A COMMENT ON SNYDER, *CONTRACTING FOR PROCESS*

LARRY T. GARVIN*

David Snyder's *Contracting for Process* is a characteristically elegant discussion of an important aspect of contract in action—not the substance of the obligation, but the means of determining the substance in a world of costly contracting and uncertainty. This distinction has long been important, particularly so in our present world of unknowns, but has, as Professor Snyder observes, often been obscured. With remarkable brevity, Professor Snyder has laid out a carefully worked-out taxonomy of contractual functions and how each is served by different levels of specificity, emphasizing how contracting for process can overcome many of the barriers to efficient and effective contract formation and performance. I will concentrate on three aspects of his article: (1) its place in the contracts literature, (2) some of the limits on contracting for process, and (3) how contracting for process might operate in the context of trust.

First, context. As Professor Snyder properly notes, some aspects of contracting for process appear elsewhere in the scholarly literature, such as the articles by Scott, Gilson, Jennejohn, and others he cites to.[1] I might add Ian Macneil's *A Primer of Contract Planning*,[2] which lays out a somewhat similar analytical structure. There is much in Macneil's article that might be worth examining further, such as his analysis of contracting for dispute resolution[3] and his discussion of flexibility and performance.[4] Similarly, this article's discussion

This Article is also available online at http://lcp.law.duke.edu/.

* Lawrence D. Stanley Professor, Michael E. Moritz College of Law, The Ohio State University. My thanks to Jonathan Lipson and Rachel Rebouché for organizing this symposium and inviting me to participate.

1. David V. Snyder, *Contracting for Process*, 85 LAW & CONTEMP. PROBS., no 2, 2022, at 6, 17–18, 26–27 (citing Robert E. Scott, The Paradox of Contracting in Markets, 83 LAW & CONTEMP. PROBS., no 2, 2020, at 71, 76; Scott J. Shapiro, *Laws, Plans, and Practical Reason*, 8 LEGAL THEORY 387 (2002); Robert E. Scott, *Conflict and Cooperation in Long Term Contracts*, 75 CAL. L. REV. 2005 (1987); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431 (2009); Ronald J. Gilson, Charles Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Terms*, 88 N.Y.U. L. REV. 170 (2013); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 253 (1984); Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 STAN. L. REV. 281, 291–94 (2016); *e.g.*, Matthew Jennejohn, Julian Nyarko & Eric L. Talley, *COVID-19 as a Force Majeure in Corporate Transactions* 1, 5 (Colum. L. Sch., Working Paper, 2020), https://scholarship.law.columbia.edu/faculty_scholarship/2645/ [https://perma.cc/93Y7-SBXW].

2. *See generally* Ian R. Macneil, *A Primer of Contract Planning,* 48 S. CAL. L. REV. 627 (1975) (providing an analytical structure for the roles of contract planning).

3. *Id.* at 676–702.

4. *Id.* at 657–66. Macneil covers much of this in other works that Professor Snyder discusses fully.

of non-legal methods of enforcement, if developed further, might benefit from David Charny's classic analysis.[5] But that is a comment about future projects, not this one.

Contracting for process is unquestionably an important part of contract design, particularly in normal times. Whether this is true in times of stress is less clear. Uncertainty, especially in the Knightian sense of unknown probability distributions,[6] is normally constrained by such extra-legal factors as reputation. In the shadow of bankruptcy, however, reputation commonly takes a back seat to survival. Unless a contract allows for extra process in place of trust, the result may be a contract that fails to align the interests of the parties and creates incentives for one party to evade ordinary contractual constraints. Whether added process would be cost-effective and whether it would interfere with establishing efficient behavior by the parties are tricky questions, answerable only by considering theoretical and empirical issues only sketched here.[7]

Behind much of executory contracting is trust: developing it, creating substitutes for it, adjusting for asymmetry in it, deterring its misuse. Professor Snyder discusses this cogently and as fully as space permits. I would like to add a few points for further consideration: to study contracting for process requires some attention to the institutional structures and norms guiding those who negotiate, perform, and monitor the resulting contracts, a field that has inspired much scholarship over the last few decades.[8] To name one scholar among many, Russell Hardin has advanced thinking in this area greatly.[9] As Professor Snyder observes, trust has many dimensions—economic, naturally, but also social, psychological, and moral—any of which may be implicated in a particular contractual relation.[10]

On a more conceptual level, the proper role of lawyers and the law may also be worth further investigation. As both Snyder and Macneil have observed, the role of lawyers depends greatly on the complexity of the underlying performance

---

See David V. Snyder, *Contracting for Process,* 85 LAW & CONTEMP. PROBS., no 2, 2022, at 255.

5. David Charny, *Non-Legal Sanctions in Commercial Relationships,* 104 HARV. L. REV. 373, 391–426 (1990).

6. *See* Frank H. Knight, RISK, UNCERTAINTY & PROFIT 197–232 (1921).

7. A few that come to mind are principal-agent issues, monitoring costs, information asymmetry, norms, third-party monitoring, and transaction costs. There is some question whether contract law is equipped to take all these into account. *See, e.g.*, Jonathan Morgan, CONTRACT LAW MINIMALISM 197 (2013) (discussing commercial norms).

8. The legal citations are familiar. For two classic discussions in the realms of economics and business, *see* CONTRACTS, CO-OPERATION, AND COMPETITION 105 (Simon Deakin & Jonathan Michie eds., 1997) (especially the introductory essay and the chapter by Deakin et al. on contract law and trust relationships); Partha Disgupta, *Trust as a Commodity, in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 49 (Diego Gambetta ed., 1988).

9. In particular, *see generally* Russell Hardin, TRUST AND TRUSTWORTHINESS (2002); Russell Hardin, *Conceptions and Explanations of Trust, in* TRUST IN SOCIETY 3 (Karen S. Cook ed., 2001).

10. This is exemplified by Lisa Bernstein's and Barak Richman's studies of the New York diamond industry. BARAK RICHMAN, STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE (2017); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 115, 140–42 (1992).

and the ability of lawyers to come to grips with the context for a proposed contract.[11] How the law should take account of context and flexibility has long attracted scholarly attention. Suffice it to say that how, and indeed whether, the law should take these into account remains an underdeveloped field, though one in which modern scholarship has left behind much important work.[12]

But all this is to say that Professor Snyder's excellent article could only cover so much ground, and that we all have much work ahead. Professor Snyder has laid out a path for further work; now it is for him, and us, to proceed.

11. *See* Macneil, *supra* note 2, at 641–54.

12. *See* Morgan, *supra* note 7. For a thoughtful discussion of the virtues of formalism and process, one unaccountably neglected by the legal academy, *see generally* Arthur L. Stinchcombe, WHEN FORMALITY WORKS: AUTHORITY AND ABSTRACTION IN LAW AND ORGANIZATIONS (2001).