

ESSAY

CONFLICTING VISIONS: A CRITIQUE OF IAN MACNEIL'S RELATIONAL THEORY OF CONTRACT

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INTRODUCTION

IN MY WRITINGS, I have defended the traditional view that consent belongs at the heart of contract law.¹ That is, I maintain that contractual obligation ordinarily occurs when one person manifests an "intention to create legal relations" or an "intention to be legally bound" to fulfill a commitment.² Many of the otherwise anomalous

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¹ I introduced this thesis in Randy E. Barnett, Contract Scholarship and the Reemergence of Legal Philosophy, 97 Harv. L. Rev. 1223 (1984) (book review), and greatly expanded it in Randy E. Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269 (1986) [hereinafter Barnett, Consent Theory]. A condensed and revised account of this approach appears in Randy E. Barnett, Rights and Remedies in a Consent Theory of Contract, *in* Liability and Responsibility: Essays in Law and Morals 135 (R.G. Frey & Christopher W. Morris eds., 1991).

² Although these two expressions of the principle serve well for most purposes, they are not strictly accurate. A more complete formulation is that contractual obligation arises when a person "voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights." Barnett, Consent Theory, *supra* note 1, at 300. This more elaborate version is needed to account for the restrictions that are properly placed on people's ability to legally bind themselves. This limitation is reflected in, for example, the rules governing the remedy of specific performance. See Randy E. Barnett, Contract Remedies and Inalienable Rights, 4 Soc. Phil. & Pol'y 179 (1986). Although I describe this as the "traditional" view, it represents a rejection of the modern Willistonian-Restatement approach that places the concept of *promise* (as opposed to consent) at the heart of contract. A promise may or may not be accompanied by an explicit or implicit manifestation of intention to be legally bound. See Randy E. Barnett, Some Problems with Contract as Promise, 77 Cornell L. Rev. 1022 (1992).

doctrines of contract law, particularly those governing formation, can be explained and justified by this operative principle³—a principle that in turn can be explained and justified on functionalist grounds.⁴

In addition to its role in justifying contractual obligation, consent informs the selection of default rules that fill the so-called “gaps” that may occur in the manifested assent of contracting parties.⁵ In particular, default rules based on the common-sense or conventional understanding of persons belonging to the parties’ community of discourse facilitate the social function of consent in two ways. First, conventionalist default rules best reflect the subjective understanding actually shared by the parties. Second, such rules reduce the likelihood of subjective misunderstandings arising between the parties. Thus, conventionalist default rules bring the enforcement of the parties’ manifested consent into closer correspondence with their subjective intentions. In sum, according to a consent theory, consent is the criterion that distinguishes enforceable from unenforceable commitments. It also influences significantly the selection of default rules that are used to interpret the meaning of and to fill gaps in expressions of consent.

Perhaps the leading contemporary critic of placing consent at the center of contract law has been Ian Macneil.⁶ In his book *The New Social Contract*,⁷ as well as in a series of complex and richly textured

³ In addition to the articles already cited, see Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 *Hofstra L. Rev.* 443 (1987); Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 *Cal. L. Rev.* 1969 (1987).

⁴ See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 *Va. L. Rev.* 821, 829-59 (1992) [hereinafter Barnett, *Sound of Silence*]; Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 *Soc. Phil. & Pol’y* 62 (1992) [hereinafter Barnett, *Function of Property*]. For a discussion of what I mean by “functionalist” analysis and how it compliments more abstract modes of analysis, see Randy E. Barnett, *The Internal and External Analysis of Concepts*, 11 *Cardozo L. Rev.* 525 (1990). I explain the value of multiple modes of theoretical analysis in Randy E. Barnett, *Foreword: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses*, 12 *Harv. J.L. & Pub. Pol’y* 611 (1989); Randy E. Barnett, *The Virtues of Redundancy in Legal Thought*, 38 *Clev. St. L. Rev.* 153 (1990).

⁵ See Barnett, *Sound of Silence*, *supra* note 4, at 859-97.

⁶ See Ian R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* 47-48 (1980) (“The dominant role of consent in the jurisprudence of classical contract law has put intellectual barriers in the way of communicating a broader analysis of the subject than appears in that jurisprudence.”) (footnote omitted).

⁷ *Id.*

articles spanning nearly two decades, Macneil has eloquently presented and defended his now well-known relational theory of contract. It is a tribute to the important core of previously neglected truth in Macneil's theory that, for all its complexity, the theory can be summarized succinctly.⁸

Macneil presents nothing less than a "holistic"⁹ "social theory"¹⁰ of human exchange—with particular emphasis on the human activity of "projecting exchange into the future," which he calls "contract."¹¹ Macneil develops an elaborate set of "norms" that must be adhered to if contractual exchange is to exist and flourish.¹² Macneil sees "contract-in-law"¹³—that is, contracts enforceable by a legal system—as an infinitesimally small fraction of the total web of contracts in the modern world, including marriage, bureaucracy, and the State.¹⁴ His project is to use what all contractual exchanges have in common to better understand contracts enforceable by a legal system. By so doing he has shown that such legally enforceable contracts themselves exist on a continuum that ranges from fully specified contracts in which all obligations are unambiguously expressed at the time of for-

⁸ For a recent, very concise summary by Macneil, see Ian R. Macneil, *Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos*, 143 *J. Institutional & Theoretical Econ.* 272, 274-75 (1987).

⁹ See Ian R. Macneil, *Values in Contract: Internal and External*, 78 *Nw. U. L. Rev.* 340, 383 (1983) ("There is simply no single core to holistic or relational conceptualizing about contract . . .").

¹⁰ See Ian R. Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 *Nw. U. L. Rev.* 900, 935 (1984-85) [hereinafter Macneil, *Bureaucracy*] (using the term "social theory"); Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and The Need for a "Rich Classificatory Apparatus"*, 75 *Nw. U. L. Rev.* 1018, 1040 n.60 (1981) [hereinafter Macneil, *Rich Apparatus*] (referring to his effort to provide "a sound tool for social analysis"); Macneil, *supra* note 8, at 272 (using the term "sociology").

¹¹ See Macneil, *supra* note 6, at 4 ("By contract I mean no more and no less than the relations among parties to the process of projecting exchange into the future.").

¹² The exact set of behavioral norms has evolved over the period of his writings. Recently Macneil has offered the following list:

- (1) role integrity, (2) reciprocity, (3) implementation of planning, (4) effectuation of consent, (5) flexibility, (6) contractual solidarity, (7) the linking norms of restitution, reliance, and expectation interests, (8) the power norm (creation and restraint of power), (9) propriety of means (doing things the "right way"), and (10) harmonization with the social matrix.

Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 *Wis. L. Rev.* 483, 524 n.186; see also Macneil, *supra* note 8, at 274 (providing a somewhat different version).

¹³ Macneil, *supra* note 6, at 5.

¹⁴ See *infra* notes 50-58 and accompanying text.

mation, which he calls "discrete" and "presentiated" contracts,¹⁵ to contracts that govern relationships that exist and evolve over long periods of time, which he terms "intertwined" contracts.¹⁶

Before contrasting my approach with Macneil's, it is important to note the significant features they share in common. We agree that:

Every formal model, to be anything other than an abstract conceptualization must touch down somewhere in the world of reality. Failure to do so leaves the model nothing more than a logic game, interesting perhaps, but with no claim to recognition in the world of reality, beyond whatever merits it has as a game. Without such a nexus it is nothing but chess without a board.¹⁷

This nexus between theory and practice is provided by viewing concepts and theories as problem-solving devices.¹⁸ Therefore, both Macneil and I evaluate legal concepts and practices by considering their "social function."¹⁹ To this end, I have offered my analysis of the social problems of knowledge, interest, and power.²⁰ Macneil starts

¹⁵ Macneil, *supra* note 8, at 275.

¹⁶ *Id.* at 276. This terminology reflects a recent very helpful clarifying revision by Macneil. Where he once distinguished between "discrete" and "relational" types of contracts, he now distinguishes between "discrete" and "intertwined" contracts. He offers the following reason for the change:

[T]he spectrum of exchange relations is ambiguously described when its poles are labeled discrete and relational. This ambiguity may have some bad effects, even apart from simple confusion. It may, for example, contribute to the erroneous, but extremely common, belief that discrete transactions can and do occur free of relations. For that reason, I propose from hereon to describe the poles of this spectrum of exchange relations as discrete at one end and intertwined at the other.

Id. He now reserves the term "relational" to describe "all relations in which exchange occurs, and since all exchange, even the most discrete, occurs in relations, all exchange is thereby 'relational.'" *Id.* This change permits many very different contract theories, including the functional analysis of a consent theory I advocate, to be accurately characterized as "relational" in the Macneilian sense of the word.

¹⁷ Ian R. Macneil, Lon Fuller: Nexusist, 26 *Am J. Juris.* 219, 219 (1981) (footnote omitted).

¹⁸ For an extended account of this view of theories and concepts, see Stephen Toulmin, *Human Understanding: The Collective Use and Evolution of Concepts* (1972).

