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Franklin G. Snyder  
fsnyder@law.tamu.edu

Ian R. Macneil

John Kidwell

David Campbell

Rachel Arnow-Richman

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## RELATIONAL CONTRACTING IN A DIGITAL AGE

### Panelists

*Franklin G. Snyder*<sup>†</sup>

*Ian R. Macneil*<sup>‡</sup>

*John A. Kidwell*<sup>§</sup>

*David Campbell*<sup>\*\*</sup>

*Rachel Arnow-Richman*<sup>↑↑</sup>

### Edited with an Introduction by

*Franklin G. Snyder*<sup>‡‡</sup>

### INTRODUCTION

Few developments in contracts scholarship in the past half-century have been more influential than relational contract theory.<sup>1</sup> Perhaps no other recent movement has seeped so deeply into the way we think of and discuss contract law than the notion that the things we think of as “contracts” are rooted in larger relationships, and cannot be understood apart from those relationships. But it is also fair to say that no other movement has managed to take so many different forms. Robert Scott and Randy Barnett have both said that “we are all relationists now,”<sup>2</sup> which is almost certainly true—depending on how we define “relationist.”

No figure has played a more important role in the development of relational contract theory than Ian Macneil, who has been exploring

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<sup>†</sup> Professor of Law, Texas Wesleyan University School of Law, Fort Worth, Texas.

<sup>‡</sup> John Henry Wigmore Professor of Law (Emeritus), Northwestern University School of Law, Chicago, Illinois.

<sup>§</sup> Kathleen M. & George I. Haight Professor of Law and Associate Dean for Academic Affairs, University of Wisconsin Law School, Madison, Wisconsin.

<sup>\*\*</sup> Professor of Law, University of Durham Department of Law, Durham, England.

<sup>↑↑</sup> Assistant Professor of Law, University of Denver College of Law, Denver, Colorado.

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1. See Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789, 808 (1993) (arguing that developments in “relational theory will be the most important challenge and accomplishment of twenty-first century contract law”).

2. Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 852 (2000) (adding that, “All contracts are relational, complex and subjective.”); Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil’s Relational Theory of Contract*, 78 VA. L. REV. 1175, 1200 (1992) (noting that, “To a significant degree, we are all ‘relationalists’ now.”).

the relational aspects of contracting since the early 1960s.<sup>3</sup> For Macneil, the theory involves four basic propositions, no more and no less:

First, every transaction is embedded in complex relations.

Second, understanding any transaction requires understanding all essential elements of its enveloping relations.

Third, effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly.

Fourth, combined contextual analysis of relations and transactions is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of transactions.<sup>4</sup>

All these propositions—in some form or other—are shared by scholars as diverse as Macneil and Scott, Stewart Macaulay and Eric Posner, Jay Feinman and Lisa Bernstein.<sup>5</sup> It is, in fact, doubtful whether even the great “bogeymen of formalism,” Christopher Langdell<sup>6</sup> and Samuel Williston, would dispute them.<sup>7</sup>

But the devil, as usual, is in the details.<sup>8</sup> Every transaction may be “embedded in complex relations” and we certainly must understand “all essential elements” of a transaction’s “enveloping relations” before we can ultimately understand it, but the real question is how much do lawyers and judges need to understand before they can make a legal decision? As John Kidwell has argued, a wide-angle lens provides more information than a telephoto, but for some uses a tele-

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3. His work is summarized in the excellent *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* (David Campbell, ed. 2001) (hereinafter “RELATIONAL THEORY”).

4. Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 Nw. U. L. REV. 877, 881 (2000) (internal citation and footnotes omitted).

5. “It took enormous effort by Macneil to persuade the community of contracts scholars to broaden its vision of contract; detailed work was needed to trace the implications of this shift. Moreover, these are insights that can be, and have been, embraced by a wide variety of legal scholars representing a broad theoretical and ideological spectrum.” Barnett, *supra* note 2 at 1200.

6. The bogeyman image is from Albert Alschuler. See Albert W. Alschuler, *The Descending Trail: Holmes’ Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353, 361 (1997). It is apt, given that discussions of their work are often cast in religious garb. See Lawrence Ponoroff, *Evil Intentions and an Irresolute Endorsement for Scientific Rationalism: Bankruptcy Preferences One More Time*, 1993 WIS. L. REV. 1439, 1441 (calling them “apostles of conceptualist thought”); Allen D. Boyer, *Samuel Williston’s Struggle with Depression*, 42 BUFF. L. REV. 1, 2 (1994) (“high priests of formalism”).

7. Macneil has stated that “any good classical neoclassical microeconomist knows there is no such thing as relational contract,” Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 483, but this probably a little overstated. These hypothetical microeconomists most likely agree that contracts are “relational”; they would disagree that this insight ought to matter.

8. “And the details, as usual, are lawyers’ work.” Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735, 1760 (1998).

photo is better.<sup>9</sup> The point is that more information may not necessarily help us resolve a particular problem. There may be good reasons why the law need not pursue the deepest analysis of any given transaction, because (1) increases in accuracy must be traded off against the additional costs of the analysis;<sup>10</sup> (2) in many classes of contracts, the additional information introduced for consideration in the decision would undercut the very benefits of reliability and competition that discrete contract theory offers;<sup>11</sup> and (3) the virtue of predictability may require that certain classes of disputes be treated alike, even where many of the details are different.<sup>12</sup> Relational analysis produces a “better analytical product” than a non-contextual analysis—it could hardly be otherwise—but in a great many cases it is not clear that a better analytical product is necessary, or that what Macneil calls a “discretist” approach<sup>13</sup> cannot do just as well.<sup>14</sup>

It is one thing—certainly a valuable thing—to recognize that a transaction between *A* and *B* is embedded in a larger and more complex relationship. It is a very different thing to decide what impact that insight ought to have on how a court ought to decide the particular dispute that arises when *B* fails to do something that *A* wants her to do. Thus, approaches vary. Some relationists seem to believe that courts should always engage in the most detailed factual evaluations to resolve such disputes, in search of the most perfect justice in any given case. Others seem to find the relational lens valuable only for certain kinds of contracts, such as employment, franchises, long-term supply contracts, and even marriage—but not in ordinary arms’ length transactions. Still others avow belief in relational theory, but then proceed in much the same manner as if they did not.

And even where scholars agree on a general approach, they may differ on specifics. One can, as Kidwell has noted, be “a soldier in the relational contract army” without abandoning any existing doctrine.<sup>15</sup> Relational theory, properly understood, might be fully compatible with a highly formal set of rules—a kind of relational formalism that recognizes that even parties embedded in a complex relationship may nevertheless prefer to be governed under a formalist system. Thus, while one relationist might decry the parol evidence rule, for example, because it prohibits the court from learning facts about the total relationship between the parties, a relational formalist might conclude

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9. John Kidwell, *A Caveat*, 1985 WIS. L. REV. 615, 620.

10. See generally Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

11. See David Campbell, *Ian Macneil and the Relational Theory of Contract*, in RELATIONAL THEORY, *supra* note 3 at, 3, 24.

12. See Kidwell, *supra* note 9 at 622.

13. Macneil, *supra* note 7 at 887.

14. See Ian R. Macneil, *Barriers to the Idea of Relational Contracts*, in THE COMPLEX LONG-TERM CONTRACT 31, 36 (Fritz Nicklisch, ed. 1987).

15. Kidwell, *supra* note 9 at 621–22.

that the creation of a written document demonstrates that the parties sought certainty and predictability, and therefore that the rule is consistent with a relational approach. Thus, while some seem to think that relational theory necessarily demands a larger role for the state in determining and imposing contractual duties, other card-carrying relationalists, such as Macneil and David Campbell, do not.<sup>16</sup>

If, as it has sometimes been argued, changes in contract rules and theory are strongly affected by changes in economic conditions, we should note that the world has changed a good deal since the early 1960s when relational contract theory began to bloom. The economic world of 2004 is very different from the world of 1964. Modern relational contract theory was born about the same time as its great theoretical competitor, the rational choice approach of the legal economists.<sup>17</sup> It came before the vast changes wrought by the information revolution and the increased globalization of the economy. What has relational theory taught us over the past forty years? How has it changed and adapted in light of those great economic changes? Where is it going in the future?

Those were the general topics at a panel discussion which took place June 8, 2004, at the Oxstalls campus of the University of Gloucestershire in Gloucester, England.<sup>18</sup> It was part of a conference entitled, "The Common Law of Contracts as a World Force in Two Ages of Revolution," which marked the 150th anniversary of one of the most famous contracts cases of all time, *Hadley v. Baxendale*,<sup>19</sup> and is the theme of the present Symposium. The Conference's object was to explore how the common law adapts to and influences the kind of revolutionary changes that have swept over our society in the past forty years, and which swept over England in the forty years before *Hadley v. Baxendale*.

