1985

Macneil, Macaulay, and the Discovery of Power and Solidarity in Contract Law

Robert W. Gordon
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
https://digitalcommons.law.yale.edu/fss_papers/1367

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
MACAULAY, MACNEIL, AND THE DISCOVERY OF SOLIDARITY AND POWER IN CONTRACT LAW

ROBERT W. GORDON*

Professor Gordon's Comment focuses on the substantial departures of Stewart Macaulay and Ian Macneil from the conventions of traditional contracts scholarship. He argues that the Macaulay-Macneil perspectives, different though they are, have challenged mainstream scholars in three ways: (1) in emphasizing continuing relations within a community rather than discrete transactions between autonomous individuals; (2) in recognizing the pervasiveness of coercion and dependence in nominally free marketplace relationships; and (3) in demonstrating the practical marginality of the legal rules comprising the core of most conventional scholarship. Professor Gordon concludes by outlining the dramatic changes that would be required in mainstream scholarship were the insights of Macaulay and Macneil to be taken seriously.

It is extremely pleasant to be handed the task of commenting on a paper by Ian Macneil at a conference called in appreciation of the work of Stewart Macaulay. The occasion seems a good one on which to speculate upon—and simply to celebrate—the contribution that these two extraordinary Scotsmen have made to contracts scholarship in our time.

That contribution—the development of a "relational" perspective on contracting—has been, I believe, fundamental, in the literal sense of altering the foundations of the subject. You would never know this, unfortunately, from reading ordinary contracts scholarship, which the work of Macneil and Macaulay, as contrasted to law-and-economics, has as yet scarcely dented. That is not an accident. Most law-and-economics scholarship emerged from the "transactional" models of exchange and the highly individualist ideological assumptions central to straight common law doctrinal scholarship, and so has been readily assimilated to that scholarship. The "relational" view poses a much more radical set of challenges: contracts scholars who took it seriously would really have to change their thinking about the field. Let me try to explain why.

One way of looking at Macneil-Macaulay "relationalism"—to compress for the moment into a single slogan the approaches of these

* Professor of Law, Stanford University. Ian Macneil commented helpfully on a draft of this Comment.
two quite different thinkers—is as the continuation of two scholarly projects embraced, but then prematurely abandoned, by the Legal Realists of the 1920s and 1930s. One of those projects was chiefly destructive, the other constructive. Let’s call the destructive project “critique, through contextualization, of classical-formalist contract law” and the other, “reconstruction, also through contextualization, of the actual operating norms and conventions of contracting.”

(1) The project of critique was, of course, to take apart the magnificent doctrinal Crystal Palace that Langdell, Anson, Pollock, and Williston had built; the favored critical technique was to examine how courts actually operated the classical rules in different fact-situations stated in decided contracts cases. The result was a vast body of contracts scholarship, reaching its Summa in Corbin’s great treatise, showing how rules framed in abstract general terms (“performance of a pre-existing duty is not consideration sufficient to support a promise”) could lead, as actually applied, to quite opposite results in different settings. ¹

(2) The other project was to try to build a new contract law on the ruins of the old, a law that would be more solidly founded on the empirical regularities observed in the decided cases, and that would make articulate their hitherto unstated but implicit bases in ethics, policy, and social function. The result was a body of distinguished work (the roll-call of soldiers in this cause includes the names of Corbin, Llewellyn, Kessler, Patterson, Fuller, and Dawson among many others) showing that contextual considerations—such as the severity of the fault of the breaching party, the relative good faith of the parties, their relative sophistication or bargaining power, the degree of their detrimental reliance upon one another, the harshness of contract terms or the tiny standard-form type in which such terms appeared—both did and should

¹ Given this large body of work, I am always a bit taken aback to hear lawyers argue, as they sometimes do, that for all its faults the old formal-classical system of rules had the virtues of predictability and administrative convenience; its results might be sometimes arbitrary or unjust but at least one knew where one stood. I should have thought if there was one proof the Realists critics had managed to nail down for good it was that of the manipulability and contextual variability of the old rule-system. If the rules are stable and predictable in particular practice settings—as of course they usually are, at least in the short-to-medium term—that stability derives from well-accepted conventions within the community of regular interpreters of the rule. Parties with a stake in upsetting the established interpretations, however, may (and often do) throw out new arguments that faithful adherence to the stabilizing conventions would defeat the larger purposes or policies behind the rule. When these arguments are made, and it suddenly becomes clear that the rule can be plausibly interpreted in different ways, the usual response of legal decision-makers is the same as that of the Realists: i.e., to attempt a rough classification of contexts where the convention will and will not apply. (“In sales to consumers via standardized forms, the parol evidence rule will almost never be successfully invoked to bar evidence of oral sales warranties.”) New conventions may then stabilize around the new classification.
influence judicial decisions whether contracts had been formed, modified, breached, or excused, and what remedies should be given.

