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Improving Contracts Through Expanding Perspectives of Understanding

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IMPROVING CONTRACTS THROUGH EXPANDING PERSPECTIVES OF UNDERSTANDING©

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I. OVERVIEW AND PURPOSE

As conventionally understood, the point of making a contract is to manage risks by constructing a legal future that will be carried out regardless of what the real world future may bring. Parties bind themselves to particular behaviors by voluntarily assuming legal duties in exchange for consideration or legal rights. Parties may summon the full power of the state — through legal judgment obtained in court — to assure performance of contractual duties or to extract compensation from a party who has breached those duties.

Judging from surveys, however, business leaders are not fully satisfied with how contracts conventionally function. According to data gathered by the International Association of Contract and Commercial Managers (IACCM), businesses overwhelmingly seek more flexibility and innovation in their arrangements than contracts — as conventionally understood — provide.[1] Perhaps as a consequence,

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1. In a poll taken among the members of the IACCM, nearly ninety percent said that "flexibility and greater agility" is important for their contracts. Commitment Matters, *Stuck in a Negotiation* Rut, http://commitment-

contracts frequently do not operate according to the conventional understanding and arguably never have.[2] Where a dispute arises about promised behaviors, data gathered more than half a century ago revealed business executives to be strikingly reluctant to resort to litigation to coerce performance or damages.[3]

We are left with the puzzling and unsettling picture of contracts. On the one hand, it is a vital legal, social, and economic institution. On the other hand, it is often viewed skeptically, if not outright ignored, by its creators and users. Reforms seem advisable to align the design of contracts better with their actual use. Yet both contract design and the general understanding of their usefulness are resistant to significant change.[4] Perhaps this is because of organizational or

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matters.com/2011/09/21/stuck-in-a-negotiation-rut/ (last visited May 20, 2013). *See also* Peter Roberts, *Complexity calls for flexibility,* AUSTL. FIN. REV., Oct. 13, 2011 (complex project management).

2. This was first described in 1963 by the seminal research of Stewart Macaulay (Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study,* 28 AM. SOCIOLOGICAL REV. 55 (1963), and has been replicated since then (*see* Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity, and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 46-47 (2003)). *See also* Ian R. MacNeil, THE NEW SOCIAL CONTRACT (1980).

3. *See* Macaulay, *Non-contractual Relations in Business, supra* note 2, at 1; *see also* Iva Bozovic & Gillian K. Hadfield, *Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation,* S. CAL. L. REV., SELECTED WORKS OF GILLIAN K. HADFIELD, Jan. 21, 2013, http://works.bepress.com/ghadfield/48. Bozovic and Hadfield reinforce Macaulay's findings, but note important differences where contracts were made in contexts that business people self-reported as "innovative." *Id.* Contracts in innovative settings drew far more planning and periodic review during implementation. Even so, the parties were no more willing to use formal litigation for enforcement. *Id.* For an in-depth empirical study and analysis of business litigation patterns, *see* Ross E. Cheit & Jacob E. Gersen, *When Businesses Sue Each Other: An Empirical Study of State Court Litigation,* 25 L. & SOC. INQUIRY 789 (2000). *See also* the discussion of the related work of Ian MacNeil & Oliver Williamson *in* Kate Vitasek, Katherine Kawamoto, & Gerald Stevens, *Unpacking Outsourcing Governance: How to Build a Sound Governance Structure to Drive Insight Versus Oversight,* https://www.iaccm.com/members/library/?id=3911#top, (last visited May 22, 2013).

4. According to the IACCM *Agility Survey* of May, 2010, conducted from 252 participants, "while a large majority feel that they must become more flexible and innovative in the terms and related commercial policies, the scope of envisaged change appears very limited. . . . The survey implies awareness . . . that change is needed and that it would be welcomed by executive management. Yet in general,

conceptual barriers to reforms, or perhaps because business leaders see contracts as serving different purposes than conventionally understood. Regardless of the reasons, this disjuncture between conventional meaning and real-world behavior raises questions: how much more valuable could contracts be if they were consciously designed to suit the uses actually made of them? How might contracts and contracting practices grow so as to function more strongly in ways that business people describe as desirable?

This article posits that the conventional understanding of contracts is constructed primarily from a legal perspective. That in itself is virtually self-evident, but not nearly so visible is how that legal perspective begins to influence a related set of ideas and structures that *accompany* the legal perspective. Core understandings of social institutions (or "paradigms") typically have this systemic quality: the core meaning or approach has spill-over effects for other connected practices, institutions, or concepts. Usually, however, we do not stop to consider these connections or the pattern of mutual influences. Their influence is real, however. Understanding contracts generally through a legal perspective has systemic influences on how companies are organized; how personnel communicate internally and externally; how and by whom strategic planning proceeds; what is identified as a contract problem, and the conceived structure of that problem; the procedures with which problem should be addressed; and what counts as success or failure in resolving the problem.

If one were to change or expand the basic perspective by which contracts are understood, then suddenly all of those associated concepts and structures could also become more open to new ideas. The purpose of this article is to make more explicit the basic assumptions by which we understand contracts and suggest how the many connected functions are influenced by those core assumptions. The article also explores how our basic perceptions about contracting might change, and how the associated business ideas and structures might also change, if we were to imagine contracts from two alternative perspectives: the economic exchange that is the substance

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there is little evidence that the contracts and commercial community is responding by identifying the mechanisms and changes needed to facilitate greater flexibility and agility. This is clearly a missed opportunity." INTERNATIONAL ASSOCIATION FOR CONTRACT AND COMMERCIAL MANAGEMENT, Agility Survey, 2.

and basic purpose of contracts, and the personal relationships that go into making and implementing an agreement.

Importantly, this article is *not* arguing that the legal perspective is not valuable, or that it should be significantly reduced. Legal rules and state enforcement are vital aspects of contracting. However, it should not be the *exclusive* way to imagine how and why contracts function. For many commercial actors — regardless of whether legally trained — the legal perspective has too strongly captured their imagination about contracts. Taken together, the legal perspective and its corollary concepts seem to constrain innovation in contract design and contracting practices. To accelerate reform efforts and enable better contracting practices, this article suggests supplementing our understanding of contracts by viewing contracts from these two alternative perspectives: (1) economic exchange, and (2) personal relationships.

II. THE LEGAL, ECONOMIC, AND PERSONAL RELATIONSHIPS OF CONTRACTING

Contracting practices can be understood from at least two additional perspectives that are inherent to every contract: (1) the economic exchange of the contracting parties, and (2) the personal relationships of those parties. Analyzing contracts through the lenses of those two perspectives reveals expanded functions of contracts and suggests different means for preventing and solving problems that may emerge from contracts. Understanding contracting practices from all three perspectives (legal, economic, and personal) could ultimately affect the design of agreements; the organizational structures and communication patterns in which contracts are planned, negotiated, and implemented; and efforts to measure the significance and success of contracting practices. In short, expanding the frame of reference for understanding contracts may remove long-standing obstacles to innovation in contracting practices.

A. The Conventional Understanding of Contracts

To underscore and elaborate the conventional (legal) understanding of contracts, the agreements are typically regarded as:

(1) a document;[5] that (2) contains an arms-length, voluntarily bargained-for exchange that binds performance[6] and articulates legal rights and responsibilities of future conduct;[7] and that (3) extracts compensation[8] from the breaching party, or requires actual performance of the contractual duties,[9] if a promise is broken without a good excuse.

