

RELATIONAL CONTRACTS FLOATING ON A SEA OF CUSTOM? THOUGHTS ABOUT THE IDEAS OF IAN MACNEIL AND LISA BERNSTEIN

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I have known Ian Macneil and admired his work for about forty years. I have admired Lisa Bernstein's scholarship since her wonderful study of the dispute avoidance and resolution in the diamond trade.¹ While they might not seem closely related—and while Bernstein is not included in the published version of this Symposium—there is an important bridge between Macneil's relational theories and Bernstein's challenge to conventional ideas about custom and performance of contracts. Long-term continuing relations create expectations, but we interpret these situations in light of what we and others usually do. I will first discuss those parts of Macneil's writing that have influenced my own. Then I will consider Bernstein's two empirical studies of trade usage² and course of performance.³

My University of Wisconsin colleague Bill Whitford and I taught courses based on Macneil's contracts casebook in its photocopied edition, and we gave Ian many comments and suggestions. We then used the published first edition⁴ for a number of years. Before we turned to Ian's book, we had used Kessler and Sharp.⁵ We had supplemented this book with an increasing amount of empirical work. When Macneil did not want to go as far in an empirical direction as we did, we adapted much of our Kessler and Sharp supplement to fit Macneil's book. Over the years the supplement grew, and eventually these Wisconsin contracts materials became a case-

* Malcolm Pitman Sharp Hilldale Professor and Theodore W. Brazeau Bascom Professor of Law, University of Wisconsin Law School. Dr. Jacqueline Macaulay edited my text for the last time. She died on January 2, 2000, and superb editing is only one thing that I've lost. My Wisconsin colleagues Professors Katherine Hendley and Elizabeth Mertz offered valuable comments. Mistakes remain mine. This Article is a version of a paper presented at *Relational Contract Theory: Unanswered Questions*, a symposium held at Northwestern University School of Law on January 29, 1999.

¹ Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

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

³ Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) [hereinafter Bernstein, *Merchant Law*].

⁴ IAN R. MACNEIL, CASES AND MATERIALS ON CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONSHIPS (1971).

⁵ FRIEDRICH KESSLER & MALCOLM PITMAN SHARP, CONTRACTS: CASES AND MATERIALS (1953).

book in their own right, *Contracts: Law in Action* (which in this Article I will refer to as *Law in Action*).⁶ Anyone who had taught from Ian's materials would recognize some of its organization and many favorite cases in the Wisconsin casebook. Both Macneil's book and *Law in Action* take a relational approach to the field. I hope that Ian accepts that this imitation is the sincerest form of flattery.

I want to call attention to some of Macneil's specific ideas that we emphasize in our contracts casebook, for two reasons. First, I want to acknowledge our debt to him. But, second, I want to spotlight some of his ideas that have not been given their due in our legal culture. About fourteen years ago, Robert Gordon referred to Macneil's and my work as "remarkable, if up until now rather lonely, accomplishments."⁷ It is my impression that writers in our field have paid much more attention to Ian's work since Gordon wrote, and, in my view, people should not attempt to write about contracts until they have studied Macneil.⁸

In *Law in Action*, we present our students with several quotations from Macneil's work. In the section on duress, we first contrast Judge Posner's assertion that overturning bargains made by needy people would be against their interest in the long run⁹ with Roberto Unger's call for a "counter-vision" emphasizing a solidarity constraint "requiring each party to give some force to the other party's interests, though perhaps less than to his own."¹⁰ Then we reprint Macneil's argument¹¹ that "the more an exchange system is perceived as wrongly uneven the more its beneficiaries must depend on external force to maintain it."¹² We can recall that in many third-world countries, the rich guard their property with high walls, large dogs, and armed guards. Guerrilla forces battle death squads seeking to repress

those who might spark an uprising by the poor. Macneil asserts that organic solidarity, which would prevent much of this conflict, rests on the answer to a question: "Do I think conditions will continue to exist whereby each of us will desire to and be able to depend on the other?"¹³ As the gap between the rich and the working poor in America grows, we cannot forget the importance of this question.

Contract law, Macneil argues, plays the symbolic role of reinforcing the sense of organic solidarity. It "says to all in our society [that] it is important that you pay your bills."¹⁴ It is an index of social practice. Macneil warns: "[B]eliefs that one social class 'gets too much,' rapidly convert the psychology of exchange from that of goods to that of harms."¹⁵ At the least, we should be concerned that too many contract decisions and statutes that ignore power and conduct on the borders of fraud may threaten organic solidarity. Macneil notes, however, that solidarity beliefs can take a lot of battering, but he insists that there are limits to these ideas' power to ward off experience.¹⁶ It is an empirical question whether the extreme law-and-economics, antigovernment position risks damaging the very system that it champions. Perhaps it is enough to note that most people in our society will never read or hear about law-and-economics scholarship, except insofar as it trickles down into television news magazine shows. But perhaps legal culture has played a role in provoking such cynical views of our economic system as those expressed in *Dilbert* cartoons¹⁷ or Michael Moore's film *Roger and Me*.¹⁸

¹³ *Id.* at 92, 102.

¹⁴ *Id.* at 94.

¹⁵ *Id.* at 103.

¹⁶ *Id.*

¹⁷ *Dilbert*'s subversive messages are taped and pinned up in many business offices as a way of commenting on the absurdity of office work in the 1990s. In *Dilbert* those who know things are powerless; those who know nothing run corporations. From time to time Scott Adams, who draws *Dilbert*, deals with matters of interest to contracts teachers. Two of my favorites involve contracts created by the magic of tearing the shrinkwrap on packages of computer software. In a cartoon dated Jan. 14, 1997, *Dilbert* is talking to *Dogbert*. He says, "I didn't read all of the shrink-wrap license agreement on my new software until after I opened it." He continues in the next panel: "Apparently I agreed to spend the rest of my life as a towel boy in Bill Gates' new mansion." *Dogbert* says, "Call your lawyer." In the next panel, *Dilbert* says, "Too late. He opened software yesterday. Now he's Bill's laundry boy." *Dogbert* responds: "It must be dangerous for lawyers to iron pants. They'd always have one hand in a pocket." In another dated April 7, 1997, *Dilbert* reads: "Software License: By opening this package, you agree . . ." In the next panel, the license terms continue: "[Y]ou will not make copies or export to despotic nations. You will submit to strip searches in your home . . ." In the next panel, *Dilbert* opens the package. An employee of the software company is pulling on a rubber glove and says, "Frankly, both of us would have been happier if you had just walked away." Purchasers of software can sign a petition calling for warranty protection at <<http://www.zdnet.com/anchordesk/smbg/index.html>>. Somehow, signing a petition on the web hardly seems like the revolution people talked about at the University of Wisconsin-Madison in the 1960s.

¹⁸ See Richard Bernstein, "Roger and Me": Documentary? Satire? Or Both?, N.Y. TIMES, Feb. 1, 1990, at C20.

⁶ STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* (1995) [hereinafter *LAW IN ACTION*]. For comment on *LAW IN ACTION*, see Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 48 (1995); William J. Woodward, Jr., *Clearing the Underbrush for Real-Life Contracting*, 24 L. & SOC. INQUIRY 99 (1999).

⁷ Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 578. This article also contains Gordon's wonderful line: "Freedom of contract means, among other things, never having to say you are sorry." *Ibid.*

⁸ I reviewed relational contract theory, and devoted particular emphasis to Ian Macneil's work, in Stewart Macaulay, *Long-Term Continuing Relations: The American Experience Regulating Dealerships and Franchises*, in *FRANCHISING AND THE LAW: THEORETICAL AND COMPARATIVE APPROACHES IN EUROPE AND THE UNITED STATES* (Christian Joerges ed. 1991). For the best short review of Macneil's work, see William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545.

⁹ *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924 (7th Cir. 1983) ("[P]eople who desperately want to settle for cash—who simply could not afford to litigate—would be unable to settle, because they could not enter into a binding settlement; being desperate, they could always get it set aside later on grounds of duress. It is a detriment, not a benefit, to one's long-run interests not to be able to make a binding settlement.").

¹⁰ Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 629 (1983).

¹¹ *LAW IN ACTION*, *supra* note 6, at 622.

¹² IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 45 (1980).

Macneil also points out that our assumed story about making contracts often fits the facts poorly.¹⁹ In this story, parties bring the future to the present. The parties' contract records in detail their plan for all foreseeable contingencies in a written record. Performance is guided by this plan, and any disputes that cannot be avoided by reference to it can be resolved by interpreting it. However, this story better fits situations where trust is limited and lawyers who do the drafting behave as if they are being paid by the word. Perhaps the best example of such detailed planning occurs when someone wants to borrow money. More commonly, Macneil insists, people agree on some terms, but not everything, and just start performing: "The exercise of free choice [about contract content] is . . . an incremental process in which parties gather increasing information and gradually agree to more and more as they proceed."²⁰ Rather than guide performance, contract documents are filed away and ignored. I have heard Macneil offer two analogies. Classic contract law assumes a light switch. A light is either on or off; the parties have agreed to a contract or they haven't. Often, however, in a long-term continuing relationship, the situation resembles a rheostat. As more and more power is sent to the bulb, we get more and more light. It is hard to say when the light has been turned on. On and off are not useful terms. Similarly, in a relational contract often it is hard to say when the contract is formed. Moreover, it is not likely to be formed once and for all. Rather than a scene frozen in a still photograph, a relational contract is more like an ongoing motion picture.

