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Essays on the Nature of Contract

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ESSAYS ON THE NATURE OF CONTRACT

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In *Contracts: Exchange Transactions and Relations,*[1] a number of essays perform introductory, connective, and explanatory functions. Rearranged in a single place with some minor modifications, they may perform different functions for a different audience. So assembled, they will perhaps reveal facets of contract and contract law not to be found, at least readily, elsewhere. They make no greater claim to fame than the modest word essay implies; moreover, they are essays, not *an* essay, although I hope the reader will perceive threads running through the whole.

It is difficult to separate exchange from law—surprising to no Marxist—and it is difficult to separate future exchange from present exchange—surprising to no lawyer. Nevertheless, the first series of essays, Patterns for Exchange, largely avoids the juxtaposition of future exchange and law, the juxtaposition we most commonly label: Contracts. But the second series, Law and Exchange Projected into the Future, melds law with future exchange, and should satisfy the purist that the whole assemblage does indeed have something to do with both contract and contract law.

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1. I. MACNEIL, CONTRACTS; EXCHANGE TRANSACTIONS AND RELATIONS (2d ed. 1978) [hereinafter cited as MACNEIL, CONTRACTS]. The essays are reprinted here with the permission of the publisher, all rights reserved.

As much as possible these essays avoid repeating work appearing elsewhere. They are, however, part of a general examination of contracts carried on for a number of years, aspects of which have been published as follows: *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law,* 72 NW. U.L. REV. 854 (1978); *A Primer of Contract Planning,* 48 SO. CAL. L. REV. 627 (1975); *The Many Futures of Contracts,* 47 SO. CAL. L. REV. 691 (1974); *Restatement (Second) of Contracts and Presentiation,* 60 VA. L. REV. 589 (1974). It is not, therefore, possible to avoid criss-crossing this other work or occasional repetition; instances of significant repetition are noted in the footnotes.

Since these essays were written, the author has given the 1979 Rosenthal Lectures at Northwestern University School of Law, expected to be published in 1980 under the title: THE NEW SOCIAL CONTRACT—AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS. These include, inter alia, a simplified and considerably modified version of *Many Futures of Contracts.* In addition, two recent, as yet unpublished, papers develop more extensively points touched on in these essays: *The Neoclassical Microeconomic Model: Omission of External and Internal Relations; Exchange Revised: Individual Utility and Social Solidarity.* Since, however, none of these is presently available in published form, no further reference will be made to them.

I. PATTERNS FOR EXCHANGE

A. Specialization of Labor and Exchange[2]

A key root of contract is specialization of labor and exchange. Specialization of labor occurs whenever different people in a society perform different tasks. Exchange, as the term is used here, is simply the way such specialists distribute their work products among themselves in a reciprocal manner, thereby permitting continued specialization. Consider, for example, a society consisting exclusively of full time hunters and full time potato farmers. No one will have a balanced diet without exchange of potatoes for meat. If the people require a balanced diet, either exchange will occur, or despecialization will occur with the hunters growing their own potatoes and the potato farmers doing their own hunting.

If specialization of labor is more productive, i.e., by permitting the fleet, strong, and cunning to perfect their hunting skills by long practice, and the placid, sturdy, and "green thumbs" to grow potatoes, the interest of the society calls for exchange to take place so that the people can continue their specialized work. To this end society may inculcate habits in the young, develop customs and rituals, and use force, physical, economic or legal, to cause exchange to occur. Almost all societies do a great deal of this sort of thing—witness, for example, the bombardment of America with TV commercials, many of which are aimed at convincing the viewer of the high social morality of engaging in exchange (of money for goods or services). But will individuals engage in exchange without such external pressures? Of course, because each party can benefit from an exchange.

Consider the following in our meat and potato society. A hunter, H, returns laden with 50 pounds of meat to his potatoless hut. The meat has value to him. In a primitive, nonmoney society such as this, mathematical measurement of utility is little used; nevertheless, for pedagogical purposes, we shall overlook that, and assume that H would assign 10 "utiles"[3] of value to this meat supply. Since a "utile" is nothing more than the fictional medium by which H would measure one good against another, e. g., X pounds of meat against Z arrows, we'll call these "H-utiles" to distinguish them from the way other people measure value.

2. Because of its great individualistic bias, I have become increasingly uncomfortable with starting analysis of contract with this particular essay. In contrast the discussion of contract in the 1979 Rosenthal Lectures started with: "We shall start at the beginning. In the beginning was society." The present essay starts with individuals bouncing around maximizing their utilities like atoms free of the social molecule. I do not for a second believe either that people behave that way or that *any* social analysis can be a remotely comprehensive or sensible one if it progresses no further than that. The essay at hand does eventually progress further, but were I rewriting it now, its starting point would be society.

3. *Ed. note:* Utile has been coined as a noun by Professor Macneil to express relative economic values.

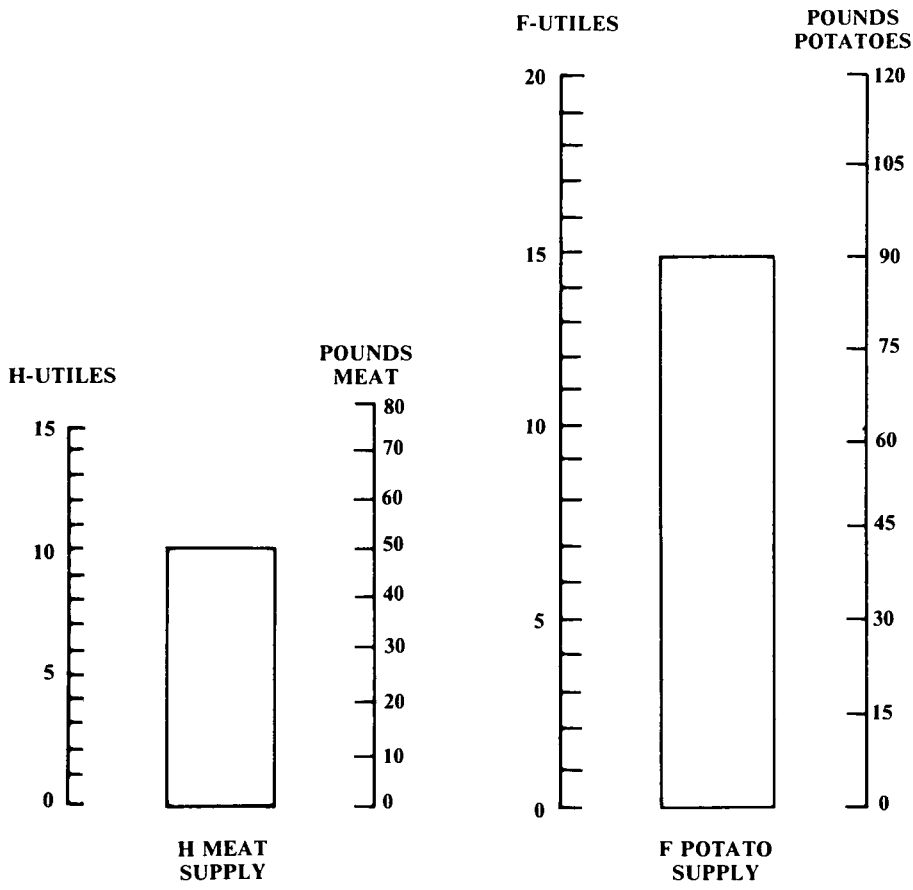
Meanwhile, H's potato farming neighbor, F, has 90 pounds of potatoes in his hut. Assume F would assign 15 of his personal "utiles" of value to this supply. Since a "utile" is, in this instance, nothing more than the fictional medium by which F would measure one good against another, e.g., X pounds of potatoes against one new hoe, we'll call them "F-utiles" to distinguish them from the way other people measure their own utiles. Note that in this example F-utiles have no ascertainable relation to the way other people measure value. Figure 1 shows the economic picture at the time of H's return from the hunt.

Can H and F through exchange increase the total value of their property as measured by their respective utiles? Almost surely Yes.[4] F and his family crave protein, and have an abundance of carbohydrates. F will therefore, probably assign a relatively low number of F-utiles to say, 30 pounds of potatoes; suppose he assigns 3 F-utiles. At the same time, 15 pounds of meat would be very valuable to F; suppose he would assign 6 F-utiles to 15 pounds of meat. On these assumptions, it is plain that, if it costs F nothing additional to engage in making an exchange, i.e. transaction costs,[5] F would gain by exchanging 30 pounds of potatoes for 15 pounds of meat. The F-utiles of his property would thereby be increased from 15 to 18. (15 + 6 — 3).

4. Note that an affirmative answer depends on no decrease occurring in the level of *either* H-utiles or F-utiles. Since we cannot value either in terms of the other, any decrease in one, no matter how small, *might be* larger than any increase in the other, no matter how large. Thus to answer affirmatively with assurance we must show an increase in either H- or F-utiles (or both) and no decrease in the other. (Economists will recognize such a change as a move toward Pareto optimality.)

5. *E.g.*, time and energy to transport the potatoes to H's hut. Transaction costs are too often ignored in economic models, or shunted aside in unrealistic ways. Coase and those following him consider the whole system of contracting as transaction costs. Coase, *The Problem of Social Cost*, 3 J. L. ECON. 1 (1960). [Hereinafter cited as Coase, *Social Cost*]. This seems far too narrow a concept. Organizing production and distribution, whether through contract or other methods, is a basic factor of production every bit as much as are labor, capital, and land. *Cf.* Goldberg, *Toward an Economic Theory of Contract*, 10 J. ECON. ISSUES 45 (1976). [Hereinafter cited as Goldberg, *Theory of Contract*.)

FIGURE 1

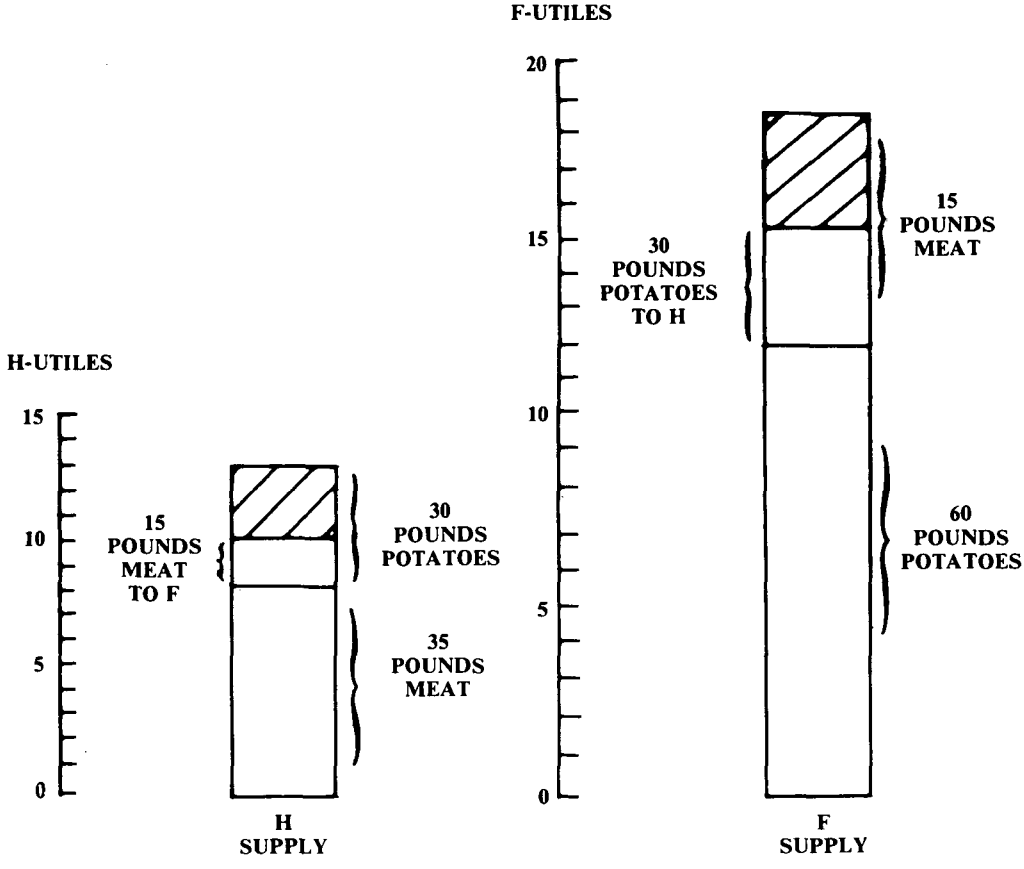


N.B. Do not try to measure H-utiles in terms of F-utiles, or vice-versa; they are different scales, and no way exists to tell the relation between them in this moneyless society.

But what about H? H and his family crave carbohydrates, and have an abundance of meat. H will probably assign a relatively low number of H-utiles to say, 15 pounds of meat; suppose he would assign 2 H-utiles. At the same time, 30 pounds of potatoes would be very valuable to H; suppose he would assign 5 H-utiles to 30 pounds of potatoes. On these assumptions (again assuming no transaction costs), H would gain by exchanging 15 pounds of meat for 30 pounds of potatoes. The H-utiles of his property would thereby be increased from 10 to 13. (10 + 5 — 2).

On the foregoing assumptions H and F may be willing to exchange 30 pounds of potatoes for 15 pounds of meat, as their respective wealth would then be increased as shown in Figure 2.[6]

FIGURE 2



Shaded areas show increases in utiles resulting from the exchange. Again, do not try to measure H-utiles in terms of F-utiles, or vice-versa.

6. *May* be willing, rather than *will* be willing because problems of information, communication, and bargaining may prevent one or both from knowing a deal is possible, and hence being willing to enter it.