This kind of work, radically disruptive though it undoubtedly once was (it has since become the normal-science staple crop of the contracts field), was quite modest in its methods: it stuck to appellate contracts cases, and drew its contextual data from the facts as related in those cases. Some of the Realists had been more ambitious about the reconstructive project: they planned to go beyond the cases to discover what the relation was between legal and social norms, and, if there were disparities between the two, to use the social norms (e.g., the best commercial customs) as the basis for reforming the legal ones. For various reasons—resistance of traditional lawyers, frustration with the difficulty and inconclusiveness of empirical research, diversion into New Deal politics, inability to theorize beyond naive functionalism or behavioralism about law-society relations—the Realists never took these ambitions very far off the ground. Some of their successors bravely struggled onwards, producing remarkable work that was almost completely ignored in mainstream scholarship. Dawson studied contract decisions in periods of high inflation in the United States and Germany. Kessler looked closely at auto dealer franchises as an instance of contract relationships within a vertically-integrated industry. Hurst and Friedman studied hundreds of contracts cases in the historical context of a developing Wisconsin society and economy. A few scholars, notably Reitz and Speidel, carried on the project of relating legal decisions, and evaluating them by their functional contribution to particular commercial contexts. Danzig thoroughly researched the background of some well-known contracts cases, locating the appellate decisions within great tangled complexes of emotional, social, and economic purposes as well as the labyrinths of legal bureaucracies and pro-

---


fessional strategies. Whitford produced seminal studies of consumer protection law, fully situated in regulatory and social contexts. There were a few empirical studies of contracting practices in specialized trades which were very useful but modestly refrained from trying to generalize from their conclusions. Within the vast ocean of common law contracts scholarship, these social-contextual studies made up a forlorn and isolated archipelago. After 1970, the main tendencies of new work on contracts turned away from Realist contextualism altogether. In their efforts to reconstruct what looks remarkably like the old formal-classical rule-system (with some pieces missing, such as the "consideration" doctrine or the policy against stipulated penalties) on the basis of economic efficiency or Kantian moral autonomy, both the law-and-economics and contract-as-promise scholars stuck mostly to the appellate cases, and used them not as the Realist tradition had, as rich storehouses of contextual data, but largely as statements of rules, and rather barebones statements at that.

Macaulay and Macneil paid no attention to these trends, and went their own way. Their way, as it turned out, lay in the close inspection of the norms and practices of the commercial users of contract law, the contracting parties themselves. Supplementing their own observations of contracting practices with materials from anthropology and sociology, they painted a stunning series of real-world contractual landscapes. The shock value of this work, as so often with the best of the avant-garde, lay partly in its dramatic announcement of underground truths in public—perceptions widely shared by business people and their lawyers, but never before given utterance in the polite society of formal discourse about law. As I see it, the new work challenged the salon jurists of the old establishment in three fundamental ways.

1. Organic Solidarity. Classical contract law, like classical political economy, assumed a social world populated by self-constituting, self-reliant subjects, each pursuing his individual projects, and viewing other people either as threats or as means to realizing those projects. A contract represented one of the carefully circumscribed occasional interactions that joined some of these isolated beings together for an
alienated moment of mutual exploitation. This Hobbesian individualism is not at all the only mode even of classical contract law, as Duncan Kennedy has shown, but it is the dominant mode of that law and of the modern economism that now seeks to resurrect it.