Macneil next reappears when *Law in Action* considers the standard-form contract.²¹ In an article entitled "Bureaucracy and Contracts of Adhesion" that appeared in a Canadian law journal,²² Macneil notes that consumers do not choose the terms of their bargains in any meaningful sense, except in a few limiting cases:

In short, consumers do not read long documents. They do not, therefore, consent in the sense of understanding that to which they are consenting. Moreover, no one can honestly say that consumers ought to read long documents of this kind. The many courts which over the years have casually or not so casually said that ignore the fact that if consumers actually did such a foolish thing the modern economy would come to a screeching halt.²³

However, all of us enter long-term relationships such as employment, the army, or marriage without knowing in advance the full content of the rela-

tionship. Macneil argues that consumer relationships are valuable, and that firms such as the Ford Motor Company have a consumer mission that they are charged with carrying out. Society cannot regulate in ways which might destroy the large automobile companies or so transform them that they cannot perform their consumer mission. To a great extent, we can rely on the market to discipline the large corporations. Macneil notes that "[t]he consumer vote in the marketplace is a powerful force toward harmony of motivation and mission, but far from all powerful. And to the extent there is disharmony, public intervention must be considered. Considered, mind you, not automatically chosen."²⁴

Whatever we may think about abandoning consent and choice as the basis of contractual relationships, Macneil's approach has the virtue of avoiding fictions and reflecting actual situations. I am far more comfortable with this than with Judge Easterbrook's tortured attempts to find consumer-buyers consenting to material printed in tiny type on a package which one "accepts" by tearing the shrink-wrap,²⁵ or to an arbitration clause buried inside a box containing a computer that had been ordered by telephone.²⁶

²⁴ *Id.* at 26.

²⁵ In *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), Judge Easterbrook upheld a computer software maker's license arrangement restricting what a buyer could do with the software. He stated: "Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license." *Id.* at 1450. As a result, ProCD made its customers an offer: "Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . ." *Id.* at 1451. Under U.C.C. § 2-204(1), "[a] contract for sale of goods may be made in any manner sufficient to show agreement." Judge Easterbrook asserted that "ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure." *Id.* at 1452. There are no cases holding that the U.C.C. requires "the ordinary terms found in shrinkwrap licenses require any special prominence." *Id.* at 1453.

When we look at a ProCD box, Judge Easterbrook's "offer" becomes pure fantasy. The notice is printed on the bottom flap of the box, flanked by a statement in large type that there are 250 million telephone numbers on 11 CD-Roms and the bar code for the scanner. The notice is printed in 6-point type in a space 2 3/4th inches by 1 inch. The notice that there are terms and conditions inside the box begins in the third sentence in this paragraph. Judge Easterbrook relies on U.C.C. § 2-204(1) that talks about making a contract "in any manner sufficient to show agreement."

"Agreement," however, is a term defined in the Code. Section 1-201(3) says, "'Agreement' means the bargain of the parties in fact . . ." Using a conventional objective theory, ProCD's officials had no reason to think that the buyers of its software knew of the offer that Judge Easterbrook sees them making. Perhaps, as Judge Easterbrook says, Article 2 does not require the notice that there is an offer inside the box to be displayed prominently. But if we are looking for the bargain of the parties "in fact," it has to be displayed so that a reasonable person might find it. If ProCD's motive had been to hide the clause, it couldn't have done better. See *Gladden v. General Motors Corp.*, 83 N.J. 320, 332, 416 A.2d 394, 400 (1980) (The "question is whether the terms of the remedy limitation . . . are so deceptive, confusing, or misleading so as to constitute an adequate communication to purchasers . . ."). The communication and choice requirement for making a contract is abandoned to an even greater degree in a Washington case that relies on the ProCD opinion. See *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 93 Wash. App. 819, 970 P.2d 803 (1999).

²⁶ In *Hill v. Gateway 2000, Inc.*, 105 F.3d 1148 (7th Cir. 1997), a consumer had ordered a computer by telephone and paid by credit card. When the box arrived it contained a computer and an instruction book with a collection of terms and conditions. This document said that these terms and conditions gov-

¹⁹ Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589 (1974).

²⁰ Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a Rich Classificatory Apparatus*, 75 NW. U. L. REV. 1018, 1041 (1981).

²¹ LAW IN ACTION, *supra* note 6, at 683-685.

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

²³ *Id.* at 5-6.

Macneil, in "Bureaucracy and Contracts of Adhesion," sees consumers as "bureaucrats" participating in large-scale transactions characterized by standardized planning. I prefer to see such consumers as "citizens" of a private government.²⁷ Just as most citizens of Wisconsin have very imperfect ideas of what is buried in the Wisconsin Statutes, most consumers do not and cannot learn in advance about such things as warranty disclaimers and arbitration clauses. In both cases, however, ignorance of the law is seldom an excuse that courts find acceptable.

At the margin, however, courts can and, in my view, should exercise some constitutional power to limit outrageous public and private regulation. For example, *Brower v. Gateway 2000, Inc.*²⁸ declared that a Gateway arbitration scam²⁹ was unconscionable. Gateway customers bought a box that contained a computer and an instruction manual that purported to define the terms of the relationship. Gateway used an arbitration clause that was designed not to utilize a better means of dispute resolution, but rather to make complaining to a third party about Gateway's performance practically impossible.³⁰ The New York court decided, in substance, that private gov-

erned unless the consumer returned the computer within thirty days. One of the terms was an arbitration clause. Judge Easterbrook upheld the arbitration clause. He pushed aside considerations of choice or responsibility of the consumers for leading Gateway to think that they accepted its terms: "[T]he Hills knew before they ordered the computer that the carton would include some important terms, and they did not seek to discover these in advance. Gateway's ads state that their products come with limited warranties and lifetime support." *Id.* at 1150. The Hills, he continued, could have asked Gateway to send a copy of its terms before they placed an order, they could have consulted public sources such as Gateway's website, or they could have inspected the documents after the box was delivered. "By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause." *Ibid.* Judge Easterbrook, perhaps without knowing it, was following Macneil's position. The judge stated: "Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales." *Id.* at 1149.

²⁷ See Stewart Macaulay, *Private Government*, in *LAW AND THE SOCIAL SCIENCES* 445 (Leon Lipson & Stanton Wheeler eds., 1986).

²⁸ 676 N.Y. Supp. 2d 569 (App. Div. 1998).

²⁹ I see Gateway's actions as a scam, because the provision was hidden where few, if any, customers would see it before they discovered that their computer would not work and that Gateway would not fix it. Moreover, even if they had found the provision printed on the instruction manual in the box containing their computer, Gateway's clause incorporated the arbitration rules by reference rather than disclosing them. Finally, I think most customers would have been surprised by the practical effect of the provision. In the guise of alternative dispute resolution, Gateway was making its decisions final and unreviewable. Had Gateway published in large type in their advertising and on their website something such as "You must trust us to fix your computer. If we are unable to fix it, you will have no right to assert any rights in any court," it would not have been a scam. Of course, Gateway might have worried that it would not sell as many computers had it made such a disclosure. So it tricked its customers. After its loss before the New York courts, Gateway now does disclose its arbitration clause in its catalog and on its website. Reasonable people might wonder whether Gateway consumers have any practical rights under the new clause.

³⁰ Gateway's clause called for arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Chicago. Under those rules, a consumer seeking to arbitrate a claim against Gateway had to advance fees of \$4000. \$2000 of this amount was not refundable even if the consumer prevailed in arbitration. If the consumer did not prevail, she would have to pay Gateway's

ernments can legislate about relationships, but that their power is subject to some limitations. As a result, the consumer prevailed against Gateway.

Ian Macneil's relational approach to contract figures prominently in one of my favorite writing assignments that we give to first-year students at Wisconsin, where we have taught the first-semester contracts course in small groups for over twenty-five years. We give three simple writing assignments as well as a midterm examination. In the early 1980s, Marc Galanter fashioned a wonderful hypothetical statutory proposal for this assignment. His "Fair Contracts Act" provides (1) that an obligation of good faith and fair dealing arises in every contract, (2) that the obligation of good faith and fair dealing that arises in every contract includes an obligation to use superior economic power reasonably in bargaining situations,³¹ and (3) that a court may refuse to enforce a contract in which superior economic power is used unreasonably to the extent necessary to prevent injustice. Students are asked, based on material in our casebook, to state how Judge Richard Posner,³² Duncan Kennedy,³³ Leon Trakman,³⁴ and Ian Macneil³⁵ would react to this statute.³⁶ Most find this a challenging exercise, judging by their complaints and papers. I'm not sure whether Ian would

legal fees. A consumer could not discover the content of these rules easily; nothing supplied by Gateway disclosed them.

³¹ This was the test advocated in *Note, Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis*, 53 IOWA L. REV. 892 (1968). The test was accepted by a Wisconsin intermediate appellate court in *Wurtz v. Fleischman*, 89 Wis. 2d 291, 278 N.W.2d 266 (1979). The *Wurtz* case was reversed on other grounds in *Wurtz v. Fleischman*, 97 Wis. 2d 100, 293 N.W.2d 155 (1980). However, in its opinion, the Supreme Court of Wisconsin offered much dicta based on the classic will theory. The law of Wisconsin concerning economic duress is most unclear.

³² See *Selmer v. Blakeslee-Midwest Co.*, 704 F.2d 924 (7th Cir. 1983), reprinted in *Law in Action*, supra note 6, at 813.

³³ See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 620-21, 638-49 (1982), reprinted in *LAW IN ACTION*, supra note 6, at 598, 780; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1178 (1976), reprinted in *LAW IN ACTION*, supra note 6, at 780.

³⁴ Leon Trakman, *The Effect of Illegality in the Law of Contract: Suggestions for Reform*, 55 Canadian Bar Review/La Revue du Barreau Canadien 627, 652-654 (1977), reprinted in *LAW IN ACTION*, supra note 6, at 548-549.

³⁵ Ian R. Macneil, *The New Social Contract* 45, 56-7, 91, 94, 102-103 (1980), reprinted in *LAW IN ACTION*, supra note 6, at 621-23; Ian R. Macneil, *Bureaucracy and Contracts of Adhesion*, 22 Osgoode Hall L.J. 5 (1984), summarized in *LAW IN ACTION*, supra note 6, at 683-684.