A number of things should be noted about this illustration. First, it should be stressed that the exchange produced *mutual* benefits; both parties gained. Exchange is not, therefore, a zero-sum game.[7]

Second, because we cannot measure H-utiles in terms of F-utiles and vice-versa, the information in the illustration cannot tell us who benefited most by the transaction. We cannot tell whether F's gain of 3 F-utiles is equal to, less than, or greater than H's gain of 3 H-utiles. Even to try to do that requires looking at factors external to our model. Relative prices of meat and potatoes in exchanges between others, i. e. market prices, or concepts such as a labor

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7. A zero-sum game is one in which one party's gain is exactly equal to the other party's loss. A theft of $10 is an example: the thief is $10 richer, and the victim is $10 poorer. Considering thief-victim as a single unit, the gain and the loss total zero, hence "zero-sum game." A nonzero-sum game could be either a gaining game or a losing game. While the latter is by no means a rarity, our main concern in thinking about economic productivity is the former. An example: Jill stands on Jack's shoulders to reach an apple branch neither could reach alone and picks two apples, one for him and one for her. This is not a zero-sum game because the wealth of *both* has been increased; thus treating Jack-Jill as a unit the gain and loss do not total zero, but a positive figure. We shall explore the nature of simple exchange in terms of zero-sum games in a bit more detail below.

The description of the thief-victim game as zero-sum is accurate only if the $10 is worth the same amount in personal utiles to both victim and thief. If it is worth more to thief than to victim, then the game causes a net gain to the thief-victim unit. This might be called The Robin Hood Game. If it is worth less to thief than to victim, then the game causes a net loss to the thief-victim unit. This might be called the Sheriff of Nottingham Game. But to make any assumptions about relative values of this kind (including equality of value) requires interpersonal utility comparisons. The model in the text provides no basis for such comparisons. Thus the thief-victim example simply illustrates what a zero-sum game would be *if* both value the $10 the same; it does not show in any given situation that it is in fact a zero-sum game. (A common assumption of any law of property is that it is in fact zero-sum. Hugo's Les Miserables illustates what happens when that assumption is pushed to extremes.)

This footnote in MACNEIL, CONTRACTS *supra* note 1, at 4, starts: "Contra, and wrong on this point, see Lowry, *Bargain and Contract Theory in Law and Economics,* 10 J. ECON. ISSUES 1 (1976)." In a letter dated October 23, 1978, Professor Lowry explained the Aristotelian origins of his analysis, and the limited scope of his conclusion:

> [O]nce the potential mutual benefits from bargain are defined, the process devolves into an essentially distributive or divisional process where, if one party gets more, the other will necessarily get less, i.e. a zero-sum game. . . . I would argue that in some cases (a stable, active market, for example) the mutual benefits from a bargain are so apparent to the individuals who enter into personal negotiation that, from the inception of the transaction, the parties are primarily involved in negotiating a division of the fruits of the exchange process.

He goes on:

> In the case where contract functions as a private structuring of relationships to build a unique basis for mutual advantage, the reciprocal utilities are generated by negotiative planning, but they are also being distributed within a zero-sum perspective as the fruits of the arrangement are allocated between the parties.

As the reader of this essay will see, Professor Lowry and I are thus far more in agreement than one would think from direct comparison of his article with the essay. We may, however, well differ on how common is the pure zero-sum allocation bargain. I think it is a rare, perhaps nonexistent, bird in the real world.

The phrase "exchange-surplus" seems a useful one to describe enhanced utility created for both parties by exchange.

theory of value, i. e. how much time and effort go into hunting and into potato farming respectively, might enable us to do so. Or indeed, the parties themselves might have views on the subject, perhaps in accord, perhaps in conflict. Were we to pay attention to any of these factors, we would begin to have the rudiments of measuring H-utiles in terms of F-utiles, but not without information beyond that supplied by *this* exchange.[8]

Third, some social structure of which both H and F are members is an inevitable prerequisite to the occurrence of such an exchange. Without some such matrix nothing would preclude either H or F from employing methods other than exchange, e. g. armed robbery, to get what he wants with less cost to himself.[9] This matrix may be minimal in terms of social cohesiveness, such as a balance of available physical force between F and H making it cheaper for each to trade the potatoes and meat than to try to take what is wanted by force. Relations based only on short-run balance of physical force tend, however, to be very unstable. The environment they provide for exchange is seldom more than barely adequate and is never sufficient to support the high levels of specialization of labor that make exchange most productive.[10] Complex social structures held together by webs such as kinship, custom, law, economic interdependence, and countless other ties that bind, provide better conditions for both specialization of labor and exchange.

Important consequences follow from the prerequisite of a social matrix. For one, it is error to attribute *all* benefits arising from the exchange solely to the exchange or solely to the social matrix in which it occurs.[11] *Both* are necessary factors in the production of the benefit. Closely related, since the exchange may impose costs on the social matrix in which it occurs, is the fallacy of concluding that utiles of *everyone* involved go up simply because those of H and F go up. If we think of all the rest of the society as a unit, with "S-utiles," the exchange may decrease S-utiles. For example, the kind of specialization and exchange involved leads to soil depletion and scarcity of game. If S-utiles are decreased, it is incorrect to speak of total utiles being increased by the exchange.[12]

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8. Whether interpersonal utility can be measured is a much disputed issue in economics, one involving very complex issues; it is not my intention to enter that thicket here.

9. Lowry, *Bargain and Contract Theory in Law and Economics*, 10 J. ECON. ISSUES 1 (1976), vividly illustrates this in analyzing the famous Coase theorem. *See* Coase, *supra* note 5.

10. Nevertheless, much established trade has historical roots in raiding, as in the case of the Vikings, whose raid-or-trade tactics were a major contribution to the restoration of international trade after the collapse of the Roman Empire.

11. The former is a common fallacy in microeconomic analysis as well as in much analysis of the benefits of "freedom of contract." The latter is the error charged to Lowry, *supra* note 7, and which may also be charged against much standard Marxist analysis.

12. A very common fallacy in microeconomic analysis, where efficiency is measured in terms of the benefits and costs of a transaction to the private parties, but then the results are spoken of as if *total* economic efficiency in the society had been measured. Two examples: R. POSNER, ECONOMIC ANALYSIS OF LAW 223-24 (1972); P. SAMUELSON, ECONOMICS (9th ed. 1973).

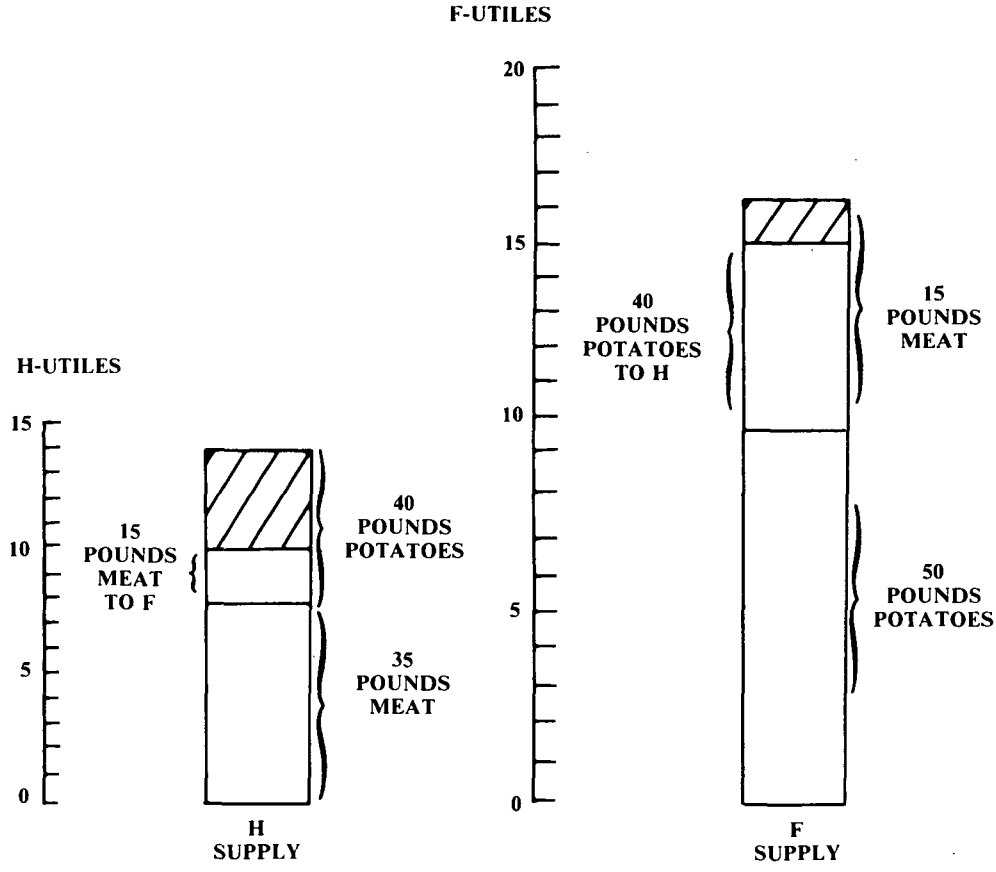
Again, the statement in the text assumes that we cannot make interpersonal utility comparisons. (This does not affect criticism of the misuse of the basic microeconomic model, since the model is also based on that assumption.)

Fourth, while exchange is normally not a zero-sum game, some zero-sum characteristics occur in exchange. To return to the meat and potato illustration, suppose that F, who in the example valued 30 pounds of potatoes at 3 F-utiles, also valued 40 pounds of potatoes at 5 F-utiles. Since F valued 15 pounds of meat at 6 F-utiles, he still would have gained 1 F-utile even if he had had to give up 40 rather than 30 pounds of potatoes for the 15 pounds of meat. And suppose that H valued 40 pounds of potatoes at 6 H-utiles, one more than he valued 30 pounds of potatoes. Had the exchange gone through for 40 pounds of potatoes rather than 30 as originally described, F would have gained 1 F-utile and H would have gained 4 H-utiles (6-2), as shown in Figure 3. But compared with the exchange depicted in Figure 2, H has gained an additional H-utile, and F has lost 2 F-utiles. H's gain was entirely at F's expense, i.e. this looks like a zero-sum change.[13] Nevertheless, F gained from the exchange compared to making *no* exchange at all, and the exchange depicted in Figure 3 is not a zero-sum game. It is only zero-sum compared to other exchanges that could have been made, i. e., all those which would achieve at least some mutual benefit. But this is not how we normally use the term zero-sum; rather we compare actual-before-the-game with actual-after-the-game.

The picture becomes slightly more complicated if we ask if bargaining, as distinct from the exchange itself, is a zero-sum game. In one respect it is, since everything one party gains by haggling, e.g., a higher price, exactly equals what the other gives up, e.g., the higher price. But to attach the label zero-sum game to this process is to assume that bargaining plays no role in bringing about the exchange; it treats bargaining as only affecting the price (for example) of a deal to which the parties are already committed. This, however, is not what bargaining is all about. Bargaining is the very process by which the parties become committed and bring about the exchange; to the extent that it contributes to the gains on both sides brought about by the exchange, it is no more zero-sum than is any other aspect of the exchange. Bargaining typically serves many informational and persuasive purposes, among them helping the parties find out that exchange benefitting both sides is a possibility, something that they often do not know at the start of the bargaining.

13. *See* note 7 *supra*.

FIGURE 3



Shaded areas show increases in utiles from exchange. Note that we still cannot tell who gained the most by the exchange.

Thus, viewed in terms of its overall functions, bargaining itself is not a zero-sum game.

As will be seen from the above, except where induced by factors outside the exchange itself, exchange occurs only when both sides see themselves as gaining. If, for example, a house owner values his house at $40,000, and no potential buyer values it at more than $37,000, no sale will take place. Neither potential party will see a gain. If, however, a house owner values his house at $37,000 and one or more potential buyers value it at $40,000, a sale can take place at a price between $37,000 and $40,000. Such exchange will result in a net gain of $3,000 in terms of the total valuations the parties put on the house and the money being exchanged. Within this sum of $3,000, however, zero-sum

game playing can occur, but only if we ignore the contributions the game makes in bringing about the exchange. Dependent upon a variety of circumstances such as accuracy of information, bargaining skill, and factors external to the exchange motivations themselves, the purchase price can range from a trifle over $37,000 to a trifle under $40,000.[14]

B. Exchange and the Future

1. Introduction. If the only exchanges possible were those involving existing property, exchange could still yield mutual benefits. People with unexpectedly large quantities of particular goods as the result of, for example, a bountiful hunt or harvest, might gain by trading them for other goods. So too, individual tastes and circumstances may change, resulting in changed valuations of existing stocks of goods. Exchange will then yield mutual gain, not because of planned specialized production, but because "it happened that way." Even in societies with only a relatively simple range of available goods and with relatively little specialization of labor, such fortuitous variations in valuation may be expected to cause considerable amounts of trading. Only an extraordinarily small, simple and static society, if that, could remain very long in an equilibrium of ownership in which further trading of goods or services could achieve no mutual benefit whatever.

Not until exchange is projected into the future[15] with some degree of foresight, however, do the potential benefits of exchange become massively significant. With this projection comes the potential for immensely increased specialization of labor. For example, suppose the hunter discussed in A. above knows—for whatever reason—that in the future he can trade for other valuable goods all the game he can catch by working full time. He can then spend his time hunting, rather than spending substantial time growing potatoes and providing shelter and other needs by his own hands.