¹⁹ See, e.g., Ian R. Macneil, *The Many Futures of Contracts*, 47 *S. Cal. L. Rev.* 691 (1974): The keeping of promises, like any other phenomenon serving a social function, tends to fall into disuse when it is perceived that one of two things has occurred: (a) the phenomenon has stopped serving the function and no sufficient substitute function is served, or (b) the cost of having it serve the function has come to outweigh the benefit derived.

Id. at 729 (footnote omitted).

²⁰ For my discussion and use of functionalist analysis, see Barnett, *Sound of Silence*, *supra* note 4, at 829-59; Barnett, *Function of Property*, *supra* note 4; see also Randy E. Barnett,

with what he terms the “primal roots of contract”—society, specialization of labor and exchange, choice, and awareness of the future²¹—and proceeds by continually adding other features of social life as he refines his analysis of contractual exchange. According to Macneil, the “common contract norms . . . give rise to whatever values emerge from all contract behavior and our assessment of it. Those norms and their interplay permit the *widest possible range of ‘successful’ human activity and interaction.*”²² In this regard as in others,²³ both Macneil and I have been influenced by the writings of Lon Fuller.²⁴

Macneil and I also agree that the role of theory is not to determine legal rules, but to evaluate them. In this manner, legal theory provides principles—Macneil usually calls them “norms” and sometimes “normative principles”—that can be used to criticize doctrine, even if a specific set of doctrines cannot be deduced logically from these principles. “[N]orms,” he writes, “supply principles to test specific rules of law.”²⁵ The most that can usually be discerned is that a set of doctrines is inconsistent or consistent with these norms. As Macneil explains, the normative principles of contractual exchange “can, I believe, be serviceable as the foundations for framing more specific legal principles Moreover, they can serve as touchstones for testing the efficacy of those more precise rules in accomplishing their underlying purposes.”²⁶

Most importantly, however, the consent theory of contract is an unabashed *relational* theory of contract. As I said in my original presentation of a consent theory: “Any concept of individual rights must assume a social context. If the world were inhabited by one person, it might make sense to speak of that person’s actions as ‘good’ or ‘bad.’ . . . It makes no sense, however, to speak about this person’s

Foreword: Can Justice and the Rule of Law be Reconciled?, 11 Harv. J.L. & Pub. Pol’y 597 (1988) (discussing the conflict between the values of justice and the rule of law in judicial decision-making).

²¹ See Macneil, *supra* note 6, at 1-4.

²² Macneil, *supra* note 9, at 351 (emphasis added).

²³ See, e.g., *infra* note 64 (discussing the significance of tacit assumptions for contract theory).

²⁴ See, e.g., Macneil, *supra* note 9, at 368 n.73 (“I find it generally . . . helpful . . . to define law in Fullerian terms: the purposive enterprise of subjecting men to the guidance of rules.”).

²⁵ Macneil, *supra* note 6, at 39.

²⁶ Macneil, *supra* note 19, at 810 (footnote omitted).

rights.²⁷ It is only because human beings are in society with others that rights are needed. I have explained elsewhere why we need rights in a social context. I proposed that certain rights are important, in part, to enable the existence of a relational order of actions that permits persons to solve the pervasive problems of knowledge and interest.²⁸ Indeed, the relational aspect of a consent theory is hardly a coincidence. Along with all other contemporary contract scholars, I have unquestionably been influenced both directly and indirectly by Macneil's relational theory.

Notwithstanding the significant similarities, however, it is safe to conclude that Macneil and his adherents would object strongly to a consent theory of contract. In this Essay, I will critically evaluate three distinct aspects of Macneil's relational theory and compare his treatment with mine. First, Macneil insists on characterizing consent as equivalent to promise. In particular, he characterizes true or "real" consent as subjective. For this reason, Macneil considers the objective theory of consent to be a fiction. I maintain that this position is highly contestable and undermined even by arguments Macneil has made in seemingly unrelated contexts. For example, Macneil himself acknowledges that, under certain circumstances, it is meaningful to conclude that parties have consented to default rules, even when such consent was not conscious. In the end, Macneil is far more ambivalent, or possibly ambiguous, about consent than his criticisms of classical and neoclassical contract theory suggest.

The second feature of Macneil's theory that merits scrutiny is his consistent assertion that standing behind all relational exchange or contracts is a socially-enforced system of property. I maintain that although this observation is largely true, somewhat surprisingly it is never properly integrated into Macneil's social analysis. Consequently his social theory of contract is virtually, if not entirely, uninfluenced by any comparable social theory of property. Related to this is the near complete absence in his theory of background rights that can be used to evaluate normatively the legal rights actually recog-

²⁷ Barnett, *Consent Theory*, supra note 1, at 294 (footnote omitted).

²⁸ See Barnett, *Sound of Silence*, supra note 4, at 829-59; Barnett, *Function of Property*, supra note 4. Rights are also needed to address the pervasive problems of power. See sources cited supra note 20.

nized by a legal system.²⁹ In contrast, a consent theory explicitly places contract theory within a larger theory of entitlements or property. It views contracts, as distinguished from other types of exchanges, as transfers of entitlements.

Third, Macneil repeatedly insists that the principle of freedom of contract can best be understood as referring exclusively to the “power of contract” or what I and others³⁰ call “freedom *to* contract.” For this reason, he slights the important functions of the other aspect of liberal freedom of contract—freedom *from* contract—and its import for contract theory. In addition, he does not fully recognize the vital social function of freedom to contract. Given that Macneil is a functionalist, his omission of these important functions of contractual freedom can be expected to lead him to place consent in a highly subordinate position in his relational theory—and he does. My account of a consent theory has placed great stress on the social functions both of freedom to and freedom from contract.

Bearing in mind these three points of comparison, I shall argue that, for all its strengths, Macneil presents a relational theory that is at once too encompassing and not encompassing enough. His conception of contract is too encompassing in that it is unable (or perhaps, more accurately, unwilling³¹) to distinguish between legally enforceable and legally unenforceable exchanges, preferring to focus instead on the common characteristics and functions of all exchanges. At the same time, Macneil’s account lacks sufficient breadth inasmuch as it fails sufficiently to integrate his conception of contract into the set of social norms that it presupposes.

In particular, Macneil’s version of relational theory fails to integrate contract and property—a highly relational concept that performs its own vital social functions and that, as Macneil himself has repeatedly noted, provides the essential backdrop against which con-

²⁹ I take this distinction from Ronald Dworkin, *Taking Rights Seriously* 101 (1977), although Dworkin seems to have abandoned it. The distinction is nowhere to be found in Ronald Dworkin, *Law’s Empire* (1986).

³⁰ See, e.g., Richard E. Speidel, *The New Spirit of Contract*, 2 *J.L. & Com.* 193, 194 (1982) (“In fact, the spirit of a people at any given time may be measured by the opportunity and incentive to exercise ‘freedom to’ and the felt necessity to assert ‘freedom from.’”).

³¹ As I shall argue, Macneil himself appears to have implicitly and sometimes explicitly relied on the conceptions of consent that provide this operative distinction, although he would object to putting these concepts to this theoretical use. See *infra* notes 42-58 and accompanying text.

tractual exchange can be distinguished from theft. It would be surprising if the scheme of property that lies behind contract and that performs vital social functions of its own would fail to influence in any way a realistic understanding of the functions of contract. Here is where Macneil's overbroad conception of contract is related to its lack of sufficient breadth. For, as I shall explain, the social function of property that Macneil neglects contributes both to an imperative that legally enforceable commitments be distinguished from legally unenforceable ones and to a means of drawing such a distinction.

I conclude by suggesting that these various ambivalences and ambiguities of Macneil's writings are probably not random oversights. Instead, they are likely a product of his attempt to embrace conflicting visions of society, in particular what he calls the "community vision" and the "liberal vision."³² Thus an essential cause of the differences between Macneil and myself is that my approach is liberal, whereas his is communitarian.

I. MACNEIL ON CONSENT

Despite the fact that his writings are replete with discussions of consent, it is very difficult to identify exactly what Macneil takes this concept to mean. He does distinguish consent from either choice or voluntariness. Indeed, he views the binding quality of consent as potentially choice-restricting, even choice-destroying.³³ At times, however, it seems that Macneil uses one conception of consent when disparaging traditional contract theory and another when developing his own.

When criticizing traditional contract theories, Macneil implicitly assumes that the only actual or real consent is subjective or "conscious consent."³⁴ He repeatedly disparages the theory of objective assent adopted by nearly all classical and neoclassical contracts theorists as fictitious.

[T]he limited extent to which it is possible for people to consent to all the terms of a transaction, even a relatively simple and very discrete

³² See *infra* notes 107-27 and accompanying text.

³³ See, e.g., Macneil, *supra* note 9, at 392 ("Professor Fried values choice in contract—real choice, not just consent—more than most modern contract theorists, even the so-called Chicago School theorists, who often sacrifice choice in favor of choice-destroying consent.").