³⁶ I always hope that students will see that such a statute would be largely symbolic because of cost barriers to litigation that are increased when extremely qualitative standards are adopted. See William C. Whitford, *Contract Law and the Control of Standardised Terms in Consumer Contracts: An American Report*, 3 EUROPEAN REVIEW OF PRIVATE LAW 193, 203, 207 (1995). Moreover, as I stress in class, defendants worth suing usually are corporations that are not citizens of the state where the transaction took place. Diversity of citizenship usually means a trip through the wonderland of the federal courts. Over the last two decades, the Seventh Circuit's reading of Wisconsin statutes and cases has been funny or sad, depending on your point of view. As was true in the *ProCD* case, supra note 25, that court often embarks on a frolic of its own rather than attempting to do what a Wisconsin court would do.

laugh or cry if he read some of the views attributed to him by my students. Some read his position on organic solidarity as suggesting that he would champion this statute. Some read his article on entering relationships³⁷ without specified terms as indicating that he would be completely opposed. The language of the statute symbolizes a commitment to solidarity, but it might get in the way of large firms carrying out their consumer mission. Given the cost barriers to asserting rights granted by the bill, Macneil might characterize the statute as largely a statement of what would be nice. But the point is, of course, that Wisconsin students must wrestle with Macneil's ideas, and this involves understanding them.

The brochure announcing the conference honoring Ian Macneil states:

More controversially, Professor Macneil argues that these behavioral and normative elements [such as solidarity, role integrity, and harmonization with the social matrix, internal and external] provide more effective tools of social and legal analysis of contractual relations than either more familiar legal concepts, such as good faith, substantive unconscionability, and fairness or rational choice or game theory.³⁸

I am not the one you would call on to attack this statement. I am a card-carrying member of the Macneil party. I find that a relational approach, mixed with an empirical perspective, helps avoid the kinds of oversimplification that I keep encountering. When I am told that a rational actor would prefer a particular default rule to fill a gap in a written contract or that a franchisor would not mistreat its franchisees because it would be against its long-term interests, I start humming "It ain't necessarily so."³⁹ Macneil, for example, exposed the oversimplifications common in much, but not all, writing about so-called "efficient breach."⁴⁰ I would add that, in my experience, when relational concerns do not matter, many large corporations and their law firms do not efficiently breach. They do not seek to buy their way out of contracts for anything like the other party's expectation damages. They just breach, at best offer an insulting token settlement, and practice scorched earth litigation tactics, taken out of that unpublished but very real text, *Discovery Abuse for Fun and Profit*.

The oversimplifications that I object to may be the product of overgeneralizing from one kind of transaction to another. The economist Arthur Okun suggests that we must distinguish "auction markets," such as commodities exchanges or other sales of fungible goods, from "customer mar-

kets," where relational ideas fit much better.⁴¹ In a customer market, there are costs associated with finding the lowest price, and acceptable performance may be important. Often the buyer cannot easily reject defective performance and find a substitute in time elsewhere. Moreover, the individuals who do the buying may be punished more for selecting a supplier who fails than they would be rewarded for attaining the lowest price for an acceptable delivery. Thus, an analysis that may work in one kind of market may be found wanting in the other.

Much of the controversy mentioned in the announcement of this Symposium is provoked by people seeking different goals. Macneil's relational approach and a law-and-society perspective do not offer elegant models of contracting behavior. You get a story and multiple factors to consider, but not a simple formula that produces results. Roberto Unger captures much of the problem:

By tightening or relaxing the strictness of the premises, by making them more or less complex and therefore more or less faithful to the social reality we want to apprehend, we are able to control the balance between simplicity of explanation and descriptive fidelity.

The more we lean toward . . . [simplicity of explanation], the greater the danger that our inferences will fail to apply to any world in which we are actually interested. The more we tend to . . . [descriptive fidelity], the higher the risk that our conjectures will degenerate into a series of propositions so qualified and complicated that we are just as well off with our commonsense impressions. Whether simplicity or faithfulness to fact is emphasized will depend on the particular purpose for which we choose between them.⁴²

Professor Ellickson tells us that the late Arthur Leff saw law and economics as a desert and law and society as a swamp.⁴³ However, I have hope that all of us can move from the desert and the swamp into a more friendly landscape. Many economists concerned with law also are concerned with data.⁴⁴ Moreover, Lawrence Friedman, Marc Galanter and I are all former Presidents of the Law and Society Association and all have important con-

⁴¹ ARTHUR M. OKUN, PRICES & QUANTITIES: A MACROECONOMIC ANALYSIS 134-78 (1981).

⁴² ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 11-12 (1976).

⁴³ ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 147 (1991). In a speech at a Law and Society Association meeting, Leff offered the image of the free market marching northwest from the University of Chicago along the Illinois toll way while the class struggle was marching southeast from the University of Wisconsin along the same road. He imagined they might meet for the decisive battle at the McDonald's at the Belvedere oasis.

⁴⁴ See, e.g., ELICKSON, *supra* note 43; Victor P. Goldberg, *Price Adjustments in Long-Term Contracts*, 1985 WIS. L. REV. 527; Ian Ayres, *Never Confuse Efficiency with a Liver Complaint*, 1997 WIS. L. REV. 503; Edward Lorenz, *Trust, Contract and Economic Cooperation*, 23 CAMBRIDGE J. OF ECON. 301 (1999).

³⁷ See *supra* note 22.

³⁸ A Symposium Honoring the Scholarship of Ian Roderick Macneil (on file with the Northwestern University Law Review).

³⁹ I hope that it is not necessary to cite George and Ira Gershwin's *Porgy and Bess*, but I realize that my musical taste is about forty years out of date.

⁴⁰ Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982).

nections with the University of Chicago Law School.⁴⁵ All of us learned that there is no such thing as a free lunch. Friedman introduced cost barriers to litigation into the law-and-society culture,⁴⁶ Galanter's *Why the Haves Come Out Ahead*⁴⁷ is also concerned with comparative costs of the legal system, and when I listed the seven most important findings of twenty-five years of law and society work, my first was "law is not free."⁴⁸ Moreover, in my early work, I often cite Frank Knight,⁴⁹ one of the founding fathers of Chicago School economics.

Lisa Bernstein has long had at least one foot in the quagmire which pleases we swamp creatures on the law-and-society side. At the outset, let me applaud the hard work that has gone into her writings. She is not an ivory tower theorist who gets her data from looking at the ceiling tiles in her office. Some legal scholars seem happier in a world they imagine than the one in which corporate executives, assembly-line workers, and members of families inhabit. Given my respect for anyone whose research includes conducting extensive interviews, my comments on her work should be taken as friendly notes on the margins of her paper.⁵⁰ I'll push for qualifications to some of her positions that are generally right.⁵¹ Bernstein's major empirical point is that her interviews, and the testimony of officials of

trade associations at hearings on the proposed Uniform Commercial Code, suggests as follows:

"[U]sages of trade" and "commercial standards," as those terms are used by the Code, may not consistently exist, even in relatively close-knit merchant communities. While merchants in the industries examined sometimes do and did act in ways amounting to loose behavioral regularities, most such regularities are either much more geographically local in nature or far more general in scope and conditional in form than is commonly assumed.⁵²

This seems plausible. We often state customs and practices but then must offer qualifications. Sometimes the qualifications swallow the rule.⁵³

Take, for example, the custom that each law professor can select the casebook from which to teach her course. This is an important part of academic freedom at the University of Wisconsin Law School. However, while it is recognized at many other law schools, it is not the custom everywhere. Moreover, even at schools such as Wisconsin where the custom is recognized, what are its boundaries? For example, suppose, as is true at Wisconsin, the faculty has voted that the first-year contracts course must cover the contracts aspects of Article 2 of the Uniform Commercial Code (the "U.C.C." or "Code") as well as an introduction to consumer protection law. Now is a faculty member free to select a casebook that does not cover Article 2 nor consumer protection law? Contracts at Wisconsin is a two-semester course, and the first semester is often taught by many different instructors. If different casebooks are used in the first semester, there will be problems in teaching the second semester, because the students will not have studied the same material. Is a faculty member free to create such a coordination problem for his colleagues who teach the second-semester course? Suppose a visiting professor is brought in to teach contracts. Must she use the unfamiliar book used by the other professors? Practice at Wisconsin over the past twenty-five years suggests that the answers to such questions are uncertain. We have faced all of these problems. Some professors were unhappy that a colleague created difficulties. Is that unhappiness alone sufficient evidence of a counter-custom calling for coordination and deference to faculty legislation about the content of courses? Or does the custom of being master of the classroom trump any such institutional demand? Furthermore, you have just read my report of Wisconsin folklore. We can ask how many, if any, of my colleagues would agree with my account. If, improbably, the question of the content of the casebook custom

⁴⁵ Friedman and Galanter went to law school there; Galanter and I were Bigelow Teaching Fellows at the same time.

⁴⁶ Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 799-807 (1967).

⁴⁷ Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

⁴⁸ Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL'Y 149, 152 (1984).

⁴⁹ See Stewart Macaulay, *Restitution in Context*, 107 U. PA. L. REV. 1133, 1142 nn. 25, 36 (1959); Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 813 n.3, 852 n.117, 856 n.127, 857 n.128 (1961).

⁵⁰ For a much more critical reaction to Bernstein's position on trade usage, see Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA. J. INT'L L. 707, 710 n.10 (1999) ("I find Professor Bernstein's assertions about the scarcity of custom unconvincing . . . [I]t is easy to point to substantial evidence of custom in commercial law. Notwithstanding Professor Bernstein's efforts to distinguish written and unwritten customs, the existence of such documents as the Uniform Customs and Practice for Documentary Credits and INCOTERMS indicates that customary practices do, in fact, play a significant role in the commercial world.").

⁵¹ See also John H. Schlegel, *American Legal Realism and Empirical Social Sciences: From the Yale Experience*, 28 BUFF. L. REV. 459, 513-19 (1979). Schlegel describes the reaction of progressive reformers, such as Professor Felix Frankfurter, who "knew" that there was a problem of court congestion. When Charles Clark conducted an empirical study of the business of federal courts that failed to support their preconceptions, they ignored or attacked Clark's work. Schlegel says that for these reformers: "Fact gathering that did not advance an immediate reform objective was scholarship not worth publishing, just as fact gathering that did not fit their model of how the world was structured was an 'irrelevant jumble of figures.'" Evasion and denial of good empirical studies are far too typical of law professors and Supreme Court justices. We cannot brush aside Bernstein's research. While we may object to the inferences that she draws from her findings, any contrary position must be consistent with her data. If we doubt her data, the burden is on us to gather our own and see if it supports our or her views.