A society can provide the assurance of future exchange sufficient to support specialization of labor in many ways. The very existence of extensive specialization of labor provides significant assurance that its fruits can be exchanged for goods needed for survival and comfort. At the same time that the hunters are specializing, so are others specializing in other activities. Those others will need meat for themselves and their families, and their needs provide opportunities for future exchange likely to make worthwhile the hunter's continued specialization.

But the existence of specialization of labor does not necessarily produce exchange opportunities for the product of any particular producer. If too many

14. Factors external to the exchange motivation respecting these goods as such, e.g. altruism or physical threats, could take the price above or below these limits. *See* M. SAHLINS, STONE AGE ECONOMICS (1974) for discussion of the former, and see *The Godfather* for an example of the latter.

15. Projecting exchange into the future means simply that at least some elements of the exchange occur some time after one or both parties started planning for its future occurrence.

people go into hunting relative to those going into farming, for example, or if meat is not much valued relative to other goods in the society, a hunter may have lots of meat and little else. Numerous social mechanisms can be used, however, to provide assurance that particular specialization will be worthwhile. Command, status, social role, kinship structures and obligation, bureaucratic patterns, religious obligations, habit and other internalized behavior patterns, all may create additional assurance. So too, the existence of extensive markets with their reflections of constantly changing demands for particular goods and services provide information and with it some assurance of the benefits to be achieved by continuing in particular lines of production. Markets are, however, but one example of the webs of interdependence arising out of ongoing exchange relations; such interdependence, whatever form it may take, provides assurance that when goods are produced they can be exchanged with gain accruing to the producer.

Not yet mentioned is the social technique of promise.[16] Promise—the "manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made"[17]—is a major source of assurance permitting projection of exchange into the future. For a number of reasons, promise is an especially important kind of assurance.

First, inherent in the concept of promise is the idea that the promisor's *individual* will can affect the future at least partially free of communal will. This notion is not necessarily present in the other techniques for projecting exchange into the future, e.g., communal customs respecting planting and harvesting. Closely related to this is the presumption of some element of choice in the making of a promise; also, the promise constitutes expression of a present intention to limit the promisor's range of choice in the future.

Moreover, promise is the foundation stone of two kinds of ideal contract structures. One is the ideal contract postulated in typical microeconomic models.[18] The other is the ideal contract of classical contract law.[19] Example: On January 15, Seller promises to deliver specified goods to Buyer on March 1, and Buyer promises to pay $8,000 within 30 days of delivery. Indeed, promise as a projector of exchange can be redefined as follows to fit even closer to these ideal contract structures:

> Present communication of a commitment to engage in the future in a specified reciprocal measured exchange.

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16. Forfeiture is another important technique; logic calls for its inclusion here. But to explain it, and its relation to promise would greatly complicate an already complex discussion.

17. RESTATEMENT (SECOND) OF CONTRACTS § 2 (1973).

18. *See* Goldberg, *supra* note 5.

19. Classical is used here to refer to 19th and early 20th century law. The epitome of such law is found in the Restatement of Contracts (1932), an ambitious effort by the American Law Institute to restate the American law of contracts. It and other Restatements which followed are not official sources of law, but have had considerable influence.

Much, but by no means all, of this course will center on promise thus defined.

The final reason for focusing separately on promise is its close connection to discrete transactions. This contrasts with the close connection of non-promissory projectors of exchange to ongoing contractual relations. A perpetual tension exists in economic and legal analysis between these antipodal projectors of exchange and their related contract archetypes. This tension is not simply a conceptual one, but reflects deep practical conflicts relating to economic organization, what it is and what it should be, and relating to legal analysis of exchange, what it is and what it should be. But before one can begin to understand that statement, one needs a basic understanding of the ways in which discrete transactions and ongoing relations differ.[20]

Contractual ordering of economic activity takes place along a spectrum of transactional and relational behavior. At one end are discrete transactions.[21] Discrete transactions are contracts of short duration, involving limited personal interactions, and with precise party measurements of easily measured objects of exchange, for example, money and grain. They require a minimum of future cooperative behavior between the parties and no sharing of benefits or burdens. They bind the two parties tightly and precisely. The parties view such transactions as deals free of entangling strings, and they certainly expect no altruism. The parties see virtually everything connected with such transactions as clearly defined and presentiated.[22] If trouble is anticipated at all, it is anticipated only if someone or something turns out unexpectedly badly. The epitome of discrete contract transactions: at noon two strangers come into town from opposite directions, one walking and one riding a horse. The walker offers to buy the horse, and after brief dickering a deal is struck in which delivery of the horse is to be made at sundown[23] upon the handing over of $10. The two strangers expect to have nothing to do with each other between now and sundown; they expect never to see each other thereafter; and each has as much feeling for the other as has a Viking trading with a Saxon. A modern example with many of these characteristics is a purchase of nonbrand name gasoline in a strange town one does not expect to see again.[24]

At the other end of the contract spectrum are ongoing relations. Being more diverse than well-honed discrete transactions, they are more difficult to describe concisely, but the following are typical characteristics. The relations are of significant duration (for example, franchising). Close whole person relations

20. Both, of course, involve specialization of labor and exchange. Both also involve at least some element of choice and some consciousness of past, present, and future, and both are part of a social matrix in which language is a key element.

21. This and the following paragraph are largely from Macneil, *Restatement (Second) of Contracts and Presentiation,* 60 VA. L. REV. 589, 594-95 (1974).

22. To presentiate: "To make or render present in place or time; to cause to be perceived or realized as present." 8 Oxford English Dictionary 1306 (1933).

23. A present exchange at noon would be even more discrete. Projections of exchange into the future always shove the transaction in relational directions. Since contracts are typically projections of exchange into the future, having the exchange at sundown brings the illustration into this typical realm of contract.

24. The future aspect here is short, but nonetheless real; drivers sometimes pull out without paying for their newly filled tank.

form an integral part of the relation (employment). The object of exchange typically includes both easily measured quantities (wages)[25] 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 cooperative behavior is anticipated (the players and management of the New York Yankees[26]). The benefits and burdens of the relation are to be shared rather than entirely divided and allocated (a law partnership). The entangling strings of friendship, reputation, interdependence, morality, and altruistic desires are integral parts of the relation (a theatrical agent and his clients, a corporate management team). Trouble is expected as a matter of course (a collective bargaining agreement). Finally, the participants never intend or expect to see the whole future of the relation as presentiated at any single time, but view the relation as an ongoing integration of behavior to grow and vary with events in a largely unforeseeable future (a marriage; a family business).[27]

2. *Agreement and exchange.*

> I, too, am of the generation to whom Offer and Acceptance in traditional garb were as the rising of the sun. It had always been; it would always be; and it somehow was good.[28]

Agreement is one of the most complex concepts in contract; restitution, reliance, and expectation pale into utter simplicity by comparison. But we shall start with this complex subject as generally as possible, with a deceptively simple definition of agreement as it operates in the realm of contract:

> Agreement is the manifestation of mutual assent of two or more persons to make an exchange.[29]

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25. This is true of most modern relational contracts; the statement does not, however, necessarily apply to all modern relational contracts, e.g. marriage, nor may it be applicable in some communal societies.

26. This example is sometimes in doubt.

27. Many elements of relational contracts are nicely illustrated by this description of the relationship between proprietor and tenant in 18th and early 19th century Scottish Highland fishing communities:

> More commonly perhaps there would be some contribution in money, materials, and even subsistence, for which any exaction might be regarded as a simple return of interest; but it is seldom possible so simply to isolate the specific bargain as a balancing and self-sufficient transaction. The basic question, in a single inseparable tangle of interests, was simply how much of the surplus above necessary subsistence, out of a product derived from farming, from fishing and from any other money-making operation, the landlord was to uplift from the peasant, and how much land, material aid and subsistence, the landlord would provide in return; it was a single account, developing over a life-time, of which the individual items and temporary balance would change as needs and possibilities declared themselves. M. GRAY, THE HIGHLAND ECONOMY: 1750-1850, 116-17 (1957).

28. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance—I*, 48 YALE L.J. 1,32 (1938).

29. So defined agreement by no means encompasses all commitment that may occur in connection with exchange transactions and relations. Moreover, agreement so defined neither necessarily creates an enforceable contract nor is necessary to create one. An agreement without consideration may be unenforceable; a promise to perform an obligation the enforcement of which is

Thus defined, agreement is the bridge between the potential for gain that *might* occur through exchange and a joint decision that exchange should occur. You will recall in any given situation, even those involving only two kinds of goods and two participants, *many* exchanges are likely to be possible, any one of which could raise the utility levels of all concerned. But by no means all such potential exchanges can or will take place. People must exercise choice among *many* exchanges open to them. Many are mutually exclusive. For example, in the meat and potatoes example in the essay on specialization of labor and exchange, above, if P trades 40 pounds of potatoes for 18 pounds of meat, he no longer has them to make the other trade we discussed (30 pounds of potatoes for 15 pounds of meat[30]). H too has changed his position in similar manner. Thus, if one spends dollars for a Cadillac, none may remain for a Mercedes, or, if any do, taste for luxury cars may be satiated and one may buy a sailboat instead or postpone further expenditure.[31]

In sum, agreement is the process whereby each party: (1) decides not only that some exchange will be beneficial, but also that some particular exchange is the most beneficial to him that he can secure, and (2) communicates that decision to the other. Some of the complexities of the process are demonstrated by figures 4 and 5.

C. Exchange, Society, and Law

1. *Social structure for exchange.* In the essay on specialization of labor and exchange it was seen that as a practical matter exchange can take place only in a structure providing constraints generally preventing the use of methods, such as theft, of acquiring goods and services from others at lower costs than those of the exchange in question.

In the ten thousand or so years since the agricultural revolution, mankind has developed specialization of labor and exchange into the unprecedently productive economic systems now seen throughout the globe.[32] We cannot hope to start here on an exploration of the manifold range of social patterns causing and caused by these developments. We can, however, profit by exploring some general concepts relating to the prerequisites for successful specialization and exchange systems.

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barred by the statute of limitations may be enforceable without any manifestation of assent by the obligee.

Conpare UCC § 1-201(3): "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act. * * *

30. The parties may or may not have reached an equilibrium at which no further exchange can be mutually beneficial. They may wish to trade no further. But upon further reflection, or upon receipt of additional information, or because of changed circumstances, F and H may decide, for example, to trade another 3 pounds of meat for another 6 pounds of potatoes.

31. In economic terms, the marginal utility of acquiring a second luxury car is less than that of alternative ways of using the dollars.

32. Only the social insects can rival us in total productivity of "goods". Their production is, however, far less varied than is human production. It is limited to goods needed for continued existence, whereas ours not only goes far beyond such necessities, but through its sheer mass and other characteristics, threatens our continued existence.

2. *Stability.* High levels of specialization of labor and production and exchange can exist only in conditions of reasonable social stability. Without these conditions, society becomes so fragmented that only limited specialization is possible. If stability decreases, the economic web hitherto permitting people to support themselves by working on corporate bond issues or growing only tobacco or putting lug nuts on cars coming off the assembly line begins to fall apart. The corporate lawyer may then have to resort to picking up any kind of legal work he can find, the tobacco grower must direct some effort to corn, and the assembly line worker takes up used car repair. If the web breaks down further, each tends to become more and more a jack-of-all-trades. If it breaks down to very low levels, as it did in most of Europe after the fall of Roman civilization, the whole economy of the survivors reverts largely to subsistence agriculture, leaving only modest specialization of labor and exchange outside the family structure.

Conversely, on the upward path of specialization and exchange, social structures grow and the web of exchange expands, providing the necessary stability for further specialization. By and large, with occasional setbacks and plateaus, we have witnessed this process throughout most of the now developed world for well over a thousand years.

