduct business even when the terms offer and acceptance do not match. Such transactions occur because general understandings may satisfy people who regularly do business with each other. Although relational concepts could help resolve the "Battle-of-the-Forms" situation, the UCC instead modifies discrete transaction law without "building relational foundations" (p. 74).

The Supreme Court applied relational principles more successfully in a series of decisions limiting judicial review of labor arbitration awards.[7] "The primacy of the arbitrator within a consensually limited jurisdiction" (p. 76) provided a relational base for these decisions. This experience indicates that relational concepts can overcome the discrete system's conceptual limitations.

Macneil's final chapter addresses other problems of modern relational contract law in addition to mutuality and bargaining power. He discusses contractual solidarity, the impact of agents without principals, and the future of "Technical Man." In several places the discussion is obscure and largely speculative. For example, in the book's closing pages, Macneil predicts that society will eventually trade certainty and complexity of planning for a less centralized, "small is beautiful" economy. Macneil fails to relate this conclusion to his analytic framework, and he therefore leaves the reader somewhat unsatisfied.

Despite his speculative conclusions, Macneil's contractual spectrum is comprehensive and analytically useful. However, his taxonomic style makes for dense reading. A chart or table outlining the differences between discrete transactions and contractual relations would have been particularly helpful.[8] Nevertheless, Macneil successfully presents a paradigm that facilitates meaningful analysis of

6. U.C.C. § 2-207.

7. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

8. Macneil has provided his students with such aids. *See* I. MACNEIL, *supra* note 1, at 14-15, 25. A chart or table could effectively aid the reader's understanding in a book of this length.

modern exchange transactions. The breadth of this subject and the constraints of limited space demanded that Macneil paint with a broad brush. Readers seeking exhaustive treatment of pressing contracts problems must look elsewhere.[9] But those who welcome a refreshing interdisciplinary[10] approach to perennial topics should certainly read this book.

9. *See, e.g.*, Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 808-16 (1974).

10. Macneil draws extensively from Weber and Durkheim in his treatment of labor and exchange specialization. *See, e.g.*, E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1964); M. WEBER, THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1947). He modestly notes, however, that his work has "yet to pay proper attention to legal history." P. 139 n.25. For a classic treatment of the early history of contract, *see* H. MAINE, ANCIENT LAW 295-354 (1963); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 591-631 (1948). The most recent treatment of contract-law development in the last century is G. GILMORE, THE DEATH OF CONTRACT (1977).