⁵² Bernstein, *Questionable Basis*, *supra* note 2, at 715.

⁵³ As Professor Gillette asserts: "Customs may take a sufficiently generalized form that, while each party agrees on the definition of the custom, they disagree on its application to the specific facts of their transaction. But if that is the case, then how much confidence will we have in judicial interpretations of disputed trade usages?" Gillette, *supra* note 50, at 718.

ever became relevant in litigation, it would not be easy to do more than offer plausible arguments about the content of this custom.⁵⁴

Richard Craswell has said that trade customs cannot be given content by judges without being influenced by "the goals, beliefs, and other normative premises of the person doing the identifying."⁵⁵ In all but extreme cases, this is true. Yet the same can be said of the most important custom of all—language. Whether we are confronted with a face-to-face conversation, an e-mail message, or a lawyer-drafted contract, we must translate the sounds and symbols into meaning. This is not a passive process. Almost always, we must fill in many gaps, drawing on context and our understanding of the person talking or writing to us, of the situation, and of the ways things are done. All professors, for example, learn early in their careers, that students tend to translate assignments and examinations in ways that favor their interests. Experience should teach us that "the plain meaning rule" is at best a comforting fantasy. Whether we are interpreting the content of a custom or the meaning of a written contract, we may get it wrong.⁵⁶

If we accept that custom often will be imprecise, so what? Bernstein's normative conclusion drawn from her empirical findings is as follows:

[G]iven the Code's flawed empirical basis, it may be time to reconceptualize the role played by custom in commercial transactions and to rethink the wisdom of the Code's incorporation-based approach to gap-filling and contract interpretation, an approach that is endorsed and strengthened in current drafts

⁵⁴ Bernstein's discussion of the imprecise nature of commercial custom reminds me of some of the writing about British colonial rule. The British judges in the colonies left family matters to native customary law. The judges sought to find precise rules or at least something analogous to common law principles. However, the judges gathered native customs by asking hypothetical questions of those adversely affected by changes in family practices brought about by colonial rule. The hypotheticals failed to capture all the qualifications. See MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1985). Sally Merry reports:

One of the major insights garnered by work on law in colonial situations is that the customary law implemented in "native courts" was not a relic of a timeless precolonial past but instead an historical construct of the colonial period. Several careful historical and anthropological studies demonstrate that the so-called "customary law" of the colonial period was forged in particular historical struggles between the colonial power and colonized groups. Francis Synder shows how modernizing elites often took a central role in defining "indigenous law" in the native courts in Senegal.

Sally Engel Merry, *Anthropology, Law, and Transnational Processes*, 21 ANN. REV. ANTHRO. 357 (1992). The point is, of course, that custom frequently doesn't just exist, sitting out there, ready to be picked up and plugged into a legal proceeding. It is often in the process of being created by contending factions.

⁵⁵ Richard Craswell, *Do Trade Customs Exist?*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW (Jody S. Kraus & Steven D. Walt eds., forthcoming 2000) (manuscript at 2, on file with the Northwestern University Law Review).

⁵⁶ Compare Harris's position: "Rules facilitate, motivate, and organize our behavior; they do not govern or cause it. The causes of behavior are to be found in the material conditions of social life. The conclusion to be drawn from the abundance of 'unless' and 'except' clauses is not that people behave in order to conform to rules, but they select or create rules appropriate for their behavior." MARVIN HARRIS, CULTURAL MATERIALISM: THE STRUGGLE FOR A SCIENCE OF CULTURE 275 (1980).

of proposed revisions to the Code, drafts that represent the undeserved triumph of legal realism in commercial law.⁵⁷

I do not think that Llewellyn was totally wrong, or that the triumph of realism was totally undeserved.⁵⁸ Bernstein does not claim or show empirically that there are no usages of trade in the entire commercial world.⁵⁹ Most simply, she has not studied the entire commercial world, nor does she claim to offer a random sample of all business in the United States.

Without doing more than engaging in anecdotal empiricism, we can offer at least some examples of business customs. If you go to a lumber yard and ask for a "two-by-four," the board tendered will not measure two inches by four inches. It will be approximately one-and-one-half inches by three-and-one-half inches.⁶⁰ I bought a bird-feeder that the instructions said was designed to be mounted on a two-by-four. The mounting bracket is too small to fit a board two inches by four inches, but it fits nicely a board one-and-one-half by three-and-one-half inches. This suggests that the manufacturer of the bird feeder was well aware of the usage of trade. Turning to another example, a specific quantity of goods may not mean exactly that amount. When I was interviewing business people some years ago, I was told that often people would order, say, one thousand fasteners. Each fastener was worth a relatively small amount. Rather than count the fasteners, the supplier would weigh them, a simple process that avoided spending time counting. This meant that sometimes the buyer would get one thousand fasteners but sometimes, because of weight variations, the buyer would get 998 or 1,004. The usage was that one thousand means a reasonable range around one thousand.

I think that the Code should continue to take such customs into account. I doubt that Bernstein would argue that those in the lumber business should be able to cancel the contract or sue because the two-by-fours delivered were not two inches by four inches, or that those who regularly buy fasteners should be able to cancel the contract or sue because a seller sup-

⁵⁷ Bernstein, *Questionable Basis*, *supra* note 2, at 716.

⁵⁸ This is not to say that the U.C.C. could not be fine-tuned as it deals with usage and courses of performance and dealing. Moreover, it may be that Article 2's many gap filling provisions that rely on usage and courses of performance and dealing will have much less impact that contracts scholars have assumed.

⁵⁹ Bernstein writes, "Although the evidence presented here has not conclusively demonstrated that the types of usages of trade and commercial standards, and industry-specific meanings of terms, referenced in the Code do not ever exist, it has suggested that the empirical foundation on which the Code in general, and its incorporation strategy in particular, is built, may be weak." Bernstein, *Questionable Basis*, *supra* note 2, at 746.

⁶⁰ See U.S. Dept. Commerce, Nat'l Inst. of Standards and Technology, Technology Admin., American Softwood Lumber Standard, Voluntary Product Standard PS 20-94, table 3 (1994), where it indicates that a nominal two by four will be 1-1/2 inches by 3-1/2 inches. One can find this document at <ts.nist.gov/ts/htdocs/210/215/vps.htm>. I wish to thank Ms Betty Karweick, Instructional Services Librarian, of the University of Wisconsin Law Library for finding this for me.

plied 997 fasteners when one thousand were ordered. If this is the case, the Code needs something such as its present provisions dealing with usage.

At *Relational Contract Theory: Unanswered Questions*, Professor Bernstein emphasized the differing meanings of the term "bale" as used to measure quantities of hay.⁶¹ There are the New England and New York bales, the Virginia bale and the western version, and all are different sizes. A court could not just plug in an accepted customary definition of "bale" when that term was used in a contract that would apply to the entire United States. This does not establish that a court could not accurately apply a customary definition between, for example, two New Yorkers who did business in the same part of the state. It does suggest the potential for many more situations like the one that arose in *Raffles v. Wichelhaus*,⁶² where the goods were to be shipped "ex 'Peerless,'" and there were two ships with that name. Courts could face this classic problem when, for example, a supplier thought that it had agreed to supply a New York bale while the buyer thought that it was buying a western bale.⁶³

These observations suggest that Bernstein's empirical findings raise questions of evidence rather than challenge the entire approach of the U.C.C. Why isn't it enough to say that one who wants to rely on a usage must prove it? Professor Bernstein's admirable empirical work suggests that more often than we would have thought, a party will not be able to carry its burden of proving the existence and content of a usage. Section 1-205(2) of the Code reinforces the significance of evidence:

A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts.⁶⁴

The statute itself says that a person relying on usage must show that the practice has "such regularity of observance . . . as to justify an expectation that it will be observed with respect to the transaction in question." Many of Bernstein's examples would seem to be situations where no such expectation would be justified. However, there may be cases where a New Yorker selling hay would be charged with knowing what the term "bale" would mean to his Virginia buyer.⁶⁵

In a dispute between parties who buy and sell lumber, it would probably be easy to prove the usage that a two-by-four does not require a board

that measures two inches by four inches. Indeed, we would be surprised to see the question raised in litigation. If a New York seller contracts to supply bales of hay to a Virginia buyer, however, it may be that there is not "such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with regard to the transaction in question." Nonetheless, the situation might be such that the Virginia buyer should have known that the New York seller was offering "New York size bales." Judge Posner has said:

It is common for contracting parties to agree—that is, to signify agreement—to a term to which each party attaches a different meaning. It is just a gamble on a favorable interpretation by the authorized tribunal should a dispute arise. Parties often prefer to gamble in this way rather than to take the time to try to iron out all their possible disagreements, most of which may never have any consequence When parties agree to a patently ambiguous term, they submit to have any dispute over it resolved by interpretation. That is what courts and arbitrators are for in contract cases—to resolve interpretive questions founded on ambiguity [Parties cannot] gamble on a favorable interpretation and, if that fails, repudiate the contract with no liability.⁶⁶

In situations where parties used the term "bale" and one or both of them should have known of its many meanings, courts could call the transaction off. Or they could follow Judge Posner and say that the parties gambled on a court or arbitrator constructing a meaning from custom, context, policy, or pure bias. This is something more than plugging in an objective custom that anyone in the business should have known would affect the expectations of other parties. However, whenever they deal, businesspeople necessarily risk that a court will find they made a contract that they did not intend to make. Attempting communication involves risking being misunderstood. Relational sanctions and cost barriers to litigation probably keep this risk acceptable in all but a few situations. Professor Bernstein does not demonstrate that courts applying the U.C.C.'s usage and course of performance and dealing sections often have violated the reasonable expectations of the parties.