FIGURE 4

SELECTION, NARROWING AND OTHER PROCESSES LIMITING THE CONTENT AND MUTUALITY OF PROMISSORY EXPRESSION

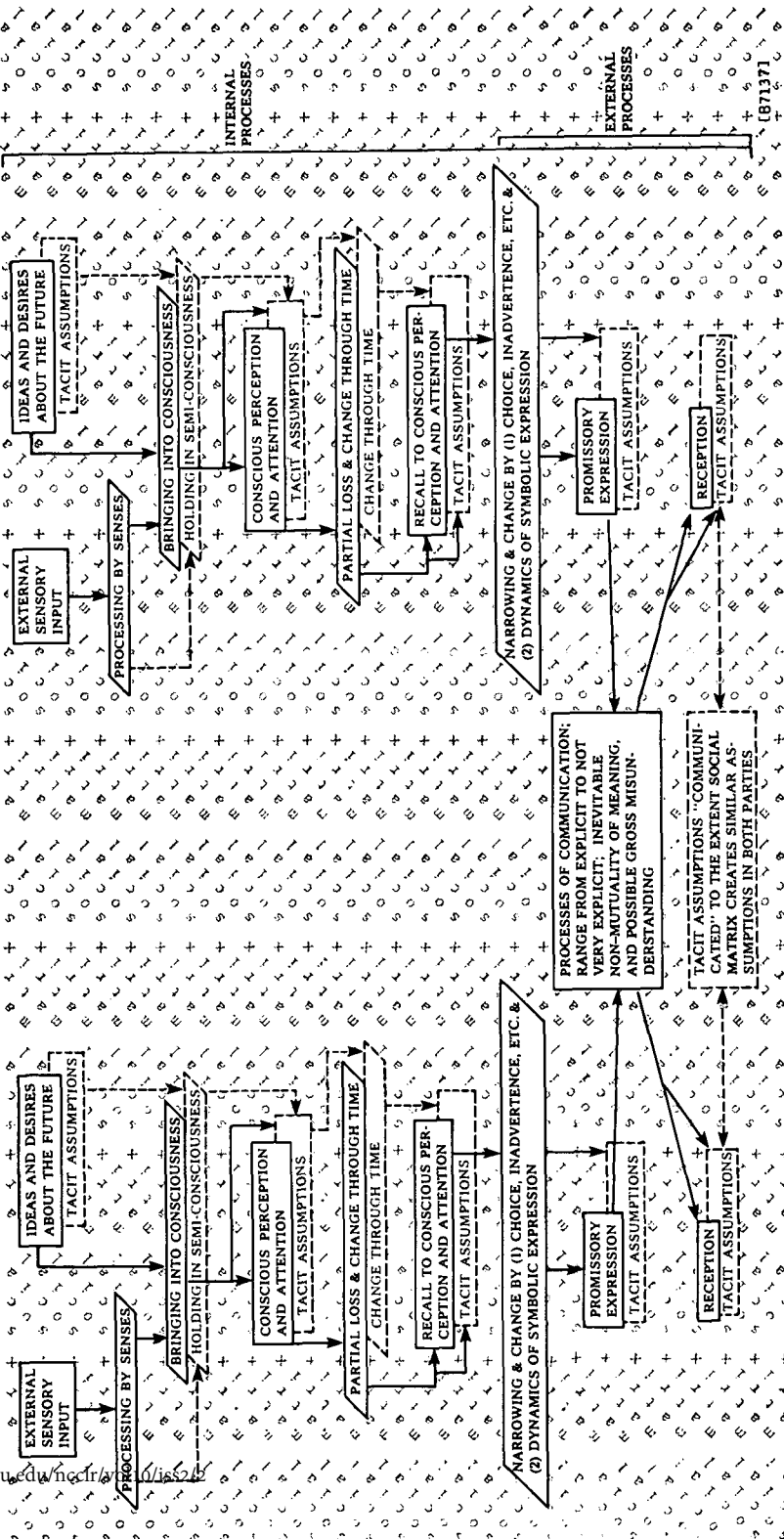
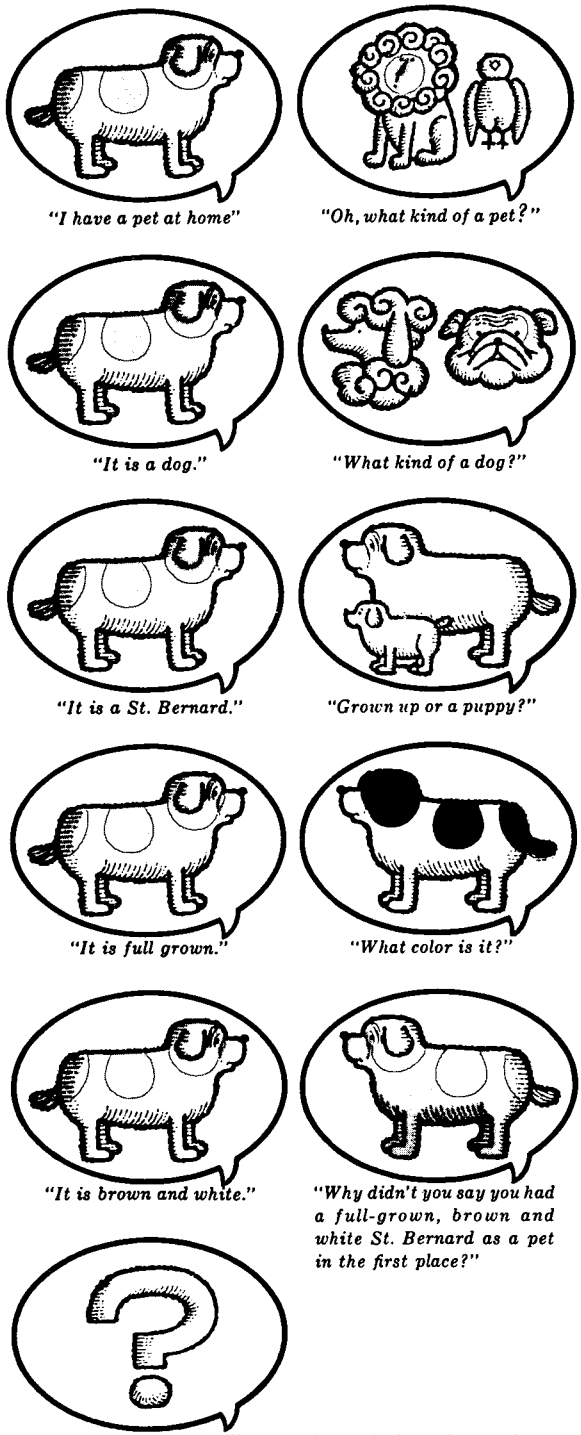


FIGURE 5[33]


"I have a pet at home"
"Oh, what kind of a pet?"
"It is a dog."
"What kind of a dog?"
"It is a St. Bernard."
"Grown up or a puppy?"
"It is full grown."
"What color is it?"
"It is brown and white."
"Why didn't you say you had a full-grown, brown and white St. Bernard as a pet in the first place?"
"Why doesn't anybody understand me?"

A society may supply in many ways the stability necessary for complex webs of exchange. This stability by no means requires the conditions we tend to associate with contract in a capitalist society—permitting and encouraging exercise of individual choice, private property, and legal enforcement of individual promises. Nor does the process of exchange itself require those conditions. A technologically advanced society can achieve great specialization of labor and product and high levels of exchange without those conditions obtaining as the dominant economic mechanism.[34] Socialist ownership, centralized planning and rationing, and bureaucratic communication structures can also provide the stability necessary for high levels of specialization and exchange.[35] Stability may also be provided, but at much lower levels of specialization, by communal and customary structures such as the extended family and other kinship or geographical ties.

In any society—communal, centrally planned, capitalist, or something else—habit, custom, learning and education, and legal reinforcement of behavior conforming to the norms they establish, in great measure supply the stability necessary for specialization and exchange. For example, in middle America one learns to protect one's status as a good credit risk well beyond what self-interest may dictate. Habit, custom and education develop a sense of obligation —call it socially constructive or paranoid as you will—to preserve one's credit rating not altogether different from that Victorian maidens felt respecting their virginity. That internalized learning helps provide the foundation for our massive American credit structure, a major factor of production.

In spite of, or perhaps because of, our day to day involvement in the American exchange system, one of the most common failings in the contracts classroom is to forget all about habit, custom, and learning when faced with the intricacies of private property, promises, and legal enforcement of promises. Yet property, promises, and their legal enforcement operate only in a far broader context of social patterns, the existence of which not only permits them to exist, but also massively affects every phase of their existence and character.

Last—and it is last, because it is relatively modern, and by no means universal—we come to the stability provided by private property, exercise of individual choice, and legal reinforcement of individual promises.

3. *Exchange, private property, individual choice, and law.* Both the meat and potato exchange and the sale of a house discussed in the essay on specialization

34. No human society is ever totally lacking them. Even a slave has a choice between performing what is demanded by the master and suffering the consequences of rebellion. No system yet known can take away entirely the "property" each human has in his own body and its use. For highly productive specialization and exchange systems in which none of these conditions prevail, one may turn to the social insects. With them the system depends on morphologically differentiated castes and genetically programmed communication systems. *See.* E. WILSON, THE INSECT SOCIETIES (1971), and E. WILSON SOCIOBIOLOGY 307-437 (1975). Whether scientific methods of mind control may yet produce comparable human societies we do not know.

35. China appeared under Chairman Mao to achieve quite high levels of specialization and exchange using an amalgam of coordinating techniques, including heavy emphasis on social solidarity and moral exhortation.

of labor and exchange postulate that each party has some control over the respective subjects of the proposed exchanges. The idea of "my" and "your"—the *meum et teum,* of the property notion—pervaded those particular exchanges.

The concept of *individual* property is not essential to the occurrence of exchange—defined as the distribution of the work products of specialists in a reciprocal manner permitting continued specialization. Exchange carried on through a rigidly organized centralized system may be exchange involving little individual property or exercise of individual choice.[36] That is, exchange takes place in such a system largely irrespective of the wishes of the producers of the products; since they cannot control its disposition it is not their property. The notion of individual choice (and with it the mine and yours of property), however, plays a significant role in all models of American contract law. In this limited context we can accurately state that the concepts of property and individual choice relate intimately to legal recognition of exchange.

The idea of property underlying contract need not necessarily be a *legal* idea—an exchange can take place even though the "property" of each party depends entirely upon his ability to keep possession of it by force. Moreover, very strong social structures can exist without law as we are most inclined to think of it—a structure of specified rules, or principles, e. g. statutes, applied by distinctive legal persons or bodies,[37] e. g. courts. Social structures lacking law in this form can easily create the conditions of mine and yours that can and do constitute the notion of property.

Where, as in our society, law exists as a phenomenon somewhat discrete from other social phenomena, property rights tend to become in significant measure *legal* property rights. That is to say, in many ways the legal system will recognize that one has rights to particular goods and services. Among other things, the legal system will make sanctions available to an "owner" to protect his interests in the property owned. Thus, a minimum role of law in a society based on the exchange of "my" and "your" kinds of property will be legal recognition of property rights.

Since exchange of property is so commonly associated with systems of private property and capitalism, it is essential to make clear that the property involved in such an exchange need not be private property. Exchange of public

36. Individual is used broadly here to include groupings as large as General Motors, or indeed the United States government itself, when it acts as a party to a contract, as distinct from acting as sovereign allocator or rationer of goods and services. Such usage is common enough and fair enough as long as we limit ourselves to fictions: "*the* corporation" or "*the* sovereign." These fictions are useful for limited purposes. After all, General Motors does enter contracts on which it is liable as a *single unit.* But the usage easily becomes ludicrous when moved to other analyses, e.g. when a devotee of the free market speaks of GM as individual enterprise.

37. Definitions of law abound, this being but one of countless possibilities. It is far too sharp a definition. Still very limited, but perhaps more reflective of real life law would be: "A structure of somewhat definable principles sometimes consulted or even followed by persons purporting to assume distinguishably legal roles when they make decisions."

property can occur just as well as exchange of private property, e. g. between state enterprises in a socialist system. Or the exchange can be of private property on the one hand and public property on the other, e. g. purchases by a government agency from a private seller. All that is needed is a separation of parties into "us" and "them" and some separate control of "our" property and "their" property.

Finally, a legal recognition of property rights does not by itself mean that reciprocal transfers of legal property rights through exchange are possible. An exchange can be legally effective only if the law recognizes the two transfers involved. If the law refuses to accord such recognition, the legal property rights remain where they were before the exchange, and in the eyes of the law the exchange is ineffective.[38]

To summarize, many aspects of social organization provide stability supporting exchange. Habit, custom, and learning are major elements in that stability. Society reinforces general social stability through a legal system, e. g. tort and criminal law. Finally, the legal system reinforces exchange by recognizing and enforcing a system of exchange based on property concepts (mine and yours) coupled with individual choice. Thus, essential legal concepts supporting effectuation of exchange in this society are: (1) legal reinforcement of basic social stability; (2) legal recognition of property rights, and (3) legal recognition of the right to make reciprocal transfers of those rights.[39]

Our list of legal supports of contract is unfinished. It will be complete only when we add the legal enforcement of promises and other legal protection of contracts as wealth, the subjects of the first two of the second series of essays.

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38. ". . . barter at first took effect exclusively as a set of two simultaneous and reciprocal acts of immediate delivery of possession. Possession, however, is protected by the claim for vengeance on, and expiation by, the thief. Thus, the kind of 'legal protection' accorded to barter was not the protection of an obligation, but of possession." M. WEBER, LAW IN ECONOMY AND SOCIETY 108 (1954).

39. Pashukanis, a Soviet legal scholar who wrote in the 1920s and 30s until he became a victim of Stalin's purges, propounded the theory that law itself is dependent upon an exchange-based society, and that only with the elimination of exchange could the law wither away, along with the state. *See* Fuller, *Pashukanis & Vishinsky: A Study in the Development of Marxian Legal Theory,* 47 MICH. L. REV. 1157 (1949); Powell, *The Legal Nihilism of Pashukanis,* 20 U. of FLA. L. REV. 18 (1967). There is a considerable revival of interest in Pashukanis. *See* P. BEIRNE & R. SHARTHET, PASHUKANIS AND SOVIET LEGAL THEORY: THE COMMODITY EXCHANGE THEORY OF LAW (1979); E. PASHUKANIS, THE GENERAL THEORY OF LAW AND MARXISM (B. Einhorn, trans. 1978); Kinsey, *Marxism and the Law: Preliminary Analysis,* 5 Br. J. of L. & Soc. 202 (1978). *Cf.* Llewellyn, *What Price Contract?—An Essay in Perspective,* 40 YALE L.J. 704, 727 (1931):

> Much of the growth of the law itself is surely traceable to bargain. Originally and still, arbitration of differences is by agreement. Out of a practice of arbitration, originally and still, official tribunals grow. Out of the results of arbitration, or of compromise, originally and still, come norms for future cases.

D. Transfers of Contractual Relations[40]

A review of the characteristics of discrete transactions reveals virtually nothing to inhibit the assignability of rights arising from them or the delegation of their performance, so long as the original obligor remains liable on the contract. The absence of primary relations, the nature of the subject matter of exchanges, the careful measuring, the sharpness of commencement and termination, the completeness and specificity of bindingness and obligation in planning, the absence of need for extensive future cooperation, the absence of a sharing of benefits and burdens, all mean that nothing stands in the way of complete transferability. Indeed, even the idea that the original obligor is unable to shift his ultimate liability to a third party is a relational notion, since in the purely theoretical discrete transaction, who the parties are is immaterial.