This conventional understanding is correct, so long as one is viewing contracts from a purely legal perspective. This article argues, however, that the conventional understanding is inherently incomplete. At least two alternative perspectives are always present in contractual arrangements; the assumptions and values of which should augment our understanding of contracts.[10]

The first alternative perspective emerges from the economic exchange itself i.e., what is being bought and sold, and on what terms. The second alternative perspective inheres in the personal relationship

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5. In the U.S. business-to-business context, agreements will normally be written. Sales of goods transactions for more than $500 must be in writing. U.C.C. § 2-201 (AM. LAW INST. & UNIF. LAW COMM'N 1977). Documentation of service agreements is not so frequently required, although services not performable within one year must be in writing. See RESTATEMENT (SECOND) OF CONTRACTS § 130 (AM. LAW INST. 1981).

6. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 15-17 (AM. LAW INST. 1981).

7. As pointed out by Ian MacNeil, all contracting is "exchange projected into the future." Ian MacNeil, *The Many Futures of Contracts,* 47 S. C. L. REV. 691 (1974). (A promise about future conduct is what distinguishes a contract from an immediate sale or service transaction).

8. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981).

9. *See* RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. LAW INST. 1981).

10. Certainly some voices are skeptical about incorporating strong relational values into the more traditional legal meaning of a contract. Douglas K. Newall, for example, cautions:

> [T]here is a difference between a relationship and a contract. Not every action has legal consequences. The promoters of a good faith duty of assistance [by one contracting party on behalf of another] are blurring the line between law and society. Relational values are important and society has relational ways to enforce them (if you behave like a sleaze your reputation will suffer). As Macaulay suggests, most parties to close relations will never see the courthouse. Law, however, is about drawing lines, setting limits, and establishing rights.

Douglas K. Newall, *Will Kindness Kill Contract?,* 24 HOFSTRA L. REV. 455, 471 (1995) (citations omitted).

between the parties making the agreement. Both of these perspectives generate distinct alternative understandings about contracts that may be conscious or may be just below conscious recognition. The alternative meanings also carry implications for how companies might better organize, plan, and communicate regarding contracts. These possibilities remain largely unrealized, however, because the power of the conventional law-based meaning tends to shove aside the assumptions and implications of the alternative perspectives.

In the paragraphs below, the article walks systematically through the three elements comprising the conventional understanding of contracts: (1) a document; (2) that establishes the parties' legal rights and responsibilities; and (3) that summons the power of the state through formal legal processes, if need be, to enforce those rights. We compare how those elements might be otherwise understood from the standpoint of the alternative perspectives. We must emphasize that the legal perspective is not "wrong," nor should it be abandoned. It should, however, be complemented by a thoughtful inclusion of the economic and personal perspectives. Those perspectives do not in themselves substantially change the legal rules.[11] Perhaps they *should* not do so or at least not do so radically. Yet broadening our *understanding* of contracts by distinguishing legal and non-legal perspectives may reveal opportunities to improve contracting practices with some additional positive side-effects.

B. Conceiving Contract as a "Document": Does that hold back organizational restructuring and better communications?

1. The Economic Exchange Perspective

As a first example, consider the conventional understanding that a contract is a document. A business person focusing exclusively on the economic exchange might well see a contract as the summary of a commercial *process*, rather than as a document. From a purely business perspective, making and implementing a contract implies

11. *See* Melvin A. Eisenberg, *Why There is No Relational Law of Contract,* 94 NW. U. L. REV. 805 (2000) (explaining why "insights into the economics and sociology of contracting" do not produce "a body of meaningful and justified contract law rules, either in place or proposed, that apply to, and only to, relational contracts").

moving from perceived commercial opportunity or need, to a search for an appropriate contractual counterpart. After finding the appropriate counterpart, the parties follow up with negotiation, implementation, quality control adjustments, cost or delivery re-negotiation, and payment. If all goes well, the parties may then move to another transaction, or a longer, broader relationship.

Particularly striking is that understanding the contracting process from this perspective does not begin and end by creating a set of legally binding rights and duties. It is more of a process-oriented "life-cycle" image of contracting which is dynamic rather than static and includes timelines that both precede and follow the signing of the agreement. A process image implies movement and coordination among a variety of people who, at various stages of a contract, will have quite different responsibilities within a business for sales/procurement, costing out, negotiating, producing, assessing quality, collecting or paying, and, finally, dealing with troubles or disputes.

Seeing contracts through the economic exchange perspective also suggests stronger attention to internal organization and communication for each party — a focus on lowering costs and maximizing both short-term and long-term revenue streams. Understood as a process, a contract can represent a focal point for developing and implementing strategic goals, measuring how well integrated the commercial operations may be within a company, and for gaining important feedback about the quality of products and services. None of those goals are necessarily implied by the purely legal understanding of a contract, perhaps because contract law arose in settled, agrarian economies characterized by much simpler operations and transactions.

2. The Personal Relationship Perspective

Now look at contracts yet differently — this time solely through the lens of the personal relationship of the parties to an agreement. Would not a contract represent a significant *connection* that places the parties in a relationship of dependency, reciprocity, and (hopefully) good faith, cooperation, and trust?[12] Parties to a personal relationship

12. *See* Daniel Markovits, *Contract and Collaboration*, 113 YALE L J. 1417 (2004). Cheit and Gersen explore and verify the hypothesis that business litigation

would probably not describe their nexus as a "document." Instead, they would describe the attributes of a commercial connection in which each party typically becomes vulnerable to the other. One or both parties may have made payments to the other. Almost always, one or both would have invested in the other internally or to third parties, in reliance on the eventual performance of the contractual counterpart. The parties would probably have assessed the dependability and trustworthiness of one another,[13] their reputation for quality, and their cooperativeness in the event of a dispute. They may perceive cultural issues, especially in international contexts, which must be comprehended and overcome. One or both may have a sense that the connection could extend beyond the immediate contract, toward future transactions or perhaps deeper integration.[14]

If enhancing the economic exchange perspective suggests better *internal* integration and communication within a commercial contracting party, then enhancing the personal relationship perspective does the same *externally* — to the communication patterns between the contracting parties. One would expect far more information to be

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will be more frequent in those industries that are structured to permit more anonymity in dealing—where barriers exist, in other words, to the formation of long-term continuing relationships. Cheit & Gersen, *supra* note 3, at 804–07.

13. Matthew Jennejohn has described an irony of modern economies. As transaction costs have fallen over the past decades, economies have "de-verticalized," that is, more firms have chosen to contract externally for operations they would have "owned" internally. Doing so is typically more efficient because contracting with a specialist, rather than performing functions in an integrated firm, captures a stronger division of labor. However, these newly outsourced functions tend to be more asset-specific and therefore are more susceptible to "hold-up" or opportunistic behaviors by contract counterparts. Moral hazards rise as economies shift more operations away from property rights and into contracting arrangements, especially where the outsourced operations are innovative and not easily reduced to complete, precise contract language. Taken together, the trends of de-verticalization make trust and dependability in contracting partners ever more important. Matthew Jennejohn, *Collaboration, Innovation, and Contract Design,* 14 STAN. J.L. BUS. & FIN. 83, 84-87 (2008).