Professor Bernstein emphasizes the real risk that the legal system will get it wrong.⁶⁷ I am confident that no litigant seeking to establish trade

⁶⁶ *Colfax Envelope Corp. v. Local No. 458-3M*, 20 F.3d 750 (7th Cir. 1994). See also *AM International, Inc. v. Graphic Management Assoc., Inc.*, 44 F.3d 575 (7th Cir. 1995) (trade usages that terms have unusual meanings is objective evidence and does not violate the purposes of the parol evidence rule as would subjective testimony of a party).

⁶⁷ Bernstein writes,

In the context of the incorporation debates, there are also reasons to be skeptical about strong statements suggesting that local customs exist. If, for example, a transactor is arguing for adoption of a particular rule (especially one that is favorable to his locality rather than simply to a subset of firms in it) he might invoke the alleged universality of the practice in his locality to give his argument legitimacy and persuasive force.

⁶¹ See Bernstein, *Questionable Basis*, *supra* note 2, at 719-25.

⁶² 159 Eng. Rep. 375 (Ct. of Exchequer 1864).

⁶³ See RESTATEMENT (SECOND) OF CONTRACTS §§ 20, 201 (1981).

⁶⁴ U.C.C. § 1-205(2) (1995).

⁶⁵ See Elizabeth Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515 (1981).

practices will ever devote the impressive effort that Bernstein has invested in conducting her interviews. Rather than relying on a full-scale empirical study, usage is proved by the testimony of expert witnesses.⁶⁸ Sometimes there will be no problem. Business people may know the quaint native customs of their part of the world. However, experts do have an incentive to please the lawyer who hired them, and it is easy to slip from the role of a neutral to being part of the team seeking to help "our side." Seller may offer an expert who says that everyone knows that the size of a bale is as she claims. Buyer may respond with another expert who says that the size of a bale is not as seller's expert claims but as buyer's expert reports. The trier of fact may believe the wrong expert, or the trier of fact may put aside conflicting testimony and find a custom that "makes sense" to the judge or jurors whether or not it really is the usage in the trade in question.⁶⁹

However, the risk that the trier of fact might get it wrong runs throughout all legal systems. Scholars identified with both law and economics⁷⁰ and critical legal studies⁷¹ are allied in challenging legal realism, arguing that this approach puts burdens on courts that they often cannot carry.⁷² Nonetheless, if the Code was written so that trade usage was not admissible,

Bernstein, *Questionable Basis*, *supra* note 2, at 719 n.28. But such skepticism goes to the evidence of the alleged local usage "having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. §1-205(2). If the practice is only local, and one party does not regularly do business in that locality and the other party knows this, often it would take strong evidence to justify concluding that there was "an expectation that it will be observed with respect to the transaction in question."

⁶⁸ Under FED. R. EVID. 701, a party may not have to be qualified as an expert but can testify about both his or her experiences and inferences. See *Western Industries, Inc. v. Newcor Canada, Ltd.*, 739 F.2d 1198, 1202 (7th Cir. 1984) ("Newcor's witnesses were experienced executives in the trade and the evidence of the alleged custom was a matter they could infer from their own observations and experience . . .").

⁶⁹ Bernstein's concern may be that it is possible to allege a trade usage, offer a deposition by an interested party and thus survive summary judgment. This may put pressure on the one favored by the formal written contract to settle because this will avoid uncertainty and the costs of litigating the claims. See Bernstein, *Merchant Law*, *supra* note 3, at 1804-05. Sometimes this is a bad thing. One who owes nothing may have to pay something to escape litigation. Sometimes, however, such a settlement is the best solution to the problem. This often is the case when there are close arguments both ways.

⁷⁰ See, e.g., Eric Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000); Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 794 (1999) ("Ordinarily, when the promisee faces a situation in which the promisor is trying to perform an obligation in a nonconforming manner, the promisee weighs the value of insisting on strict compliance with the express terms against the cost of such insistence.").

⁷¹ See, e.g., Jay Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 703 (1984) ("[T]he courts are so distant from the actual contexts of cases that judicial application of the method is properly characterized as interpretive rather than empirical."); Robert Gordon, *Comments on R. Danzig, The Capability Problem in Contract Law* (1978), reported in *LAW IN ACTION*, *supra* note 6, at 111-13.

⁷² It would be interesting to speculate about whether these two movements are allied about anything else. Of course, long before either movement came to general prominence, Richard Danzig raised this question in a supplement to his contracts casebook. See RICHARD DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* (1978). See also Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

how would a court determine the meaning of a "two-by-four" or a "bale" if these terms were used in a contract? What would Bernstein have courts faced with such cases do? It would seem perverse to allow a sophisticated buyer to recover against a seller who did not deliver boards that were exactly two inches by four inches when no reasonable buyer would expect that they would be that size. A court could not leave resolution of this matter to a dictionary. My dictionaries tell me no more than that a "bale" is a "large bundle or package of merchandise, originally of more or less rounded shape; now, *spec.* a package closely pressed, done up in canvas or other wrapping, and tightly corded or hooped with copper or iron, for transportation."⁷³ This does not tell us the exact size of the bundle or package. If a court cannot go outside the four corners of the contract, it would have to declare a contract calling for the delivery of bales to be too indefinite to be enforced. If, in fact, both buyer and seller assumed the same size bundle when they used the term "bale," it seems perverse to refuse to enforce such a contract.

Professor Bernstein's major objection to the U.C.C. may be provoked by a very different function of trade usage. Her major concern may be with situations where an alleged usage is used "to supplement or qualify terms in an agreement."⁷⁴ For example, consider *Nanakuli Paving and Rock Co. v. Shell Oil Co.*⁷⁵ Nanakuli was an asphalt paving contractor in Hawaii. It had a contract to purchase the asphalt it needed from Shell. The written document, drafted by Shell, set the price as Shell's posted price for asphalt. In effect, this gave Shell the power to change the price charged all its distributors at any time. Nanakuli bid on a road paving project for the State of Hawaii. The state did not allow escalator clauses in highway contracts. Thus, Nanakuli based its bid on Shell's posted price for asphalt at the time the bids were submitted. Before the bids were opened, Shell significantly increased the posted price. Nanakuli was awarded the state contract, but this meant that it was bound to perform at a bid price based on the old Shell price rather than the new much higher one. Nanakuli sued Shell, claiming that there was a usage of trade calling for suppliers to "price protect" those bidding on public construction. In effect, this meant that a new posted price would not apply to projects bid before an increase had been announced. The trial court enforced the literal written contract, but the Ninth Circuit, applying the Code, reversed and found that Shell was bound to price-protect Nanakuli. It relied on usage of trade, course of performance, and the obligation of good faith.

⁷³ OXFORD ENGLISH DICTIONARY (CD version 2d ed. 1995). My antique American dictionary says that a "bale" is a "standardized quantity" of goods, but it does not say what that quantity is. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 112 (1959). Professor Bernstein's research establishes that there is no reason to rely on any dictionary that does specify a size of a bale.

⁷⁴ See U.C.C. § 1-205(3).

⁷⁵ 664 F.2d 772 (9th Cir. 1982).

In both an earlier article and her presentation at *Relational Contract Theory: Unanswered Questions*, Professor Bernstein challenged the position that trade usage or course of performance necessarily should control when a written document creates a formal procedure. She contends that "transactors" might want to structure a relationship so that one party could make various concessions to keep a relationship alive. However, when that party decided that the relationship was no longer valuable or had been damaged beyond repair, it should be able to turn to the written contract and enforce its formal provisions as they were drafted.⁷⁶ Thus, perhaps she would argue that Shell might have maintained relationships with various paving companies throughout the United States by price-protecting them in public bidding situations. However, when these relationships were no longer worth preserving, the supplier should be free to assert the price clause in the written contract that gave it power to unilaterally set prices when it wanted to do so. Bernstein contends that the U.C.C. gets in the way of such a practice, which might be beneficial to both parties in some situations.

I can imagine situations where I would agree with Professor Bernstein. Sometimes concessions made during the life of a relationship should not affect contract rights at the time of divorce. For example, US Air made contracts to buy Boeing 737 and 757 aircraft in the early 1980s. From the late 1980s to the mid-1990s, US Air was in great financial difficulty and faced a risk of bankruptcy. Several times during this period, Boeing agreed to postpone delivery and payment dates for the aircraft, and the contracts were reworked in other ways. In 1994 and 1995, the contracts were reworked so that the planes would not be built until between 1998 and 2005.

In November of 1996, however, US Air selected Airbus, Boeing's major competitor, to supply up to 400 Airbus A320 aircraft to replace a substantial part of US Air's fleet. Then it told Boeing to "tear up the contracts" for the 737s and 757s. When US Air failed to make a payment required by the contract in November of 1997, Boeing sued for about \$450 million. US Air, however, asserted that Boeing's refusal to cancel the contract was a departure from a long pattern of practice in the aircraft industry. Boeing, the airline asserted, had more orders than it could fill on time. US Air's cancellation would allow Boeing to sell the planes it would have built for US Air to other airlines for a greater price. In such a situation, US Air asserted that the custom was to accept a cancellation. Boeing denied that this was

the custom of the industry.⁷⁷ Moreover, US Air argued that Boeing's many concessions on delivery dates to US Air during the life of the contracts amounted to a waiver of US Air's basic obligation to buy the planes.

This may be an example of the situation that Professor Bernstein is talking about. After all of Boeing's concessions, it still sued to enforce the contract when the end-game was reached. It was one thing to roll over delivery and payment dates in the face of US Air's grave financial problems. It was something else to tear up the contract entirely so that US Air could turn to a competitor to supply its needs for the foreseeable future. US Air had no reason to think that it could tear up the contracts. As usually happens, the parties settled the case, but as part of the settlement, US Air acknowledged that it was bound to its contract with Boeing.⁷⁸

However, as I mentioned earlier, Ian Macneil stresses that relational contracts usually are not created all at once.⁷⁹ They grow and change as the parties perform over time. It is one thing to make temporary concessions to keep a relationship alive. It is another to redefine what is expected under the contract. Much turns on what one party communicates to the other, and on the reasonableness of a significant change of position. This is a classic problem in the performance of contracts. For example, in *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*,⁸⁰ the supplier was very late in delivering new planes to its customers. The airline claimed that it had been harmed by this delay more than other airlines, and it asked for favors. In its own filing with the Civil Aeronautics Board, the airline blamed the delays in getting new aircraft on production difficulties at Douglas caused by the Vietnam conflict.