³⁴ See Macneil, *supra* note 6, at 49.

one, soon forces the development of legal fictions expanding the scope of “consent” far beyond anything remotely close to what the parties ever had in mind. The greatest of these in American law is the objective theory of contract. The classical American contract is founded not upon *actual* consent but upon objective manifestations of intent. Moreover, in classical law manifestations of intent include whole masses of contract content one, or even both, parties did not know in fact.³⁵

According to Macneil, classical contract “stretch[ed]” the term consent, “especially by the objective theory, and through an imaginative array of fictions. In that approach the norm of effectuation of consent was carried on to a fare-thee-well.”³⁶ In sum, for Macneil, the only true consent is “specific promise genuinely communicated.”³⁷ All else is fiction.

Characterizing actual consent as subjective or conscious consent enables Macneil to emphasize the limitations of using consent to define the exact terms of any contractual exchange because of the inevitable gaps that will exist in any original subjective assent.³⁸ These gaps must then be filled by some means other than by reference to original consent.

³⁵ Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 *Nw. U. L. Rev.* 854, 883-84 (1978) (emphasis added) [hereinafter Macneil, *Adjustment of Relations*]; see also Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 *Va. L. Rev.* 589, 592 (1974) (“When a subjective meeting of the minds became too narrow a concept upon which to base complete presentation, the contract structure shifted to an objective theory of contracts . . .”); Macneil, *supra* note 9, at 373 (“Thus . . . relief is given when the appearance of consent is a false one, when consent to the terms is not ‘real.’”); Ian R. Macneil, *Bureaucracy and Contracts of Adhesion*, 22 *Osgoode Hall L.J.* 5, 6-7 (1984) [hereinafter Macneil, *Contracts of Adhesion*] (“[T]he fundamental idea of liberal contract is not just to *choose to be bound* in some undefined way, but to choose with some degree of precision how and to what one is bound, or at least to be reasonably able to do so.”) (emphasis added).

³⁶ Macneil, *supra* note 6, at 49 (footnote omitted).

³⁷ Macneil, *supra* note 19, at 737. I criticize an exclusively subjective conception of consent in Barnett, *Sound of Silence*, *supra* note 4, at 855-59.

³⁸ Macneil explains:

Professor Fried has recently done contract scholarship the great service of recognizing—from the standpoint of an advocate of the *will or consent theory of contract*—the limitations of consent. Unlike earlier advocates of the objective theory of contracts such as Williston, Professor Fried is more than willing to recognize gaps in contracts and then refrain from trying to cram those gaps into the promise principle.

Macneil, *supra* note 9, at 372 (emphasis added).

[E]ven the simplest transactions go far beyond the capacity of bounded rationality to encompass everything in one grand moment of consent. For that reason, a reservoir of clear, precise content is needed to fill the gaps. In theory, this is provided by sovereign positive law, the purified law of classical contract.³⁹

Yet as I have explained elsewhere,⁴⁰ the concept of default rules changes the prevailing picture of gaps in subjective assent into a more realistic image of consent-to-the-default-rules provided by a legal system.⁴¹

When he turns from criticizing traditional contract theory to developing his own, Macneil himself makes use of this concept, or at least something quite similar. At times, Macneil considers consent to "commence"⁴² relations, the content of which is subjectively unknown to the person consenting, to be real enough consent to legitimize contractual enforcement. For example, he uses this sort of analysis to discuss the consensual basis of arbitration: "[T]he powers of arbitrators are the creation of the consent of the parties."⁴³ According to Macneil, the arbitrator's "consensually limited jurisdiction,"⁴⁴ resolves any gaps that may arise in the course of the contractual relation. And, "[i]f he is found to have exceeded his authority, then the relation is governed by mutual consent, since the only basis for finding abuse of arbitral authority is the court's finding a failure to abide by mutually agreed terms."⁴⁵

Macneil also uses a similar analysis of consent to legitimize contracts of adhesion.

[I]n our economy the idea of the consumer's being committed by consent to the unknown or to take-it-or-leave-it propositions is hardly peculiar to documents. Whenever a consumer buys any bureaucratic

³⁹ Macneil, *supra* note 6, at 62.

⁴⁰ See Barnett, *Sound of Silence*, *supra* note 4.

⁴¹ In addition, in the absence of such consent-to-default-rules, the enforcement of default rules can still be viewed as consensual if these rules reflect the likely tacit understandings of the parties or reduce the likelihood of subjective misunderstandings arising. See *id.* at 859-74.

⁴² Macneil, *supra* note 19, at 751 (discussing the role of "sharp consent" to "commence" relations). In this article, Macneil says that consent to a transaction is characterized by "total uncondition," whereas "consent to a relation" has the quality of "essential fuzziness." *Id.* at 771. He also defers until the future consideration of "the role of consent in transactional and relational contracts." *Id.* at 806 n.321.

⁴³ Macneil, *supra* note 6, at 75.

⁴⁴ *Id.* at 76.

⁴⁵ *Id.* at 76-77.

good he is being committed *by consent* both to the unknown and to take-it-or-leave-it goods.⁴⁶

He explains this statement by identifying an additional type of liberal consent that, to this point in his writings, had played little, if any, role:

Liberal society has always recognized numerous legitimate *relations* into which entry is by consent, but the content of which is largely unknown at the time the consent was given. . . . In spite of our ignorance liberal society will bind us to those unknown restraints. All that is required—besides our individual consent to join—is that the kind of relation in question be one upon which the collective stamp of approval has been impressed.⁴⁷

Similarly, in my account of a consent theory, a person who manifests to another an intention to be legally bound is bound by the default rules in effect in a legal jurisdiction (a) if the cost of discovering and contracting around these rules is sufficiently low, or (b) if these rules reflect the tacit understandings of the community of discourse of which the consenting person is a member.⁴⁸ In these two ways, consent provides a principled normative criterion for impressing on a relationship the “collective stamp of approval”⁴⁹ to which Macneil refers.

More recently, Macneil explored the concept of consent to unspecified relations in a discussion of two forms of Polish marriage. Although he says that “it was the nature of the relationship, rather

⁴⁶ Macneil, *Contracts of Adhesion*, supra note 35, at 18-19 (emphasis added).

⁴⁷ *Id.* at 20-21. Macneil is able to reconcile this acknowledgement of liberal consent by accusing liberal contract theorists of ignoring it:

Having said that liberal society has only *two* bases for restraining its members, now I have introduced a third: consent to join an approved relation. And so I have, but I shall not apologize. My excuse is that mainstream liberal thinking avoids the existence of relations like the plague, because the concept of relation, particularly when it is given the common label of status, is anathema to the individualism upon which liberalism is based. Thus, although liberal societies have *at operating levels* always—and necessarily so—used the consensual status route to *de facto* legitimation, liberal *theorists* largely ignore such legitimation. Instead they try to squeeze legitimation into one of the other two categories first mentioned. Legitimation by consent to relations approved by society is, whenever possible, hidden in the liberal intellectual closet.

Id. at 21 (footnote omitted). Whether or not this is a valid criticism of prior liberal theorists, my analysis of default rules and consent relies, in part, on just this basis of consensual legitimacy. See Barnett, *Sound of Silence*, supra note 4.

⁴⁸ See Barnett, *Sound of Silence*, supra note 4, at 864-67.

⁴⁹ Macneil, *Contracts of Adhesion*, supra note 35, at 21.

than the role of consent which made the difference"⁵⁰ between the two institutions, still, "[c]onsent . . . did establish both relationships."⁵¹ Moreover, "[t]he more intertwined the relation triggered by consent, the more intertwined is the role of consent"⁵²

Perhaps most significantly, in the course of minimizing the importance of consent for determining the content of the obligations incurred,⁵³ Macneil does allow a meaningful difference between relationships that are "actively" consented to and ones that are otherwise imposed by a community (to which a person may have "consented" by not emigrating): "Certainly, a pattern of marriages arranged by communal elders in accordance with kinship lines would, all else being equal, be more intertwined than marriages to which the spouses *actively consent* with less community direction."⁵⁴ This observation is important because Macneil has been known to question a distinction between consensual relations and nonconsensual ones when made by liberals.⁵⁵ In sum, although Macneil does not let this type of consent

⁵⁰ Macneil, *supra* note 8, at 288.

⁵¹ *Id.* at 289.

⁵² *Id.*

⁵³ Macneil emphasizes:

Moreover, the consent to both kinds of marriage was, at most, but a trigger, not something that shaped the relation. *Both* the lifelong permanence of the traditional Polish marriages and the lesser permanence of the Polish-American marriages came from the communities in which they occurred, not from variations in the terms of consent.

Id. at 289. Macneil does not consider whether a factor such as consent that "triggers" a relationship may properly shape, if not the relation itself, then the default rules that regulate the relationship when it turns sour, or to use one of Macneil's terms, "pathological." Ian R. Macneil, *Whither Contracts?*, 21 *J. Legal Educ.* 403, 408 (1969). "[C]ontracts get along very well without the law most of the time, or at least without its active intervention. The law thus has to deal largely with pathological cases." *Id.* (footnote omitted).

⁵⁴ Macneil, *supra* note 8, at 289 n.44. (emphasis added).