14. "[C]ompanies may gradually build a strategic alliance through the sequencing of a number of discrete contracts followed by an agreement for continuing collaboration. The strategic beauty of such a preconceived scheme is that the contracting parties can test each other's capabilities and reliability before agreeing to a long-term arrangement." Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage,* 47 AM. BUS. L.J. 727, 736 (2010).

shared, and for that information to be communicated with a stronger regard for the possible need to make ongoing adjustments. The conventional understanding of contracts, even while attending in a formal way to the creation of a voluntary agreement between contracting parties, does not imply the level or type of communication that would be expected from focusing on the parties' personal relationship. Indeed, conventional legal concepts posit two parties keeping their distance from one another — at "arm's length" — to legitimate the idea that they are each bargaining from self-interest. Furthermore, including the commonplace "merger" clause into the contract is intended to discharge the legal significance of any prior agreements or understanding of the parties.[15] Classic contract law thus purports to constrain the relationship of the parties to nothing more than what is represented in the text of the agreement.

C. Contract as "Establishing Legal Rights and Responsibilities": Does that narrow the perception of how contracts function and manage risk?

Clearly one important function of contracts is to establish the legal rights and responsibilities of the parties. It is the central focus of the legal perspective.[16] Yet as with the analysis above, we ask: what

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15. *See* Kerry L. MacIntosh, *When are Merger Clauses Unconscionable?*, 64 DENV. U. L. REV. 529 (1988).

16. The primary architect of the U.C.C., Karl Llewellyn, had an expansive understanding of contracts that is worth re-capturing:

> I propose to ring changes, perhaps ad nauseam, on three simple facts: first, that law observance is a question not of legal rules, but of the formation of folkways that can be and will be learned chiefly without direct reference to particular rules; second, that law and folkways alike are not general and common to our society, but are different and specific according to groups, occupational and other; and third, that for mass, as contrasted with individual, attempts at control, the problem of lawmaking and of law enforcement centers on informed, sustained effort to find the particular persons whose conduct is concerned, and to devise means for affecting the conduct patterns of those particular persons.

Karl N. Llewellyn, *Law Observance Versus Law Enforcement, in Proceedings of the Conference of Social Work* 127 (1928), *reprinted in* Karl N. Llewellyn, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 399 (1962), *quoted in* Allan R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-1949*, 51 SMU L. REV. 275, 284 (1998).

additional functions of contracting might be visible through the alternative lenses of economic and/or personal relationships? Do those functions suggest a different approach to risk management? How might contracts improve if they were consciously designed to discharge those functions, or designed to approach risk, in these alternative ways?

1. The Economic Exchange Perspective

From the economic exchange perspective, this article has already suggested a broader range of contract functions when one's vision is expanded from the purely legal perspective. More specifically, the planning, negotiation, implementation, and adjustment of contracts may aid strategically in a variety of company policies, including which company operations should be integrated within the company and which should instead be outsourced.[17] Contracting can also help determine long-term approaches to gaining market share and reputation, versus securing high rates of immediate return. It can help a company assess the levels and skills required of its personnel hiring. Staging contract performance in advance will help make inventory levels more efficient.[18] Such a practice can help make costs more transparent at every level of company operations, provide feedback for quality control, and even improve aspects of internal company governance.

More broadly yet, embedded in each alternative perspective on contracting is a distinct understanding of how future uncertainties should be managed. "Establishing legal rights and responsibilities" is the "legal" approach to risk. This approach attempts to manage an uncertain future by constructing, and assuring, an artificial future that

17. "Contracts and contract law lie at the core of procurement and sales, and all business functions and activities—including research and development, finance, accounting, strategy, human resources, information technology, operations management, outsourcing, and networking—depend on the success of the contracting process." George Seidel & Helena Haapio, *Using Proactive Law for Competitive Advantage,* 47 AM. BUS. L.J. 641, 667-68 (2010); *see also* Steven R. Salbu, *Joint Venture Contracts as Strategic Tools,* 25 IND. L.J. 397, 407-11 (1991) (focusing on the roles of lawyers, managers, and contracts in the strategic planning).

18. *See* Jennejohn, *supra* note 13, at 113 discussing "just in time" inventory as an example of the "simultaneous engineering" practices that are part of building successful commercial collaborations.

is *not* uncertain. Instead, through contract, the parties enlist the state's help in defining, *ex ante*, what the future will look like in terms of item demand, availability, pricing, delivery costs, and financing rates. Legal rights and duties regarding some future transaction, even years hence, are locked in from the moment of contract formation. Apart from exceptional cases where serious intervening events result in excusing a performance because of "impracticability,"[19] or "frustration,"[20] the future will be both predictable and secured.

The legal approach to risk — stipulating a precise future through state-enforced promises — is certainly helpful for business planning and efficiency. The legal approach copes with risk through a combination of the devises of stabilization, transference, disclaimer, and indemnification.[21] But that is not the only approach. The data demonstrates that in practice, business people tend to resort to alternatives.[22] Before exploring those alternatives — how they function and how they might be better institutionalized — this article focuses more carefully on the legal devices for managing the risks that come from an inherently unknowable future.

As to stabilization, reducing the terms of future exchanges to enforceable promises promotes efficiency and improves timing of investments. Security, provided through possible state enforcement of a contract, avoids the potential instability of one party simply changing its mind about its commitments when the time for performance has arrived. Furthermore, within the broad limits suggested above, contracting can (through legal fiat) stabilize various background conditions that are beyond the parties' control. Parties

19. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981).

20. *Id.* § 265.

21. *See generally* Steven B. Lesser, *How to Draft Exculpatory Clauses that Limit or Extinguish Liability,* 75 NOV FL. BAR J. 10 (2001).

22. "Relational theory, which is very much attuned to parties' motivations to contract, provides substantiation for the elimination of various enforcement and policing mechanisms within the bargaining process." Blake D. Morant, *Contractual Rules and Terms and the Maintenance of Bargains: the Case of the Fledgling Writer,* 18 HASTINGS COMM. & ENT. L.J. 453, 496-97 (1996).

can spell out, through *force majeure* clauses, the environmental influences that will (or will not) excuse performance.[23]

Contracts also permit one party to manage risks by transferring some risks to the other party, through express conditions that either limit one's own contractual duties[24] or force another party to assume the risks of certain contingencies. If risks were not avoided or transferred to the other party and ultimately come to fruition, liability can be disclaimed (as long as the clauses are conspicuous and carefully drafted).[25] Where liability is not deflected, a contract can require indemnification by a contract counterpart or third party insurer.[26] Generally, the dominance of this law-based approach to risk management is apparent by the chronic annual appearance of disclaimer and indemnification clauses, which are the two most common terms included in contracts among the members of IACCM.[27] Furthermore, the fifth item on the list reveals the final future-securing legal strategy: unavoidable liability can be specified (and limited) in advance by inserting a liquidated damages clause.[28]

Yet, specifying the contours of the future through contract and assuring that future through state enforcement are financially and relationally expensive, and certainly not bulletproof. That approach essentially relies on power from the state to impose a fictitious, pre-conceived reality onto a world that actually may turn out differently from what the contracting parties imagined. By analogy, think of the legal risk-management strategy as requiring energy inputs, sometimes considerable energy, to resist entropic trends toward a simpler state.

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23. *See* P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability,* 15 J.L. & COMM. 213 (1995).

24. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 224–229 (AM. LAW INST. 1981).

25. *See, e.g.,* U.C.C. 2-316 (AM. LAW INST. & UNIF. LAW COMM'N 1977); Stephen E. Friedman, *Text and Circumstance; Warranty Disclaimers in a World of Rolling Contracts,* 46 ARIZ. L. REV. 677 (2004).

26. *See* James E. Joseph, *Indemnification and Insurance: The Risk-Shifting Tools (Part I),* 79 PA. BAR ASS'N Q. 156, 160-65 (2008).

27. IACCM, *2012 Top Terms in Negotiation,* 5, https://www.iaccm.com/library/?id=4611, (last visited June 14, 2013).

28. *Id. See also* RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. LAW INST. 1981); U.C.C. 2-718(1) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

Sometimes, the power is inadequate or the effort to produce that power is just not worth the required resources.

From the economic perspective, risk management may look very different than the legal approach of stage-managing the future. A business person might see risk management as finding an appropriate ordering device — one that could bring a tolerable level of predictability at a reasonable cost. Over-investment in the legal model of risk management does not make economic sense, and that assessment is realized in practice. As recently reported in an IACCM Report, "[t]he growing complexity of doing business in increasingly global, volatile markets is a primary factor adding to the need for contracting skills and capabilities. The role is shifting from its historic focus on limiting risk to a greater need for creative, flexible commercial terms and opportunity management. . . . Executive management wants to focus more on profitability and financial risk than legal risk. . . ."[29]

Simpler, cheaper ordering devices between the parties — devices that maintain the risks of default at an acceptable level — might include reliance on trade customs and commercial norms; reciprocity; or (less honorably) economic coercion, i.e., bending a party to one's will through market power rather than legal power. Although precise data about their relative use is unavailable, each of those devices no doubt plays some role in the documented tendency of business managers to forego enforcement of their legal rights through litigation.[30]

Reliance on trade customs and commercial norms is commonly used as a virtually cost-free device to prevent and resolve problems. The practicality and sensibility of integrating trade customs into contracts is formally acknowledged by the Uniform Commercial Code by forming a contract for the usages that supplement the agreement as well as help to interpret terms that are explicitly stated.[31] How precise

29. IACCM, *Contract and Commercial Management Today: A Call to Action*, 7 (2013).

30. *See* Macaulay, *supra* note 2, at 1; *see also* Bozovic & Hadfield, *supra* note 3; Cheit & Gersen, *supra* note 3.

31. U.C.C. § 1-205(3) states: "[A]ny usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement." U.C.C. § 1-205(3) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

or widespread those provisions may or may not be in various industries is open to question.[32] But in weaker, more localized and imprecise form, the provisions may influence whether parties breach or remain in disrupted contracts.[33]

Reciprocity is the simple idea that parties will honor their commitments when the exchange remains valuable to them, because if a party breaches, they can expect reciprocal behavior from their counterpart.[34] Self-interest, in other words, can be harnessed to ensure that promises are kept. In planning contracts, therefore, parties should not seek agreements that transfer so many risks to the other side such that the other party regards the overall agreement as only marginally valuable. When an agreement is significantly unbalanced, a small shift in the commercial environment may tip such a party over the edge — simply because keeping one's promises no longer seems important or feasible to the potentially breaching party.[35] Hence, finding "balance and integrity" in the terms rather than shifting as many risks as possible to the other side[36] increases the chance that

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32. *See* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study,* 66 U. CHI. L. REV. 710 (1999).

33. While skeptical that trade usages exist as generally acknowledged or precisely stated as the drafter of the UCC may have imagined, Bernstein nonetheless sees observance of even "weaker" commercial norms as valuable markers as to "whether the other transactor is a cooperator or a defector." *Id.* at 717. The power of social expectation is explored by legal theorist Niklas Luhmann as a basic building block of law. Norms are constantly generated in everyday "temporal" life; some portion are more widely or "socially" institutionalized. When connected to material consequences, a transcendent "meaning" emerges for the norm that functions like law. *See* Thomas D. Barton, *Expectations, Institutions, and Meanings: A Review of Niklas Luhmann's "Sociological theory of Law,"* 74 CAL L. REV. 1805, 1806 (1986).

34. *See* Scott Fruehwald, *Reciprocal Altruism as the Basis for Contract,* 47 U. LOUISVILLE L. REV. 489 (2009).

35. As practiced business executives know, another risk to seeking an agreement that forces one party to shoulder heavy risks is that such party may, in the event of trouble, become financially incapable of carrying through with its promises. Tim Cummins & Jacqui Crawford, *Webinar conducted under the auspices of IACCM,* https://www.iaccm.com/members/library/files/Ask_The_Expert_Recording - Jacqui_Crawford-April10.mp3 (last visited June 14, 2013) [hereinafter *Webinar*].

36. Tim Cummins, *Contracting Excellence: Achieving Balance Through Collaboration*, https://www.iaccm.com/members/library/?id=2911#top (last visited May 28, 2013).

both parties will have incentives to perform throughout the agreement's entirety. By limiting total risks and enforcement costs, such an approach may actually increase value for *both* parties — even for a party that might have had the market power to force a significantly unbalanced contract.

This last point introduces the final possible alternative "ordering device" from the perspective of economic exchange: coercion or domination of a party through market power. This device mirrors, in a sense, the use of contracts to enable parties to rely on the power of contract and the state to structure the future. With enough market power, one party does not need to resort to legal enforcement. Indeed, those with overwhelming power would be tempted to overreach in ways that would not find legal support. Hence, turning to the legal system would be riskier than simply bending another to one's desires through threats of withdrawal.

Domination operates ironically: it has low transaction costs because neither formal enforcement mechanisms nor negotiation is required in the relationship. Indeed, relationships built on domination can even appear stable. Yet, those on the receiving end of domination usually know of their subordinated state and may seek to "right the balance" when the opportunity presents itself.[37] Relationships built on domination are therefore inherently precarious.

Intellectual property licensing agreements serve as a case in point. In those agreements, the licensor has a legally-conferred monopoly power in the form of a patent or copyright or the licensor may be permitting use of a process that is part of their trade secrets. The licensee has limited choice; even if the licensor's terms seem unreasonable, the licensee does not have any other options because the licensor is the only available contracting partner. Hence, those agreements demonstrate instances of contracts built largely on relationships of market power domination. Such contracts carry special risks, however, because of the built-in incentive of the subordinated party to find stronger value than the monopoly pricing of the contract. Below, Ronald A. Cass and Keith N. Hylton describe contracts involving licensed trade secrets:

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37. *See* M.P Baumgartner, *Social Control from Below, in* I TOWARD A GENERAL THEORY OF SOCIAL CONTROL: FUNDAMENTALS, (Donald Black, ed.) 303-39 (1984).

> [I]f the [trade secret] formula has a general scope of application, then it will be valuable to many firms, in different industries. The formula will have a market value that can be ascertained easily by looking at the additional profits generated by its use. Over time, the formula will be sold or licensed to other firms; even if licenses are accompanied by contract provisions binding licensees to maintain secrecy, as dissemination occurs in this fashion, there is a substantial likelihood that the formula will no longer remain a secret. In short, the ordinary pressures of the market are likely to ensure that a formula of general application that is potentially valuable in many production processes will not remain a secret for a long time.[38]

Seeking domination as a risk-management strategy, in other words, may be less stable and more costly than seeking a fair collaboration.[39]

1. The Personal Relationship Perspective

The parties' perspective, based on their personal relationship, might also suggest alternative "ordering devices" apart from relying on legal rights and responsibilities. From the relational perspective, the alternative devices might be social expectation,[40] and trust. These two methods are mutually reinforcing, but once again we have no empirical data to measure precisely their relative use.