#### THE DISCUSSION<sup>20</sup>

FRANK SNYDER: We've been talking through much of this Conference about "development" in the law. Of course, we may have no basis for talking about "development" in the common law, in the

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16. See Campbell, *supra* note 11, at 23-24.

17. Macneil's first tentative writings on the subject appear in Ian R. Macneil, Book Review, 46 CORNELL L.Q. 176 (1960) (reviewing LAW IN SOCIETY: AN INTRODUCTION TO FREEDOM OF CONTRACT (Harold Shepherd & Byron D. Sher, eds. 1960)), which was (coincidentally or not) published the same year as the article that launched the law and economics movement, Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

18. The Conference was jointly sponsored by the Texas Wesleyan University School of Law, by the Law Faculty of the University of Gloucestershire, and by the Central Gloucester Initiative.

19. 156 Eng. Rep. 145 (Ex. 1854).

20. Panelists did not speak from prepared papers, but were invited to exchange their thoughts among themselves and members of the audience, many of whom participated in the discussion.

sense that we have a logical forward progression of things. I liked Allan Hutchinson's point yesterday, that there is no "path" of the law,<sup>21</sup> in the sense that there's some logical progression from point A to point B. Maybe the "path of the law" isn't a trail that goes logically and predictably from place to place; maybe it's just the track of a goat wandering about the hills looking for the best spot to feed at the moment. But whether we think of the law as progressing or merely changing, it certainly does change, and it has changed much in the last few decades.

Given that almost everybody now agrees that there's *some* value in relational contract theory, where are we today, in 2004? Can we say that there's still an over-arching theory of relational contracting, or do we just have a lot of different theories that use the same terminology? Has relational contracting really influenced the way lawyers think, or has it merely put a gloss on our old tendency to treat them as discrete transactions?

IAN MACNEIL: I start from the proposition that all contracts of every kind, are relational, and they all occur *in* relations. Even the most truncated ones you can think of occur within relations. So when you are talking about whether everybody believes in relational theory or not, you have to ask yourselves: "Can you readily use a relational approach?" And does everybody agree with that? Yes, everybody now agrees that all these things happen in relations. Then people like Posner and Easterbrook<sup>22</sup> promptly forget about that.

To me the essential thing about a relational approach to contracts is that whenever you are dealing with a specific situation, like *Hadley v. Baxendale*, you approach it from its relational side. You don't approach it from the discrete side. You don't approach it through *promise*. Now, *Hadley v. Baxendale* tends to be seen pretty much from the discrete approach. But you have to put the thing in its total context before you can even begin to understand it, and this, I think, is where I fall completely in 100 percent disagreement with the more extreme rational choice theorists, because they start at the exact opposite end.

I would say to Frank Easterbrook, for example, you are starting at the wrong end of the stick. It's the framework of starting with the relations that is important. Within that framework, if you start with the relations, then you can have any orientation you want from extreme Marxism or Maoism or Nazism to market orientation—whatever it is—and still be relational. You go through a selection process of what you think is important and what you need to think about.

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21. Allan C. Hutchinson, *Work-In-Progress: Evolution and Common Law*, 11 TEX. WESLEYAN L. REV. 253, 254 (2005). The reference is, of course, to Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

22. Judges Richard Posner and Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit.

The judges in *Hadley v. Baxendale* did not have to sit down and try to understand the whole economy, the empire, all the social forces, and everything else, in order to decide this case. They could do it within a fairly narrow approach to the relationship, but it is obvious they approached it from a relational standpoint. How else could they make the statement that no one would have suggested that just because the mill shaft was broken, that the mill was not operating? That is a relational statement.

JOHN KIDWELL: I find enormous power in the idea of relational contracts, but the way I think about this question is a bit different from Ian's. It seems to me that whenever we think about law, we ask two things of it. We ask that it produce both social order and justice. Sometimes we can have a rule or decision that does both of those things comfortably. But sometimes it appears that a particular rule emphasizes social order or, on the other hand, emphasizes individual justice. When we are thinking about individual justice in the context of contracts, our notion of justice tends to be related to whether the expectations of the parties themselves have been satisfied. That is, we think that a result is *just*, from the point of view of one party, if that party's expectations have somehow been satisfied.

There are two different ways in which those expectations might arise. They sometimes arise from what we call the contract, and we legitimize an expectation because it seems embodied in that contract. But other kinds of contracts have a more complex, more multifaceted dimension—a relationship—which may include a contract or a transaction. What happens, and what causes a lot of anxiety, is when the expectations of the parties seem to be arising out of that *relationship*, and those expectations contradict the expectations that might come out of a document or the transactional aspect.

So . . . relational contract theory reminds us constantly that there are legitimate expectations which arise out of that complicated long-term relationship, and if we do not acknowledge those expectations as legitimate, and ignore them in the decision-making process, we will feel always that the result is unjust. It is only if we can find a way to honor the legitimate expectations of the parties that we have a sense that justice—individual justice—has been done. That is why I find relational contract theory so important. Sometimes it is the only way we can have a sense that justice has been done to the parties to some contract.

SNYDER: But that obviously raises a related issue. I know Ian, for example, considers a marriage to be an exchange transaction.

MACNEIL: A relationship.

SNYDER: Sorry, "exchange relationship." (I think that Nevada is the only U.S. state where exchange *transactions* of that nature are legal.) But that raises this issue: "Where we have a relationship, are all parts of that relationship legally enforceable?" Obviously not. There

is some contractual core that we can look at and say, yes, we know *this* part at least is intended to be legally enforceable.

MACNEIL: You are shifting terms there. You shifted from talking about “exchanges” and things like that to “contract,” meaning a contract that is legally enforceable. That is a different concept. That is something I always have had trouble with, because people are always doing that.

SNYDER: Let me then say the legally enforceable part of the relational expectations. Is that reasonable?

MACNEIL: Yes.

SNYDER: How do we go about telling what that part is? I know that this is the sort of thing Rachel struggles with in the employment area.

RACHEL ARNOW-RICHMAN: Employment, of course, is both a relationship and a legal institution, and it offers a nice microcosm in which to view how some of these ideas play out. I see my role in this panel as giving context to our discussion in order to consider both the viability and utility of these theories. What you find in the employment context is that, although relationships are extremely important to the parties, the legal issues that arise often are not resolved in the manner you would expect. In fact, relatively little of employment contract law follows a relational approach and reaches what we might consider correct relational results.

As to the question of which aspects of the relationship should be legally enforceable, one of the things that makes employment somewhat unique among business relationships is that it is quite rare to have any written instrument at all. So, by necessity, in order to determine what the parties’ legal obligations are, you have to look at context. In the United States we have an employment-at-will regime, which is different, of course, from the default law of most European countries. In many American cases, therefore, the question is whether there is some type of enforceable commitment to providing the employee with job security. In the absence of a writing, the court must look to context: expectations of the individual worker, assurances by managers, past company practices, and so on. These are all part of a relational inquiry.

There are two points about this which are interesting. One is that in American employment decisions those relational components are mediated through very traditional contract doctrines. For instance, a court might ask whether a statement of assurance by the employer created an express oral contract, or might enlist promissory estoppel theory to try to identify a compensable reliance interest on the part of the employee. Perhaps most interestingly, a few employees have successfully used implied in fact theory to present a holistic view of their relationship to the court—expectations, promises, policies and so on—thereby building an inductive argument that the parties intended



to be bound to something beyond at-will employment. Frequently, however, such inquiries do not result in legal judgments that are consistent with the parties' relationship because courts are hampered by the traditional contract doctrines through which such cases are analyzed. Thus, for instance, some courts have held in the promissory estoppel context that it is unreasonable for an employee to rely on a promise of long-term stability by a supervisor, given that the relationship, legally speaking, is at will.

The other point has to do with the significance of introducing a written document in this context. What do you do when you have a formal contract, but you also have this set of norms going on outside the document? At the moment employment law has not come up with a satisfactory answer to that. In fact, when some provisions are written down, it creates a lot of difficulties, primarily because it gives employers a vehicle for disclaiming extra-contractual obligations. I think what we need in this situation is a bit of what I would call contextual formalism. That is, we need to determine the relational view of the document as a first step, then deal with applying the terms in a formal or relational way as appropriate.

SNYDER: To use Rachel's example, let's assume that there is some core of agreement as to the employment—there is clearly an oral employment contract—but there are some parts of the relationship that neither party conceives to be part of any legally enforceable scheme. How do we deal with that?

