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STRIKING THE BALANCE IN CONTRACT THEORY

Joel Levin*
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The past three decades have seen an enormous amount of writing by Anglo-American scholars about contract theory. If nothing else, this demonstrates the almost universal perception that there are serious problems with the received theory of contract, the product of giants like Holmes, Williston, Cardozo and Corbin, a theory enshrined in the First Restatement of Contracts. This theoretical activity, instead of creating a new paradigm, has produced divergent theoretical approaches with various bands of scholars striking off in quite different directions, and in the process leaving most judges and lawyers back at the starting point. Contracts scholarship has largely overlooked the advice of Lon Fuller, who began his famous article The Reliance Interest in Contract Damages with the comment that “Nietzsche’s observation, that the most common stupidity consists in forgetting what one is trying to do, retains a disconcerting relevance to legal science.”

What should we be trying to do when we build a contract theory for the law and for lawyers? Contract law was the product of common law judges and is still largely a matter of common law jurisprudence. It provides the concepts and methods used by courts in resolving disputes arising from a particular institution - the contract - which is part social, part legal, part psychological and part economic. If the concepts and methods produced by current contract theory fail to explain what courts are doing and provide them with useful tools, the theory underlying the concepts and methods needs reworking.

Legal theory often founders as the result of what appears to be a sound dichotomy: that between a description of what the law is and a prescription as to what the law should be. Descriptive analysis of law ranges from simple (and simple-minded) lists of black letter rules to sophisticated syntheses of various legal concepts and doctrines made clearer and more

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1 Nearly all the books and articles cited in this article represent participation in that discussion. From a wealth of possible citations, we give only three recent surveys: Jay Feinman, The Significance of Contract Theory, 58 Univ. of Cinn. L. Rev., 1283 (1990); Proceedings and Papers of the Conference on Contract Law: From Theory to Practice, 1988 Annual Survey of American Law 1 (1989); Robert Hillman, The Crisis in Modern Contract Theory, 67 Tex. L. Rev. 103 (1988).
2 “Paradigm” is used in the sense developed by Thomas Kuhn, which means a new way of organizing thought in an intellectual field which changes in substantial, if not revolutionary, ways how professionals in that area operate. See Thomas Kuhn, The Structure of Scientific Revolutions (1970).
precise. What is usually ineligible for inclusion in the descriptive realm is any suggestion that things could be different, better, clearer, fairer, more efficient, or more just. That task of inclusion belongs with those who wish to criticize or reform, who want a better system, or more modestly (and, more commonly, in the rush to correct the minute and ignore the pervasive), a better rule.

Those who see legal theory as limited to either descriptions or prescriptions have lost their way. They have forgotten the essential normative element of law which mocks any simple claim that there is a legal science in the same sense as there is (at least arguably) a science of economics or politics. This is because a complete description cannot be encompassed by a report of a legal rule's (or set of rules') application, but must include a statement as to whether the rule is the proper one and is being properly applied. Such a statement is not prescriptive, pure and simple, for in stating the correct rule there is no recommendation that the rule is the best (fairest, most just, most rational) rule, merely that it is the correct rule here. Take for example the confusion surrounding whether express as well as implied conditions need only be substantially rather than explicitly performed. Reformulating the rule to break down the express/implied distinction and instead introducing Cardozo's balancing test presented in *Jacob & Youngs, Inc. v. Kent* entails more than a substitution of black letter rules. It involves the normative suggestion that the balancing test - including such factors as the materiality of the condition, the degree of forfeiture to the other party, and the willfulness of the noncompliance - is the right one for those wishing to understand how conditions in contracts are treated by courts correctly applying their own law. Absent, however, are any prescriptive suggestions about the choice between rules or consideration about the area of conditions generally.

One purpose of a contract theory is to provide a picture which adequately depicts how contract law, properly applied, works. The claim of such a theory would be that various contract rules could be brought together in such a way that, if individuals properly applying contract law had to justify their efforts, they would or could adopt such a theory. The claim would not be that the theory is the best one possible for contracting generally, best again in terms of fairness, justice, efficiency, etc. Rather, taking note of law's normative element, the depiction would include the claim that such a contract theory would encompass how one imaginative, knowledgeable, and thorough could construct a general theory of contract which explains the myriad of specific contract rules.