As with the devices of the economic exchange perspective, however, we can infer that each may have at least some influence. Bozovic and Hadfield conclude from their interviews of representatives from twenty-nine manufacturing and service companies: "Past practices and norms, and not the contract, are the reference point for judging the quality of [a] partner's effort and direct, open communication is key to problem solving."[41] They quote the following sorts of interview comments: "*We talk to everybody, it's . . . mostly conversation. I got a problem I call somebody; I call*

38. Ronald A. Cass & Keith N. Hylton, LAWS OF CREATION: PROPERTY RIGHTS IN A WORLD OF IDEAS 90 (2013).

39. *See generally* Cummins, *supra* note 36.

40. *See* discussion concerning Niklas Luhmann, Barton, *supra* note 33.

41. Bozovic & Hadfield, *supra* note 3, at 14.

somebody on the phone and we deal with it . . . It's all trust."[42] And "*I have very little interest in going forward with any sort of contract with anybody that I remotely trust, because I would rather just agree to a one-pager that broadly outlines the deal.*"[43]

a. Social Expectation

People enmeshed in personal relationships are significantly influenced by the expectations they have for the other party to the relationship, as well as for themselves.[44] In general, people comport themselves to social circumstances. Exactly what may be deemed appropriate requires social sensitivity, and carrying out those expectations in positive ways demands social skill.[45] If we view commercial dealings through the lens of such personal relationships, we could draw a quick distinction between norms that evolve through mutual interactions and adjustments of the parties, versus norms that are sought to be imposed through the contract terms (and the law). Through their interactions that may extend for years, parties build up reciprocal norm expectations. "Long-term continuing relations have their own norms and sanctions that will serve to get almost all contracts carried out in an acceptable fashion if not precisely to the letter of the contract documents."[46] This differs from what we would see through a legal lens: the formation of legal entitlements — legitimate *demands* that may be made on another, virtually regardless of circumstance (that is much of the point of making it "legal"). Viewed legally, one party has purchased rights or entitlements against

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42. *Id.* Apart from their insights into executive thinking, Bozovic and Hadfield's work is also helpful in describing the business context in which contracts are most strongly planned, and referred to during the process of implementation. Those business leaders who characterized their companies as innovative were more likely to use contracts in those ways than executives who characterized their businesses as *not* innovative. *Id.* at 5-8. Where norm expectations are already strong, as in more settled industries, formal contracts are less important. Where, in contrast, norms are not yet well evolved, the contract provides a useful guide for both parties as to what may be legitimate behavioral expectations of one another. *Id.*

43. *Id.* at 44.

44. *See* discussion concerning Niklas Luhmann, Barton, *supra* note 33.

45. Baumgartner, *supra* note 37.

46. Stewart Macaulay, *Freedom from Contract: Solutions in Search of a Problem?*, 2004 WIS. L. REV. 777, 788-89 (2004).

another — and if the consideration is paid then nothing else is required. "Entitled" parties act differently toward others than toward those with whom one has collaborated (which is recognized in the negative connotations when one uses the word "entitled" to describe another's demeanor).

Unlike legal entitlement, norm expectation is built gradually, rather than concluded at the point of formation of the contract. Norm expectation is flexible, relatively ill-defined, and understood to involve some history of reciprocity. Notwithstanding its relative informality, expectations can be very powerful in influencing people's behaviors — and the reactions to those behaviors.[47] Relationships can deteriorate because of some misunderstanding or mismatch of expectations. Open and ongoing communication helps people to adjust or calibrate those expectations and prevent feelings of injustice or disrespect.

Social expectations such as an ordering or risk management device may work better in some settings than in others. For example, in addition to their insights into executive thinking, Bozovic and Hadfield's work is also helpful in describing the business contexts in which contracts are most strongly planned and referred to during implementation, and those contexts in which contracts are created, but rarely consulted.[48] Those business leaders who characterized their companies as innovative were more likely to plan and use contracts intensively; those executives who characterized their businesses as *not* innovative tended to use form contracts that they then ignored.[49] This characterization based on innovative versus traditional industries makes sense. Where norm expectations are already strong, as in more settled industries, formal contracts are less important; where, in contrast, norms are not yet well evolved in innovative settings, the contract provides a useful guide for both parties as to what may be legitimate behavioral expectations of one another.[50] Cheit and Gersten offer a different, but not inconsistent, idea: that informal

47. *See* Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment* 74 CORNELL L. REV. 655, 676-77 (1989).

48. *"[Distributors] have pretty extensive contracts that we sign with them for exclusivity. . . . No one ever looks at the things. . . . [Y]ou throw the thing in the drawer."* Bozovic & Hadfield, *supra* note 3, at 12.

49. *Id.* at 16.

50. *Id.* at 5.

norms are relied upon more strongly where underlying economic conditions are strong, with formal legal processes being used more often when economic conditions tighten.[51] When economic survival is at stake, social expectations become less compelling.

b. Trust

Trust is arguably distinct from social expectations, although clearly the ideas support one another. "Trust is the glue that binds couples, communities, and countries. Societies without a sufficient wealth of trust cannot function efficiently, sometimes cannot function at all."[52] Social expectations create standards and pressure for how parties ought to behave. Those expectations — like legally-backed contract terms themselves — can create a foundation for building trust.[53] When behavior standards are unclear, trust may become the default ordering device. In some circumstances, no customary norm exists. But where trust prevails, the other party can nonetheless be relied upon to eschew possible exploitation, even if particular behaviors cannot be predicted.

Trust as a social regulator is certainly different than the law: "In theory, law makes trustworthiness unnecessary, even obsolete. When law is fully in command, morality itself loses relevance." [54] That may be over-stated, but a different proposition may be more easily defended: when trust vanishes, people turn to law.

Yet trust and the law are not mutually exclusive — as suggested above, they can work together. That is what should happen in the process of creating and implementing a contract. People in relationships can feel more secure and trusting where traditional legal

51. Cheit & Gersen, *supra* note 3, at 804-07.

52. Christopher R. Leslie, *Trust, Distrust, and Antitrust,* 82 TEX. L. REV. 515, 517 (2004).

53. Frank B. Cross, *Law and Trust, 93* GEO. L.J. 1457 (2005).

54. Donald Black, SOCIOLOGICAL JUSTICE 85 (1989). Conversely, "[i]f all parties were truly trusting, they would feel no need for legalized protections, and devoting time, effort, and resources to such protections would be entirely wasteful." Cross, *supra* note 53, at 1482.

rights are available for support if needed.[55] Conversely, even the most traditional defenders of rights-based liberalism typically "lead their lives in relationships of trust and reciprocity rather than standing on their rights."[56] Thus, clear contractual language may enhance the power of relationship and trust to work through problems.[57]

Just as important, however, are the ongoing discussions among the parties about the commitments they have made: "the development of trust-based relationships generally requires effective communication."[58] In experimental work based on Prisoner's Dilemma scenarios, "[c]ommunication seems to have a linear relationship with trust. The more time that subjects have to communicate, the greater their cooperation; the more communications that are exchanged, the greater the cooperation."[59] Time, therefore, becomes important: it is difficult to build trust without some period during which dialogue and loyalty testing may proceed.[60] As we shall see below, contract design should be reformed to speed and intensify communications among the parties, and thereby facilitate building trust.