MACNEIL: You keep trying to force this into a mold. You keep trying to force this into a mold of enforceability. It's as if God or somebody has said that in this relationship—which in fact is like Allan Hutchinson's point, it's come via your goat path and the parties just go along with it—that somewhere or other there is some legal core there, that the parties must have thought of this or that. They probably never thought a thing about it. People drift into things. They may know vaguely that there is some legal impact of it—I am sure they do.

In unfair dismissal over here, for example,<sup>23</sup> every interesting case finds its way into the newspaper. Everybody knows about it if an employer sacks you. You have to think about that. But there is no kernel somewhere in the middle of it that the parties have put together that does what you are talking about. I can't approach it that way myself.

SNYDER: How would a judge, dealing with that relationship, make a decision as to whether or not the agreement was breached?

MACNEIL: "As to whether or not the agreement was breached." You've done it again.

SNYDER: I'm sorry, but we don't get a *case* for a court to decide unless we have a breach. Andrew?

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23. The United Kingdom.

ANDREW TETTENBORN:<sup>24</sup> When we talk about enforcing people's legitimate expectations, there are two ways we can do it. One is enforcing the obligations or the state of affairs which they legitimately expected to occur. The other is avoiding situations which they had no reason to expect would occur. I think the negative side may actually be much more important than the positive one, because what that does is explain why we sometimes enforce obligations which *ex hypothesi* nobody ever thought of. If you like, it's the function of contract to avoid unpleasant surprises within the relation between the parties.

That comes very nicely back to *Hadley v. Baxendale* itself, because that is one very neat way of justifying the limitation of damages to that which was foreseeable; *i.e.*, if I make a contract with you, I do not really have an expectation as to what is going to happen if I break the contract because I do not think I am going to break it. But I think I do have a legitimate expectation of being spared the nasty surprise that when I, for example, break the contract to supply you with a car, that you, the next day, were off to an extremely lucrative interview which would have yielded you several million dollars. That might be a neat way of looking at the point, or I may be shooting my mouth off. I don't know.

KIDWELL: The way I would respond to the challenge of giving an example of a relational perspective is to offer the *Nanakuli* case.<sup>25</sup> That was a case involving a long-term relationship. It took the court nearly fifty pages to decide, and many of the pages were devoted to summarizing the facts. A company that was dealing with asphalt mix had a contract with a supplier, and there was a document—an elaborate, written document—that seemed to define this, but the practices of the parties over the years had substantially departed from this written document.

Ultimately, it was treated as a parol evidence rule case because the question was whether you could introduce and consider and give legal effect to this series of departures in the practices of the parties from what the written document seemed to suggest. It is because in that case the court believed, I think, that the legitimate expectations of the parties were more a function of their behavioral interaction over the years than this paper document which had been executed and put in a filing cabinet years before, and which no longer played any real role in defining what they expected.

So the legal decision of the court was to slightly—or some would say substantially—alter the parol evidence rule in order to accommodate the relational perspective. The court was honoring the fact that

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24. Bracton Professor of Law, University of Exeter, England.

25. *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981) (holding that merger clause did not bar evidence of trade usage and prior dealings and thus plaintiff could introduce evidence to contradict explicit terms of agreement).

the expectations of the parties had been formed differently than just by executing the document.

So there is an example in which you could have an opinion, which I think is a highly relational contract opinion, and yet that phrase never appears in it. The court simply sees this as an application of the parol evidence rule. I don't know if you agree, Ian, or not.

MACNEIL: I agree with you. I don't see that the parol evidence rule would apply in a case like that, because what the parties do afterwards is—even in a discrete approach theory—make a new contract as they go along, basically. That does not even stretch the traditional approach to contracts, if you say that. They do this or that even though they said they were not going to do it in the contract, that we will only do this by writing, or something like that. The fact is that they change that, too, by going and proceeding in this way. That's quite easy really. But you are quite right; no American court, and certainly I don't think any British court, would approach that and say we are now dealing with this fancy new relational approach to contracts. They do not need to.

SNYDER: Yes, Bill?

L.J. PRIESTLEY:<sup>26</sup> You were talking about the contractual core. I think you were asking how Professor Macneil would identify the core. He did not quite like that question, if I understand his reaction, but the question will always present itself to the person who is pleading the case when the first Statement of Claim is written down, and how then, using the relational approach, does the pleader decide what he is going to allege?

MACNEIL: I want to get back to marriage. The people engage in a courtship, and then finally they decide to get married. When they get married, they both say yes. They don't say anything else except yes. Then they go on for say fifteen years, and they have a falling out, and start heading for the divorce courts for property settlements and stuff like that. There is no "contract core" there. There is nothing. All they did was say yes, they were going to continue the relationship and change its legal and social structure somewhat, but they did not define anything at all where you could say, "There is a legal core there that they really meant to be enforceable." That just never happens in that relationship.

That is why marriage should be considered contractual, because it illuminates so much about other things. Basically, I think that is true. The fact that pleaders are going to have problems later on is not a reason for saying that there was a core in the parties' relationship which justifies saying yes, that is a legal core. That is something the pleaders have to work to try to find and produce themselves. It's arti-

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26. Barrister and former Justice of the Supreme Court of New South Wales.

ficial. It does not exist. That is what they have to do. That is their business.

PRIESTLEY: Doesn't the pleader have to say, in effect, these are the facts from which the plaintiff alleges an obligation arose, and which is not being fulfilled? He has got to say that in some form or other.

MACNEIL: Yes, they got married. There is a marriage certificate. There is a host of things that follow from that, legally.

SNYDER: Irma?

IRMA S. RUSSELL:<sup>27</sup> I think I am just now understanding relational theory better than I ever did. I think I respect and buy into it to a great extent, but I think this may be—at least until I hear your response, Ian—where I would change it *vis-a-vis* the commercial context.

The idea of marriage comes to us as a package, a societal package in a certain sense, and if the parties gave detail to that package in some way, we not only don't care, but we really don't want to know. We would not respect an exchange of marriage that gave detail to what kind of cooking, what sort of sexual relations, how many times, and so on, but we do accept that detail and the right to more of a cash and carry sort of relationship in the commercial context.

So, rather than importing, it seems to me if we take that relational aspect of marriage and superimpose it on business, we get sort of a total aspirational, good faith societal development that the business entities would, in large part, not want, because they want to define it, and we respect that sort of defining. So that sort of drives us down to respecting the detailed promises.

I still like the idea of importing relational aspects, but I think it must be a little bit on the other end. That is, we respect the cash and carry aspects of "this much for the wheat," etc., but interpretation allows us to bring in relational elements, both that they might not have thought of and also societal elements about good faith.

MACNEIL: I am not suggesting that people do not frame things in great detail, and I am not suggesting that, when they do that, one of the important relational principles is to give effect to their consent and agreement to the things they frame. That is very important. What I am suggesting is that to insist that there is a legal nature to that, that there is some kind of legal core that is separate from the fact that they vary intensely—if you call up your broker and tell him you want to buy pork bellies at a certain price, no amount of relational stuff is going to get you out of the consequences of doing that. There is a legal core there, but that is not what the parties are about.

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27. Professor of Law, University of Memphis School of Law, Memphis, Tennessee.

I think it was David yesterday<sup>28</sup> who said the parties don't make contracts for the pleasure of making contracts. They are trying to create an exchange surplus that they can mutually benefit from. That is what they are about, and that is what happens when people call their brokers and order pork bellies. They know that their doing so will result in a lot of legal enforceability. But that is not a legal core, that's part of the costs that David was talking about: "If you do that, that is one of the things that is going to happen here." But I think if we start trying to analyze what they are doing in terms of some metaphysical legal core out there, we are not going to understand what they are doing.

SNYDER: Let me ask the question a somewhat different way. I am trying to avoid metaphysics; I think I am a realist. The entire point of contract law is to enlist the power of State coercion, the police and the sheriff, to use force to make somebody do something or stop doing something based on this relationship.

Suppose you and I enter into a transaction. The transaction is part of a larger relationship. But you complain about what I do in connection with the transaction. You go to the State, and ask the State to use physical force to make me do something or give you something. It seems to me that both of us expect that *some* part of our commercial relationship is the sort of thing where we expect the power of the State might be brought to bear either for or against us. But there are other parts where we do not. We do not expect those parts to be *legally enforceable*, even if we fully expect them to be carried out. This is Lisa Bernstein's approach, I think, the argument that some parts of our relational contracts should not be legally enforceable.<sup>29</sup> How do we tell the enforceable and non-enforceable parts apart?

MACNEIL: I don't think you can answer that question generally. You can only answer it in specific circumstances. I think you are quite right. People are not thinking an awful lot about law when they are doing it. Even when people are sitting down defining very complex contracting, where all the obligations are spelt out, they know in the background there will be legal enforcement possibilities if anything goes wrong, but they are not thinking about it primarily. They know that they are committed and sticking their necks out. But what they are really thinking about is the best deal they can get. That is what

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28. David Campbell, *The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract*, 11 TEX. WESLEYAN L. REV. 455 (2005).