What Macneil and Macaulay brought to surface awareness was that the images of classical contract law described at best a small and residual body of contract dealings: “discrete transactions” (in Macneil’s phrase) between strangers. The common type of commercial exchange was among participants in continuing relations, members of interactive communities whose projects themselves, as well as expectations about how they will be carried out, are partially created by the community. In classical contract, individuals have no obligations to each other save those created by the coercive rules of the state or their own promises: if contract law outcomes are therefore to be rationalized on the preferred grounds of consent rather than those of public policy, the outcomes must appear to flow from the parties’ promises, from their ex ante allocations of performance obligations and risks, or at least from a plausible implication (or transaction-cost-saving legal approximation) of such promises. In the “relational” view of Macaulay and Macneil, parties treat their contracts more like marriages than like one-night stands. Obligations grow out of the commitment that they have made to one another, and the conventions that the trading community establishes for such commitments; they are not frozen at the initial moment of commitment, but change as circumstances change; the object of contracting is not primarily to allocate risks, but to signify a commitment to cooperate. In bad times parties are expected to lend one another mutual support, rather than standing on their rights; each will treat the other’s insistence on literal performance as willful obstructionism; if unexpected contingencies occur resulting in severe losses, the parties are to search for equitable ways of dividing the losses; and the sanction for egregiously bad behavior, is always, of course, refusal to deal again.

14. Again, this is a caricature even of the 19th century rule-system. It leaves out of account the entire, very extensive realm of legally recognized and enforced fiduciary relationships, as well as the many occasions on which contracts courts paternalistically protected weak parties from bad bargains. The caricature also ignores what Victorian lawyers took for granted as the background they were legislating against: a body of powerful non-legal social codes and sanctions.
The work of Macaulay and Macneil thus picks up a recurrent if usually muted contrapuntal theme in liberal social science: that certain kinds of cultural-social understandings and institutions, to maintain them, have been important conditions of the successful operation of capitalist economies. To put it another way, expectations of mutual advantage (narrowly conceived), reinforced only by coercive state enforcement of property-and-contract rights, fashion insufficiently durable bonds to induce cooperative social action on any large scale. Something else must be at work to create the foundations of mutual trust and solidarity upon which economic planning depends. Macneil's work in particular is close to Durkheim's in its emphasis upon the norms of solidarity and reciprocity, "organic solidarity," that can emerge from continuing relations. I don't mean to trivialize their achievement by trying thus to pigeon-hole it in the social science tradition. It is one thing to have an insight at this general level of abstraction; it is another thing to have thoroughly analyzed, as Macneil and Macaulay have done, the particular ways in which the insight is played out in actual economic relations.

2. Domination. Classical contract law solves the Hobbesian problem of power by trying to give the parties only the most circumscribed rights in one another's future conduct: rights bargained for through formally specified contracting procedures. In the messy and open-ended world of continuing contract relations, where the contours of obligation are constantly shifting, the effects of power imbalances are not limited to the concessions that parties can extort in the original bargain. Such imbalances tend to generate hierarchies that can gradually extend to govern every aspect of the relation in performance. This is the potential dark side of continuing contract relations, as organic solidarity is the bright side: what starts out as a mere inequity in market power can be deepened into persistent domination on one side and dependence on the other. This is not slavery, since the parties are legally free to exit; but the whole perspective of relational contract suggests that sunk costs can matter tremendously, that the trauma of abandoning a relationship around which a company has structured all its operations, hiring, investment, and planning decisions, can keep it tied into a dependence that its members experience as all the more corrupting because it is in some sense voluntary.

15. The locus classicus for this theme is in the work of another child of the Scottish Enlightenment, A. Smith, The Theory of Moral Sentiments (1759), the other face of the founder of classical political economy.
Modern contracts scholars tend to see such relations of domination as aberrational situations, which, for good or evil (depending on whether one is liberally or conservatively inclined) contract law has evolved various curative doctrines to police. In other words, there is not that much of a problem, and contract law can take care of what problem there is. Macaulay and Macneil, like the Critical Legal Studies scholars, follow the lead of the more unsparingly cold-eyed Realists such as Hale, Kessler, and Dawson, who find coercion and domination to be pervasive in market relations. Their reactions to this knowledge differ somewhat. Macaulay’s reaction (which I feel more confident that I can describe than I do Macneil’s) is to assimilate continuing contract relations to a general conception of political struggle. In Macaulay’s view, contract parties—such as the automobile manufacturers and their suppliers or dealers, or the oil companies and gas-station franchisees—appear both as social groups locked into relations of hierarchy and as political interest-groups trying strategically to manipulate outside institutions (including courts) to improve their basic bargaining positions. On the whole, Macaulay is a depressed liberal; he wishes that the weaker parties to these relationships could transform them into more egalitarian ones, but is very pessimistic about their ability to do so, because he believes that most of the institutional structures through which the struggle is carried on tend to work to the advantage of wealth and power. (More on this issue in a moment.)