D. Contracts as Coercive Enforcement

The final element of the conventional understanding of contracts relates to governance: the state will mandate performance of contract duties, or extract some monetary compensation for failure to perform. The conventional understanding conjures images of litigation, even

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55. Robert E. Goodin, *Structures of Political Order: The Relational Feminist Alternative,* in NOMOS 38 POLITICAL ORDER 498 (Ian Shapiro & Russell Hardin, eds. 1995).

56. *Id.* at 513.

57. Cross, *supra* note 53, at 1482-83. In some Asian cultures, to demand that an agreement be reduced to written expectations may be a source of distrust. Donna Stringer & Lonnie Lusardo, BRIDGING CULTURAL GAPS IN MEDIATION, 56-OCT DISPUTE RESOLUTION 29, 38 (2001).

58. Leslie, *supra* note 52, at 538.

59. *Id.* at 538-39.

60. Matthew Jennejohn, *supra* note 13, at 98 ("the key premise to relational contracting is time. Long-term interaction is usually necessary for informal norms to substitute for formal rules. Without long-term interactions, firms are not concerned about their reputation in the marketplace nor the benefits of building trust with their collaborators.").

courtroom proceedings. That is not an illegitimate image, but it is incomplete.

Conventional notions of contract governance certainly generate images of legal procedures. Just as strong (even if far less intuitive) are related default ideas about: (1) what constitutes, and how does one describe, a *problem* worthy of resort to such procedures; (2) what *skills* are associated with resolving that problem; and (3) what constitutes *success or failure* in resolving the problem, and how should that be measured? Each of these related ideas is answered differently by the three perspectives of legal, economic, and relational. The construct behind this analysis bears repeating: each distinct perspective understands "contract" differently, but each of the three frameworks comprises a distinctive system of thought. Contracts are devices for a very basic and ancient sort of human connection, a bond created through voluntary exchange. Hence, we should not be surprised that each separate understanding of the device entails a distinctive clumping of associated concepts: the nature and structure of problems; the procedures for addressing such problems; the skills required to operate those procedures, and even the differing images of human motives or behaviors that engage one another in those distinctive ways. To assess the consequences of deferring too strongly to the legal perspective, these different understandings of the clumped ideas should be considered in greater detail.

1. The Legal Perspective

From the purely legal perspective, understanding contract governance as formal legal enforcement means seeing "problems" as those behaviors that would call forth possible vindication through legal rules. In other words, a legal problem is one that is raised by some possible violation of a legal rule that can be addressed through legal procedures, and which in turn can be measured through damages or an order for specific performance. From the legal perspective, if a disagreement concerning a contract does *not* implicate some rule violation, then there is no problem. The issue may involve an inadequately drafted contract or poor business judgment, but a legal problem does not exist (unless such shortcomings are so severe as to raise a non-contract legal rule like breach of professional or corporate fiduciary responsibilities).

More specifically, the purely legal perspective does *not* view the lack of real value in a contract as problematic, so long as consideration exists. Similarly non-problematic is the lack of flexibility in the contract or in a contracting party: neither is a problem because neither is demanded by legal rules. Nor, typically, is the failure to perform by one's "best efforts" a problem unless specifically mandated in the contract. Nor is it legally worrisome that the parties have failed to communicate in a way that would help build product quality or opportunities for expansion or innovation in the exchange.

2. The Economic Exchange Perspective

Virtually the opposite prevails from the perspective of the economic exchange. Most of the above shortcomings suggest that the exchange will fail to deliver optimal value, which from the economic standpoint, is the purpose of making the contract. So what constitutes a "problem" is perceived quite differently from the two perspectives. Certainly, failure of the contract to generate profit is a problem when viewed from the exchange perspective. Problems, viewed from the economic exchange perspective, also include a contract's lack of flexibility, failure to use best efforts, and failure to optimize opportunities for product quality, enhanced efficiency, or development of new markets.

Furthermore, when we look at procedures for addressing problems, we learn from Macaulay and others that executives prefer re-negotiation rather than resorting to litigation. This difference in preferred or customary procedures — between the lawyer's litigation and the manager's re-negotiation — entails further differences in what constitutes important skills and knowledge. Operating legal procedures requires an advocacy mindset, linguistic and infrastructure information, and a license that is essentially exclusive to lawyers. This may be a supplementary reason why management dislikes litigation: it marginalizes their participation in dispute resolution to that of a user or role-player rather than designer. In contrast, negotiation is far more accessible, flexible, and participatory. The skills required for its successful operation differ significantly from advocacy in litigation, and can be fully mastered by those who lack legal training. Finally, employing negotiation as a problem-solving method inherently transforms the *structure* of the problem. Seen

through legal eyes, problems are structurally binary and absolute (behavior is either within the legal rules, or it is not). In negotiation, by contrast, problems are structurally incremental or probabilistic, which accords with an economic or market-based outlook and contributes to their flexible resolution.

3. The Personal Relationships Perspective

What is a "problem" from the personal relationships perspective? The failure of post-formation communication is problematic, along with the rancor and adversarial positioning that may accompany legal trouble. What procedures tend to clump with viewing contract problems from this perspective? A relational rift is typically addressed through honest communication. That could entail negotiation, but it could also entail a surrender of self-interest, apology, or request of forgiveness — procedures for addressing problems shorthanded here as "healing."

The skills required for interpersonal healing are still different than those required in litigation or in negotiation. "Empathy," for example, certainly has a stronger role in relational communication than in litigation, and somewhat more than in negotiation (although empathy is an important skill of successful negotiation).[61] The same applies to "compassion," "grace," "guilt," or "shame": such moral/psychological concepts must be at least understood, and perhaps accepted, in the world of repairing personal relationships. Structurally, relational problems are rarely understood as absolute or binary — if they are so regarded, then the relationship is probably threatened. Relational problems reflect the contingent, provisional qualities that characterize negotiation issues, but relational problems often have a deeper level of causal ambiguity, and an ongoing shared responsibility.

E. Summary

As stated above, the legal perspective is not right or wrong; it is simply incomplete. And yet its power and language tend to push out alternative perspectives on purposes, functions, problems, procedures,

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61. *See* Robert H. Mnookin, Scott R. Peppet, & Andrew S. Tulumello, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000).

and skills in the world of contract formation and governance. By teasing out the economic and personal relational perspectives of each of the three elements that comprise the conventional understanding of contracts, we can better understand what each perspective may have to offer. The next step is to build contracting practices that take all three perspectives into account. This short article can only suggest movements already underway, and encourage future innovation toward that goal.