29. The thesis is developed in several related articles. See Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 777 (1999); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724, 1735-36 (2001).

they are working for. Part of the problem is we are all bloody lawyers. We think as if the law was the center of things, but it's not.

ARNOW-RICHMAN: I completely agree with that. This debate about the relationship between the written agreement and the rest of the relationship is interesting, but it strikes me as completely abstract because what we really need to know is whether the parties intended to reserve to themselves the power to invoke the written document to the exclusion of other relational considerations. The answer to that depends on the circumstances.

To bring it back to a particular area, labor arbitration is a phenomenal example of this. Frank alluded earlier to Lisa Bernstein, who has suggested that increased reliance on private arbitration reflects a desire to escape the fuzzy, relational approach to contract interpretation that obtains under the U.C.C. I think that the trend toward private arbitration is more complicated than that. If the question we are wrestling with is whether there is a legally enforceable "core" within the relationship, and if we agree that the presence of an incomplete writing does not dictate the answer, then the move to arbitration raises questions of judicial capacity. What forum are we going to use to determine what the parties believe they have committed to?

With labor arbitration, the aim was to create a separate tribunal precisely to deal with questions of the import of the written collective bargaining agreement in the context of the labor/management relationship. I want to share with you a particular case, *Steel Workers v. Warrior & Gulf*,<sup>30</sup> as an illustration. In this dispute, the union sought to challenge the employer's decision to contract out a segment of its workforce through the parties' established grievance procedure. The employer argued that contracting out was a managerial decision not subject to the grievance procedure. It relied on the letter of the collective bargaining agreement, saying, in effect, "This issue is not governed by our contract. The agreement does not specifically cover contracting out; therefore we are allowed to do it without consulting the union." The U.S. Supreme Court ultimately affirmed an award requiring management to respond to the union's grievance. In so finding, the Court said:

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.<sup>31</sup>

The Court then goes on to quote Archibald Cox:

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30. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

31. *Id.* at 578–79 (footnotes omitted).

[I]t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.<sup>32</sup>

That seems to me to be the essence of it. And I do not believe it is an adequate response to say that labor law is specialized or that employment relationships are inherently different from "real" contracts. Within the universe of employment disputes we must try to distinguish between relational norms that deviate from the supposed contractual "core" but are intended to be binding, and relational norms that deviate from the "core" and are understood to be non-binding, just as we would to a greater or lesser extent in other types of exchange relationships. The point is simply that we need an appropriate forum to make those initial determinations and then to make appropriate choices about enforcement with those principles in mind.

SNYDER: Ben?

BENJAMIN G. DAVIS:<sup>33</sup> Two things; one on the labor front. The labor part is not a big part of it. There is a public policy labor space. That means the relationships are allowed in because their public policy, pushing through the courts, is leaving that space open for the relationship.

I was thinking of another situation I heard about when I was in international contracts, about project finance negotiations—big, huge international project finance. Everybody in the negotiating room, the best lawyers in the room, are doing magic stuff to come up with this incredible series of papers. But apparently everybody in the room knows that it's going to be completely renegotiated at least once. Maybe only one person, the person getting the deal, does not know, but all the lawyers know it. But they are acting like this is the four corners document. I don't know where the relational part of that

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32. *Id.* at 578–80 (quoting Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498–1499 (1959)).

33. Associate Professor of Law, University of Toledo College of Law.

goes, of acting one way when everybody knows it's going to be modified, and that is part of the deal.

SNYDER: The question would be why do they do it? They must feel like they are getting some benefit out of preparing this document. If what we are going to say is it is going to be renegotiated, of what benefit is that initially?

JOE SPURLOCK II:<sup>34</sup> That is the deal—they want the deal first. “We’ll get the deal and then we’ll work out the details later.” That is precisely what you were trying to tell us originally, David. It’s like *Foakes v. Beer*.<sup>35</sup> These folks are willing to sell their soul to the devil in order to get the deal. Then later, when we find out it’s not advantageous to us but against our best interests, then we want to find our way out of it. The reason is, Frank, that people want customers, they want money, they want action here, and we’ll work all these little details out later on.

DAVID CAMPBELL: I think that way the discussion has hit one or two walls that Ian must be getting quite familiar with in the reception of his work, but I am going to blame him for creating these walls. He was far too modest when, having said we are all lawyers, and included himself as only a lawyer. He stopped being only a lawyer a long time ago and has been really engaged primarily on a sociological explanatory task.

Ian can show you the huge network of relations that you need to take into account if you want to explain even the most apparently discrete contract. The sociological explanation is extremely rich. It is a work of real value as sociology, and I think is recognized by (economic) sociologists as such.

KIDWELL: And I think in your book that contains a lot of Ian’s work, you acknowledge that sometimes in the context of an extremely complex relationship the parties will choose to crystallize their expectations and create an almost entirely transactional moment,<sup>36</sup> so that it is not inconsistent with Ian’s theory to suggest that there are these transactional moments in which certainty is what the parties now want. Like the case of buying the pork bellies: “I am not trying to capture our long-term history with one another; what I want is 200 lots of some commodity at a certain price.”

CAMPBELL: Ian’s theory, I think it is fair to say, has still mainly been appreciated for the sociological richness it brings to the explanation of the most apparently simple phenomena. But there is another aspect, and I am at a loss to explain why it has not been taken up more widely than it has. Ian has a theory of discrete contracts as well. He

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34. Professor of Law and Director of the Asian Judicial Institute, Texas Wesleyan University School of Law, Fort Worth, Texas; Senior Justice, Texas Second Court of Appeals.

35. 9 App. Cas. 605 (1884).

36. See generally RELATIONAL THEORY, *supra* note 3.



has a theory of discrete contracts as the product of relations. In his normative schemes, there are values to certainty and discreteness, and to parties on some occasions, when they want the sharp-in/sharp-out contract, will emphasize those discrete normative orientations in the way they work, and they will produce contracts that will satisfy the requirements that you say.

But it is not an explanation in terms of rational choice thinking. It is not in terms of the black letter law. It produces the positive effects, the positive achievements of certainty, the positive achievements of discreteness, but they are shown to be dependent on the parties' normative relational orientations.

I have tried—and certainly I have not had tremendous success in trying—to show that Ian's work has a central place for discreteness and competition as well as for emphasizing these relational aspects. And, just really out of perversity, I would say the thing that can be laid at Ian's door, if you do not mind me saying so, Ian, is that you have produced this enormously rich sociological account, but there has not been enough effort made to tell lawyers how it affects them. We say that the legal relationship is not the central thing; that there is this much more complex situation that you must understand if you wish to explain any contract. And they will say: "Yes, but what is the function of the *law* within that?" And we have not done enough work on what is the role of the law? Why does the law play some role?

I am aware that there are contracts that everybody knows are going to be renegotiated. I know this from my own work in aerospace, where people spend a great deal of money drawing up complex contracts, but I tell you quite literally that when there is a dispute, it is regarded as bad thing to get the contract out of the drawer and look at it. That is regarded as a bad thing to do. You would say that this is "non-use" of the contract. Ian has incorporated this in his work. But as Frank says, why did they spend so much on the contract in the first place only to put it in the drawer? We need an answer to that question within the relational framework.

ARNOW-RICHMAN: Because their lawyers told them they needed it.

CAMPBELL: I don't think it can be entirely that.

SNYDER: My own experience is very different from David's; in the highly relational area where I worked—government contracts for high-tech weapons systems—the letter of the contract is *exactly* what the parties are stuck with, and deviations from it are serious.

But to use a metaphor, I think the law is in some sense like military force. Military force plays a role in the relationships between states, but it is certainly not the central element. Ninety-nine percent of the time, even when other countries do something that makes you mad, you settle disputes peacefully. You don't mobilize the Marines. It's considered bad form to rattle the saber. But when the regular mecha-

nisms break down, the availability of that force becomes extremely important. The mere fact that it is in the background—even when nobody mentions it—colors all of the dealings between the parties. Andrew?

TETTENBORN: When it comes to deciding just how far the law goes, I suspect that the normal way relationships of that sort are pursued is one of the best indications. There is a nice dichotomy you can draw here. I will do it from the English context but I suspect there is no difference in the States.

Do we imply a term of good faith into a contract? Now it all really depends on what kind of contract you are talking about. If you take a contract to charter a ship for a given period—where the relationship between the parties is rather reminiscent of that between two sharks, and everybody realizes it—then it is actually going to be very difficult to imply a term of good faith. You might even say that there is no room for the implication of an obligation of good faith. On the other hand—take a different relationship—you agree to act as my agents, or carry out some long-term job for me. Is there then an implication that you will actually act with at least minimal good faith towards me? The answer must be yes. The reason why we have the difference is simply the historical understanding which has always arisen from those relationships and how far the law should go or not.