There was conflicting evidence as to whether Eastern officials had told Douglas officials that the airline would not sue for damages caused by the delays. Eastern continued to negotiate new contracts and amend old ones with Douglas throughout the period in which the delays occurred. In these negotiations, it did not seek a settlement of its claims. The court looked at the relational nature of the contracts between the manufacturer and the airline, but decided that Eastern could not make concessions to keep the deal

⁷⁷ Stanley Holmes, *US Airways Says Boeing After Revenge, Not Justice*, SEATTLE TIMES, Nov. 30, 1997, at E1; Frederic M. Biddle, *US Air Attack's Boeing's Problems with Production in Legal Dispute*, WALL ST. J., Nov. 18, 1997, at B10.

⁷⁸ The case was settled in April 1998. US Air paid Boeing an undisclosed amount, acknowledged that it had breached the contract, and dropped its countersuit against Boeing. Susan Carey, *US Airways is About to Order Airbus A-330s*, WALL ST. J., July 2, 1998, at A3. There was speculation in the press about whether Boeing had so poisoned the relationship by refusing a cancellation that US Air would not buy larger aircraft from it in the future. NEWS TRIBUNE (Tacoma, Wa.), July 3, 1998, available in 1998 WL 408965. Of course, with only two available suppliers of large passenger jet aircraft in the world, US Air would benefit from at least the threat of buying Boeing planes in its negotiations with Airbus.

⁷⁹ See *supra* text accompanying notes 19-21.

⁸⁰ 532 F.2d 957 (5th Cir. 1976).

⁷⁶ Cf. Robert Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 615 (1990) ("The parties, in essence, have learned to behave under two sets of rules: a strict set of rules for legal enforcement and a more flexible set of rules for social enforcement."); Victor Goldberg, *Impossibility and Related Excuses*, 144 J. INSTITUTIONAL AND THEORETICAL ECON. 100 n.3 (1988) (a party may be willing to grant a concession during the performance of a contract but it usually expects at least an implicit quid pro quo in return).

alive and then pull them back when the particular contract was over. The court said:

We recognize, of course, that once an airline begins to build a fleet with a particular make of airplane it cannot easily switch to a competing manufacturer. Eastern, therefore, is correct in pointing out that as of 1965, it was effectively "married" to Douglas. The conjugal nature of its relationship with Douglas, however, did not relieve Eastern of its obligation of commercial good faith. As we have seen, the notice requirement [of U.C.C. § 2-607(3)(a)] reconciles the seller's right to early warning of claims for breach with the need to accommodate the buyer who, for reasons of necessity, has to accept a tender which is not in full compliance with the contract. In a continuing contractual relationship, therefore, the buyer must decide whether the benefits of claiming a breach of contract outweigh the need for a close rapport with the seller.⁸¹

In this case, had Eastern given clear notice, it would not have enabled Douglas to cure its default. There was no way to repair a late delivery; Douglas could not just paste pages back on the calendar. While we can debate the court's reading of Section 2-607(3)(a), its opinion stressed that even a defaulting party that cannot cure its failure to perform has some interest in not being misled to its detriment.

When the party receiving concessions is not in default, we can argue that it has an even stronger interest in not being misled to its detriment. In the *Nanakuli* case, Nanakuli's reliance was prompted by its belief that the usage of trade regarding price-protection for bids on public construction at least qualified Shell's rights under the written contract, and reinstating the contract language would bankrupt Nanakuli. Shell officials were well aware of the price-protection custom, and they had debated the benefits and costs to Shell of continuing to follow it. Asphalt suppliers in other parts of the United States regularly followed this practice.⁸² Shell's local official in Hawaii acted more as Nanakuli's partner than as an agent of a supplier dealing at arms length. He knew that Nanakuli was relying on price-protection, and he knew the consequences to Nanakuli of making a contract to pave but then finding a drastic increase in the cost of asphalt.

The Shell official also knew, moreover, that Chevron, Shell's major competitor, was price-protecting its local paving company. Asphalt sales in the western United States had been transferred to a new department in the Shell bureaucracy, and almost all the former officials of the old department no longer worked for Shell. The new officials, apparently eager to show good profits, decided to impose the posted price without asking about practices in Hawaii. They decided to honor only what was in the file at the home office. That this would bankrupt Nanakuli was no concern of theirs.

⁸¹ *Id.* at 979 n.62.

⁸² See, e.g., *W.H. Barber Co. v. McNamara-Vivant Contracting Co., Inc.*, 293 N.W.2d 351 (Minn. 1978); *Lige Dickson Co. v. Union Oil of California*, 96 Wash. 2d 291, 635 P.2d 103 (1981).

As so often is true, expectations and reliance created by those in the field clashed with formal procedures that make running a large corporate bureaucracy easier. And as so often is true, the written document was asserted to ward off responsibility for actions of a corporate agent in the field.⁸³

While it is not clear how Professor Bernstein would decide the *Nanakuli* case, I think that a key point is the value of communication and the reasonableness of the reliance on the agent's words and deeds. In some transactions, the parties know that the writing is a blueprint for the transaction, and they are likely to have read and understood it to some degree. Even here, Bernstein's distinction between relational concessions and end-game insistence on contract rights can pose problems. Are the concessions likely to mislead the defaulting party? Often this will be a question of agency. Was a bargainer justified in relying on a lowly field agent when he or she said that the formal procedures of a corporate bureaucracy would not be applied? Sometimes reliance on people speaking for the corporation would be reasonable. If the formal document, written by lawyers to minimize liability and largely unintelligible to anyone other than a lawyer, is never referred to either during the negotiation or in the ongoing transaction, reasonable business people may be misled. This often happens.

We must remember that while a corporation is a legal entity, in reality it is a collection of people playing different roles. The legal staff may write a detailed contract that is not understood by the executive representing the corporation in negotiations. This is likely to be the case when it is a complex printed standard-form agreement. The executive negotiating the contract will know that the people on the other side will not read and understand the document. Moreover, the executive may know that the other side is unlikely to have the document reviewed by a lawyer. Then all business is transacted in ways inconsistent with the lawyer's contract, which has been buried in the files. If a court allows such a written contract to wipe out a history of interaction, then its decision may be based on expectations and reliance only in a fictional sense. Indeed, in many situations, a court following this course would be accepting that corporate lawyers can grant company officials in the field a "license to lie." And because salespeople often are rewarded by commissions, their pay structure pushes them to shade the truth. Insofar as the paper deal controls the real deal, fraud may become the oil that lubricates capitalism. Perhaps, as Macneil suggests, there is reason to allow this so that large organizations can carry out their social functions. Yet we should expect that if people became fully aware of

⁸³ Bernstein notes that "[b]ecause NGFA [the National Grain and Feed Association] refuses to imply terms that do not appear in written contracts or the trade rules, employees cannot unobservably bind their companies to obligations not contained in their companies' standard-form contracts." See Bernstein, *Merchant Law*, *supra* note 3, at 817. Insofar as everyone knows this, reliance on representations and promises not found in formal writings would be unreasonable. However, often this is not the case in other industries.

what was happening, it would undercut to some unknown or unknowable extent the sense of organic solidarity that Macneil has written about.

Some firms attempt to arm themselves with end-game strategies by placing "heads I win, tails you lose" clauses in form contracts unlikely to be read until trouble arises. Professor Fuller's 1947 casebook⁸⁴ defended such drafting. He noted: "The practice actually followed in the settlement of claims by companies which employ a standard form for transacting business is often much more liberal than might be inferred from the terms of the contract they ask their customers to sign."⁸⁵ Fuller continues: "The companies . . . seek a contractual margin of safety within which they can exercise their own discretion free from the threat of litigation . . ."⁸⁶ Firms hide loopholes in the fine print, knowing that these terms will not be the subject of negotiations. These terms are used to ward off legal liability by providing bright-line rules. Rather than having to prove such things as fraud, material failure of performance, or substantial breach, the firm's lawyers give themselves an easy-to-establish standard.

For example, although courts do not always accept the attempt, many form contracts provide that "time is of the essence," and the buyer reserves the right to cancel for any delay. Suppose that a seller delivers goods that could be argued not to comply with the contract specifications, or that the buyer changes the design of its product so that components ordered from the seller are no longer needed. In some instances, a buyer's lawyer might be able to justify canceling the contract and recovering any sums paid, but there always is a risk that the lawyer will fail to satisfy qualitative standards. Late deliveries are common, and buyers usually accept them. The task of the buyer's lawyer would be much easier if she need do no more than compare the contract date against the actual date of delivery. If the rule were simply that a late delivery equals a right to rescind, buyers would have an "out" even if their real reason for canceling had nothing to do with the delay. The buyer would have discretion to assert the bright-line rule. Fuller points out that when this kind of discretion exists, some suppliers will be treated more favorably than others. We might try to rationalize an absolute time-is-of-the-essence rule in terms of cutting transaction costs. However, suppliers are often likely to be misled and not understand the rules of the game. Business practice largely undercuts time-is-of-the-essence clauses in printed form contracts because everyone knows that usually the precise time of delivery is not of the essence.⁸⁷ Courts have not favored such end-game clauses that seek to avoid the merits of the case.⁸⁸

⁸⁴ LON L. FULLER, BASIC CONTRACT LAW (1947).

⁸⁵ *Id.* at 213. ("The Actual Operation of 'Harsh' Provisions in Standardized Contracts").

⁸⁶ *Id.* at 214.