III. USING MULTIPLE PERSPECTIVES TO REFORM CONTRACT PRACTICES

A. Contract Design

In an insightful article,[62] Matthew C. Jennejohn suggests a re-framing of contracts that better integrates the legal, economic, and relational perspectives analyzed above. Terming it "generative contracting", Jennejohn suggests that recent innovations reveal "parties . . . using contracts to build novel governance systems that limit opportunism *by immersing parties in joint learning processes.*"[63] Understanding contracts as moveable platforms for communicating information would incorporate aspects of each of the three perspectives. The model also implicates the need to integrate contract design with information design.[64]

At least in the highly dynamic industries on which Jennejohn based his study, contracts as a learning process begins to look like an amalgamation of all three frameworks. Viewed as a learning process: (1) contracts are conceived as dynamic rather than static; (2) flexibility is a virtue rather than a weakness; (3) uncertainty and incompleteness are expected, but are viewed as important triggers of post-formation collaboration; and (4) "hold-up" or opportunistic

62. Jennejohn, *supra* note 13.

63. *Id.* at 111 (italics added).

64. *See generally* Helena Haapio, Stefania Passera, & Thomas D. Barton, *Innovating Contract Practices: Merging Contract Design with Information Design, in* PROCEEDINGS OF THE 2013 IACCM ACADEMIC FORUM ON INTEGRATING LAW AND CONTRACT MANAGEMENT: PROACTIVE, PREVENTIVE AND STRATEGIC APPROACHES (2013).

behaviors[65] are minimized by harnessing multiple devices of social ordering: reciprocity, expectations, reputation, and trust as well as possible legal coercion.

To bolster his vision, Jennejohn cites Charles Sabel's urging of "pragmatic governance" or "pragmatic coordination."[66] Jennejohn also cites Sabel's collaboration with others in suggesting the tools by which pragmatic governance might be achieved: simultaneous engineering, benchmarking, and error detection/correction institutions.[67] Jennejohn summarizes each technique:

- "'Simultaneous engineering,'" says Jennejohn, "is a catch-all phrase for the immediate, side-by-side cooperation between collaborators. Also called 'concurrent' engineering, it takes place where 'upstream' and 'downstream' steps proceed simultaneously, each taking account of the [changes in the] requirements of the other."[68] Jennejohn offers an illustration: "Just-in-time production, which requires interpenetration between collaborators to achieve the quick adjustment capabilities necessary for minimal inventory, is a classic example of simultaneous engineering. The close proximity necessary for simultaneous engineering to work creates an environment of rich information sharing, a key ingredient for governing inter-firm relationships."[69]
- "Benchmarking" is more familiar. It occurs when "firms find an idea of how to proceed by probing possibilities and then building the results of this probing into flexible

65. *See* discussion of economic trends toward greater "hold-up" risks, *supra* note 13.

66. Jennejohn, *supra* note 13, at 112 (citing Susan Helper, John P. MacDuffie & Charles Sabel, *Pragmatic Collaborations: Advancing Knowledge While Controlling Opportunism*, 9 INDUS. & CORP. CHANGE 443 (2000)).

67. Helper, MacDuffie & Sabel, *supra* note 66, at 445, *cited in* Jennejohn, *supra* note 13, at 113.

68. Jennejohn, *supra* note 13, at 114 (quoting Charles Sabel, *A Real-Time Revolution in Routines*, *in* THE FIRM AS A COLLABORATIVE COMMUNITY, 106 (Charles Heckscher & Paul Adler eds., 2006)).

69. Jennejohn, *supra* note 13 at 114 (citing John K. Halvey & Barbara Murphy Melby, INFORMATION TECHNOLOGY OUTSOURCING TRANSACTIONS: PROCESS, STRATEGIES, AND CONTRACTS, 138-39 (2d ed. 2005)).

development plans."[70] "Benchmarking typically involves two closely related processes: prototyping and searching. In benchmarking by prototype, firms purposefully depart from proven models, develop a range of potential products, and test these potentials, often with consumers. This iterative dialogue, between collaborating firms and/or between collaborators and possible customers, sets the course for production. When firms benchmark through search, they look to industry experience for comparable approaches."[71]

- "Error Detection and Correction" is a simple idea that can be difficult to implement. It is "the process for changing rules that were originally approximated through benchmarking. . . . As collaborators continually detect and correct errors in design and production as they perform, they adjust the rules that they are to follow."[72] Although Jennejohn does not speak explicitly in terms of feedback loops in system design, his suggested technique of error detection and correction is similar. The goal is to uncover information about systemic flaws that is deep enough to identify root causes[73] so that the design itself can be corrected and prevent future mistakes. Practices that encourage (or require) error reporting have proven effective, for example, in gradually improving medical practices.[74]

Jennejohn's analysis fits especially well within the networked economy that increasingly characterizes innovative industries, and is borne out in several empirical studies that he describes. But the integrative vision of contract as a set of meeting points, or what Jennejohn calls a "modular learning system,"[75] can have broader application. The prerequisite for effectively using techniques like simultaneous engineering, benchmarking, and error detection and

70. Jennejohn, *supra* note 13 at 114.

71. *Id.* (citations omitted).

72. *Id.* at 115-16.

73. *Id.* at 116.

74. Edward A. Dauer, *The Role of Culture in Legal Risk Management*, *in* 49 SCANDINAVIAN STUDIES IN LAW 93, 98-99 (2006).

75. Jennejohn, *supra* note 13, at 140.

correction is a willingness to communicate effectively and collaboratively. Forming a contract purely from legal perspective does not necessarily communicate effectively because the language is dense and some of the concepts are inaccessible to non-lawyers. Nor, from the purely legal perspective, does the implementation and governance of the contract necessarily promote collaboration: the insistence on legal rights as entitlements can actually discourage pragmatic interchange.[76] A more integrative understanding of the multiple perspectives of contracting widens our eyes to the importance of good communication and points toward possible ways to improve communication and understanding.

Finally, one should note that broader perspectives are not necessarily achieved by merging the legal department of a company with the contract management division. Given historic patterns of the tendency of the legal perspective to dominate communications, such a merger can sometimes *decrease* the alternative voices. That may be why, for example, data gathered by IACCM reveals that "in a few instances, this integration [of Legal and Contract Management] is viewed as having curtailed commercial creativity and resulted in some loss of flexibility in favor of an emphasis on legal issues at the expense of other business and stakeholder interests."[77]

B. Effective and Collaborative Communication

1. Visualization

"Visualization" refers to work by Helena Haapio, Stefania Passera, and others that can be a vital foundation for re-framing contracts.[78] Visualization is dedicated to designing contracts in ways that enable understanding and ongoing communication by all those who may have some role in the contracting process beyond simply the

76. Mary Ann Glendon, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 1-9 (1991).

77. IACCM, *supra* note 29, at 9.

78. *See, e.g.,* Haapio, Passera, & Barton, *supra* note 64; Stefania Passera & Helena Haapio, *Transforming Contracts from Legal Rules to User-centered Communication Tools: a Human-Information Interaction Challenge,* 1 COMMC'N DESIGN Q. 38 (2013); Thomas D. Barton, Gerlinde Berger-Walliser, & Helena Haapio, *Visualization: Seeing Contracts for What They Are, and What They Could Become,* 19 J. L. BUS. & ETHICS 47 (2013).

lawyers. That class of people includes: engineers, financial analysts, contract managers, sales and procurement staff, and management generally. Visualization assumes that contracts can function toward better planning, internal organization, quality control, and innovation — the broader, largely unmet potential for contracts. That potential will not be achieved, however, unless the contract is actually planned by a variety of stakeholders and used as an ongoing guide for implementation and re-negotiation. However, that goal may be impossible unless the contracting process is well designed and complemented by explicit terms that are accessible to all parties through effective information design.[79] As IACCM summarizes the priorities of global one hundred companies: "Simplification remains an important objective; the reduction of bureaucracy and unnecessary rules reduces costs."[80]

Visualization employs a variety of techniques — natural language, timelines, diagrams, graphs, maps, flowcharts, icons, decision trees, and photographs.[81] Its aims were recently summarized as follows:

1. Clarifying what written language does not manage to fully explain;
2. Making the logic and structure of the documents more visible;
3. Giving both overview and insight into complex terms and processes;
4. Supporting evidence, analysis, explanation, and reasoning in complex settings;
5. Providing an alternative access structure to the contents, especially to the non-experts working with the document;
6. Helping the parties articulate tacit assumptions and clarify and align expectations; and
7. Engaging stakeholder who have been alienated by the conventional look and feel of contracts.[82]

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79. *See generally* Haapio, Passera, & Barton, *Innovating Contract Practices, supra* note 64.