CAMPBELL: Just to elaborate my point—and I am laying this at Ian's door rather unfairly—the notion of non-use has been very helpful, but it cannot be entirely right. The problem is that we do not understand the actual nature of the “use” relationship. It cannot be that the contract is of no use; otherwise, why are these contracts entered into and why do people spend all this effort in drawing them up?

MACNEIL: For exactly the same reason people make architectural drawings for a building which are likely never to be used because making them is part of the process of getting the final plans and finally building the building.

Abraham Lincoln had the ability, apparently, to sit down and write out something once, perfectly, clearly, and understandably. But few of us have that ability. Why do you write a first draft of an article? You know damn well you're going to throw the thing away. You do it because you are shaping your thoughts as you are putting it together, and one of the processes that has been described here, which goes on all the time, not just in the international financing area but with any kind of complex structure, is that the parties are forcing themselves to a point that they would not reach if they did not do this. They would still be sitting down squiggling about this and that, but now they are being forced to shape it. They know it's not the final shaping, but they put themselves in this mold where that is what they are doing, and it's not just because the lawyers said that is what they ought to do. It is part of the process of putting it all together, even though they know

they are going to take it apart. It is a process of learning, I think. Basically, that is what it's all about.

ARNOW-RICHMAN: We should recognize that we are talking about a distinct subset of contractual relationships. We are talking about heavily lawyered transactions between parties of roughly equal means, and asking why they devote their resources to creating a complex, formal contract. In other contexts, written documents are desirable because they create or protect a bargaining advantage for one party. That point should be on the table, I think.

As we were talking about discrete contractual elements within a broader relationship, what came to my mind was the increasingly prevalent use of written documents to contractualize particular obligations of employee—namely covenants not-to-complete, contracts waiving rights to pursue remedies in court, independent contractor agreements, and so on. Lots of times what ultimately happens with these agreements is they get tossed. The employee departs, the employer never looks at the non-compete, never thinks of going to court to get an injunction, may not even think it appropriate in the relational sense to try to restrain the employee.

But the employer has that paper. So the formal “contract” is really a way of preserving options for the employer, who can then choose either to rely on informal enforcement mechanisms or to insist on precise compliance through a legal process where relational considerations are likely to be excluded. The employee does not have that option; indeed, in the United States such documents confer no rights at all on the employee, other than the opportunity to commence an at-will relationship, if one can call that a right. In that situation I think it is fair to say that the end-game behavior of the employer is an abuse of the written contract rather than a reflection of the parties’ bargain. The same can perhaps be said of a variety of contract relationships that are papered with standard forms. We should not disregard the possibility that some writings are adopted precisely because of their exploitive potential.

KIDWELL: I want to just offer an amendment. I agree with everything that has been said, but I want to amend it in a way that might confuse it a bit more. That is, I think it was Arthur Leff who used the phrase, in writing about unconscionability, “our incoherent hearts’ desires,”<sup>37</sup> because people, when they engage in the contract making process, want certainty, predictability, reliability, the displacement of risk to the other party. At the same moment, they want solidarity, flexibility, a kind of capacity to readjust in the light of changed cir-

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37. Arthur Leff, *Thomist Unconscionability*, 4 CANADIAN BUS. L.J. 424, 428 (1979), *quoted in* I STEWART MACAULAY, JOHN KIDWELL & WILLIAM WHITFORD, *CONTRACTS: LAW IN ACTION* 704 (2d ed. 2003).

cumstances, and they want both those things simultaneously. Well, they both can't be maximized, I think.

The result is that we get this tension, and one of the things that I think relational contract theory adds to this is the acknowledgment of that tension in a way that does not occur if we emphasize only the certainty-promoting aspects of a contract document.

SNYDER: Yes, Jim?

JAMES J. FISHMAN:<sup>38</sup> I want to go back to something John Kidwell said. The notion of justice, he said, gets related to the written expectation and to whether the expectation of the parties had been satisfied. Under that theory, *Hadley v. Baxendale* was wrongly decided because it was a jury decision originally, and the jury gave damages of £25. If you look at the account in the local paper, the jury consisted of three lawyers and nine merchants. Today, we would call that a blue ribbon jury. That jury reflected the expectations of both parties, and I think that what the appellate court did was overturn those expectations. So, under your principle, *Hadley v. Baxendale* is a very unjust case, to my mind.

CAMPBELL: It was a special jury, and its function really was—at not much level of legal doctrinal sophistication—just to say what would merchants in that type of position expect to happen. In my own opinion, it has not necessarily all been productive in this country—where civil jury trials are basically dead—that we have tried to turn the amorphous notion of what the type of people on that kind of special jury think should be the legitimate expectation in that circumstance, into matters of *doctrine*. We have got ourselves into extremely difficult, pointless hair-splitting, and perhaps bringing back a mechanism like a special jury is something we should consider in this country. It would cut out a lot of pointless, legal doctrinal debate.

RUSSELL: Back to the question why we do a document—it is for many different reasons. One extreme, perhaps, of agreements we never expect to be judicially enforced is the “gentleman’s agreement,” made to give us some sort of comfort level. In some circumstances the agreement is made not for individual or two-party consumption but rather for a third-party consumption, to establish credit—to do a building, those sorts of things.

But I think in the context that we are talking about, the enforcement context, in a certain sense the contract is the exit document. It is the dissolution, to take the metaphor of marriage. It is as if we, as a society, every time we married, did the prenuptial thing that says that have expectations that the relationship will flourish, but if it does not, here is what will happen. I like this development with regard to relational theory, because I think I am seeing it develop as a continuum. Marriage, on the one hand, is perhaps the richest relational contract

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38. Professor of Law, Pace Law School, White Plains, New York.

that exists—in fact, so rich that some would put it over the line, outside of contract, into covenant, into a sacrament—but if we put it on the contract side of the line, it is the richest in terms of relational contract. Then at the other end of the continuum would be the stripped-down contract that David poses: “I just want the steel and that is all. I have had no relationship with you in the past. I plan to have none in the future; it’s all about this deal. Let’s make this deal and let’s have it very discrete.”

To launch a little bit into David’s comments yesterday,<sup>39</sup> I agree that writing a contract is a cost, and what we are after is the surplus, but I think that tells me something different, which is that, if it is a cost, why would we incur it? Certainly not to encourage rational acting. We do not need to even incur the cost for that. We have that automatically, by virtue of self-interest.

So contract law, I believe, is there to counterbalance the rational actor, to gain something for society—and that is, I think, enough certainty that people are willing to have confidence that the rational actor will not defeat the interests that they believe have been allocated to them. That is why I think the benefit of the bargain is the kernel of the contest. That is why efficient breach merely glorifies that rational actor without identifying the certainty aspect, which is the reasonable willingness of society to incur the cost of this mechanism. In fact, it is the primary reason; to figure out how we will protect that potential future-injured party.

CAMPBELL: I feel very loathe to reply, because I feel I am plagiarizing Ian while he is sitting right next to me. Nobody, no economist, other than a purely mathematical economist, believes that rational self-interest is self-guiding. There has to be some sort of a *laissez faire* framework. Even the Fable of the Bees ends with a couplet that stresses that it’s only when it’s wisely guided that self-interest action is productive of well-being. Once you have conceded that, as all economists do—I do not mean the positive, marvelous economists who treat this productively, like Adam Smith, but the economists who have it rung out of them because they have to admit it though they do not want to—there is an absolute necessity for a legal institutional framework that turns self-interest, which is completely formless and abstract, into concrete direction that is productive of well-being. And then they stop.

The law and economists allow this basic relational aspect, though this must surely contradict blunt notions of self-interest because it admits the necessity of a publicly-regulated framework, but they stop there. And it’s Ian’s achievement to *not* stop. Instead of having a theory that acknowledges the existence of what, in one of Ian’s topologies, is the two levels of relations that make up the basic social ma-

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39. Campbell, *supra* note 28.

trix, the economists stop, and so they have a completely inconsistent theory that is schizophrenic. It is Ian's achievement to have not stopped, and to have developed a more, incredibly richer framework that covers all contracts.

But what has unfortunately happened is that the stress on the necessity of relation has somehow—it was not Ian's intention—seemed to imply that all contracts must be lovely and warm and co-operative, that there is no room for competition and that the virtues of certainty, discreteness, and planning have no value in the relational theory because all we like is flexibility. I am at a loss to understand why the interpretation of Ian's work has gone the way it has, but it has gone that way, and progress now, I think, really has to turn on developing a law, a relational theory, that can embrace competition, as it easily can, and can embrace the virtues of, I will say, formalism.