⁵⁵ For example, Macneil criticizes Robert Ellickson's distinction between "the sometimes involuntary nature of membership in a city versus the *perfectly voluntary nature of membership in a homeowners association*," Macneil, *Bureaucracy*, *supra* note 10, at 944 n.173 (alteration in original) (quoting Robert C. Ellickson, *Cities and Homeowners Associations*, 130 *U. Pa. L. Rev.* 1519, 1520 (1982)), as follows: "Unlike the market vision, however, the community vision is not so bemused by property rights as to believe that agreements relating to their creation and exchange are voluntary." *Id.* at 944. In a footnote, Macneil continues: "In fact, of course, membership in homeowners' associations is voluntary only if one ignores the coercion inherent in property rights." *Id.* at 944 n.173. Macneil may just be criticizing Ellickson's use of the phrase "perfectly voluntary," which he italicizes when quoting Ellickson, or he may be distinguishing between "voluntary" consent and "involuntary" (or less voluntary or "pressured") consent. Nonetheless, the distinction *he* is willing to make in the Polish marriage

mitigate his criticism of what he calls "liberal contract,"⁵⁶ he does allow that it is a form of genuine *legitimizing* consent.⁵⁷ Another example of Macneil's willingness to see the presence of consent as making a difference is a distinction he suggests between transactions that are generated by consent and those that are generated by bureaucracies.

Discreteness may be different in a discrete transaction generated by consent than it is when generated by bureaucratic rules in a complex relation. . . . If there is a difference in the discreteness of the two situations, as I believe there is, the difference originates in the presence of consent of the "governed" in the one form and its absence in the other.⁵⁸

I must once again stress that because Macneil appears to use the concept of consent in quite different ways depending on the context of his usage, I cannot be sure that in each of these examples he is using consent in the same way. Still, in light of his usual reticence to acknowledge the moral significance of this sort of distinction,⁵⁹ it is important to note that he does employ it on occasion. This suggests that a consent theory's distinction between commitments that are accompanied by a manifested consent-to-create-legal-relations or consent-to-be-legally-bound and those that are not consented to in this manner cannot be dismissed by him as meaningless, or more importantly, functionless.

context is one that is compatible with the account of consent I have elaborated in Barnett, *Sound of Silence*, supra note 4.

⁵⁶ See Macneil, *Contracts of Adhesion*, supra note 35:

In [liberal] theory, only two justifications exist for applying rules to anyone, both founded on consent. One is individual or contractual consent, whereby individual manifestation of a willingness to be bound in relatively specific ways constitutes submission to rules (sometimes hereinafter called "liberal contract").

Id. at 5.

⁵⁷ But he does so with some ambivalence. See Macneil, supra note 12, at 501-02 ("Since assumption of obligation is indistinguishable from promise, balance-theory is simply another promise-centered theory.").

⁵⁸ Macneil, supra note 9, at 364 n.67.

⁵⁹ See, e.g., Macneil, supra note 12, at 503 n.84, quoting with approval: "The free will concept . . . has serious shortcomings. Because both normal contracts and those formed under duress result from a choice between alternative evils, it is impossible to distinguish one situation from the other on the basis of any difference in the freedom of the consent." Note, *Economic Duress after the Demise of Free Will Theory: A Proposed Tort Analysis*, 53 *Iowa L. Rev.* 892, 894 (1968).

Related to his acknowledgement of consent-to-relations where the terms of the relation are provided by others, Macneil also discusses the concept of tacit understandings, albeit in the context of planning, not consent. He writes, “[c]ommunication is here arbitrarily distinguished from uncommunicated basic assumptions below the threshold of mutual consciousness, a limitation on the concept which runs immediately into major trouble as soon as one thinks about the ‘tacit assumptions’ of real life.”⁶⁰ “Such [tacit] assumptions,” he explains, “may range from general ones such as trust to the highly specific, such as assumptions about particular and precise trade usages.”⁶¹ Later he observes, “[w]hen such tacit assumptions concern an exchange, and when they are mutual assumptions, they serve the same planning functions as specifically expressed mutual consent.”⁶² In terms that now sound very much like the concept of consensual default rules, he says: “In such instances planning is *by default*, but it is no less significant on that account in terms of future impact.”⁶³

Although in these passages Macneil is claiming that tacit assumptions permit planning by default in the absence of expressed mutual consent, he fails to explain why the same commonly-held tacit or non-conscious assumptions that permit planning do not also influence the actual meaning of expressed consent—in particular the meaning of silence—even when parties may not have consciously considered an issue. Nor does he explain why choosing default rules that reflect the tacit assumptions of most persons in the relevant community of discourse as a way of effectuating the actual consent of contracting parties is somehow contrary to a liberal conception of contract.⁶⁴ Because Macneil is a prisoner of a purely subjectivist conception of consent, he misses the fact that the existence of tacit assumptions

⁶⁰ Macneil, *supra* note 19, at 717 n.76. See also Macneil, *supra* note 6, at 25 (“One important aspect of incomplete planning in relations is the tacit assumption.”).

⁶¹ Macneil, *supra* note 6, at 25.

⁶² Macneil, *supra* note 19, at 773.

⁶³ *Id.* at 774 (emphasis added).

⁶⁴ For my account of how tacit assumptions bear on the proper interpretation of consent, see Barnett, *Sound of Silence*, *supra* note 4, at 875-85. In stressing the role of tacit assumptions, both Macneil and I draw on the legacy of Lon Fuller. See Macneil, *supra* note 19, at 772-73; Macneil, *supra* note 6, at 25.

greatly expands the domain of actual consent and shrinks the domain of coercively imposed gapfillers.⁶⁵

In sum, by acknowledging the importance of tacit assumptions in planning, Macneil opens the door to an expanded, more realistic notion of contractual consent that is not limited to matters about which the parties consciously deliberated. Thus there exists an alternative to the stark contrast Macneil draws between “conscious consent” and no consent.⁶⁶ When Macneil argues that “the ‘great sea of custom’ . . . forms the main structure of contract”⁶⁷ and explicit promise the exception, he does not realize that this argument against consent turns on itself. For, if custom is a reflection of our shared tacit assumptions and the reverse, then custom can be seen as the embodiment of what parties in the relevant community actually, not fictitiously, consent to when they manifest their intention to be legally bound.

From the foregoing discussion, one finds that although Macneil would surely reject any approach that attempts to limit legal contracts to those that are accompanied by a manifested intention to be legally bound—or “consent” as I use the term—most of his arguments against consent are aimed at a quite different target. Macneil’s sustained criticism of “consent” is really an attack on theories that place too much stress on what he characterizes as “discreteness” and “presentation”⁶⁸ rather than on consent itself. That is, it is a criticism of the notion that every term that will be found to govern a

⁶⁵ Another reason for this oversight is that Macneil is a prisoner of his communitarianism. See *infra* part III.

⁶⁶ Macneil discusses the scope of consent as follows:

Since virtually any contract has far more complex consequences than anyone can possibly *have in mind at once*, one of two things must happen. Either the scope of the power created is beyond the realm of *conscious* consent, or important aspects of the contract remain subject to free exercise of further choice by the consenting party.

Macneil, *supra* note 6, at 49 (emphasis added) (footnote omitted). I am not suggesting, however, that tacit assumptions on every possible eventuality exist at the time of contract formation. Rather, my point is that when actual consent embraces tacit as well as conscious assumptions the domain of actual consent is increased vastly beyond what Macneil and his adherents acknowledge.

⁶⁷ Macneil, *supra* note 19, at 731.

⁶⁸ See Macneil, *supra* note 6, at 60. Macneil writes:

Discreteness and presentation are themselves not the same phenomenon, in spite of their merger in discrete contracts. Discreteness is the separating of a transaction from all else between the participants at the same time and before and after. Its ideal, never achieved in life, occurs when there *is* nothing else between the parties, never has been,

relationship is consciously consented to at some magic moment of contractual conception that is completely divorced from the relations that precede and succeed contract formation. On this issue, Macneil has clearly prevailed. But criticisms of theories that identify consent exclusively with discreteness—and especially with presentation—do not apply with equal force to a consent theory that includes consent-to-default-rules and the nonconscious tacit assumptions that pervade contract as part of its conception of consent.

Macneil's arguments against consent, then, apply only within a particular context. He offers nothing to refute the importance of a conception of consent that lies outside that context. Because a consent theory of the sort I favor is compatible conceptually with either highly discrete and presentiated or highly intertwined contracts, arguments effective against theories identifying consent exclusively with fully specified, conscious consent at the moment of formation are inapplicable to my approach.⁶⁹

Although surely rejecting consent-to-be-legally-bound as the criteria of contractual enforcement, in his otherwise salutary effort to broaden our conception of contract, Macneil has adamantly refused to offer his own principled, or at least discernable, distinction between those Macneilian contractual exchanges⁷⁰ that merit legal protection and those that do not. This is, however, one of the singular problems that contract theory, as opposed to a more general social theory of exchange, attempts to address. Although Macneil clearly views legal enforcement as "reinforcing" contractual exchange,⁷¹ he says little

and never will be. Presentation, on the other hand, is the bringing of the future into the present. Underlying both is the ideal of 100 percent planning of the future.

Id.