The move from discrete transactions to ongoing contractual relations raises serious questions about assignability of rights and delegability of performance. Many of the characteristics of contractual relations are such that assignment or delegation can work great changes in the relation. Primary relations, depending as they do heavily on the identity of participants, tend to be inherently nontransferable by simple exchange. The absence of measurability and actual measurement of subjects of exchange in pure relations makes transfers of the relations difficult, as do the absence of finiteness and clarity of commencement and termination of relations. Similarly, both the length of relations and the nature of limitations on relational planning make simple transfers of relations difficult to achieve. The possibility of future planning altering relations, the absence of bindingness of planning, and the great need for future cooperation and relational development of future obligations all make simple exchange-transfer of relations an anomalous concept, particularly since burdens and benefits tend to be shared rather than divided and parceled out. Finally, the elements of trust demanded by participant views of relations make identity important, and simple transfer therefore unlikely.

But the foregoing is by no means a complete story. As contractual relations become more complex and larger numbers of people become involved, the relations become significantly de-personalized. Thus, while it is clear enough that Employee A may not delegate performance of his duties to B over Employer's objection, and Employer Y cannot assign his rights in contracts with his employees to Employer Z over their objection, we may find transfers effected in other ways. Unions, for example, may in effect transfer rights to employment (and delegate performance) by controlling admission to union membership. The filiation practices of various construction unions in effect made possible intergenerational transfers of permanent employment rights.[41] Similarly, when a controlling stockholder of Corporation K sells his interest to an individual

40. This essay is based partially on Macneil, *The Many Futures of Contracts*, 47 So. CAL. L. REV. 691, 791-92 (1974).

41. The only *legal* objection to this appears to be its effect on racial minorities. If the unions are fully integrated so that no racially discriminatory effect results from filiation practices, such conduct presumably would be legal.

or a corporation, the practical effect respecting all of the contracts, including employment contracts, of Corporation K may be very similar to assignment. Thus, we find, as relational contracts become larger and more impersonal, a kind of reification permitting the reintroduction of some transactional characteristics for limited, but nevertheless important, purposes.

The kinds of clashes that can occur when contractual relations become reified and hence transferable are illustrated by the problem in labor law of the successor employer. Company A purchases a controlling interest in Company B; is Company B obliged to continue to bargain with the same union it has been bargaining with in the past? is it still bound by the current collective bargaining agreement? by its arbitration provisions? Affirmative answers come easily. But suppose that instead of buying a controlling interest and continuing Company B as a legal entity, Company A buys all of Company B's assets and takes over running its business. Has Company A somehow now become bound by Company B's obligations to the labor force? Suppose it has been careful to disclaim any intention of doing so? Or suppose that Company C liquidates its operations in Somerville, Massachusetts, where it has been located for 100 years, and the owners and all the management move to Plains, Georgia, and set up a similar operation? An infinite variety of situations of this nature has led to development of a significant corpus juris, all quite clearly related to assignment, but developed in different terms and with different concepts.[42]

II. Law and Exchanges Projected Into the Future

A. *Legal Reinforcements of Exchange Projected into the Future*

1. *Contracts as wealth protected by law.* In one sense the only economic wealth is the *present* availability of goods and services. The old saying, "You can't live on promises," is, in a literal and restricted sense, accurate. But the fact is that in a modern economy we do "live on promises." We attribute *present* value to promises, to the mere assurance that something will happen in the future. A $10 bill is a good example: because it gives immediate assurance that it can be exchanged any time in the future for something of value, it has *present* value.[43] So too private promises in contracts. We view a great many contracts as immediate wealth, even though they consist only of one or more unperformed promises. In fact, major parts of the economic wealth of the modern

42. *See* R. Gorman, Labor Law—Unionization and Collective Bargaining, 116-31, 139-42, 575-83 (1976).

43. Indeed, it more clearly has *full* present value than do physical durables, e.g. industrial plants and machinery or homes and their equipment. Consider, for example, the new family washing machine, costing $319. Its resale value is probably $219 or less, its immediate use value is a dollar or so—the cost of doing today's wash at the nearest laundromat. It is worth $319 to the family only because of the assurance it provides of many future washings. That assurance cannot, however, be traded in on $319 worth of an immediate trip to Bermuda, as can $319 in cash. Some of the relationships between contracts and physical goods are explored brilliantly in Leff, Contract as a Thing, 19 Am. U.L. Rev. 131 (1970).

credit economy are in the form not of present goods and services, but of promises.[44] In a regime of property, private wealth, whatever form it may take, receives legal protection. Contract—the projection of exchange into the future—is no exception: an important aspect of contract law is the protection given against tortious interference with contractual relations.[45]

2. *Legal reinforcement as between the parties.* Undoubtedly the most important support the legal system supplies for *future* exchange is the kind of support it supplies for present exchange, discussed in the essay on exchange, society, and law. But as the immediately preceding discussion of contracts as wealth protected by law suggests, the legal structure is also much concerned with directly facilitating projections of exchange into the future. This added function is to reinforce the many techniques and mechanisms by which a society provides assurance of *future* exchange sufficient to support specialization of labor. Earlier we differentiated between promise, one such technique, and manifold other techniques, like command, status, bureaucratic patterns, habit and custom, markets, and other webs of interdependence arising out of ongoing exchange relations. The same differentiation will be helpful here, except that to promise will be added another technique often associated with individual choice, forfeiture.

a. *Nonpromissory mechanisms.* Consider first nonpromissory mechanisms. Law is, *inter alia,* an instrument for enforcing commands of the sovereign relating to exchange, e. g., central rationing or price control. It defines status formally and adds its force to the definition, e. g., who is an "employee" protected by Workmen's Compensation and the sanctions protecting that status. Law defines bureaucratic jurisdictions and powers, affecting contracts directly or indirectly, e. g., what is the province of the FTC and what is the province of the FDA. It provides criminal and civil sanctions reinforcing desirable habitual and customary contract behavior, such as refraining from the use of forged credit cards. It helps preserve markets through antitrust regulation, thereby supporting the role markets play in assuring that specialization will be adequately rewarded. Law provides reinforcement for the web of interdependence arising out of ongoing exchange relations, e. g., protecting business relations against tortious interference and forms of competition seen as destructive of such relations. All of these and countless other varieties of legal intervention can and do reinforce societal assurance of future exchange sufficient to support specialization of labor.

b. *Promise.* Promissory exchange-projecting mechanisms reinforced by law grow out of the individual choice inherent in exchange when "my" and "your" are present. When the respective subjects of exchange are initially within "my" and "your" control, we can give assurance *by promise* that an exchange will be made in the future.[46] By promising we do something now limiting the

44. "Credit is a principal form of wealth. It is a presupposition of the whole economic order that promises will be kept." R. POUND, JURISPRUDENCE 162 (1959).

45. This is a sizeable and complex body of law. *See* 1 F. HARPER & F. JAMES, LAW OF TORTS, §§ 6.5-.13 (1956).

46. Or by making possible a forfeiture, of which more below.

choices otherwise available to us in the future. The role of law respecting such promises is to add its force to the assurance.

The law can say that if, in return for A's giving B a cow, B promises to give A twenty bushels of wheat next month, mechanisms will be available to make life unpleasant for B if he does not perform his promise. Or it might be able to do even more and make devices available to accomplish the promised transfer, e. g., court officers will seize the wheat (if there is any) from B and turn it over to A. Or it might allow A to go after B's property to recoup losses A has suffered because of the breach of the promise. These devices cannot, of course, provide 100% certainty that the promise will be fulfilled by the transfer of the wheat, but they may nevertheless add to the assurance. How much they add varies from one situation to another. *In any case one should never assume that even ironclad legal rights of enforcement will necessarily result in performance of a promise.* Indeed one of the most important recurring questions in contracts concerns the effectiveness of legal contract remedies in a variety of real-life contexts.

c. *Forfeiture.* A common technique for assuring that an exchange will be completed—one antedating promise in many societies—is forfeiture.[47] The forfeiture assurance of exchange takes the form of a present transfer of a thing of value as security that the *real* subject of exchange will later be transferred. The ancient practice of giving hostages is an example, as is the present day practice of pawning goods to secure a loan. The role of the law respecting the forfeiture assurance appears to be a limited one. It need simply recognize the validity of the transfer of the security to the transferee. For example, if you pawn your typewriter in return for $25 repayable in 30 days, and you do not pay the $25, the law effectuates the future exchange by recognizing that upon your default or at a specified time thereafter the typewriter belongs to the pawnbroker and not to you.[48]

Both promise-assurance and forfeit-assurance are illustrated by the modern land financing transaction. A financing institution, e.g., a bank, wants to lend money to the owner of real estate. The owner signs a note promising to repay the amount lent together with interest. The owner's making such a promise has certain consequences in the business-legal world. The promise gives the bank some assurance it will receive what it wants from the deal: repayment of principal with interest. But normally the bank requires greater assurance. This it gets by requiring owner to transfer to the bank a present interest in his real estate. Owner does this by executing a mortgage conveying to the lender a security interest in the real estate. If the loan is repaid as promised the security interest of the lender (mortgagee) terminates, and the owner-borrower (mort-

47. Llewellyn discusses the "forfeit root" of contract enforcement in *What Price Contract?—An Essay in Perspective,* 40 YALE L.J. 704, 714 (1931).

48. Actually, the picture is a bit more complicated. In the example given, the pawnbroker owes you an obligation to return the typewriter if you repay the $25 within the specified time. This obligation is promissory in nature. Hence what is apparently a purely forfeit assurance is always associated with a return promissory assurance to give back the security in the event of performance. The law then has an additional role in enforcement of that return promissory assurance.

gagor) once again owns the property free and clear. If, however, the loan is not repaid, the bank will take steps, called foreclosure, to realize from the property the debt owed to it. If this happens the owner has forfeited his interest in the property and the proceeds of its sale to the extent necessary to pay the debt.

Which of the kinds of assurance—promise or forfeit or both—is used initially and relied upon or utilized when trouble occurs depends upon the nature of the transaction, and upon such things as business custom and legal rules of various kinds. Both kinds demand attention in acquiring a basic understanding of exchanges not entirely consummated at a single point of time.

d. *Assurances and the law.* When contemplating an immediate exchange of existing property the only economic question each party must ask is whether what is offered by the other is more valuable to him than what he must give in return. When, however, the thing offered is an *assurance* of a future transfer the offeree cannot content himself merely with the valuation of the property (or service) at the time it will be exchanged. He must go further and evaluate the assurance itself. Just how sure is it that the transfer will be completed? To the extent that he is not completely sure, the value of what he hopes to receive is reduced by the risk that he will not receive it. Suppose he is promised $100 tomorrow; if he assesses the chances of actually getting the $100 at 80% the promise can be worth no more than $80.[49] This risk may push the value down so far that he will not agree to make the deal even though he would have been delighted to do so if the exchange could be effected immediately.[50]

From the foregoing it is plain that the more reliable the assurances offered in exchanges, the more practical the possibility of projecting exchanges into the future. No matter how beneficial to both parties the ultimate exchange might be, it may never come about if no way exists to use an "assurance exchange" first. This should always be kept in mind where one deals with legal contract remedies. How complete are the assurances they offer? How effective are the various techniques in providing assurance? What obstacles keep these remedies from constituting 100% assurance? Is a contract law system providing 100% assurance possible? desirable? what would be its costs?

3. *Limitations of private legal remedies.* It is all too easy to read a rule of positive law such as UCC 2-708 or 2-713 and jump to the conclusion that the law will miraculously put an injured party in an economic position equivalent to performance. In fact, countless obstacles lie between such statements of positive law and what is practically available to an injured party through legal process.

First, the very spirit underlying these remedies is not one of assuring performance or its equivalent. As Professor Farnsworth has put it:

49. It will be worth even less if the promisee does not like to take risks. A 4 out of 5 chance of collecting $100 is not the same thing as a certain collection of $80. For example, if you needed dollars to prevent immediate starvation, you undoubtedly would prefer $80 to a 4 out of 5 chance for $100, or perhaps even to a 99 out of 100 chance of $100.

50. In addition to the risk of nonperformance, the time-use value of money would reduce the figure below $80, but even at very high interest rates, one day's interest on $80 is not much.

> Our system * * * is not much concerned with the question suggested by Frost's lines: How can men be made to keep their promises? It is instead preoccupied with a different question: How can men be encouraged to deal with those who make promises. * * * [T]his * * * adds to the celebrated freedom to make contracts, a considerable freedom to break them as well.[51]

Second, as a careful reading of almost any selection of contracts cases will reveal, even many "successful" plaintiffs secure only limited recoveries, for one reason or another, e.g., because of difficulties with foreseeability or certainty.

Third is the problem of transaction costs. Litigation costs money, directly in the form of legal and other expenses and indirectly in the form of lost time of participants and disturbance of their normal activities. Nonmoney costs of litigation such as worry are also very high. The American legal system does relatively little to compensate prevailing parties for such costs. It is thus fatuous to think that even the most successful law suit under, for example, UCC 2-708, will in fact put the plaintiff in an economic position equivalent to performance.

Fourth, litigation is risky. A host of legal and other traps and many burdens of pleading, of proceeding with evidence, and of persuasion lie between a plaintiff and the judgment he seeks. He can never be sure one of these obstacles will not totally or partially block him from securing his putative black letter rights.