In this sense, I do think that Professor Scott is actually carrying out something of real value at the moment, though if I can repeat something I have written elsewhere, I think the basic idea was stated by John Kidwell, in a short Wisconsin paper, where he also tried to say that the vital thing is to bring the virtues of the transactional framework into the relational framework.<sup>40</sup>

SNYDER: I want to come back to the issue of costs. One of the costs to be avoided in the system is the cost of negotiation; the cost of getting our minds to meet together. To the extent we don't need to do that, we maximize surplus. That is the value of standardization. To some extent there is a value to getting rid of negotiation and standardizing.

Let me throw out an issue that American contracts folks are struggling with now, the *Hill v. Gateway*<sup>41</sup> case. Here we have a telephone purchase of a computer. The terms of the deal come in the box afterwards. Gateway's claim is: "We need to do business on standard terms for predictability." The consumer's argument is: "I never agreed to those terms. I should get whatever the default terms of the Wisconsin Uniform Commercial Code are." Rachel raised the issue: that kind of practice does give rise to potential exploitation. Does relational contracting have anything to tell us on issues like that?

MACNEIL: It has a lot to say. So does discrete contract theory. Of all the blatant violations of the principles of consent, the *Gateway* case is one of the worst. You do not have to get to relational contracting to say it's a nutty case. The buyer could not know what the devil he was getting into. To carry consent beyond some reasonable penumbra of actual knowledge is absurd.

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40. See Kidwell, *supra* note 9.

41. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997).

But one of the norms that I put into my own relational theory of contract is power norms. This is a problem I have with Lisa Bernstein's work with the national grain industry, if you are familiar with that.<sup>42</sup> She purports to do a relational analysis, but pays no attention to the power structure in which these contracts are made. Well, you absolutely have to do that.<sup>43</sup>

If you pay any attention at all to the power relationship between Gateway and an individual consumer, it is perfectly plain you cannot allow Gateway a free hand to legislate in the relationship, which is exactly what the decision does. Some say sellers can legislate any way they want as long as they do not violate some positive statute, like the antitrust laws or something like that, it's okay. Well, that does not fit into any relational theory that makes any sense, or fit into discrete theory, either. It's just an aberration. That is the kind of case that might tip me over the edge if I were already leaning in the direction of Marxism.

CAMPBELL: I think, paradoxically, that a relational theory is needed to make *Gateway* and similar cases have any sense at all, and to know what to do in response to them. On a classical contract theory, there is no contract in the *Gateway* case. How is there any consent? You have to stretch the meaning of the word "consent" so far that words have begun to lose any concrete sense.

In the *Gateway* case, if you can in one sense deny Gateway's claim, how could you sell computers at that price and have all the contracts individually negotiated? You cannot. So what you really need—if you agree there is a positive value to selling computers at that price—is a relational framework in which you can set the parts of the contract that actually can be individually negotiated, like price and date of delivery.

What that case seems to tell me is that the stronger party has exploited the weaknesses of the classical theory of contract. It is saying: "You agreed to take the computer." Well, the buyer did not really agree, did they? A relational theory will tell you that this transaction is taking place within a quite complex set of relations, and we must make sure those relations produce fair outcomes, and it seems to me that in these circumstances a relational theory points you towards the necessity of legislative guidance of what can be put into the terms of the contract. It is only when you have the legislative framework established that it makes any sense to then leave the price, or whatever, open to negotiation. Because if you leave the price open to negotia-

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42. See Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

43. See Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 715 (1974) (arguing that "[c]ommand, status, social role, kinship, bureaucratic patterns, religious obligation, habit and other internalizations" all play a role in the exchange).

tion and then find you have actually got nothing when you open the box, the price means nothing. The relational framework is essential to give meaning to the few terms that can be individually negotiated.

SNYDER: So when Judge Easterbrook says that everybody knows there are going to be these terms and they are going to bind you, is he being a relationist in that sense?

MACNEIL: Yes.

CAMPBELL: Yes.

ARNOW-RICHMAN: Incidentally, this problem of terms in the box occurs in the employment context as well. How many employees get all of their employment documents before they accept their jobs? None. What happens is that the employee accepts the job, and at some point later, perhaps on the first day of work, he or she receives a handful of written forms and policies.

To invoke the terminology of shrink-wrap and click-wrap terms in the consumer context, I think of this practice as "cube-wrap,"—cube being the short form in American English for cubicle, the little cubbies that pass for offices in many modern service and knowledge industry companies in the United States. Clearly there is no element of consent when an employee, who has already committed to a job, finds a stack of HR<sup>44</sup> documents in his or her cubicle and signs them as a matter of course. Yet the same thing is happening in cases challenging the validity of cube-wrap terms as happened in the *Gateway* case. Courts have concluded that these documents are enforceable because they relate back to the moment of acceptance, either when the employee said, "Yes, I'll take the job," or the day the employee started working.

In the employment context we do not even have the counter-concern of the drafter's need to sell its product on uniform terms, which I agree is legitimate in a mass-market context. This is unquestionably private legislation by companies with bargaining power, and I think it calls for a more democratic solution.

SNYDER: Roy, you want to add something?

ROY RYDEN ANDERSON:<sup>45</sup> To follow up, as detached academics, it is a little bit unfair of us to keep pointing to *Hill v. Gateway*—the only thing in my mind that case stands for is that if you give the Seventh Circuit a license to abuse, they will abuse.

But its predecessor case, the *ProCD* case,<sup>46</sup> struck me at the time, and still does, as a very sensible decision. Not in terms of standard contract law—it certainly does not follow that, whether we're talking

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44. This is the American abbreviation for the "Human Resources" or Personnel department.

45. Vinson & Elkins Distinguished Teaching Fellow and Professor of Law, and Senior Associate Dean for Academic Affairs, Dedman School of Law, Southern Methodist University, Dallas, Texas.

46. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).



about the common law or Section 2-207<sup>47</sup>—but basically Easterbrook, who is nobody's fool, said the contract rules are not working for millions and millions of transactions. Yet these transactions go on all the time. We have to assume that we are dealing with somewhat informed buyers and that they know darn good and well that when we talk to someone over the telephone to place an order—just to take that example—that the person we're talking to, maybe a student on Christmas break, earning some money or whatever, knows nothing about the contract terms of the product he is selling. To then begin talking to the consumer about all these things is nonsense.

So, essentially *ProCD* says: "We are going to bind you to those terms. Once you get the box, those terms are carefully brought to your attention. They are this and this. They are reasonable terms. (This is what *Hill* ignores completely, that an international arbitration clause isn't reasonable in this context.) And you, the consumer, have the opportunity, within a reasonable time—thirty days or whatever—to cancel the deal and send the goods back." That is bad law if you are applying the law. But there is a lot of sense in *ProCD* and we need something like that to accommodate this new world of transactions.

It is a great irony, incidentally, that the revisers of Article 2 attempted to put that into the new 2-207. Indeed, it tracked *ProCD* chapter and verse,<sup>48</sup> and the business community went bonkers. They saw a possibility of abuse, and said to hell with that, what is all this reasonableness? So the idea got trashed. But it strikes me that there is a great deal of wisdom in *ProCD*, which we need to take with us and account for.

SNYDER: Joe?

JOSEPH M. PERILLO:<sup>49</sup> I heard three of you criticize *Gateway*, you yesterday and Ian and David today. I think I am hearing formalists, not realists, not relationists, because at the other end of the phone the person could have had a script that said: "Of course you realize there are additional terms and conditions of this contract? You can find them on the Internet, or you can read them in the box when they come. Are you still willing to buy?"

And the answer would be one hundred percent "yes." So that is probably what they may be doing now, I don't know. But for that lack of formal introduction—and you know darn well there is going to be a

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47. Uniform Commercial Code § 2-207.

48. See Revised U.C.C. § 2-207(c) (Draft, Dec. 1999). Under this provision, the terms included in the box would have become part of the contract if the buyer had advance notice of them, and either (a) the seller provided the opportunity for a full refund if the goods were returned within thirty days, or (b) "the terms, taken as a whole, do not alter the contract to the detriment of the buyer." *Id.* § 2-207(c)(1)(ii), (2)(ii).

49. Distinguished Professor of Law, Emeritus, Fordham University School of Law, New York, New York.

thing in the box—why criticize the decision, other than to say, as one New York court said, the particular arbitration clause was unconscionable.<sup>50</sup>

SNYDER: Just to defend myself, I criticized it as an application of 2-207. I actually like the result in *Gateway*, though I think it has to be defended on other grounds. It was a terrible application of 2-207.

PERILLO: But that's a bad statute, and that kind of thing happens all the time.