⁶⁹ Consider an analogy to the longstanding nature-nurture debate concerning human personality. The discrete, presentiated, "transactional" view of contract Macneil is criticizing is akin to the argument that everything about a person is shaped by the genetic combination that occurs at the moment of egg joining sperm. The "relational" view of contract he is defending is akin to the argument that also allows a substantial role for environmental factors experienced over the course of a lifetime to shape one's personality. Arguments stressing the important role of environment that are effective against purely genetic theories of personality will be ineffective against a competing theory that takes environment seriously.

⁷⁰ I do not use the term "Macneilian contractual exchange" facetiously, but simply to refer to his broad conception of contract that includes all exchanges that are projected into the future, not just legally enforceable ones.

⁷¹ See Macneil, *supra* note 53, at 406 ("[P]otential sanctions external to the 'contract' itself are incorporated or added to give reinforcement to the relationship. We are perhaps inclined

about when this reinforcement is or is not appropriate. As such, for purposes of legal theory his conception of contract is overbroad. That an infallible rule providing “[s]harp in by clear agreement; sharp out by clear performance”⁷² may be unattainable does not eliminate a social need for a principled distinction between the two realms, however difficult it may be at times to apply to actual situations.

The liberal conception of the rule of law⁷³ is based on the notion that persons need access to knowledge of when they will be subjected to legal sanctions and when they will not. In this way, they can not only avoid the heavy transaction costs imposed by a legal regime that Macneil himself has emphasized in his criticisms of neoclassical economic models,⁷⁴ but they can also order their actions so as to achieve social harmony, rather than social conflict. It does persons who would contemplate engaging in Macneilian contractual exchanges little good to be told that “maybe legal sanctions will be used to ‘reinforce’ your relationship, but maybe not. Ask us again *after* you exchange.” Of course, a principle limiting legally enforceable contracts to those agreements to which there has been a consent to be legally bound is but a principle and like all principles, concepts or distinctions, including those that Macneil employs for his purposes,⁷⁵ it is not without its difficulties of application. However, even the imperfect information provided by this, or any other, legal principle is preferable to no guidance whatsoever—particularly when this principle is instantiated in more specific rules that are easier to apply to specific facts, such as the doctrine of bargained-for consideration.⁷⁶

to think of these sanctions as being legal sanctions, but they are, of course, not so limited . . .”).

⁷² Macneil, *supra* note 19, at 738.

⁷³ See Barnett, *supra* note 20.

⁷⁴ A particularly lovely example of his recognition of the heavy costs imposed by legal enforcement is his criticism of the Posnerian theory of efficient breach:

Although [Posner] stresses the transaction costs of negotiations needed to reach efficient results . . . he pays no attention to the transaction costs of talking after a breach. And this is so despite the fact that “talking after a breach” may be one of the more expensive forms of conversation to be found, involving, as it so often does, engaging high-priced lawyers, and gambits like starting litigation, engaging in discovery, and even trying and appealing cases.

Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 Va. L. Rev. 947, 968-69 (1982).

⁷⁵ See *infra* notes 81-84 and accompanying text.

⁷⁶ This is in no way to endorse an *exclusive* reliance on this criterion of enforceability. See Barnett, *Consent Theory*, *supra* note 1, at 310-17; Barnett & Becker, *supra* note 3.

The inability of Macneil's classificatory apparatus to distinguish in a principled manner between enforceable and unenforceable exchanges sometimes makes an appearance in surprising ways. For example, in one article he lists a variety of examples of exchange including the following:

A. Spot purchase from a stranger of 500 tons of coal in a market of many sellers, Seller's agents delivering the coal by truck dumped at Smelter's yard, cash being paid on delivery of each load.

B. Same as Illustration A, except that Seller is one from whom Smelter usually buys its coal, terms are thirty days credit, and Seller is tolerant of arrearages for fairly lengthy periods.⁷⁷

Macneil later asserts that "the extension of credit in Illustration B results in Seller's having power to use legal process to try to collect the debt should Smelter fail to pay."⁷⁸ *Why* a legal power results from this exchange, as opposed to any other Macneilian contractual exchange, is never explained as near as I can determine.⁷⁹ Later in the article, Macneil makes the same unexplained assertion: "The unilateral power created by the sale on credit of coal . . . appears to be quite specific and clear, namely, the legal right to enforce contractual obligations."⁸⁰ We simply are never told why these transactions are *legally* enforceable.

Macneil's antipathy for providing guidance as to when legal enforcement will result from exchange activity may stem from his antipathy to drawing any distinction between private and public power.⁸¹ For example, Macneil is critical of Richard Epstein's will-

⁷⁷ Macneil, *Rich Apparatus*, supra note 10, at 1025.

⁷⁸ *Id.* at 1037.

⁷⁹ This may not be entirely accurate. In the article, Macneil also says that: "Every exercise of bilateral power, is, by definition, an exercise of unilateral power (with the consent of another holder of different unilateral power) via exchange." *Id.* at 1054. One could interpret this passage and the rest of his discussion here as hewing implicitly to an entitlement theory of contract by asserting that the subject of the transfer in question involved a property right (or power) such that an exchange of powers necessarily had legal implications. Because this would be to impute to Macneil what in essence is a consent theory of contract of the sort I have advanced, I am hesitant to do so without considerably more explicit textual support.

⁸⁰ *Id.* at 1052.

⁸¹ See Macneil, *Bureaucracy*, supra note 10, at 903-04 (referring to "any bureaucracy, private as well as public—*whatever that distinction means*—good as well as bad, however you measure goodness and badness.") (emphasis added) (footnote omitted). Macneil also states that "[g]iven even a relatively modest governmental structure, its interconnections make its

ingness, when discussing the case of *Texaco, Inc. v. Short*⁸² during a faculty seminar at Northwestern, to draw a principled distinction between the power of “Leviathan,” meaning the government—in particular, the State of Indiana—and that of Texaco. Macneil argues that both are Leviathan. “Indiana has the positive law on its side and annual revenues in 1981 of five and a half billion dollars. . . . Texaco has the power conferred on it by property law and annual gross revenues in 1981 of fifty seven billion dollars, ten times Indiana’s.”⁸³

Although Macneil found Epstein’s comment to be “amusing[],”⁸⁴ a few short years later, Texaco and its many shareholders found nothing amusing about its run-in with a judge and twelve jurors in the State of Texas who forced it into bankruptcy over the issue of whether or not a contract had ever existed between the Getty Foundation and Pennzoil.⁸⁵ That these thirteen people could so humble such a “leviathan” as Texaco is a fact worth taking seriously in social and legal theory. If Texaco is a leviathan, then all leviathans are not created equal—and the differences among them are not merely matters of degree but are also matters of kind. Comparing the gross revenue of Texaco with the combined salaries of the judge and jurors reveals only that relative wealth cannot be the most salient characteristic of the power exercised by a legal system.⁸⁶

Given the dangers inherent in the exercise of such public power, it would seem desirable to have discernable legal precepts by which law-

bureaucracies part of the private bureaucracies, thereby further bringing into question any radical distinctions between public and private bureaucracy.” *Id.* at 919.

⁸² 454 U.S. 516 (1982).

⁸³ Macneil, *Bureaucracy*, *supra* note 10, at 918 n.65 (citation omitted). Macneil continues: “To think that the power of positive law necessarily outweighs the disparities of power resulting from control over dollars is to live in a dream world.” *Id.* But the word “necessarily” deprives this sentence of much that is controversial. The real issue is whether there is something characteristic about the power of the state that makes special safeguards against this exercise of power important.

⁸⁴ *Id.* at 917 n.65.

⁸⁵ *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987). Texaco was accused of tortiously interfering with a contract between Getty Foundation and Pennzoil. Had the court found no contract to have existed, Texaco would have been held to be free of tort liability. *Id.* at 784.

⁸⁶ Nor is it an adequate response to point out that the other party to the lawsuit, Pennzoil, was also a leviathan. It was the particular public power of the State of Texas as lodged in the trial judge and jury that decided which of these private powers would prevail. There is something qualitatively different about the power of the State of Texas that merits a separate word like “public” to describe it accurately.

yers could advise both behemoths and individuals alike as to whether they are exposing themselves to the weight of legal coercion. Had these legal specialists accurately discerned that Getty and Pennzoil had a legally binding contract,⁸⁷ the directors of Texaco might well have acted quite differently than they did, thus avoiding considerable expense and anguish.⁸⁸

The problem of distinguishing *ex ante* in a principled manner legally enforceable from legally unenforceable commitments is simply not a social problem that interests Macneil enough for it to play a role in his social theory of contract. Consequently, his approach provides little explicit guidance as to how this problem should be addressed. In light of this, it should come as no surprise that Macneil neglects those aspects of the liberal conception of justice—the concept of several property and the principle of freedom from contract—that function in part to address this social problem. In contrast, a principal concern of a consent theory of contract has been to address just this issue. The aspects of liberalism that perform this social function thus play a much greater role in my approach than in his.