Finally, even after winning a judgment, the plaintiff may have little chance of successfully enforcing it. Judgments are not self-executing. Again quoting Farnsworth:

> The typical judgment at common law declared that the plaintiff recover from the defendant a sum of money, which in effect imposed on him a new obligation as redress for the breach of the old. The new obligation required no cooperation on his part for its enforcement since, if the sum was not paid, a writ of execution would issue empowering the sheriff to seize and sell so much of the defendant's property as was required to pay the plaintiff.[52]

But suppose that the defendant has insufficient or even no property? Or even more likely, suppose that generous debtor-protection laws provide exemptions from seizure of much or all his property? Many a plaintiff has ended up crying all the way to the wastebasket with a judgment for thousands of dollars, but utterly worthless.[53]

The limitations of private remedies in achieving the putative results enshrined in statements of substantive rules, such as those in UCC 2-708 and 2-713,

51. Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970).

52. *Id.* at 1151-52.

53. These barebones paragraphs may be fleshed out by reading Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U.L. REV. 115 (1969) a vivid, if cynical, account of the real life of private litigation.

do not, however, erode our overall contract system as much as one might think. To develop this point comprehensively would be a major piece of work; the following three points will have to suffice therefore as a mere introduction.

First, it is a mistake ever to think of law as the equivalent of litigation, or even of potential litigation. Indeed, one might even argue that law is at its most powerful when its invocation through litigation is *most remote* from men's minds. For example, most drivers keeping to the right of a double-yellow line on the highway think not one whit of "The Law", much less of litigation, civil or criminal. Habit and customary behavior and fear of the physical consequences of deviation have long since replaced fear of societal reprisal as the chief enforcement technique. [54] Similarly, many of the "black letter" rules of contract law, including contract remedies, are thoroughly enmeshed in habitual and customary behavior. Such rules are followed with little or no thought of enforcement by litigation. Think, for example, of the restitutionary "remedy" extended customers by virtually all supermarkets and large discount stores. Simply bring back the goods within a reasonable time and your money is returned. Similarly, when a bond series of a prosperous corporation comes due, habit and customary behavior lead to repayment of the bondholders. No one thinks: "If we do not pay, we'll end up with a judgment against us for expectation damages." That is, of course, what would happen, and the fact that it would happen is at least a tacit assumption of financial dealings, but no one thinks of it.[55]

The second reason the limitations of private remedies do not vastly erode our overall contract system arises from the limited role of law in the enforcement of contracts. Parties perform most contracts for the same reason they made them in the first place: they *want* to make the exchanges contemplated initially. This is true even when one party has performed and the other's performance is still due. For a host of reasons we *want* to pay our credit card bills. The reasons have little or nothing to do with the threat of suit if we do not. The reasons involve more fundamental contract *enforcement* mechanisms, namely nonlegal sanctions for breach of promises. If we do not pay our bills, no one will trust us in the future, and we shall have to pay cash for everything, a major disaster in this credit-prone society. We are, in short, very much involved in a huge and pervasive relational contract structure supplying many incentives to perform

54. Note the difference between double-yellow lines and speeding. At least on superhighways under current 55 M.P.H. constraints, the great majority of drivers exceed the speed limit by 5 to 10 miles an hour. Their reduction of speed when a police radar is perceived illustrates just how conscious they are of the litigation aspects of the law. Why are they? Because within that range of speed habit has not replaced the litigation technique as the main legal reinforcement mechanism. Everyone looks at the speedometer with fear when the police are near, but the fear in inadvertently straddling the yellow lines is of oncoming traffic rather than of the police.

55. When they do (beyond idle fantasizing) they are like the speeders on the highways: aware of the fact that they may come into trouble with the law because their natural behavior may not meet its dictates.

promises, entirely apart from active intervention of legal contract remedies.[56]

Finally, simple private contract remedies are not the only *legal* mechanisms for reinforcing contract transactions and relations. For one thing, class actions may greatly reinforce contract remedies.[57] Similarly, a statute may provide for allowance of some or all the costs of litigation in certain kinds of cases. An example of the latter is to be found in state statutes allowing costs to the prevailing insured for certain kinds of breaches by insurers.[58] Private remedies may also be reinforced by such techniques as allowance of treble damages for certain kinds of behavior related to contract, although seldom for simple contract breaches.

Even more important than the foregoing, a host of statutes and a vast array of administrative law reinforce contracts by directly regulating them or indirectly affecting them. Some of these are closely related to ordinary contract performance, e.g., statutes creating criminal penalties for writing bad checks. Others are more indirectly related, but nevertheless, very significant. For example, a complex system of bank regulation makes relatively unlikely your bank's insolvency and consequent inability to pay as promised when you seek

56. Without the backup role of these remedies, however, an erosion would gradually take place, just as some erosion of driving in the right lane would take place if the double-yellow lines were advisory and not mandatory. Little is gained by speculating about the extent of such erosion in a "lawless" society since we are not about to abandon contract law, however seldom it may be brought into direct action, just as we are not about to abandon legally enforced double-yellow lines or some functional equivalent.

57. By allowing the aggregation of a large number of small claims, the class action may make it economically feasible for one or a few injured parties to press their individually small grievances, while at the same time enforcing the rights of other members of the class lacking information or initiative to bring their own suits. Representing the entire class of those having entered similar transactions, the class plaintiff may seek both damages and injunctive relief prohibiting continuation of an unconscionable or otherwise wrongful practice.

In theory, simply aggregating claims into a class suit does not change the substantive questions of law, but in fact it may. For example, in Swarb v. Lennox, 405 U.S. 191 (1972), Pennsylvania confession of judgment clauses were challenged as violative of the due process clause of the 14th Amendment. In another case decided at the same time the Supreme Court held such a clause to be valid if the party challenging it "voluntarily, intelligently and knowingly waived the rights it otherwise possessed to prejudgment notice and that it did so with full awareness of the legal consequences." D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972). In *Overmyer,* not a class suit, the court treated this question as it might any other term in a contract, looking to the process of agreement and documents of the *particular* contract before it. *Swarb* was a class action. For procedural reasons the Supreme Court never reached similar issues in *Swarb,* but the District Court had. 314 F.Supp. 1091, 1112 (E.D. Pa. 1970). Instead of looking primarily at the circumstances relating to the information available to *each* of the contractors representing the class, the District Court turned to a far more general subject, namely how members of the class generally understood cognovit notes. It relied, for example, on testimoney of a detective with the Consumers Fraud Division "that 95% of the notes brought to him by those complaining of fraud contained confession of judgment clauses which were not understood by the persons signing such notes." It also relied on a survey by Caplovitz showing that among poorer debtors in Philadelphia only 14% signing confession of judgment contracts knew such a clause was included.

58. R. KEETON, INSURANCE—BASIC TEXT § 7.4 (1971).

to make a withdrawal.[59] Even more indirect is the legal reinforcement given to the entire interlocking ongoing relational contract structure of our society—the supplying of corporate forms of organization, legal property rights, full employment policies, and countless others. Consider, for example, Detroit auto workers and their creditors. Full employment in the auto industry is infinitely more important to the creditors than all their private contract remedies put together. By and large, the lenders of Detroit will be paid if the auto workers are working and will not be paid if the auto workers are laid off for long periods of time, UCC 2-708 notwithstanding.

To summarize, habit and custom, other nonlegal enforcement mechanisms, e.g., the threat of losing one's good credit rating, and legal mechanisms other than private contract remedies, e.g., the system of bank regulation, all lead to contract enforcement. Most often these are of far greater significance than the legal remedies of "contract law." The study of "contract law" and its private remedies often induces myopia obscuring the legal and economic milieu in which "contract law" functions. One should never forget that other forces, usually more vital than "contract law", are at work ordering contract relations. Particularly dangerous to memory on this score is the hypnotic effect of continually dealing with the intricacies of fact and doctrine in litigated "contract law" cases.

B. *Bargaining and Offer and Acceptance*

Among many kinds of bargaining one common type has become the underpinning for prevailing legal doctrines governing formation of contracts by agreement.[60] In it, the end is always identical: one side expresses commitment to the whole deal he proposes, if the other will agree,[61] and the other does agree. The penultimate step, when all the terms are proposed, whether directly or by inference, is called an *offer*, and the ultimate step, when the offeree accedes to the offer, is called *acceptance*. We then say that agreement, and with it formation of a contract, has occurred.[62]

59. Mr. Lance's problems recently dramatized this usually obscure aspect of American life.

60. Prevailing not only in Anglo-American law, but in modern contract systems generally. *See generally,* FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (R. Schlesinger ed. 1968).

61. Many consumer transactions appear to be of this type. But most of them are part of an ongoing relation. i.e., brand name relation, repeated use of same store, response to advertising, etc., clearly differentiating them from this highly transactional type. Business schools recognize this fact when they teach courses in mass merchandising with such titles as "Relationship Marketing."

62. Expressing commitment to the whole deal does *not* mean that all pertinent details must be expressed at the time of the offer. It means simply that the proposer somehow makes known to the other party all of the deal or at least its essential elements. Many or all of these may have been spelled out earlier in the bargaining process, and are simply referred to expressly or impliedly in the offer. Moreover, many an offer is made by the offeror's incorporating terms (in their entirety) first proposed by the other party. For example, forms used by door-to-door salesmen often are couched so that the buyer is the offeror, although all the buyer does is sign on the dotted line. Such forms may provide, for example: "Seller has no obligation under this offer until it is accepted at the home office."

Such concluded bargaining may or may not follow other bargaining, and if it does, the earlier bargaining may or may not have involved someone's making an offer.[63] Obviously, many times to-and-fro bazaar bargaining will occur where each proposition constitutes an offer. Equally obviously, negotiation may proceed through an accretion of tentative agreements on various issues, all of them contingent upon total agreement, with no offer being made by anyone until the very end of the line.[64]

The simplest definition of offer is in terms of its legal effect: An offer is *anything* creating a power of acceptance in someone. Continuing in terms of legal effect, a power of acceptance is the legal power to complete the formation of contract, and its exercise is what completes that formation. These are, of course, tautological definitions, and tell us nothing whatever about the legal requisites for creating a power of acceptance or what constitutes exercise of that power. They are, however, very useful starting points, precisely because they are so empty of substantive content. We can start with them and cautiously add substantive elements, confident in the unchallengeable correctness of our initial tautology.[65]

The foregoing definitions go but one step beyond saying: formation of contract = formation of contract. They take the analytical step of separating the parties into two categories, an initiator and a responder. The categorization is based solely on who first—more accurately, who next to last—frames the issues in a particular way. This is the beginning of a highly transactional analysis in which the forms of expression rather than the substantive processes of negotiation determine the analytical result.

The concept of offer and acceptance is one of a trap being sprung at a precise moment of "acceptance." A distinguished Columbia Law School contracts teacher—now deceased—is reputed to have used a noose as a pedagogical symbol of a formed contract. This is, of course, a highly discrete notion, fitting very nicely the needs of discrete transactions. But such notions become increasingly inaccurate (as descriptions) and harmful as more and more relational elements come into a contract. And some are always present. Moreover, the relative ineffectiveness of contract remedies demonstrates how weak are the catches on the trap of acceptance, how loose and frayed the noose of contract formation.

As suggested, starting with offer = creation of power of acceptance and acceptance = exercise of that power, and together = formation of contract,

63. It may also have involved an acceptance and hence formation of a contract, one the parties now intend to modify or supersede with the new offer and acceptance. The law may have difficulty with these situations, especially where the first offer and acceptance is in different form from the second, e.g. an oral agreement followed by a written one.

64. Ascertaining who is the offeror and who the offeree seldom is a serious issue. More important and troublesome are questions concerning the effect to be given to these tentative agreements if no total agreement is ultimately reached, of which more later.

65. Correctness and wisdom are not the same. The tautology presupposes a social structure, one based on very individualistic notions, and on a host of social assumptions. It is *not* a socially neutral or neutrally scientific construct.

we have little more than an empty bucket to fill. Restatement (Second) of Contracts starts filling it:

> § 24. An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.[66]
>
> § 34(1) An offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer.

Note how these sections add to our original completely or almost completely tautological definition, the requirement of a particular factor: manifestation of assent. The offeror is someone *manifesting* "a willingness to enter into a bargain," and to complete that bargain an offeree must "complete the *manifestation* of mutual assent." (Note also how the focus on manifestation of assent reinforces the transactional characteristics of the model; again look at Figure 4, supra, p. 174.)

To complete our picture insofar as projection of exchange into the future is concerned, we must explore the concept of promise. Restatement (Second) defines it:

> § 2(1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

Note here the concept of commitment. It is not simply, "I agree to this now—but might, of course, change my mind." Rather it is, "I agree to this now, and will be committed to it hereafter." This, then, is the exercise of a choice to *surrender* rights to exercise choice in the future—the crucial notion of promise.

Numerous difficulties arise when this system of offer and acceptance is imposed on real life contracts. These may be separated into three categories. One has to do with the inevitable border area (area, not line) between clearly understood commitment and clearly understood non-commitment. A very large segment of contract life lies in that area. Moreover, the situation is exacerbated in relational contract because "the idea of a range of commitment is the very nature of relations; no commitment in ongoing relations is ever quite a 100% commitment and nothing that affects others in ongoing relations is ever quite productive of zero commitment."[67] This is contrary to the assumptions of Restatement (Second) §§ 24, 34 (1) and 2(1) that commitment is either on (100%) or off (0%). This being a totally inaccurate assumption respecting most, if not all, real life situations, the Restatement has to (and does) make countless adjustments elsewhere to fit its rules to reality.[68]

A second difficulty concerns the likelihood of conflict between the objective manifestations of assent of the parties (at least two such manifestations are

66. RESTATEMENT (SECOND) OF CONTRACTS § 4. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.

67. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589, 604 (1974).