3. Discontinuity and Marginality of “Contract Law.” All their other challenges to standard contracts work might have been forgiveable, if Macneil and Macaulay had not implacably insisted upon demonstrating, over and over again, the relative insignificance for contracts-in-action of the traditional materials of legal scholarship, the decisions of common law contracts courts. This demonstration has two aspects:

(a) The marginality of state-enforced norms and sanctions in the governance of contract relations. This was of course the theme of Macaulay’s famous 1963 article which described businessmen who did not rely on legal norms to define or sanctions to enforce their relations because they had their own, more effective, norms and sanctions.

Macneil's approach has been somewhat different. It has been to contrast the detailed normative premises in traditional contract law with those emerging from relational contracting, and show that despite limited concessions to relationalism, modern contract law remains wedded to unrealistic models of the discrete transaction.\footnote{See generally I. Macneil, The New Social Contract: An Inquiry into Modern Contractual Relations (1980).} Both men picture contract law and its enforcement as a world removed from, and only indirectly related to, the normal expectations of contracting parties (except in one-shot high-risk transactions between strangers where the Hobbesian assumptions of contract law may become the practical realism of the situation). Macaulay in particular pictures the occasional resort by private parties to formal legal sanctions as mostly opportunistic and tactical: by going to law, the parties are not appealing to shared values embodied in legal rules, or seeking moral vindication of their position or a just settlement of their disputes; they are usually engaged in maneuvers to improve their bargaining positions. The "law", to such parties, its norms, rules, procedures, costs, etc., appears in a completely alienated form as a set of games, strategies and hurdles.\footnote{Ted Schneyer pointed out to me at the symposium how Macaulay's account of the way law looks to contract parties resembles Erving Goffman's accounts of ordinary social interactions as games—strategic manipulations of conventional forms.} From this point of view, the only thing that matters about a legal form is whether it can help give one leverage or slow the other side down. Parties with a lot of resources, for example, do not mind general equitable standards even if the substance of such standards cuts against them because they cannot practically be enforced without a lot of expensive evidence. Such parties also like nice points of law—jurisdictional objections, conflicts-of-laws issues, and the like—because their lawyers are likely to be more practiced in arguing them than are the opposition's.\footnote{Macaulay, Elegant Models, Empirical Pictures, and the Complexities of Contract [hereinafter cited as Elegant Models], 11 L. & Soc'y Rev. 507 (1977); cf. Galanter. Why The "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc'y Rev. 95 (1974).} Macaulay's point, I should stress, ought not be confused with the economist's reduction of all human choice to "rational" maximizing behavior. Macaulay doesn't believe contracting parties think like Holmesian "bad men" about all norms, and certainly not the norms of their interest group or relational-contract community; but they often do think like "bad men" with respect to specifically legal rules and procedures. Macaulay's businessmen may be seen as inhabiting overlapping and to some extent mutually contradicting moral universes of contracting rules, one of which (their private order) supplies the norms that they actually internalize, the other (the legal order) furnishing an arsenal of
strategic weapons in case the relation breaks down. His work reveals, then, a radical discontinuity between official ways of thinking about law, as a repository of values and sanctions controlling social behavior, and the expectations of the inhabitants of the “semi-autonomous social fields” (in Sally Moore’s phrase) that the law is supposed to affect. Even more interesting and disturbing, it reveals that quite often the professionals of the legal system themselves adopt the outsiders’ rather than the official view: Macaulay shows lawyers, and even sometimes judges, accepting the chilling and amoral vision of the law as nothing but a storehouse of bargaining chips.\(^2\)