II. MACNEIL ON PROPERTY AND FREEDOM OF CONTRACT

Turning now away from the problem of having an overencompassing conception of contract, I shall consider how Macneil's relational theory of exchange is, somewhat surprisingly, not encompassing enough. I say surprising because the normal reaction to Macneil's theory is Oliver Williamson's observation that "[s]erious problems of recognition and application are posed by such a rich classificatory apparatus."⁸⁹ In this Section, I offer precisely the opposite criticism:

⁸⁷ Of course, the existence of the contract was not the only issue in this case, which involved the tort of wrongful interference with contract. Among other things, Texaco must have also had actual knowledge of the agreement with Pennzoil before it could have been held to wrongfully interfere with any contract that may have existed. *Texaco*, 729 S.W.2d at 796.

⁸⁸ In addition, the huge transaction costs caused by the lawsuit could also have been avoided or reduced if Texaco's lawyers, even after the fact, had been more certain of the justice of Pennzoil's claims.

⁸⁹ Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 *J.L. & Econ.* 233, 236 (1979). Macneil replied to Williamson that "[a] 'rich classificatory apparatus' of *some* kind is essential if contractual relations are to be both understood and subjected to successful, realistic, and reasonably consistent analysis." Macneil, *Rich Apparatus*, *supra* note 10, at 1025 n.26. See also Macneil, *supra* note 9, at 402 ("The common contract norms form what has been criticized as a 'rich classificatory apparatus,' relational contract theory being rich in the sense that the various norms are many

Macneil's classificatory apparatus is not rich enough. In particular, by failing to offer a social theory of property that corresponds to his social theory of exchange, he attempts to view Macneilian contractual exchange—and a fortiori legally enforceable contracts—largely apart from the function played by the liberal concept of several property.

In light of this theoretical gap, it is especially intriguing that Macneil has from his earliest writings to the present consistently asserted that the concept or practice of contract presupposes the concept of property. In 1974, he said that “exchange transactions can occur effectively only if property rights receive socioeconomic support from others besides the parties to the transaction.”⁹⁰ His later writings are replete with similar observations.⁹¹

More than once, and usually when criticizing economic analysis, Macneil has acknowledged that a background set of entitlements is needed to distinguish conceptually exchange from theft. As he states, “[t]he practical inability to get what is desired without paying, imposed by property rights and sanctions, results in exchange rather than theft. . . . [P]arties are aware of these rights and abide by them as a social norm”⁹² Elsewhere he maintains that “[r]elations are in fact assumed which permit exchanging by precluding theft, etc., but

and constitute core concepts, rather than theoretically precise, on-off ideas like maximization.”) (footnote omitted).

⁹⁰ Macneil, *supra* note 19, at 746. In Macneil's lexicon, “transaction” lies on the discrete, presentiated end of the contractual spectrum, so this quotation, and others as well, could be interpreted as limiting the role of property rights to these sorts of exchanges. However, Macneil does not always confine this observation to this specific context. Moreover, because he generally acknowledges the social necessity of having such transactions (his criticism is that contract is *more* than just transactions), he could also be seen as acknowledging the social necessity of the concept of property that lies behind transactions.

⁹¹ See, e.g., Macneil, *Rich Apparatus*, *supra* note 10, at 1036:

Members of *any* society have unilateral power arising, *inter alia*, from the existence of property and other rights (such as liberty) conferring on the powerholders the ability to impose sanctions on others interfering with those rights. (This is, essentially, the “power to be let alone” with one's property and oneself.)

Id. (first emphasis added). See also, Macneil, *supra* note 9, at 375 (“[T]he most fundamental sovereign *creation* of power affecting contracts is first, sovereign enforcement of liberty and property rights among the populace and their organizations, and second, sovereign enforcement of contracts.”); Macneil, *Contracts of Adhesion*, *supra* note 35, at 20 (“Thus we find that the idea of individual consent, upon which our traditional notions of contract are based, is in fact set upon a foundation of coercion made possible by property and liberty, which themselves are legitimized by collective consent.”).

⁹² Macneil, *supra* note 19, at 795 n.290.

which have no effect whatever on the content of the exchanges made. If this is an anomaly, then so it is."⁹³

Although it may not be an "anomaly" in Macneil's theory, it is surely an oversight to assume without argument that the best theory of contractual exchange might not be affected by whatever theory of property lies behind it. More specifically, it may be a mistake to assume that the concept and institution of property bears no functional relationship to the concept and institution of contract, especially to the distinction between enforceable and unenforceable contracts. This gap in Macneil's relational theory is as potentially significant as the omission of relational factors and norms and the single-minded pursuit of pure presentation that Macneil attributes to classical contract theorists.

Macneil's uncharacteristic silence on the nature and scope of the property rights that, he concedes, underlie legally enforceable contracts significantly affects his treatment of contractual freedom. Notwithstanding that his earliest contract writings distinguished between freedom from and freedom to contract,⁹⁴ from then to the present, Macneil has consistently maintained that freedom of contract is a misleading misnomer that is better called the "power of contract," which corresponds to freedom to contract.⁹⁵ With rare exceptions, he

⁹³ Ian R. Macneil, *Contract Remedies: A Need for Better Efficiency Analysis*, 144 J. Institutional & Theoretical Econ. 6, 7 n.4 (1988).

⁹⁴ In 1962, Macneil wrote:

Power of contract is one of two sides of freedom of contract. On one hand, freedom of contract is freedom from restraint, an immunity from legal reprisal for making or receiving promises. On the other hand, it is not really a freedom of contract, but a power of contract, a power to secure legal sanctions when another breaks his promise. Ian R. Macneil, *Power of Contract and Agreed Remedies*, 47 Cornell L.Q. 495, 495 (1962). Macneil's version of this distinction is a bit murky. Freedom from contract is more accurately conceived as immunity from having one's entitlements transferred to another without one's consent. Elsewhere in the same article, Macneil acknowledges that: "A party is free to contract or not to contract" and that a party has a "right not to contract." *Id.* at 511 n.54.

⁹⁵ See, e.g., Macneil, *Adjustment of Relations*, *supra* note 35, at 873 n.55 ("Freedom of contract here means, of course, power of contract, e.g., the power to bind oneself, by agreement, to further action or consequences to which one otherwise would not have been bound."); Macneil, *supra* note 9, at 370 ("Freedom of contract is almost always used to mean freedom to bind oneself by contract—that is, to cause the sovereign to confer power on the other contractor to enforce the contract against one's self."); Macneil, *Contracts of Adhesion*, *supra* note 35, at 23 n.40 ("I label [freedom of contract] 'so-called' not because of a distaste for it, but because freedom of contract is a misleading term; for most purposes it is better called 'power of contract.'").

has focused exclusively on this aspect of contractual freedom whenever the subject arose.⁹⁶

His neglect of freedom from contract is directly related to his neglect of property and its functional relation to contract. For Macneil considers freedom from contract to be an aspect, not of contract theory, but of what he terms “basic property and liberty rights”:

The basis for the right *not* to contract is so obvious—and one would think especially to those trained in economics—that it hardly seemed necessary at the time to explain it or to explain that the basis is *not* to be found in the power of contract. *It arises out of the basic property and liberty rights underlying the institution of contract.* Property rights are rights to have others not interfere with possession, use, etc., and normally these include rights *not* to have to contract with others wishing to deprive the rights holder of those rights by agreement.⁹⁷

Macneil’s relational theory of contract, therefore, ignores the vital social functions performed by freedom from contract because it ignores the social functions of property rights as well as the functional relationship between property and contract.

My criticism is not merely that Macneil fails to analyze property as thoroughly as he analyzes exchange. He is certainly entitled to concentrate his attention primarily on exchange if he wishes. Rather, I am maintaining that his relational theory of contract is both greatly influenced and distorted by his exclusive focus on exchange to the exclusion of any treatment of its functional relationship to the conception of property that exchange presupposes. This omission is manifested in two ways.

First, as just explained, Macneil entirely fails to take into account the vital social functions performed by the liberal principle of freedom from contract, a subject I have discussed at length elsewhere.⁹⁸ Consequently, his relational theory of contract makes no effort to deal with the danger of contractual overenforcement—that is, the enforcement of commitments that ought not be enforced. Without considering these dangers, the advantages of liberal contract theory and doctrine that, at least in part, address this problem will be seriously underestimated. This accounts for Macneil’s patent lack of concern

⁹⁶ For a fuller discussion of the distinction between freedom from and freedom to contract and its social function, see Barnett, *Sound of Silence*, *supra* note 4, at 839-41, 869-73.

⁹⁷ Macneil, *Rich Apparatus*, *supra* note 10, at 1058-59 n.115 (third emphasis added).

⁹⁸ See Barnett, *Sound of Silence*, *supra* note 4, at 831-55.

to provide any principled distinction between enforceable and unenforceable commitments.