68. The very concept of limited contract remedies that do not use all available sovereign power, e.g., jail, to enforce contracts is itself such an adjustment.

always involved) and the subjective goals, purposes, and thoughts of the parties (likewise there are always at least two sets of these). While countless contracts go to reasonably happy conclusions without this conflict becoming a problem, nevertheless it is inherent in human nature and in communication among human beings; it causes problems quite regularly.[69]

The third category of difficulties is a motley collection of problems arising from any human interaction, particularly when the legal system calls for orderly human behavior fitting its structure, while actual human behavior is in considerable disorder and constantly fails to fall into legal slots.[70] This category is most often dealt with in classical and neoclassical contract law system under the rubric Offer and Acceptance.

C. *The Limited Nature of Power of Contract*

Human beings achieve more power, over both the physical world generally and over other human beings, when they cooperate than when they act individually. Since contractual relations always involve cooperation, contracts also usually result in the magnification of the power of individuals and of socioeconomic units. Exchange relations would have this result even if they depended entirely upon nonlegal sanctions for effectuation. Indeed, even given the existence of legal reinforcement of exchange relations, magnification of power by contracts occurs not primarily through the existence of legal sanctions, but through the fundamental social, economic, and political structures of society. Custom, habit, economic power, institutional structures, knowledge (such as that available to credit bureaus), and the like, rather than ultimate legal enforceability, constitute the primary sources of contractual magnification of economic advantage.

Of all the institutions permitting magnification of power through contract, probably the most important is property. And of all the legal magnification of power through contract the legal reinforcement of fundamental property rights is the most important. Contract, and the power that goes with it, could survive while stripped of all legal remedies enforcing contracts, but it is doubtful if it could survive the removal of all legal property rights.

In spite of the secondary role of "contract law" in reinforcing contractual relations, that role, as noted earlier, is often an important one, actually or potentially. In discussing social control of contract, two aspects of that role merit consideration. First, in the negative sense, the law recognizes the legitimacy of contracts by not criminalizing entry into exchange relations. This noncriminality is one of two meanings of "freedom of contract"—a freedom from restraint, an immunity to legal reprisal for entering exchange relations. (Imposition of such legal reprisals is, of course, one form of social control.)

69. *See* Figures 4 and 5 *supra.*

70. Particularly is this true in the area of contracts, since one of their very foundations is the exercise of choice, an exercise which—given manifold human experience, circumstances, and desires—leads to an extraordinarily wide range of human behavior.

But a contract is a legal mechanism in a second sense; the law adds its power to the relation. This "power of contract," the power of an individual to call forth legal reinforcement of exchange relations, is the second and affirmative meaning of "freedom of contract."[71]

Legal recognitions of contract, whether in the negative or the affirmative sense, magnify the achievement of power by parties to exchange relations. As between such parties the magnification tends to be greater as to the more powerful than it is as to the weaker.[72] It follows from this that to the extent the law effectively reinforces contractual relations, despite the fact that the reinforcement is available on a "neutral" basis, it adds to the relative imbalance of power between the parties. Hence, in the absence of affirmative counterbalancing by the legal system, the greater the scope and effectiveness of legal remedies, the greater is the resulting intensification of power differentials.

It follows further that among the most important legal controls of contractual behavior is the *limited character* of the remedies and procedures the legal system offers for reinforcement of contractual relations. It is perhaps difficult to recognize as a "control" the fact that the legal system limits its reinforcement of contractual relations largely to compensatory protection of the restitutionary, reliance, and expectation interests, and does so by procedures giving even those interests only limited protection. Examining possible remedial extremes, may, however, facilitate understanding of this kind of control.

Suppose the legal system were to withdraw entirely from the enforcement of contracts and cease giving contract remedies; the legal "power of contract" discussed earlier would cease to exist. With it would disappear whatever magnification of power legal enforceability confers on parties to contractual relations. Compared with the present legal enforceability of contracts the withdrawal of legal reinforcement would reduce the power the powerful can now achieve through contract. For example, the withdrawal of sanctions enforcing creditors rights, such as prohibiting wage garnishment, significantly reduces the power of creditors. (It may of course, dry up sources of credit in achieving this result.) Thus we can view refusals to provide "normal" contract remedies as a technique of controlling contractual relations by making those contracts less enforceable, and hence less desirable, and less powerful when used.

At the other end of the remedial spectrum, suppose the legal system enforced contracts vigorously with fines and jail sentences for breach; the legal "power of

71. *See* A. CORBIN, CONTRACTS § 1276.

72. Professor Charles Black attributes the intensification of "economic advantage and disadvantage" through contract to the fact that "people and businesses who are in strong bargaining positions, or who can afford expensive legal advice, can and epidemically do exact of necessitous and ignorant people contractual engagements which the general law never would impose." *Some Notes on Law Schools in the Present Day*, 79 YALE L.J. 505, 508 (1970). This overly narrow view omits the two most important parts of the legal contribution: (1) the legal reinforcement generally of property rights and (2) the fact that the legal system adds its power to reinforce contractual relations. These by themselves intensify disparities in economic advantages and disadvantages no matter how "fair" the contract terms are. Also far more important than enforcement of hard contract terms are the intensifications caused by economic and institutional power, etc.

contract" would increase measurably. (Reflect, for example, on "The Merchant of Venice.") Compared with present legal enforceability this more stringent enforcement would constitute a lessened control of contract relations by the legal system. By strengthening remedies while allowing their invocation freely by either the powerful or the weak (in theory), the state adds to the "power of contract" of the parties. It thereby in effect relinquishes to them, especially to the more powerful party, more control over the relations.

The seeming anomaly in the foregoing description—the more vigorously the legal system enforces contracts the less it is regulating them—is inherent in the nature of contract and its legal enforcement. Freedom of contract in the "power of contract" sense means the freedom of a party to call down the wrath of the legal system on a contract wrongdoer. The more unwilling the legal system is to loose all its wrath, the more it is controlling that "power of contract," rather than leaving its exercise to party autonomy. Thus inherent in the unwillingness of the legal system to loose its entire arsenal of power to reinforce contractual relations is a social desideratum that contract power should not be unlimited.

In two respects equating vigorous contract enforcement with lack of regulation and non-enforcement with regulation, is less than accurate. First, legal non-enforceability may lead to the development of self-help enforcement techniques more powerful and effective than anything the legal system would provide. A classic example is the loan shark transaction; a main justification for laws permitting small loans at rates of interest far higher than ordinarily permitted by usury statutes is to enable the legal system to police such transactions. In the absence of such legislation (and indeed to some extent even with it) loans at high rates of interest to necessitous persons flourish, the ultimate enforcement mechanism being the cruel weapons of the loan shark and his henchmen. When such enforcement mechanisms are far more effective than those supplied by law to legal transactions, the effective "power of contract" of the loan shark becomes an infinitely greater power than that conferred by any court on any legally enforceable contractual relation.

Second, when one of the parties to a transaction is weaker than the other, the limiting of legal enforcement powers to weak sanctions and processes, even if done "even-handedly," leaves the weaker party subject to the differences in power created by custom, habit, economic power, institutional structures, knowledge, and the like. In such situations the law's conferring of greater power on the weaker party would, by helping redress the balance of power, have a net effect of increased regulation of the contract power of the stronger party. This is happening to a limited, but increasing, extent respecting consumer transactions.

An important aspect of remedial control of contract is the refusal of courts to enforce agreed remedies clauses in contracts when the courts characterize them as penalities.

D. *Imposing Contractual Relations: Improper Motivations*

As a result of growing up in the American socioeconomic system we are likely to feel that forcing contractual relations on people is somehow either absurd or aberrational. Since we think of exchange and contracts as resulting from the desire of reasonably autonomous entities to enhance their respective "utiles," forcing people to enter contractual relations seems either absurd, totally unnecessary or, where exchange would not occur without coercion, aberrational as contrary to notions of choice underlying contract. What sense or profit could result from allowing outside coercion to dominate the individual in assessing his own individual utilities?

Such views are overly narrow, indeed myopic. It is true that much exchange is horizontal, that is mutually motivated by desires to gain from the exchange of goods and services in question. But exchange may be defined in much broader terms than horizontal exchange: "simply the way . . . specialists distribute their work products among themselves in a reciprocal manner, thereby permitting continued specialization".[73] This includes exchange brought about by command in a vertical structure, as well as horizontal exchange. For example, the relation between an infantry soldier and the regimental cooks he guards from ambush is an exchange relation, even though both cooking and guarding occur solely in response to the orders of the regimental commander. But we need hardly turn to military analogues; any centralized planning and distribution system can accomplish exchanges of mutual benefit to the participants.

When outside pressure, in whole or in part, brings about exchange, we lack assurance that the parties want, apart from the coercion, to enter the exchange, that both or even one of them view it as personally beneficial to do so, i.e., that either or both will see the exchange as increasing his utiles. Thus we should realize that whatever sense of the absurd or of aberration we have concerning the imposing of contractual relations reflects our feeling that contract equals—and only equals—the raising of individual utile levels through choice. Once we put aside that narrow view, contractual relations involving severely limited choice become a logical possibility, irrespective of what one may think of them as a matter of public and legal policy.[74]

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73. *See* text 160 *supra.*

74. The concept of some freedom to elect among a range of behaviors is one of the four primal roots of contract. In its absence, speaking of even rudimentary contract is futile despite the presence of the first root—specialization of labor and exchange. Without freedom of will (real, imagined or postulated) contract becomes conceptually indistinguishable from any other mechanistically imposed phenomenon such as the exchange of positive and negative charges through a cell membrane.* * *

The foregoing should not, of course, be taken to suggest that a highly coerced pattern is either the ideal prototype or current stereotype of contract. What is suggested is merely that inclusion of all choice situations, however truncated or twisted the choice may be, within the definition of contract may be useful in developing an understanding of the many futures of contracts. 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

In a theoretical sense, contract, even at its most free, always involves the *limitation of choice.* Even in the present exchange of existing goods, the exercise of choice to engage in the exchange limits future choice, since surrendering something in the exchange precludes a later choice to keep it. That the exercise of choice always involves its limitation becomes even more apparent when promises project exchange into the future, i.e., the typical contract.

> . . .[F]reedom of contract means the freedom to exercise a choice which, if exercised one way, will result in severe limitations on choice in the future, i.e., restraints imposed by the potential consequences of breaching the contract made by the first exercise.[75]

In theory, of course, these inherent limitations of choice in contract are only self-imposed limitations. In fact, no contract system has ever been entirely free of superimposed limitations going beyond those necessary simply to effectuate those that are self-imposed. Inevitably other social policies come to be implemented in the process of enforcing contractual promises. And with those policies comes at least partial imposing of contractual relations. Nowadays we are familiar with massive impositions. For example, it is utterly impossible for either a seller or buyer or both together, to enter a consumer transaction free of a whole range of consumer protection legal rules, no matter how hard they try to exclude them. This constitutes, of course, a substantial imposition of the content of contractual relations, although some triggering choice must be exercised to start the relations in the first place.

What about the imposition of contractual relations from the start? Here again there is nothing aberrational in the concept in Anglo-American history. Both the military draft and compensated taking of private property for public use exemplify imposed contractual relations with long history in our law. Special tax assessments are another example of well-established imposed contracts.

> Special assessments to pay for local public improvements benefiting specific land are of ancient lineage. They have been valid for the construction and improvement of streets, curbs, gutters, sidewalks, and for the installation of sanitary and storm sewers, drains, levees, ditches, street lighting and water mains. . . . All such assessments have one common element: they are for the construction of local improvements that are appurtenant to specific land and bring a benefit substantially more intense than is yielded to the rest of the municipality.[76]

Through special assessment the majority of district property owners can force all district property owners to share the cost of such improvements, a clear example of imposed contract.

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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, *The Many Futures of Contracts,* 47 So. Cal. L. Rev. 691, 701-02, 705 (1974).

75. *Id.* at 810. "Freedom of contract is in this, one of its common usages, a freedom to subject oneself to the power of contract." *Id.* at 811.

76. Heavens v. King Co. Rural Library Dist., 66 Wash. 2d 558, 563, 404 P.2d 453, 456 (1965).

Another ancient example of legal obligation to enter contractual relations is that which the English common law imposes on innkeepers to supply service to customers. This was but the forerunner of duties that now have been imposed on public utilities for several generations to serve customers within their franchise areas.

We thus have an ancient and increasingly rich history of imposing contractual relations even in our essentially capitalistic system. The massive burgeoning of such imposition implementing civil rights, for example, thus should be considered against that backdrop, rather than as something startingly different from our past legal patterns.

1. *Improper motivations.* The imposition by civil rights statutes and decisions of obligations to enter or continue contractual relations has vastly expanded use of the concept that a power to refrain from entering contractual relations or to discontinue contractual relations generally at will may nevertheless not be exercised for improper reasons. Although such a concept certainly lurks in older law relating, for example, to the obligations of innkeepers and public utilities, those older rules tend to be stated differently, namely in terms of absolute rules to serve anyone meeting certain requisites.[77] The modern application of this concept has proceeded on a number of fronts.

One of the routes towards limitations of this kind is in constitutional rules relating to conferral of governmental benefits, including contracting with government. For example, in *Perry* v. *Sinderman*[78] the plaintiff was employed in a state college under a series of one-year written contracts. When the Regents declined to renew his employment at the end of a year, He brought suit, alleging that the decision not to rehire was based on his public criticism of the Regents, and violated his constitutional rights to free speech. In holding that the District Court should have determined whether this was the basis for the decision not to rehire, the Supreme Court said:

> For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." [Cit.]