KIDWELL: I want to call people's attention to the most wonderful exposition of some of these ideas in *McCutcheon v. David Mac-Brayne*.<sup>51</sup> The defendant had a standard form "risk note," but the plaintiff didn't sign it. One of the things the judge says is that it really should not make any difference whether he signed the risk note or not.<sup>52</sup> But, he goes on to say that under the law it *does* make a difference.<sup>53</sup> If we change the law to create a legislative set of norms that requires such non-negotiable terms to be reasonable, then we could say it now does not matter whether you sign or not. But under the existing law, the signature matters, and what is sauce for the goose is sauce for the gander, because if the people had signed the contract and the car had gone down when the ferry sank, it would have been their problem. I think that's a wonderful answer to Joe.

I think you are absolutely right, Joe. In one sense it should not make any difference whether the Gateway employees on the telephone read that little script or not, but in *McCutcheon v. David Mac-Brayne* the court said it does make a difference, because the rules we now operate under say it makes a difference.

MACNEIL: Touché, Joe, in terms of my being a formalist in making those remarks. However, I want to point out that a long time ago I

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50. See *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998).

51. [1964] 1 W.L.R. 125 (House of Lords), reprinted in MACAULAY, *supra* note 37 at 616. In the case, the plaintiff was shipping his car on a ferry boat, a trip which cost £6. The boat operator had a standard-form contract of twenty-seven paragraphs and some two or three thousand words of small print, but for some reason neglected to get the shipper to sign it, although the shipper had signed on previous trips. The ferry hit a rock and sank, taking the car with it. The shipper sued.

52. This is how Lord Devlin put it:

If it were possible for your Lordships to escape from the world of make-believe which the law has created into the real world in which transactions of this sort are actually done, the answer would be short and simple. It should make no difference whatever [whether the document was signed]. This sort of document is not meant to be read, still less to be understood. Its signature is in truth about as significant as a handshake that marks the formal conclusion of a bargain.

*Id.* at 619.

53. Thus, "make-believe" or not, Lord Devlin goes on to conclude that the failure to sign the document means that the terms are not part of the contract, notwithstanding the plaintiff's knowledge of them and his signature to the same form on prior occasions. *Id.* at 619-623.

wrote an article called *Bureaucracy and Contracts of Adhesion*.<sup>54</sup> The position I took in that article is the situation of *Gateway*, the situation you have described, that wherever you know that people will not read contracts, there has to be some basis for legitimizing what is in them that is not based on consent. It is stretching consent too far to allow a whole relationship to be put together by one side, while the other party knows nothing and is not expected to know anything about it. Think what would happen at Heathrow if everybody insisted on looking at the rules and regulations before they got their tickets.

So how do you legitimize private bureaucratic legislation? These bureaucracies have to have standardized contracts. But what is going to be the content of those contracts? You can't legitimize it on the basis of consent. You can only legitimize it on the basis that the larger society has delegated to those "non-governmental" agencies the power to legislate for people. *Gateway* legislates about this. At that point, it seems to me, what you say is they do not have unlimited power to put any damned thing they want in that contract. It has to be reasonable.

So, I plead guilty that my remarks on the *Gateway* case appeared to be formalist, but I am not a formalist. I will go exactly the same way, all along the line.

SNYDER: Florian?

FLORIAN FAUST:<sup>55</sup> My role here is the role of the outsider, from a weird country which does not follow the common law. Perhaps you will allow me to give the German solution to the *Gateway* problem. We have an elaborate way of dealing with fine-print contracts, which was developed by the German Supreme Court, mainly in the 1960s and '70s, and then turned into a German statute.<sup>56</sup> Finally, in 1993, the EC directive on unfair terms in consumer contracts was issued.<sup>57</sup>

We base the legitimacy of such fine-print contracts on two pillars. The first is consent and the second one is reasonableness. Now what does that mean? If a company wants to include its standard contract terms into a contract, it has to inform the other party in advance that it wants to do that, by giving an express notice or, if this is too difficult, by putting up a note at the place where the contract is concluded. It has to give the other party the opportunity of reading all the terms ahead of time. So the terms have to be accessible. Of course, nobody

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54. See Ian R. Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5 (1984).

55. Professor of Law, Bucerius Law School, Hamburg, Germany.

56. See "Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)," Dec. 9, 1976, BGBl. 1976 I, p. 3317; codified at BGB (German Civil Code) §§ 305-310.

57. See Council Directive (EEC) 93/13 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 (April 21, 1993).

thinks that anybody is really going to read them, but there has to be the opportunity.

However, because nobody is going to read them, the terms are subjected to the control of the courts, and the test of "reasonableness." The standard applied is not simply reasonableness—we have a long, elaborate catalogue of terms that are not allowed. So the basic idea behind this is: if you *want* to know, you *can* know. But, because normally it is not efficient to read the terms, we assume you won't read them. Then you at least cannot be hurt very badly because of the reasonableness constraint. We think that has worked quite well.

SNYDER: The particular situation in the *Hill v. Gateway 2000* case was a telephone sale, where you're not in the showroom, you don't have a catalogue, and you can't see on the website. Can a German seller get its terms into the contract in that situation? Have the courts settled that?

FAUST: The requirement of an express notice does not cause a problem. But to make the terms accessible is almost impossible over the phone. To read them to the consumer is not practical, and would not be sufficient with regard to complex terms anyway. Most authors think that it should nevertheless be possible to include standardized terms in contracts concluded over the phone. Therefore, they argue that the consumer can renounce the opportunity of reading the terms. However, the *Amtsgericht*<sup>58</sup> Krefeld has rejected this proposal.<sup>59</sup> As far as I know, there are no relevant appellate court or supreme court judgments.

SNYDER: David, you wanted to add something?

CAMPBELL: I must have expressed myself badly. I meant to say the opposite of what you understood me to be saying, Joe. I am not particularly bothered about the agreement aspects of either of these cases. What is wrong in one of them is that the arbitration clause is pernicious and should be struck out in the way that we have just heard about.<sup>60</sup> If you want to challenge it, challenge it because it is unconscionable in some way.

I am taking this opportunity to make these comments now because I think I can point out who this *Gateway* approach is difficult for. I was talking about these cases with James J. White in Wisconsin earlier this year. J.J. taught me contracts way back in the early 80s, and I had not seen him since then. (Quite characteristically of him, I understand, he could still remember something I said in the contracts class after a gap of twenty-five years.)

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58. Trial court.

59. See AG Krefeld, Judgment of April 1, 1996, NJW-Rechtsprechungs-Report Zivilrecht 1997, p. 245.

60. See *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998) (striking arbitration clause in consumer computer contract as unconscionable).

But he was upset about the shrink-wrap issues. He really cared about the consent aspect of it. I think that *Gateway* is a problem for the classical consent model, not really for relational theory, because in Ian's two articles on standard form contracts, the solution of these problems was broadly indicated twenty-five years ago.<sup>61</sup>

SNYDER: Yes, Mara?

MARA KENT:<sup>62</sup> My question actually is for Florian. How does German law treat the issue in the employment context? Does what you just described apply only in the consumer context? Because, as Rachel brings out, there's a parallel with compelled arbitration clauses at the point of hiring, and I'm interested in that issue. If the employee, especially in a difficult economy, has no real alternative but to take the job, then even if they are informed about the clause up front, what solution do they have at that point other than to walk away and be jobless? I am wondering how German law treats that.

FAUST: My answer is twofold. First, it is not only for consumer contracts, although if it is a contract among business people, the standards, both for incorporating the terms and for their control, are less strict. Second, it used not to be applicable to employment contracts until two years ago. I am not a labor lawyer, but I know our labor lawyers are still struggling with it.

DAVID A. RICE:<sup>63</sup> A long time ago I discovered that there were things like unfair contract term statutes in many places, like Scandinavia, where it is known very widely. *Gateway* and *ProCD* are abominable in what they do with the state law. But I think the instincts behind them, in terms of common sense, are not wrong. The problem is the fact that we allow people to say we are doing this in the name of "freedom of contracts," and let them impose any terms they want.

I do not think we are ever going to get anything past the software and automobile industries that has a standard of reasonableness, because they get up and yell, and say that they may have to go to court, and have to spend money to defend what they want to do.

That is what happened all the way through the Article 2B process.<sup>64</sup> If you could see the drafting process, you would see that you could not

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61. See Ian R. Macneil, *Values in Contract: Internal and External*, 78 Nw. U. L. REV. 340 (1983); Macneil, *supra* note 54.