Second, Macneil's relational theory takes an overly restricted view of the social function of freedom to contract, or what he calls the "power of contract." The only function he acknowledges that this principle serves is that of enhancing the value of resources that are the subject of exchanges. According to Macneil, when an exchange of control of resources designated by the concepts of "ownership" or "property" occurs,

it is productive *only* because the exchange per se—virtually by definition, and certainly in effect—is expected to enhance the value of the items exchanged. . . . While discrete exchange is commonly a prelude to further physical production, and while it enhances value by itself, it does not achieve physical production. This is not to minimize its importance or to denigrate its social value, but to recognize its nature.⁹⁹

Perhaps it is Macneil's preoccupation with physical production, which is reflected in this passage, that causes him to give short shrift to the equally vital production of information that is made possible by adherence to the liberal principles of freedom from and freedom to contract.¹⁰⁰

Whatever the reason, in considering the social function of exchange of property rights, Macneil focuses exclusively on the physical effects of such exchange while ignoring the informational effects.¹⁰¹ Nowhere in his voluminous writings, for example, does he consider the informational function of the price system that the two liberal principles of contractual freedom, along with the concept of several property, make possible.¹⁰² When I exercise my freedom to sell my house at the prevailing market price my actions will affect the price signals that others receive concerning the social demand for their houses. But as important, when I exercise my right to refrain from

⁹⁹ Macneil, *supra* note 12, at 487 (emphasis added) (footnotes omitted).

¹⁰⁰ See Barnett, *Sound of Silence*, *supra* note 4, at 831-55.

¹⁰¹ See Macneil, *supra* note 12, at 486 n.13 ("Transfer of control by discrete exchange often involves some movement of the goods and services. This movement may be—indeed usually is—productive in the *physical* sense.") (emphasis added); *id.* at 487 ("[W]hen discrete exchange occurs, it does so at interfaces between quasi-independent entities, and is not in itself *physically* productive.").

¹⁰² See Barnett, *Sound of Silence*, *supra* note 4, at 846-48.

selling my house I also affect, by my inaction, the market price of houses and thereby contribute to a more knowledgeable use of resources. Indeed, market prices would never arise without the freedom to refuse to consent to an exchange.

In one passage, Macneil considers, and then misses, the knowledge-generating function of exchange made possible by both freedom to and freedom from contract:

At first thought, one might conclude that knowledge, a good, can be created by discrete exchange, e.g., the sale of a book on carpentry. But, of course, a book is not knowledge, merely a source of it; the production of knowledge comes, alas, from reading, not from acquiring, the book. Knowledge can, however, be created by the processes of relational exchange—witness any classroom.¹⁰³

Like many others, Macneil fails to appreciate the essential “social-educational” function of consensual exchange itself.¹⁰⁴ An omission this serious cannot help but have significant implications for his relational theory of contract. For example, at one juncture in his analysis, Macneil relies on the institution of market cost, as though this information were not a product of the very processes he was seeking to explain.¹⁰⁵ Thus, the explanation of the value of contractual freedom provided by Macneil’s relational theory of contract, which he never denies, is a pale one.¹⁰⁶

¹⁰³ Macneil, *supra* note 12, at 486 n.13. Macneil apparently has in mind the direct impartation or explicit exchange of knowledge between teachers and students.

¹⁰⁴ Intriguingly, in another context, Macneil sees how organization can be a form of knowledge: “[T]he very way we organize our thinking is a form of knowledge.” *Id.* at 484. So is the way we order resource holdings and transfers.

¹⁰⁵ See *id.* at 489 n.24:

For the purpose of understanding relational contract it is probably unnecessary to deal with the troubling questions about the relative importance of labor and capital, labor value, and the like, as long as we use the same measure, e.g. market cost, for inputs into both physical production and exchange.

Id.

¹⁰⁶ See Macneil, *supra* note 94:

The use of the word “freedom” to describe a power to compel may be confusing, but the usage is not as anomalous as it first appears. Contract has been and is an extremely flexible libertarian instrument for arranging social and economic relationships. It has the capacity of utilizing and channeling legal authority so that society can operate with a relative minimum of limitation on the freedom from restraint of its members. In view of the function of contract in the preservation of freedom it is not surprising that rights to its availability came to be known as freedom of contract.

Id. at 495 n.1. All of this may be true, but is far from the full story.

III. CONFLICTING VISIONS: COMMUNITARIANISM, LIBERALISM, AND CONSENT

The core of Ian Macneil's lasting contribution to contract theory is his insistence that the values of "discreteness" and "presentation" are not synonymous with all contracts, but comprise one pole of a continuum that ranges from highly discrete relations to those that are highly intertwined.¹⁰⁷ Furthermore, even highly discrete contracts are embedded in a complex fabric of relations. These insights of Macneil's relational theory were neither as simple nor as obvious as they may seem today. It took enormous effort by Macneil to persuade the community of contracts scholars to broaden its vision of contract; detailed work was needed to trace the implications of this shift. Moreover, these are insights that can be, and have been, embraced by a wide variety of legal scholars representing a broad theoretical and ideological spectrum.¹⁰⁸ To a significant degree, we are all "relation-
alists" now.

If, however, these important truths at the core of Macneil's relational theory are compatible with a wide variety of theoretical approaches to contract, then Macneil's antipathy towards consent stems not from the core of his theories, but from the periphery. If, for example, a consent theory is compatible with Macneil's account of the embeddedness of contracts in a web of social relations and the contractual incompleteness that results from the intertwined nature of contracting parties' ongoing relationships, then the source of his opposition to placing consent at the heart of contract must lie elsewhere. Indeed, Macneil himself would surely bristle at any suggestion that his theory did not extend well beyond what I am calling his "core" insights.

In the passages from Macneil already cited, we have seen some evidence that his ambivalence towards consent does stem from another source. For example, his reluctance to concede any meaning to the

¹⁰⁷ Although Macneil would resist reducing his relational theory to this brief statement, he has stated that "the discrete-intertwined (relational) spectrum remains the most fundamental adjunct to relational contract theory. It captures much of what I believe to be essential differences between contractual relations." Macneil, *supra* note 8, at 278.

¹⁰⁸ Compare Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 *Ann. Surv. Am. L.* 139 (presenting a leftist version of relational theory), with Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 *Va. L. Rev.* 1089 (1981) (presenting a law-and-economics version of relational theory).

public-private distinction cannot be said to depend on the core insights of his relational theory.¹⁰⁹ Surely there is no reason in principle why some highly intertwined relationships that we call “private” cannot be qualitatively distinguished from others that we call “public.” Although Macneil readily disparages as artificial liberal distinctions such as this that he dislikes,¹¹⁰ he, like any other scholar, is more than willing to employ highly imperfect and artificial distinctions that he thinks are clarifying or otherwise helpful.¹¹¹ Macneil’s persistent indifference both to property—a concept that is as relational as contract—and to “freedom from contract” are further indicia that something beyond the core of his relational theory accounts for his hostility to placing consent at the heart of contract.

That “something else” is not hard to find, and in his later writings has been made explicit: Macneil is a communitarian. As he puts it, “[t]he vision I have in mind is that of community.”¹¹² Macneil has discussed his communitarian views at some length and I cannot fairly summarize them here.¹¹³ Perhaps the following passage will convey Macneil’s vision:

¹⁰⁹ See *supra* notes 81-84 and accompanying text.

¹¹⁰ Another example is his refusal to exclude from the category of contracts highly coerced or pressured choices on the grounds that “however inutile it may be to include the extreme coercive end—the holdup—it will be more inutile to draw an *artificial boundary line* or area somewhere along the way towards the non-coercive end.” Macneil, *supra* note 19, at 703 (emphasis added). However, whether it is “inutile” to draw an “artificial boundary line” will depend primarily on the problems one is trying to understand and solve. Distinctions inutile for Macneil may become essential when considering the social problems of knowledge, interest, and power.

¹¹¹ Some examples are his distinction between “particularly contractual” and “supracontractual” norms. Macneil, *supra* note 9, at 350 n.30 (“Once contract is perceived to encompass all aspects of life, there can be no supracontract norms that are not *particularly contractual*.”). Another is his distinction between “external” and “internal” contract values. *Id.* at 367 (“As long as we remember that our separation of the internal from the external is somewhat artificial and arbitrary, we can proceed with caution to speak in such terms.”). Also, he is willing to distinguish separate bureaucracies. Macneil, *Contracts of Adhesion*, *supra* note 35, at 10 (“[I]t is convenient to speak of parts of the worldwide bureaucracy as if they were separate bureaucratic organizations.”). Similarly, he distinguishes between “internal” and “external” kinds of community, although “[t]his distinction is somewhat artificial.” Macneil, *Bureaucracy*, *supra* note 10, at 937 n.144. Of course, all of this is perfectly permissible once one realizes that *every* conceptual distinction is artificial—including the liberal distinction between public and private—and that the test of such distinctions is their usefulness for understanding.

¹¹² Macneil, *Bureaucracy*, *supra* note 10, at 934.

¹¹³ For the most lengthy and recent account, see *id.* at 934-48 (comparing the “community vision,” the “CLS vision,” the “market vision,” and the “liberal vision”).

The key to community seems to me to be the opposite from that of man-the-atom. Community is where one *loses* one's self and one's goods. Community is where and how the non-existent Hobbesian atomistic individual becomes the real life human being ridden with the conflicts of desires for self-gain and self-loss at the same time.