(b) The marginality of the common law of contract within the body of state-enforced norms and sanctions. Macneil and Macaulay go well beyond the familiar point that general contract law has fallen from its nineteenth century primacy in the governance of private ordering to the relatively trivial status of a body of law employed to fill in the interstices left by the big new systems of specialized legislative and administrative regulation. Macneil points out that from the relational perspective, any body of law that helps to structure contracting behavior ought to be considered as part of contract law: this would include corporation law and labor law, for example. Macaulay’s view of contract relations as periodic political conflict, sees common law contract courts as simply one among the many institutional battlegrounds on which the parties carry on their struggle. The perspectives of both men suggest that even those who think legal scholarship should be confined to the study of state-enforced norms, are not looking at enough of the contract law that matters if they stick to the common law (and UCC) alone.\(^2\)

Now perhaps it will be clear why, if contracts scholars were to take seriously the challenges posed by Macneil and Macaulay, they would have to write very differently about their subject. Contracts scholarship rests upon the essentially liberal premise that the terms of social interaction ought to be, and in our society mostly are, instituted by consent—either the actual voluntary choices of the parties, or by means of state rules enacted and enforced by their constitutionally chosen representatives. Liberals on the right want most terms to be of the former kind, liberals on the left are more favorable to the latter kind; but they both share this notion that social life is, both ideally and (almost) in practice, the product of voluntary individual choice. If there is coercion, it should be defended as necessary to police deviations from consensually


fixed terms, or else as an unfortunate but necessary minimum of control that people in any society would have to endure.

With their discovery of relational contract-in-action, Macneil and Macaulay imported a new element into contracts discourse, the element of society, which cannot be accounted for entirely as the product of individual or constitutional-democratic-state choices, but which exists in some respects prior to such choices, and which helps to condition both what is chosen and the structures within which choices are played out. To express this in another way, their work shows how economic purposes and actions are deeply embedded in social fields, in densely woven webs of local customs, conventional morals, bonds of loyalty and entrenched power hierarchies. Of course, nobody could claim that Macneil and Macaulay discovered contracting societies. Mainstream contract law, especially in its post-Realist forms, repeatedly recognizes the existence of social background conditions to contracting. For example, consider the "course of dealing, course of performance, and usage of trade" or the "commercial reasonableness" that may be consulted as supplementary guides to contractual intent, or the sometimes pervasive inequalities between parties in information, bargaining skill, or market alternatives that make up what the courts like to call "unequal bargaining power." But in mainstream contract law, such conditions only occupy the background; they are what will govern the transaction only until the parties or the state choose otherwise; they are canvases which individual intent or state policy may paint over at discretion. Macneil's and Macaulay's accomplishment has been to bring contracting societies into the foreground, and by so doing to show that you cannot even begin to understand contractual expectations without understanding the social conditions of their generation, change, and termination. Moreover, they demonstrate that such conditions are not supplementary, but primary, sources of contracting norms and sanctions. Finally, not only are those social conditions not readily trumped by the state-enforced norms and sanctions of contract law, but they are often simply not affected by contract law at all.

I want to make clear that I am not attributing to Macneil and Macaulay a kind of conservative Burkean organicism, some notion that contracting societies arise spontaneously and reproduce mysteriously, resistant alike to rational understanding and deliberate alteration. On the contrary, they can be understood, and Macneil and Macaulay have gone a long way toward understanding them. They are built with human intentions and purposes, and can be changed, like any other social arrangements, through politics, including but not at all limited to politics whose strategy is to make use of the instrumentalities of the state and legal system. As Macaulay has shown, however, any group
that tries to change the social structure of contract relations through political struggle must be prepared for a lot of frustration and unexpected consequences.

If contracts scholars were to accept the relational revolution, and shift their focus accordingly, what would be the fate of the traditional materials of contracts—the common law and UCC cases and the commentaries on them? At some moments in their work both Macneil and Macaulay have seemed to say that the relational perspective reveals that traditional contracts materials are an academic museum of quaint curiosities, a law of law professors bearing but slight resemblance to the law-in-action known to contracting parties and their lawyers. In this view the marginality and discontinuity of mainstream contracts results from nothing more significant than an academic deformation professionelle, the narrow parochialism of the case-law tradition persisting through sheer inertia. Clearly there is something to this; but it is not the whole story, as Macneil and Macaulay have also recognized on other occasions.\(^\text{26}\) As I have been arguing in this Comment, the relational perspective's revelation of a social world of semi-autonomous contracting cultures, governed by relations of cooperative organic solidarity and of pervasive hierarchical domination, is deeply upsetting to the core premises of our liberal social order. Contract law has traditionally been one of the theatres—a small, elite theatre, to be sure, compared to television or Chamber of Commerce lunches—in which those premises are given public expression. Contract law has, arguably, been filled with ideological purposes; and the manner in which it suppresses or relegates to the background conditions of the social element in contracting have not been just incidental consequences of professional parochialism, but important to its vindication of those purposes.\(^\text{27}\)