62. Assistant Professor of Law, Thomas M. Cooley Law School, Lansing, Michigan.

63. Professor of Law, Ralph R. Papitto School of Law, Roger Williams University, Bristol, Rhode Island.

64. The proposed UCC Article 2B was eventually issued as the Uniform Computer Information Transactions Act (UCITA). See Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law and Software Sales*, 8 GEO. MASON L. REV. 261 (1999). A recent chronicle of UCITA's origins and its decidedly mixed reception in the legislatures is set out in Sandy T. Wu, Note, *Uniform Computer Information Transactions Act: Failed to Appease its Opponents in Light of the Newly Adopted Amendments*, 33 Sw. U. L. REV. 307 (2004).

have a standard of reasonableness on anything. That standard of reasonableness is what takes you down to the essence of the relationship.

SNYDER: That is a question I want to talk about in a minute. To what extent can courts figure all this stuff out? Yes, Andrew?

TETTENBORN: I am not sure whether *Hill v. Gateway* says anything all that new or whether actually it is all that difficult to reconcile with something like consent. You can actually go back some years, even back to the 1930s, before anybody had thought of this particular application. Say I ring my broker, telling my broker to buy me some stock. I am a classic consumer. It may actually be the first time I have ever rung a broker. There is no doubt, and never has been any doubt, that I am bound by the entire rules of the stock exchange on which I deal, because those are absolutely usual and standard terms.

Similarly, if in *Hill v. Gateway* there is a term which is universal in that particular trade, I don't think it is stretching matters too far to say that I can legitimately be regarded as having waived any right to object.

Again to use another example—make it very homely—say I need some cement. I need cement and I need it yesterday. I ring up the local builders' merchant and say: "Send round five sacks of cement on your truck." "Yes, sir," they say, "it will be round in an hour." Now clearly in that case we have to say that I am bound by the sort of terms you usually find in such transactions. They are pretty standard ones. I don't think there is any difficulty at all in saying I am bound by the sort of terms usually found, and I think again the explanation is that by ringing up, I have implicitly consented to be bound by them.

FAUST: Did you take into consideration the EC directive?<sup>65</sup>

TETTENBORN: No, that is why I went back to the 1930s. I am looking at the classical points of view of consent, and I actually don't think there is all that much difficulty, provided the terms are usual.

KIDWELL: In *Gateway*, Easterbrook says this is not so unusual because there are other examples of "agreement now, terms later."<sup>66</sup> There are three examples. The first is insurance contracts, which strikes me as a poor example because it is a fairly heavily regulated industry, with an agency that polices and validates the contract before it can be offered for sale in a given state. The second example is the airline ticket case; another regulated contract, most of the terms of which are passed by the Federal Aviation Administration. So two of the examples he gives are against his argument rather than in favor. The third is theater tickets.<sup>67</sup>

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65. See Council Directive, *supra* note 57.

66. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997).

67. See *id.*

RICE: He used one other—either in *Gateway* or in *ProCD*—the student that is authorized to access computer research tools.<sup>68</sup> One of the terms is that you cannot use this for anything other than educational purposes. But that is a straight copyright case. That is a copyright license. You can divide your rights and your license; hypothecate them in almost any way you want to. So in that situation, he has stated the obvious, but it is subject to statutory rule.

SNYDER: Rachel?

ARNOW-RICHMAN: Turning from the issue of consent, to the questions of institutional capability you were pushing us toward earlier—can we agree on what is reasonable; can courts or other decision-makers do this kind of review?—my response is yes. In some cases, it isn't that hard. For example, in looking at arbitration in the employment context, I would propose that arbitration provisions be examined on four grounds: accessibility, neutrality, transparency, and reviewability. The selected forum must be *accessible* in terms of cost and location; the decision makers must be *neutral*; there must be some means of publicly *disseminating* the resulting decisions, in order to have a degree accountability as well as to make up for the fact that we are losing a body of legal precedent; and finally, judicial *review* must be available to the disputants. Those are the four factors that I would look at in terms of fair procedure, and if an arbitration agreement did not conform in those respects, I would say it is not reasonable. The question then is: can we do this for every other standard term in every other industry?

Obviously, we cannot put all of this on the general courts. As an alternative, in some areas, we might benefit from cultivating commercial or community standards. Employee covenants not-to-compete are a good candidate for this type of solution, because in such cases employers have interests on both sides of the “v.”<sup>69</sup>—they want to prevent their employees from being poached, but they also want the freedom to recruit employees from other companies. In this situation I think there is real potential for some standardization within individual industries that could be helpful in understanding what is reasonable.

SNYDER: Let me follow up on Rachel's point about arbitration, which ties into my question about whether courts are capable of dealing with relational norms. If we look at the most relational area of traditional contract law, disputes under collective bargaining agreements, it is interesting that it is virtually all driven to arbitration—not by employers involuntarily imposing it on workers, but quite willingly

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68. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996).

69. That is, they are sometimes plaintiffs and sometimes defendants in the same kinds of actions.

by labor unions negotiating arbitration provisions.<sup>70</sup> At the other end, merchants are among themselves specifying arbitration in the most heavily negotiated kinds of contractual arrangements.<sup>71</sup>

So, given the way that parties with the power to opt-out of the court system are doing so regularly, are common law courts—the American jury and the British generalist judge—really capable of making the kind of inquiries we are talking about here?

MACNEIL: Of course the answer is very often not, but because that is an answer does not mean that we ignore the whole thing. Consider, for example, something people forget about when they talk about relational contracts: Corporate reorganizations. You have a corporation which gets into financial trouble, and you have a massive reorganization which has to deal with all these complex relational problems between different classes of creditors, different classes of shareholders, who sometimes have to get involved in running the company while they are trying to sort all of this out and bale out the company. Could a common law court handle that?

No. Not without appointing a master who would do the same thing as the others are doing now. The common law courts are limited. That kind of process has a vastly wide use, but there are a lot of places where it does not work. The assumption I find all too often is that if a court cannot get into it, it is sort of “not law,” but that is not true. In corporate reorganizations, where they are making all kinds of judgments, favoring particular groups, making economic judgments, making complex managerial judgments and so on, we see that those legal processes do work.

We tend to think in terms of rather discrete resolutions. When we think of arbitration, we think of common law courts first, then arbitration. We forget about administrative bodies engaged in a lot of this kind of stuff—the National Labor Relations Board, for example, in the U.S. There is a whole range of possibilities of how you deal with conflict and disputes in contractual relations.

Unfortunately, an awful lot of us who are contracts teachers are commercial law types, and we tend to focus on narrow specific disputes at the discrete end of the spectrum and forget a whole wide range of possibilities of things but we can use where things do not fit into that nice mold.

SNYDER: All right, our time is short. I know Ian has been beating us over the head with the greatest good humor since 1963, and we still

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70. See generally Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration For Discrimination Claims*, 31 RUTGERS L.J. 399 (2000).

71. See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 763 (2002) (noting that contract cases in American courts have slowed to a “trickle”).



have not got it, but ultimately we may. So let me finish by asking what is the next step for relational theory? Where does it go from here?

CAMPBELL: To repeat something I said earlier, I think the main thing that is theoretically needed is to give a relational statement of competition, to make it perfectly clear that competition has an integrated role. Ian is probably getting very cross with me as I am saying this. Quite legitimately, he will say: "I have done this already in setting out the topologies of the contract norms," but something has gone wrong, certainly in the reception if not the production of Ian's work. A theory of competition is essential. I think it is quite easy to provide.

The other thing, and I return to Professor Scott, is that some statement of what the value of formal discrete-type lawyering within the relational framework is also needed. I have mixed opinions of Professor Scott's recent articles,<sup>72</sup> I must say, but I think the basic task is an important one that he has set himself.

KIDWELL: I am just going to yield my time to David and agree with him.

ARNOW-RICHMAN: I have a final suggestion to the theorists, if you are interested in practical suggestions, and it is simply: "Come hawk your wares on my side of the world." There is a prevailing misconception that employment law decisions tend to be highly relational in terms of process and results. In fact, the relationally conscious processes of labor arbitration and collective bargaining that I described earlier are available only to the roughly thirteen percent of the American work force that is unionized.<sup>73</sup>

Everybody else is in the private contract domain, and courts often analyze and interpret those contracts in very traditional ways. While employment scholars and employee advocates have been critical of such decisions, I think it is fair to say that those critiques generally have not sounded in relational contract theory. There is a very rich opportunity to do some constructive and potentially influential theorizing in the employment contract arena, which could then serve as a framework for extending relational principles to other sub-disciplines within contract law.

SNYDER: I'm afraid we'll have to let that be the last word today. Thank you all very much.

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72. See, e.g., Scott, *supra* note 2; Schwartz & Scott, *supra* note 10; Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603 (2000).

73. This is a percentage of the total U.S. work force; only about ten percent of the private sector work force is covered by collective bargaining agreements. See Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 104 (2002).