If the key to community is loss of one's self and one's goods, the legal core of community becomes not individual rights, as in liberal theory, but communal duties.¹¹⁴

Macneil, like many modern communitarians, tries to accommodate aspects of liberalism into his communitarianism as indicated by the footnote that immediately follows the passage just quoted:

This does not mean there are no rights; individual communally based rights derive from the next principle mentioned in the text, reciprocity. In addition, since the community vision advanced here is paired with—although it can never be melded into—a modified liberal vision, individual rights also arise from the individualistic liberal side of that pairing.¹¹⁵

But in Macneil's relational theory these individual rights would be opposed to other communitarian rights: "[C]ommunities, like individuals, are entitled to rights. Those rights include rights against its own individuals, against other individuals and communities, and against Leviathan itself."¹¹⁶

Macneil's attempt to "pair" his community vision with a "modified liberal vision" may well account for his ambivalent and conflicting views on the role of consent in contract. Whereas many theorists on the left have what may be termed a blind spot with respect to consent, Macneil's particular version of communitarianism causes him to suffer a theoretical malady more like double vision. By attempting to pair the insights of liberalism with his communitarian impulse without integrating the two, Macneil, when discussing consent, often seems partially to be taking back with one hand (often in his footnotes) what he gives with the other. In particular, he takes a narrow subjectivist view of consent when rejecting traditional contract theory, while substantially broadening his conception when developing his own.

¹¹⁴ Id. at 935-36 (footnotes omitted).

¹¹⁵ Id. at 936 n.136.

¹¹⁶ Id. at 944.

Consequently, Macneil's relational theory never really specifies the role that consent is supposed to play in contract theory or doctrine. Whenever he does offer a conclusion on the role of consent in contract, it is as though he places a patch over his more liberal vision, letting his community vision produce a highly skeptical view of consent: "Unlike the market vision, . . . the community vision is not so bemused by property rights as to believe that agreements relating to their creation and exchange are voluntary."¹¹⁷ Given that Macneil has shown little appreciation for the social problems that the main principles of liberalism are needed to solve, this should come as no great surprise.

Whereas Macneil's relational theory of contract is explicitly communitarian, mine is decidedly liberal. The liberal principles of several property and freedom of contract and the entitlements or rights they recommend provide a "baseline" or framework within which productive and satisfying social relations can evolve both spontaneously and by design. There is no magic moment of contractual conception at which time every right and obligation of contracting parties is unambiguously expressed. Yet it remains true that some divining principle is needed to help parties to an exchange, as well as third parties charged with law enforcement, assess whether "reinforcement" (to use Macneil's term) of the exchange by legal coercion is or is not warranted. This social function, which is as relational as any other, is best performed by consent.¹¹⁸

Of course, to say that a function is "best performed" in some manner is not to say that it is perfectly or entirely unproblematically performed in this way. Trying to discern consent-to-create-legal-relations is not always easy and is particularly difficult when this consent is tacit or nonconscious.¹¹⁹ And, like every articulated principle, it may potentially be subject to abuse and advantage-taking. But a practice is justified *prima facie* if it can be shown to be the best way of dealing with a social problem or problems that must be dealt with somehow. Consent can be justified as enabling contracting parties and others to distinguish enforceable from unenforceable commit-

¹¹⁷ *Id.*

¹¹⁸ Barnett, *Sound of Silence*, *supra* note 4, at 859-73.

¹¹⁹ See *supra* notes 64-67 and accompanying text. For an analysis of the doctrines governing promissory estoppel, contract formalities, and promissory misrepresentations from this "consensual" perspective, see Barnett & Becker, *supra* note 3.

ments in a manner that addresses the serious social problems of knowledge, interest, and power.

Moreover, many of the shortcomings associated with a principle of consent are deficiencies only by the standards of this principle. For example, doctrines regulating duress and various forms of incompetency or incapacitation address situations that are thought to be problems only against the baseline established by the need to transfer entitlements by consent.¹²⁰ More controversially, undue influence and unconscionability may also be viewed in this way.¹²¹ In sum, the factors that are usually pointed to as mitigating the significance of consent are themselves significant only against a moral background shaped by the requirement of consent.

As I have discussed extensively elsewhere,¹²² the liberal principles of several property and freedom of contract make possible a relational order of actions that permits persons and associations to live and pursue happiness in society with others. The entitlements legitimized by these principles protect the individual and association from the crushing weight of the society in which persons are inextricably enmeshed.

The greatest calumny made of liberalism by communitarians is the charge that liberals hew to an "atomistic" view of rugged individuals who need no one and affect no one by their actions.¹²³ To the contrary, for liberals it is precisely because individuals inevitably exist in a complex web of social relations that they require the protection of the entitlements provided by several property and freedom of contract (and also the protection of the rule of law). The more all-encompass-

¹²⁰ I offer a very brief account of this analysis of contract defenses in Barnett, *Consent Theory*, supra note 1, at 318-19. More development of this aspect of a consent theory is needed.

¹²¹ See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J.L. & Econ.* 293, 293-305 (1975); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 *U. Pa. L. Rev.* 485, 485-508 (1967). Even critics of this approach require a baseline by which unconscionable exchanges can be identified. See, e.g., Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 *Harv. L. Rev.* 741, 748-54 (1982) (using a perfectly competitive market as the baseline).

¹²² Barnett, *Sound of Silence*, supra note 4; Barnett, *Function of Property*, supra note 4.

¹²³ Unfortunately, Macneil is guilty of this communitarian sin. See, e.g., Macneil, supra note 10, at 934 (referring to the "liberal vision" as "founded on the atomistic individual"); id. at 942 ("liberal theory . . . [allows] community to be crowded out by the atomistic individual"); id. at 944 (referring to "the atomized individual" as "the fundament of liberalism"). Just once, one longs to see authority presented to substantiate the claim that liberal theorists have actually taken an "atomistic" view of persons, with all this term is meant to connote.

ing, and potentially stifling, a society really is, the more that “individualistic rights”¹²⁴ are needed to protect the members of a society from each other. By bending against the potentially overpowering social tide, the liberal conception of justice and the rule of law of which consent is a crucial part shelters very fragile individuals and associations. Atomistic individuals would need no such protection.

Communitarianism works best—and it does work quite well at times—precisely under those circumstances where each person or group in the relevant community is fully capable of protecting itself without direct recourse to legal entitlements. Often this will occur in small communities in which persons are able to engage effectively in a “tit-for-tat” strategy for dealing with antagonistic behavior¹²⁵ or in which they have easy access to exit.¹²⁶ Because these conditions are likely to obtain within many commercial communities, the individual rights provided by contract law may well be of only secondary importance in the normal run of exchange. But where these conditions do not exist or when social consensus and sanctions fail, such liberal rights assume increasing importance.

All of this is or ought to be too obvious to bear repeating, but the recent communitarian revival among legal theorists suggests otherwise. These communitarians properly inveigh against a variety of very real problems of liberal society. But they never adequately explain how the even more serious and pervasive problems solved by liberal society will be handled in the absence of that which makes society liberal: the entitlements provided by the liberal conception of justice and the rule of law.

In the final analysis, then, what separates Macneil’s relational theory of contract from a consent theory may not be that one is relational and the other is not, but rather that a consent theory is a relational approach that is decidedly liberal whereas Macneil’s is a relational approach that is communitarian. As Macneil himself has stated, “[a]lthough my own preferences are communitarian, I have argued

¹²⁴ The phrase is Macneil’s. *Id.* at 938.

¹²⁵ For an analysis of how this circumstance is conducive to the evolution of cooperative communal behavior see Robert Axelrod, *The Evolution of Cooperation* (1984); Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991); Robert Sugden, *The Economics of Rights, Co-operation, and Welfare* (1986).

¹²⁶ Of course, for these conditions to obtain, entitlements or rights must exist somewhere in the background.

that this theory can accommodate liberal relational theory in the broad sense"¹²⁷ With respect to the core of his relational theory I heartily agree. When discussing the proper theoretical role of contractual consent, however, Macneil's theory of contract moves away from the solid core of his relationalism and becomes heavily influenced by his conflicting visions of society. This leads Macneil to a less than satisfactory account of contractual consent.

CONCLUSION

Ian Macneil's relational theory of contract has reshaped how every contract scholar views the subject. Yet in this Essay I have shown that his critical stance towards contractual consent is undermined in a number of ways. First, his highly subjectivist conception of consent when criticizing traditional contract theorists is undermined by his broader, more realistic, conception of consent when developing his own theory. Second, when Macneil's acknowledgement of the pervasiveness of tacit assumptions in the planning context is applied in the context of consent, manifesting consent becomes a far more meaningful act than Macneil realizes. Third, though he has acknowledged that the concept of property underlies that of contract, Macneil's relational theory fails to take this relationship into account. Finally, viewing contractual consent in isolation from property has caused Macneil to underestimate the social function of freedom from contract—that is, the immunity from having one's rights transferred without a manifestation of one's consent.

Were Macneil's relational theory modified to take account of each of these considerations, the result would be highly compatible with a consent theory of contract. Of course, Macneil would never consent to modify his theory in this way, for to do so would undermine his communitarian vision or agenda. In the final analysis, then, it is Macneil's communitarianism, not his relationalism, that has led to his failure to appreciate the importance of contractual consent.

¹²⁷ Macneil, *supra* note 12, at 524 (footnote omitted).