⁸⁷ There has long been a reluctance to allow a party to a contract to wiggle out of an obligation through a loophole. When I taught from the Fuller casebook, one of my favorite cases was *Liverpool and London and Globe Ins. Co. v. Kearney*, 180 U.S. 132 (1901), in which the fire insurance policy at

In a number of places in her articles, Professor Bernstein assumes a picture of the contracting process that my research suggests often will not hold true. For example, she notes that "the per transaction cost to a transactor of reading a standard-form contract by someone he does business with frequently are small in comparison to learning all of the practices in vogue in the other transactor's market."⁸⁹ Many of the businesspeople whom I have interviewed would not agree. The statement assumes that a person starts from scratch behind a veil of ignorance. Yet business people can draw inferences from their experience and a few clues about a particular business practice. In almost all transactions, the standard-form provisions in the contract documents will not come into play. Either there will be no problems, or problems will be resolved by a telephone call or an exchange of correspondence without reference to legally enforceable terms and conditions. Many lawyer-drafted, standard-form contracts could only be decoded by a lawyer. Often a lawyer's fee is a prohibitively high transaction cost. Whatever the purposes of standard-form contracts, communication to the other party is low on the list.⁹⁰

Bernstein continues with another assertion that rests on an often questionable picture of the process of negotiation:

[T]ransactors are likely to find it undesirable, and perhaps difficult, to persuade others to do business on terms that radically depart [from] custom or commercial standards. Because transactors who propose to transact on explicitly non-customary terms are likely to be viewed with suspicion, and their proposals are likely to be met with counter-proposals, the relational costs of even proposing a departure from custom might be high and the associated risk [of] transaction breakdown significant.⁹¹

issue contained an "iron-safe clause" that required the insured to keep the books and an inventory in a fireproof safe or in some secure place not exposed to a fire. A fire broke out in a livery stable about three hundred yards from the insured's place of business. The fire spread, and just before the insured's place of business burst into flame, the insured attempted to take the books and inventory from the store to his house. Later, when it was time to make a claim, the inventory could not be produced. It had been left in the safe or was lost in the rush out of the burning building. The insurance company refused to pay because there was no inventory. The insurance company's literal reading of the policy might have served to avoid the burden of having to prove fraud. However, the Supreme Court read the policy as calling only for using prudent care in removing the contents of the safe. "[T]he court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used and yet to meet the ends of justice." There was no showing that the inventory would have benefited the insurance company in any way, and it was unlikely that the insured's building burned because of arson because the fire started in the stable some 300 yards away.

⁸⁸ See, e.g., *Bead Chain Mfg. Co. v. Saxton Products, Inc.*, 439 A.2d 314 (Conn. 1981) (The contract may fix a time which is not manifestly unreasonable, but a printed form time-is-of the essence clause cannot extend a buyer's reasonable time to inspect and to reject a tender).

⁸⁹ Bernstein, *Questionable Basis*, *supra* note 2, at 759 n.192.

⁹⁰ See William C. Whitford, *The Functions of Disclosure Regulation in Consumer Contracts*, 1973 WIS. L. REV. 400.

⁹¹ *Id.*

But this assumes that the radical departure from custom is communicated to the other party. When it is, Bernstein's argument is plausible. However, when the terms are buried in a standard-form contract in legal language, the odds that something may slip past one of the parties are high. Of course, this could be avoided by having lawyers review all contracts, but this is a very high-cost solution. Many businesses, including almost all smaller ones, would not find it practical.

Bernstein offers an original view of what is going on in the battle of the forms. When we face an exchange of contract forms containing conflicting terms and conditions, the problem is more complex than in a simple form contract situation. Often the seller's proposal forms seek to ward off liability for late or defective performance and expand the seller's remedies in situations where it looks as if the buyer will not pay. The buyer's purchase order rejects all of the seller's terms and, not uncommonly, includes a clause allowing the buyer to cancel the order "for convenience," with only an obligation to pay for some reliance losses. Often it will attempt to transform any action by the seller into an acceptance of the buyer's terms. The seller's acknowledgment-of-order form accepts the order but seeks to reject all of the buyer's terms. The forms are exchanged. No one reads the terms and conditions on any of these forms. They are filed away and forgotten. Trouble arises, and even then no one turns to the documents.

If matters cannot be settled and a lawyer enters the picture, the form contract may enter the picture. Section 2-207 of the Code attempts to sort out the mess. Bernstein argues that even if a party's additional or different terms will not have legal effect under that section,

[t]hese additional terms can also be understood as setting the terms that the other transactor must comply with if he wants the contracting relationship to continue These additional terms are really saying to sellers, "It is all well and good for you to comply with the contract, that protects you from suit, but if you want to get repeat business from us, these are the terms you must meet."⁹²

Sometimes this may be true. However, again we must disaggregate the corporations that are buyer and seller. Often terms and conditions are the work of lawyers who are within those corporations but do not represent them in negotiations. Frequently, rather than a statement of acceptable practices, the meaning of these terms and conditions can be summed up as "heads I win, tails you lose." The sales and purchasing personnel seldom will read or understand them. They are content to deal on the basis of an exchange of forms that leaves matters uncertain under Section 2-207, because they do not think that the risk of suing or being sued is great enough to warrant investing the time to reconcile differences on forms. Indeed, in

⁹² Bernstein, *Questionable Basis*, *supra* note 2, at 775-76.

many firms the volume of documents being exchanged makes it practically impossible to review hundreds if not thousands of sets of terms and conditions every day. Instead of a statement of practices considered acceptable, terms and conditions are viewed by many businesspeople as little more than a form of magic, and not very powerful magic at that. Moreover, sometimes it is not enough to comply with the express terms of a written contract to keep a relationship alive. Good customers may demand price cuts, quality improvements and technological advances despite the written terms of the agreement. The demand itself may be a breach, and the supplier may have no legal obligation to accept such changes. Practically, however, good customers get what they want.⁹³

Professor Bernstein frequently writes about "transactors," and often she seems to be assuming rational actors who knowingly make choices and take risks. Sometimes this is the case: if US Air, Boeing, and Airbus, for example, are negotiating about reequipping the airline's fleet of planes, I would expect officials of the various corporations to know just what is in the contract documents. But this would be true because the deal is a bet-the-company transaction where the risks warrant investing in detailed planning. In less risky waters, purchasing and sales people are content to navigate by the seat of their pants. Bernstein recognizes this at various places in her work. She would not apply her approach indiscriminately. She cautions:

However, because the Code also governs other types of contracting relationships, such as merchant-to-consumer transactions where arguments in favor of contextualized adjudication may be stronger than they are in merchant-to-merchant transactions, the analysis presented here does not necessarily suggest that the entire Code should be amended to reflect a more formalistic adjudicative approach.⁹⁴

She explains this point further in a footnote:

The arguments in favor of allowing courts to look to course of dealing and course of performance to establish the terms and interpret the meaning of an agreement are far stronger in merchant-to-consumer transactions where the problems of reliance and asymmetric information are often more pronounced. As between the terms of detailed contracts, the default rules of the Code, and their experience during the contracting relationship, consumers may often tend

⁹³ Lane Kenworthy, Stewart Macaulay & Joel Rogers, "The More Things Change . . .": *Business Litigation and Governance in the American Automobile Industry*, 21 LAW & SOC. INQUIRY 631, 650 (1996), for example, report that "[i]n June 1992, GM brought in a new supplier management team from its European division, headed by J. Ignacio Lopez. Lopez proceeded to rip up all existing supplier contracts, reopen bidding on contracts already established for the 1993 model year, and demand immediate price reductions of up to 20%."

⁹⁴ Bernstein, *Merchant Law*, *supra* note 3, at 1820-21.

to rely on their personal experiences, which may make the Code's contextualized approach essential to protecting consumers.⁹⁵

This observation raises all the problems of generalizing about consumers and merchants. Some consumers can be very knowledgeable about the total business situation including the terms of the contract. Some businesspeople "will often tend to rely on their personal experiences."⁹⁶ Nonetheless, we need some rules, particularly when parties with limited resources to invest in litigation are involved. Pure case-by-case approaches make it easier for Galanter's "haves" to come out ahead⁹⁷ if they are willing to invest in motions, experts and appeals.⁹⁸

Finally, we can see Bernstein's work as part of a movement away from what Max Weber called "substantive rationality," toward his "formal rationality." To the extent we ignore custom and courses of dealing and performance, we reinforce the power of the formal written contract.⁹⁹ This, in turn, reinforces the power of those who draft those documents, usually the lawyers who represent those with superior bargaining power. Frequently, these form contracts attempt to ward off responsibility for the words and deeds of agents who prompt reasonable expectations and reliance by those with whom they deal on behalf of the corporation. Of course, in certain cases the formal written contract will reflect negotiation, choice, and explicit risk-taking. Often, however, the formal written contract and its procedures are an attempt at private legislation. Often, too, this private legislation is poorly communicated to the citizens subject to it. Indeed, sometimes the packaging of a formal contract comes close to deception. Corporate lawyers argue that they should have "safe harbors"—forms of language that will produce certain legal results. Absent any attempt at real communication, I wonder why they should be given a safe harbor.

Professor Macneil, as I have noted, has argued that giving corporate lawyers the power to privately legislate is just the price of dealing in a mass society, and we all benefit if firms can carry out their function of providing

⁹⁵ *Id.* n.168.

⁹⁶ They are not always officials of small companies. See, e.g., Stewart Macaulay, *Organic Transactions: Contract, Frank Lloyd Wright and the Johnson Building*, 1996 WIS. L. REV. 75 (the contract between Wright and officials of S.C. Johnson & Sons was performed on a relational rather than a legal basis).

⁹⁷ See Galanter, *supra* note 47.

⁹⁸ Professor Whitford argues for clear rules to reduce the costs of consumer protection statutes. See Whitford, *supra* note 36. But for effective consumer protection, his position requires clear good consumer rules. Clear bad rules would not help consumers much.