80. IACCM, *supra* note 29, at 12.

81. Barton, Berger-Walliser, & Haapio, *supra* note 78, at 48.

82. Haapio, Passera, & Barton, *Innovating Contract Practices, supra* note 64, at 9-10.

One need not be a professional designer to make contracts far more clear, accessible, and useful to the broad range of company personnel whose everyday activities are guided by those contracts. Understanding the broader functions and perspectives of contracts can stimulate any drafter's imagination to design the document so that it can be used effectively to not only inform the parties of their rights and responsibilities, but to also prompt continuing communication between the parties.

2. Collaboration

Commercial relationships that depend *entirely* on trust and goodwill do not fare as well as relationships that couple relational qualities with baseline contractual expectations — i.e., trust that is "entwined within explicit contract terms."[83] This statement, based on Jennejohn's pulling together of empirical studies, is consistent with the Bozovic and Hadfield analysis relating norm expectations with perceptions about importance of formal contracts. In older industries — especially ones with few players — established industry norms mean that the parties who contract in such contexts tend to pay less attention to contract drafting, and tend to consult contracts less in the event of a dispute. [84] In contrast, contracts made within dynamic, innovative industries in which the norms are weak or non-existent tend to draft careful, explicit agreements and to consult them frequently.[85] Norms from some source — either informal social norms within the relevant commercial community or explicitly agreed-upon norms within the contract — seem crucial as a foundation for the parties finding some mutual adjustment that avoids resort to legal coercion in the event of trouble.

Explicit contract rights and duties (together with expectations from trade custom and other sources) thus seem to be helpful but not sufficient for creating collaboration among the contracting parties. If so, what more can be supplied to stimulate collaboration?

At the planning and negotiation stages, the parties can think through the entire life-cycle of the exchange. They can design, to the

83. Jennejohn, *supra* note 13, at 102.

84. Bozovic & Hadfield, *supra* note 3, at 5.

85. *Id.* at 6-7.

extent possible, a system that includes simultaneous engineering, benchmarking, and error detection and correction. They can imagine a process for anticipating, addressing, incorporating, and learning from the changes that will inevitably occur over the life of a long-term contract.[86]

Contracting parties should also understand and acknowledge their mutual need for a relationship that is stronger than the cautious arm's length relationship that characterizes conventional contracting.[87] Being explicit about collaborative intentions and responsibilities can be especially useful if it is coupled with trust-building and the creation of norm expectations. In many instances, the parties can do this by disclosing not only their baseline expectations but also their respective long-term strategic commercial and relational interests.[88] Revealing underlying interests advances both the economic exchange perspective and the relational perspective. It also promotes finding win-win solutions where problems emerge.

- In drafting the document, the parties can express both the general intentions they have worked out during the planning and negotiation stages, and also include as much detail as possible about the process that they have devised for periodic communication. Statements of their relational expectations should go beyond labels, but also be open-ended to set up basic norm expectations. In a preamble or in the body of the contract document the parties could, for example, explicitly pledge the following types of cooperation:
- "to improve the quality of information they share, focusing from the beginning on their underlying interests and the risks they perceive;
- "to work toward clauses that share risks in a balanced way, striving for maximal realization of *both* parties' interests;

86. *See* Tim Cummins & Jacqui Crawford, *supra* note 35.

87. Thomas D. Barton, *Collaborative Contracting as Proactive/Preventive Law, in* PROACTIVE LAW IN A BUSINESS ENVIRONMENT 122-27 (Gerlinde Berger-Walliser & Kim Ostergaard, eds., 2012).

88. *See generally* the "interests" based negotiation strategy classically described in Roger Fisher, William Ury, & Bruce Patton, GETTING TO YES (3d ed., 2011).

- "to communicate in regularly scheduled meetings about the progress and quality of performances;
- "when needed, to cooperate and perhaps even provide affirmative assistance toward another party's performance of its contractual duties; [and]
- "to work toward understanding and accommodating the needs of one another in response to changes, and to be open to modifying terms where conditions suggest the need for adjustment. . . ."[89]

Specific detail about communication structures and scheduling is, of course, particular to the parties' plans. Jennejohn cites helpful examples, however, from contracts made between parties like Cisco & KMPG, Coca-Cola & Synomyx, and Intel & Phoenix Technologies. To operationalize simultaneous engineering, those companies adopted measures like forming interacting teams, exchanging on-site personnel, and creating a joint research steering committee.[90] They also fleshed out general benchmarking clauses with specific metrics.[91] Then, to implement the error-detection and correction device, the parties took measures such as establishing "an oversight body, often a committee, which coordinates the parties' activities and oversees rule adjustments. This committee is typically staffed by an equal number of representatives from each collaborator and is tasked with creating a production plan, setting benchmarks and incentives, and problem-solving."[92]

CONCLUSION

When people consider the meaning or importance of contracts, they should be aware that the interpretation they reach is not only about a document, nor a set of legal rights that can be enforced in the event of a dispute. They should know that their basic understanding about contracts will also affect their assessment of the purposes and functions of contracts. That in turn will influence how companies

89. Barton, *Collaborative Contracts as Preventive/Proactive Law, supra* note 87, at 125-26 (citation omitted).

90. Jennejohn, *supra* note 13, at 119.

91. *Id.* at 120.

92. *Id.* at 121 (citations omitted).

organize and communicate regarding contract planning, formation, implementation, and modification. Finally, one's basic understanding about contracts affects a range of connected ideas about what constitutes a problem regarding a contract; the procedures by which such problems should be prevented or addressed; the skills and knowledge required to operate those procedures; and the nature of the human relationships that are created through binding economic exchange.

Understanding contracts predominately through legal perspectives tends to overshadow alternative perspectives built on the economic exchange itself or the personal relationships forged through the process of making and implementing contracts. Those alternative perspectives respond differently to each of the concepts and questions posed above. Understanding and respecting those alternative perspectives more strongly may unlock potential innovations in contracting, as well as generally strengthen planning and communication within a company. An agreement's content can be made stronger through provisions that encourage flexibility and collaboration, even while offering clear guidance. An agreement's design can be made stronger through visualization. Finally, the stability of personal relationships and potential long-term value can be enhanced through conceiving contracts as a collaborative process of learning more about markets, opportunities, obstacles, and the basic interests of each partner to the agreement.