\(^{27}\) I do not mean to suggest here that it would be impossible for a liberal theory of contracts to swallow the insights of relationalism without being turned on its head, i.e., that liberalism to save its integrity must deny the pervasiveness of organic solidarity and hierarchy in civil society. On the contrary. The "transaction-cost" economics of Oliver Williamson and his school represents exactly such an assimilation of "relational" insights to the liberal model of social relations as the products of rational individual choices: solidarity and hierarchy are explained as institutional governance forms chosen for the purpose of realizing efficiency gains. See, e.g., Williamson, \textit{The Organization of Work: A Comparative Institutional Assessment}, 1 J. \textit{ECON. BEHAV. \\& ORG.} 5 (1980); Williamson, \textit{Transaction Cost Economics: The Governance of Contractual Relations}, 22 J. \textit{LAW AND ECON.} 233 (1979). The work of this school is exciting and extremely rich in insights; for instance, consult Victor Goldberg and Thomas Palay's contributions to this Symposium. But the price of this school's success in its project of assimilation is its exclusion from its analysis the very elements of contract relations to which Macneil and Macaulay have given most prominence: culture, politics, and power.
If you accept this account, if you stop thinking of contract law as a pathetically inadequate attempt by legal academics to structure the dealings of the commercial world and think of it instead as a (relatively modest) platform for the expression of ideology, then its doctrines become interesting again for what they can reveal about the society's official values. (Of course, at least as interesting if not more so for the same purpose, would be less elevated, "field-level" manifestations of legal ideology, such as advice given in lawyers' offices; but these are obviously a lot harder to study.) This has been the focus of the fascinating work of some of the scholars associated with the Conference on Critical Legal Studies, who have tried to show, working with doctrinal materials alone, how contracts doctrine tries to suppress, deny, or mediate its own internal contradictions. For example, every time mainstream contracts courts or commentators approach a full recognition of relationalist insights (as when relationalism raises reliance-based obligations, or paternalistically protects the weak from consenting to their victimization, or enforces a "socialism-of-the-transaction" by dividing unexpected losses by need and ability to pay), they will find some device to keep the implications of relationalism from threatening their liberal-individualist core premises. They will use contract interpretation to disguise the relationalist result as the individualist intent of the parties. They will saturate the reasons for the result in the peculiar facts of the case at hand. They will classify the relational doctrine as belonging to an exceptional body of remedies available only in special and unusual situations. They will rhetorically celebrate the core values of freedom of contract in dicta while doing freehanded equitable redistribution in the case before them.28

If persuasive, the hypothesis just offered for the discontinuity between doctrine and law-in-action—that doctrine is ideologically committed to denying certain relational realities—might also furnish some


If I may be allowed a moment of peevishness in what is otherwise meant to be a paean of praise: I think it unfortunate that Macneil's Symposium paper contributes—while extending the courtesy of respectful summary of their actual views to every other contracts school he disagrees with—to what is becoming a legal-academic habit of making slighting references to Critical Legal Studies work as if it were so absurdly far-out, flaky, obscurely written, and obviously wrong as not to be worth engaging with. (CLS scholars, by contrast, usually try to take very seriously the views of their liberal-doctrinal or law-and-economics antagonists, and to restate those views very thoroughly—often even more thoroughly than their authors have—before attacking them.) It's especially unfortunate because, for the reasons laid out in this Comment, I think that Macneil and the CLS writers share a good many intellectual projects in common, for all their political differences.
guidelines for a task that both Macneil and I are very interested in: writing the history of contract relations. If the hypothesis is right, it would be futile to try to write the history of contract law doctrine as if it were a functional adaptation by the legal system to the underlying needs of commercial parties. I share, for example, what I take to be Macneil's skepticism that most of the changes in contracts doctrine over the last two centuries can be completely accounted for as functional responses to changing modes of structuring business transactions. The two leading histories of nineteenth century contract law, Horwitz's and Atiyah's, seem most convincing to me when they treat doctrinal history as part of the more general history of shifts in ideological discourse (e.g., changing ideas of political economy), and least so when they treat it as a set of practical responses to the desires of businessmen.29