The "government benefit" doctrine does not, as a general proposition, extend to private contract. Moreover, as the quotation from *Perry v. Sinderman* shows, its focus purportedly is the prevention of government wrongdoing, rather than

77. *See, e.g.*, 27 HALSBURY'S LAWS OF ENGLAND para. 938 (3d ed. 1957).
78. 408 U.S. 593 (1972).

forcing the contractual relation, the latter being merely a technique to achieve the former. This is not so, however, of the great legal intervention imposing contractual relations in the civil rights area.[79] Here the very direct aim is to force employers, landlords, and others to enter contractual relations for the benefit of potential victims of discrimination, the more general goal of preventing discrimination per se being a more collateral one.[80]

The large body of anti-discrimination law represents by far the greatest burgeoning of the improper motivation concept respecting contractual relations. But it is by no means the only developing application of the concept. It has, for example, been applied to retaliatory evictions for reporting health code violations[81] And in *L'Orange v. Medical Protective Co.*[82] the court held that exercise of an express power to cancel the malpractice insurance of a dentist because he testified for the plaintiff in a malpractice action contravened public policy and constituted a breach of contract. A number of cases have arisen, as one might expect, out of employment contracts normally terminable at will (or after very short statutorily imposed notice of termination). In *Nees* v. *Hocks*[83] the court held the firing of an employee for requesting jury duty after the employer told him to try to avoid the duty to be tortious. The Oregon cases are interesting because Oregon has explored the limits of the doctrine both before and after *Nees*. In *Campbell* v. *Ford Ind. Inc.*,[84] the court had held that firing an employee for refusal to sell stock he owned in the company employing him was not actionable. In a later case with the same parties[85] the court held not actionable firing of an employee in retaliation for demanding to see the corporation's books, a right the Oregon statute conferred on him as a minority stockholder. The court distinguished *Nees* on the ground that the statute in *Campbell (2d)* created a "private and proprietary right" not raising a "community interest" as did the right to go on jury duty.

Statutes too may prohibit retaliating terminations of contractual relations that otherwise might be terminable at the will of a party, e.g., NLRA § 8(a)(4).[86]

It may be noted that the developing body of anti-retaliatory contract law is more closely analogous logically to cases like *Perry v. Sinderman* than it is to civil rights law. Forcing the contractual relation on one of the parties is, in

79. *E.g.*, Runyon v. McCrary, 427 U.S. 160 (1976).

80. As Milton Konvitz put it at the 1976 Conference on the Scottish Enlightment, at the Center for Humanities, Cornell University: "The purpose of the statutes is to *make* people act the way Adam Smith said they act."

81. *E.g.*, Dickhut v. Norton, 45 Wis.2d 389, 173 N.W.2d 297 (1970), *but see* Oil & Ref. Corp. v. Leistikow, 69 Wis.2d 226, 230 N.W.2d 736 (1975).

82. 394 F.2d 57 (6th Cir. 1968).

83. 272 Or. 210, 536 P.2d 512 (1975).

84. 266 Or. 479, 513 P.2d 1153 (1973).

85. 274 Or. 243, 546 P.2d 141 (1976).

86. Union discipline of members is another area in which this concept lurks. Congress has shown an intent to allow unions a free hand respecting acquisition and retention of union membership, NLRA Sec. 8(b)(1)(a). Nevertheless, discipline (of which explusion may be one example) of union members imposed for improper reasons has been held to violate the law. *See generally* R. GORMAN, LABOR LAW—UNIONIZATION AND COLLECTIVE BARGAINING 677-85 (1976).

theory, but a means to an end, such as preventing people from reporting housing violations and interfering with the judicial process. Nevertheless, in any given situation it is not possible to achieve complete separation of the two goals, as consideration of a firing for filing a workmen's compensation claim makes plain enough.[87]

The modern tendency towards favoring job security, together with concern about civil rights of various kinds, is likely to lead to an expansion of the improper motivation concept, at least in employment, and probably in all important contractual relations in which one party is viewed as dominant relative to the other.[88]

The proliferation of the improper motivation concept is potentially of great significance for contractual relations. Its application always involves the judicial structure in extensive examinations of intention, that most amorphous, complex, and difficult subject. The complexities of ascertaining intention in, for example, cases involving charges of racial discrimination in employment, are immense. Moreover, such investigations are likely to infringe principles of individual freedom of thought and privacy still highly valued in our society; it is not solely for reasons of difficulty of ascertaining facts that our legal system commonly sheers away from ascertaining intention.[89]

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87. *E.g.*, Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E. 2d 425 (1973).

88. A likely area for expansion involves employee rights to free speech. *See* D. EWING, FREEDOM INSIDE THE ORGANIZATION (1977). For a broad review respecting employment see Comment: *Protecting the Private Sector At Will Employee Who "Blows the Whistle"; A Cause of Action Based Upon Determinants of Public Policy,* 1977 WIS. L. REV. 777.

Logically, a statement that one may fire employees at will except for enumerated prohibited reasons is the same as a statement that one may fire employees for and only for reasons other than those enumerated reasons. Psychologically, however, a world of difference exists; moreover in a system of law in which procedure and burden of proof often determine the outcome of disputes, the structure of the statement may make a great difference in outcome. Further, if the number of prohibited reasons proliferates, we are at some point inclined to restate the rule in even different terms: firing is wrongful except for the following reasons: A, B, etc. This is more than a linguistic and procedural shift, because now any new reason for firing is unlisted as an exception, and becomes an improper reason, whereas before it would have been a proper one. In the realm of employment, at least one state Supreme Court may have moved in this direction. In *Monge v. Beebe Rubber Co.,* 114 N.H. 130, 133, 316 A.2d 549, 551 (1974), the court states that a termination "of a contract of employment at will which is motivated by bad faith or malice or based on retaliation constitutes a breach of the employment contract." The case involved a firing allegedly resulting from hostility of a foreman, arising from plaintiff's refusal to date him. The court does not deal with the case as raising a sex discrimination issue under anti-discrimination laws. Rather it focuses on maliciousness, concluding:

> The foreman's overtures and the capricious firing at 2:00 a.m., the seeming manipulation of job assignments, and the apparent connivance of the personnel manager in this course of events support the jury's conclusion that the dismissal was maliciously motivated.

The dissenting judge notes that the firing was in accordance with company rules about absenteeism, and distinguishes cases involving acts contrary to public policy, i.e., the "wrongful reason" rule,

89. *E.g.*, classical contract's rejection of subjective intent in favor of objective manifestations of intent.

Both the difficulties of investigation and the conflicting values seem likely to lead to rules of thumb and to objective approaches to ascertaining intention (in a far different context from that of Willistonian objectivism). These in turn are likely to lead more and more in the direction of regulation of specified conduct and of statistical norms, irrespective of actual wrongful motivations, a development surely evident in the approaches of, for example, HEW to discrimination in employment. This in turn will exacerbate the bureaucratic tendencies of the structure. This essay is not the place to explore these problems, but those concerned with increasing regulation in American life should be especially concerned about this kind of regulation.

E. Societal Utilization of "Private" Contract to Achieve Special Public Goals

Particular themes overarch Western society's relation to contract. Most fundamental is its massive dependence on so-called "private" contract—actually the most public of all institutions.[90] Such contract is the primary economic building block of the modern capitalist society; as such it receives significant reinforcement through a range of social and legal structures, the nature and limits of which have been explored earlier in these essays.

A second fundamental theme is that contract must know its place—because private contract is a social mechanism, no society can afford to allow the autonomy underlying it to become the be all and end all of the socioeconomic structure. This theme gives rise to two readily separable goals of society's interaction with contract. One is to prevent use of contract in ways society deems damaging to itself or to its members (other than parties), i.e., for improper purposes or in improper ways such as achieving illegal ends or creating unacceptable externalities. The other is to protect parties from the consequences of exercising their choice in contractual situations.

For ease of reference I shall label these three concerns of society in dealing with contract: primary economic building block, propriety, and party-equity.

Examination of societal imposition of contractual relations, the subject of the preceding essay, reveals that the notions of primary economic building block, propriety, and party-equity fail to exhaust society's interest in contractual relations. Neither the military draft nor the compensated taking of property for public purposes easily fits any of those categories. Both instead constitute a use by society of the technique of "private" contract for special public goals. One might, however, argue that, just like military procurement through "private" contract, these are simply direct state uses of the primary economic building block. The coercion of the law simply supplements the exchange motivations in the draft and in compensated expropriation of property. This is nothing new since pressure external to exchange motivations is a common factor in many clearly "private" contracts, *e.g.*, having to buy seat belts with your new car.

90. If proof of this statement is needed, consider the monetary and fiscal techniques of the post-Keynesian era, all designed to ensure that enough "private" contracts are made and performed to keep society economically prosperous.

Cannot, therefore, all state uses of "private" contract be squeezed, with a shoehorn at least, into the primary economic building block category? A partial answer is no; at least one, taxation of contractual relations, cannot be.

The state imposes a vast network of taxes directly or indirectly on private contracts. Perhaps the most obvious is the sales tax. When the state imposes a sales tax it is not reinforcing use of contract as the primary economic building block. Indeed, any micro - economist will tell you that a sales tax is a detriment to such use of contract.[91] Nor, does an ordinary sales tax (as distinguished, for example, from a high sales tax limited to luxuries) aim at discouraging use of contracts for improper purposes or in improper ways. Nor finally, does the sales tax aim at achieving equity between the parties to the sale. Instead society is using private contracts to achieve *special* public ends,[92] in this case, to raise public revenue. Other taxes on contractual relations accomplish the same thing; both the corporate and personal income tax may be viewed as profit-sharing arrangements in which the state takes a share of the economic gain created by the cumulation of exchange relations of private parties. Few facts of modern life demonstrate more vividly the public economic dominance of "private" exchange relations than does the increasing state fiscal participation in, and dependence on, the fruits of those relations.

As society has grown more complex and interrelated, special uses of contracts by society have grown in importance and diversity. Nowhere is this more evident than in employment relations with such societally imposed appurtenances as Social Security, unemployment insurance, workmen's compensation, health and safety requirements, and anti-discrimination legislation. Moreover, the income tax system encourages—in economic effect, coerces—a wide variety of additional appurtenances to employment such as medical insurance, retirement systems, and other fringe benefits. Thus a large and complex social welfare system—one that society might provide to its members on entirely different bases—has been founded by society on "private" employment relations.

Upon moving away from taxation, separating special from general goals may become difficult. Anti-discrimination laws, for example, may reflect *all four* concerns. One argument sometimes advanced in their support is economic efficiency: if employers exclude large groups of people from the labor market, "private" contract will simply produce less and at higher cost then if they do not. This is a primary economic building block argument. So too, engaging in the hiring of white males only may, because of its social oppression, be an improper use of contract just as is engaging in contracts in price-raising restraint of trade. Third, at least so much of anti-discrimination law as prohibits discrimination in terms of employment may aim at party equity. And finally, anti-discrimination

91. By skimming off from the parties some of the utiles (*see* text 163 *supra*), the sales tax may prevent an otherwise productive exchange, and in any event reduces utile increase of the private parties.

92. Special in the sense of not being one of the other three ends—primary building block, propriety, and party equity—all of which might be called the general societal aims in dealing with contracts.

legislation may be seen as a special public "tax" on contracts, namely employment contracts. The state may be seen as saying: "If you want to engage in employment contracts—an activity you evidently find profitable—the state will share in your profits by requiring you to employ in a nondiscriminatory manner." (The costs imposed may be economic, if hiring minority members is expensive, or non-economic, or both.)

It should be plain that any given state program may reflect some of these concerns but not all. Again, to take anti-discrimination laws, the primary economic building block argument may collapse if the law pushes less qualified employees into the work force. Similarly, society might more effectively achieve the "special" public goal of social equality by levying a tax on those who disciminate in employment and using the tax to educate minority workers, rather than forcing integration (or trying to) by statutory command. Were those arguments accepted as accurate one could nevertheless support anti-discrimination legislation on other grounds: the impropriety and party-equity goals of preventing social oppression and maintaining a decent level of equality among employees.

High taxes on sales of liquor exemplify measures augmenting some of these goals, but hindering others. They are harmful, not helpful, to contract as the primary economic building block, and do nothing for party equity. Their role respecting the remaining two issues calls for careful analysis, because the impropriety goal is achieved only if such taxes significantly cut liquor consumption, while the public revenue goal is achieved only if they do not.

Keeping in mind these four social concerns with contract—primary economic building block, propriety, party-equity, and special public goals—can be useful in facilitating clear analysis and synthesis of the law relating to contractual relations.[93] Moreover, this analysis may lay bare in a general way an increasing tendency of legislatures to avoid the wrath of taxpayers by imposing taxes in this manner, taxes largely hidden from most public view. For example, Congress has imposed large costs on the exchanges between educational institutions and their students (and probably on others, such as faculty and staff, whose compensation is affected indirectly) respecting providing facilities for the handicapped. By doing so it has escaped the scrutiny that would have resulted if the same amounts had gone through normal appropriation procedures, with their impact on taxation or deficits.

Much taxation of contractual relations of the foregoing kind is obscured as such under the guise of considering it solely in terms of party-equity; *e.g.*, as simply providing a proper balance in the relations between university and handicapped students. In fact, it is a significant transfer payment escaping much of the public debate to which many wealth transfers such as public welfare and farm subsidies, are subject. One may readily view such *covert* taxation for wealth transfers as subversive of democratic processes.

93. Some people question the fundamental social propriety of public use of "private" contracts for special public purposes. How one resolves such questions may depend upon whether one views society as an essential third party making substantial contribution to every "private" contract, or as an uninvolved onlooker simply taking advantage of its power *vis a vis* the independent private parties to take what it wants.