⁹⁹ Professor Bernstein does not say this explicitly. However, I assume that if a court could not look to usage and course of performance and dealing to define and qualify terms and fill gaps, it would follow something such as a four-corners plain-meaning rule as it looked at writings. If she were to accept my point that her empirical findings show only that courts should look carefully at the evidence of custom and courses of performance and dealing, then her work would not necessarily point toward a new formalism. However, at *Relational Contract Theory: Unanswered Questions*, she did not accept my suggestion that her empirical work went only to questions of evidence.

goods and services at a price we can pay. Often, the desire for repeat business or other market sanctions will curb the use of the powers claimed in this private legislation. But, as he recognizes, this is not always true. It is hard for the market to sanction, or not sanction, offensive contractual provisions when reasonable transactors cannot be expected to learn about them at the negotiation stage.

Macneil's work demands that anyone who thinks seriously about contract doctrine confront the reality of long-term continuing relations. These relations can involve trust and joint effort for common, or at least consistent, goals. These relationships can also involve power and exploitation where the dominated party continues in the relationship because it is the best of a bad set of options open. But one thing is clear: if we are concerned with real expectations, that is, with reasonable reliance and good faith, then we cannot be satisfied with only formal written documents. Bernstein cautions that we cannot ask courts to turn in a wooden fashion to usages and courses of performance and dealing. The buyer's assumptions about the seller's performance may rest on vague ideas about what is done in the larger community of those who buy and sell. Past concessions may not be intended as modifications of the real contract between the parties. Nonetheless, long-term continuing relations take place, as all human life does, in a sea of patterns of human behavior. To some degree, most of us have virtual continuing relationships with almost everybody, and this is more true today in a world of jet planes, television, and the Internet. That is, personal experience, stories in the *Wall Street Journal*, and business programs on television may affect how a business person decodes the content of a particular relationship. Yet we can worry whether the actual operating American legal system can discover the "real" deal or even fashion a fair deal when a real one did not exist. Cost barriers to litigation and crowded courts limit our ability to achieve the results that the legal realists championed.

Nonetheless, it is hard to imagine arguing for more formal approaches to contract adjudication without remembering Max Weber's classic analysis of the styles of legal action. Weber seemed to champion a style that he calls "formal rationality,"¹⁰⁰ but he warned us about its heavy price. David Trubek, a leading Weber scholar, notes that

Weber conducted a scathing critique of the ethical implications of legal formalism. While in principle formalism promotes liberty, Weber asserted that under the actual social conditions of modern capitalism such products of formalist thought as the classical theory of contract may actually operate to benefit those with wealth and power by strengthening their ability to coerce the have-nots.

....
[F]or Weber rationalization in law (as in other aspects of modern life) may be an ineluctable but not a desirable or hopeful development. Thus

¹⁰⁰ MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 61-64 (Max Rheinstein ed. 1954).

Weber spoke of rationalization as a "fate," by which he meant an unavoidable development. But this is a tragic fate, for in the end the process of legal rationalization leads to the denial, not the realization, of the ideals of western law.¹⁰¹

Formal rationality can produce certain but bad law. It can be divorced from the actual and reasonable expectations of transactors in the market place. Sometimes it will be mindless magic without even the virtues of flipping a coin to decide a case. Sometimes it will reward sophistry. Perhaps submitting to it will give us more microwaves and videocassette recorders at lower cost. But people who feel tricked and cheated when the paper deal is substituted for the real deal are part of the cost of this approach. As Lawrence Friedman notes, "Case-by-case decision, another alternative to legalism, is inefficient; but it flourishes in areas of law where human values are perceived as all-important."¹⁰²

Professor Bernstein recognizes the lessons of Weber's position. She is to be commended for recognizing that some "transactors" can claim legitimately to have their expectations and reliance protected even when they are based on what the other party does and says and not on its written document. Sometimes expectations and reliance can be based on customs and practices. But, as she insists, sometimes such expectations and reliance would be unreasonable. This means that both formal and substantive rationality have real costs. There is no perfect solution.

Our judges have tried to have both formal and substantive rationality at the same time. This is roughly the same as trying to go north and south simultaneously. Our legal tradition has tended to take two approaches: (1) we declare flat bright-line rules, surround them with exceptions, and avoid specifying when the rule and when the exception applies;¹⁰³ or (2) we offer qualitative standards and rely on judges who work in the grand manner to find the right result in particular cases. Both approaches turn impor-

tantly on who the judges are. Article 2 of the U.C.C. often reads as if Llewellyn, its drafter, expected it to be applied by judges such as Cardozo and Learned Hand. It matters whether the opinion is being written by such talented people as Roger Traynor, Richard Posner, Ellen Peters, and Shirley Abrahamson, or by "a lawyer who knew the governor" and who never understood his or her contracts course. Clearly, this is messy. Those who prize neatness must show us how we can avoid clear bright-line rules that produce too many clearly wrong results. The realists must respond to the criticism that they are asking courts to do what they cannot do and are imposing high cost barriers to access the legal system. Perhaps a qualitative messy system deters parties from using the courts and sometimes provokes settlements that reach the least bad result. Given the costs of litigation, remedies that seldom will achieve protection of the expectation interest, and all the difficulties of enforcing judgments, often contract law will be largely symbolic. Perhaps, a basic question is whether it will symbolize fairness or deference to power.

What are we to conclude? Professor Bernstein undoubtedly is right that many customs are vague and riddled with exceptions. Courts cannot just find a thing sitting there and plug it in to fill gaps and interpret language. Nonetheless, these vague customs will affect how those in a long-term continuing relationship interpret the situation. Macneil offers a number of variables for us to use in thinking about relationships. Most are things to consider and not precise measurable concepts. For example, relationships involve overarching obligations of good faith, solidarity, role integrity and mutuality.¹⁰⁴ People in a relationship are likely to assume that other participants will act as most people in similar situations act. Sometimes custom will offer answers: a two-by-four is not a board that measures two inches by four inches. Often alleged custom will only produce arguments and counterarguments. Similarly, during the course of an ongoing relationship, as Professor Bernstein tells us, people make concessions and accept less than what they expected. When they abandon the relationship, they may want to reassert the original deal. But as Macneil emphasizes, relationships are not fixed once and for all time. People may rely on these changes, and a return to the original paper deal may be unfair.

Courts could ignore actual expectations and reliance and try to retreat to Weber's formal rationality. If we assume that something approaching true formal rationality would be possible,¹⁰⁵ perhaps moving in this direc-

¹⁰¹ David M. Trubek, *Max Weber's Tragic Modernism and the Study of Law in Society*, 20 LAW & SOC'Y REV. 573, 589-91 (1986). In this essay, Trubek is commenting on Anthony T. Kronman, MAX WEBER (1983). See also David M. Trubek, RECONSTRUCTING MAX WEBER'S SOCIOLOGY OF LAW, 37 STAN. L. REV. 919 (1985). Professor Shamir argues that we have a history of formal rationality leading to internal contradictions. See Ronen Shamir, *Formal and Substantive Rationality in American Law: A Weberian Perspective*, 2 SOC. & LEG. STUD. 45 (1993). This provokes reform by substantive rationality, but this leads to routinization and demands for more predictable law. A new formalism arises. In time, it too will bend to the irrationality of its rationality, and we get a demand for substantive rationality. After a revolution led by actors such as Karl Llewellyn and Roger Traynor, we have been going through a counter-revolution in the last two decades. Scholars at the University of Wisconsin Law School are considering whether it is time for a "new realism." Professors Sterling and Moore rework Weber's analysis attempt to capture most of the benefits of Weber's formal rationality and substantive rationality. See Joyce S. Sterling & Wilbert E. Moore, *Weber's Analysis of Legal Rationalization: A Critique and Constructive Modification*, 2 SOCIOLOGICAL F. 67 (1987).

¹⁰² Lawrence M. Friedman, *On Legalistic Reasoning: A Footnote to Weber*, 1966 WIS. L. REV. 148, 171.

¹⁰³ See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1737 (1976).

¹⁰⁴ Professors Kaufmann and Stern find empirical support for Macneil's norms of solidarity and role integrity in long-term relationships. See Patrick J. Kaufmann & Louis W. Stern, *Relational Exchange Norms, Perceptions of Unfairness, and Retained Hostility in Commercial Litigation*, 32 J. CONFLICT RESOL. 534 (1988).

¹⁰⁵ I am still enough of a legal realist to be very skeptical whether our system of contract law could abandon doctrines such as promissory estoppel, waiver, substantial performance and the use of extrinsic evidence to resolve "ambiguity" in a writing. Even if it could, the problem of the facts would remain. Jurors can find against the weight of the evidence to reach a result. Appellate courts can ignore the rec-

tion would make a court's job easier. Perhaps it would allow parties to plan with less uncertainty. It certainly would help scholars fashion elegant theories. Yet these gains may be outweighed by a loss that is suggested by Macneil's insistence on contract law contributing to organic solidarity. If we reduce choice and consent to a magical fiction, this may affect the answers people give to a question of Macneil's: "Do I think conditions will continue to exist whereby each of us will desire to and be able to depend on the other?" Macneil warns that "beliefs that one social class 'gets too much,' rapidly convert the psychology of exchange from that of goods to that of harms."¹⁰⁶ It is one thing if some do better than others when they play by the rules of the game. It is something else if those who come out on top do so by tricking others and having their deceptions supported by the legal system. It is easy to overstate the importance of the law of contracts. Relational sanctions and private governments do most of the work of protecting expectations and reliance. Contract law in practice is a flawed product that costs too much in most situations. Nonetheless, law can matter. The chance that a court might upset outrageous behavior by a transactor makes some contribution to the trust necessary to make any economic system work.¹⁰⁷

ord or just make up facts to make a court come out the right way. My guess is that the second is more common than the first.

¹⁰⁶ IAN R. MACNEIL, THE NEW SOCIAL CONTRACT 103 (1980).

¹⁰⁷ Cf. Kathryn Hendley et al., *Observations on the Use of Law by Russian Enterprises*, 13 POST-SOVIET AFFAIRS 19 (1997); Kathryn Hendley, *Legal Development in Post-Soviet Russia*, 13 POST-SOVIET AFFAIRS 228 (1997). Hendley's work usually is read by specialists in Russia or comparative law. However, her work speaks importantly to the role of contract law in a market economy, and contracts scholars should not overlook it because they are unfamiliar with the journals in which it appears.