Indeed, if we are prepared to take to heart the Macneil-Macaulay discovery of discontinuity between individualist-transactional doctrine and solidary-hierarchical-relational practice, we should probably discard completely some of the functionalist background assumptions that have tended to inform our views of the role of law in economic change. I would speculate that most lawyers and law teachers who think about the matter at all would tell something like the following story about the evolution of contracts in recent times. It has been, roughly speaking, a three-stage evolution.

The first stage is that of mercantilist regulation and community custom: local hierarchical relations of primary social groups (the manor, the town, the extended-family household production unit), tempered by equitable norms of community, set the basic terms of economic relations. Contract law is the law of the primary group or of the local jury; there is also supplemental regulation of prices, wages, and production by mercantilist state policies, monopolies, or guilds.

In the second stage, economic actors win their freedom from status hierarchies, local customs, and state control to become free exchangers of land, labor, and capital in a laissez-faire market. Contract law becomes the abstract, formal, classical system; anything (within the limits of public law) can be commodified and its exchange contracted for, on any terms the parties can extract; and the law will blindly enforce the exchange.

In the third stage, several things happen simultaneously. First, discrete market transactions between strangers increasingly give way to continuing relations—within firms, within increasingly specialized

trades, within increasingly solidary associations (trade associations, unions, etc.). Second, regulation increasingly cuts into freedom of contract, to repair "market failures" or to redistribute power and wealth to increasingly organized and politically potent interest groups. The private law of contracts increasingly recognizes both relational realities and regulatory policies.

Again, if Macneil and Macaulay are right, the far-reaching implication of their insight is that this entire story is in need of serious revision. This whole notion that economic dealings started out embedded in hierarchical organic communities, then got disembedded as individuals dug out and formed their own free-floating relations in markets, and finally got re-embedded in specialized firms, trades and regulatory systems, is at best a set of very rough and inadequate generalizations. Economic relations are always embedded; markets are always structured by a complex of local, ethnic and trading cultures, and by varying regimes of non-state and state regulation. Dealing between "strangers" cannot regularly take place—e.g., one cannot trade on bills of exchange outside trading communities that recognize bills of exchange. The imagery behind the account of Stage Two in the standard story is supplied not by any close attention to the structure of economic dealings in nineteenth century England or America. (Such attention, I agree with Macneil, would yield a richly "relational" historical sociology—of plantation slavery, factory organization, networks of planter-factor, farmer-merchant-creditor, entrepreneur-banker, wholesaler-retailer—and nothing remotely like a world of discrete transactions between strangers.) This imagery is rather the product of certain conventions of ideological discourse, conventions most definitely embodied in contract law among other places, which encouraged even people who dealt with one another in socially-embedded solidary and hierarchical continuing contract relations to think of one another as strangers and equals. In short, the law embodies a set of fantasies about the world that become real when people act upon them as if they are real: when, for example, people accept the terms of a deal imposed upon them by powerful others as the product of circumstances and their own volition rather than simply of the power of others, or when they abandon a lifelong trading or business partner because the relation is no longer profitable. Freedom of contract means, among other things, never having to say you are sorry.

Some theorists have even advanced a bold hypothesis of a specific historical causal relationship between the fantasy world of political-legal ideological discourse about contracts and the social world of contracting: they contend that encouraging people to deal with one another as strangers progressively erodes the underlying relations of solidarity, reciprocity and trust upon which capitalist economies essentially de-
pend. If there is anything at all to this view, it suggests an urgent set of practical reasons—if reasons are required beyond inherent intellectual fascination—for lawyers interested in contract law to overcome their traditional resistance and to open their understandings to the remarkable, if up until now rather lonely, accomplishments of Macneil and Macaulay.

30. F. Hirsch, Social Limits to Growth 84-102 (1976); J. Schumpeter, Capitalism, Socialism and Democracy 121-63 (1942); Hirschman, Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?, 20 J. Econ. Literature 1463 (1982).