We have previously presented just such a theory, one with claims to providing an understanding of the common law. This theory, the balance theory of contracts, purposes that a legally binding contract exists where

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5 129 N.E. 889 (N.Y. 1921).
an obligation has been voluntarily assumed, is reasonably fair to the party against whom it is enforced, is consistent with society's contractual expectations, and gives rise to no administrative difficulties barring enforcement. The first two elements of voluntariness and fairness are variables: voluntariness $\times$ fairness = putative contract. As voluntariness decreases, there must be proportionately more fairness. As voluntariness increases, the need to examine fairness lessens. However, this is not merely a weighing test, for if there does not exist a sufficient threshold of both voluntariness and fairness, there can be no contract. Once the thresholds are achieved, then rather than some other test showing either the adequacy or sufficiency of either element being required, the two are weighed such that if their product is sufficient, a putative contract exists.

The two elements of society's contract expectations and the absence of administrative difficulties are constants. Unless these elements are present, there is no contract. Thus, if the contract breached is a dinner invitation and not one society would expect to enforce, or if it is an oral contract for the purchase of land and one society does not wish to enforce, then there is no contract regardless of any degree of voluntariness or fairness.

Perhaps the purposes and claims of the balance theory can be made clearer when it is set alongside or contrasted with the other contract theories. Basically, three different kinds of contract theory have been advanced, each in two varieties. These could be described as the mechanical or formal theory, either in the procedural or equitable version; the forward and the backward positional theory; and the directly social and consequentially social theory. Like all groupings, these are somewhat arbitrary and simplified, but such classifications are necessary to get a grasp on significant similarities and differences.

The mechanical or formal theory of contract is one which suggests that if a certain standard method is followed, and certain prescribed elements are found to be present, a contract exists. Thus, if there has been such identifiable conduct as an offer and an acceptance, legally sufficient consideration, mutuality of obligation, and possibly, depending on the theory's complexity, other indications of an intent to contract, a contract simply exists. One follows the steps and finds either a contract exists completely or fails completely. Certainly, some form of this mechanical theory, at least in its procedural posture, was developed and advocated by such writers as Samuel Williston and Oliver Wendell Holmes.

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$^{7}$ Id. at 25-26.

$^{8}$ “Mechanical” is not used here in a derogatory sense. No theory which owes its development to Oliver Wendell Holmes and Samuel Williston, and includes contributions by Arthur Corbin and Benjamin Cardozo, can be regarded as unsophisticated or devoid of ethical content. They did, however, provide a theory which operated in a mechanical way, listing certain elements which had to be found in a cumulative fashion to create a cause of action.

$^{9}$ Williston’s theory is presented in its most influential form in American Law Institute, RESTATEMENT OF THE LAW OF CONTRACTS (1932), where he was the principal reporter. His theory is justified in much more detail in his multi-volume treatise, SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, (1990 ed. by R. Lord).

A variation of the mechanical theory is one where procedural mechanics alone may be inadequate to reach a contract. Supplementation may be required or an occasional dose of equity may override the mechanistic outcome. Thus, writers and jurists such as Arthur Corbin, Benjamin Cardozo, Lon Fuller, and Karl Llewellyn suggest that one could reach a contract by one of two methods: following all the procedural steps, or if one step is missing, finding some additional or equitable argument to impose a contractual obligation. The equitable matter which most famously would allow such a mechanical theorist to supplement a missing term, such as consideration, was that of reliance.

Neither form of mechanical theory in general looked either to the bargaining context or circumstances of the contract or to its basic decency, let alone justice, voluntariness, or equity. Thus, contracts from indentured servitude to usury to blackmail might qualify under the theory, while all sorts of form contracts, ongoing contracts and multi-party contracts would present grave difficulties, as the mechanics of the theory would become so complex as to be unhelpful at best and misleading at worse.

Seeing the difficulties of the mechanical theory, positional theorists have suggested that courts should scrutinize the behavior of the parties at the time of formation of the contract. What they closely examined is the responsibility of those contracting when one of the parties significantly changes its position in a way which is meant to create a duty. The forward positional theory was advanced by Charles Fried when he found a promise both necessary and sufficient to cause contractual duties to arise. Not every statement was a promise, and not every promise was adequate, but basically, the intentionality surrounding the making of a promise and the moral obligations which arise toward those to whom the promise is directed were the props which created the contractual backdrop. Patrick Atiyah, advancing a backward positional theory, looked not so much at the promise made, but rather to representations relied upon, finding positions which justifiably changed when such assertions were made. Thus, for Atiyah, contract collapses into tort, and reliance rather than expectation damages are the sole measure of recovery for contractual breach.

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11 According to Grant Gilmore, during the drafting sessions for the first Restatement, Arthur Corbin criticized the exclusive use of bargained for consideration which Williston had written into the draft as the enforcement criteria for promises, citing a number of decisions by Cardozo on the New York Court of Appeals. Because of this, the famous Section 90, providing for promissory estoppel, was added to the Restatement. See Grant Gilmore, The Death of Contract, 61-65 (1974).

12 This is not to say that the Holmes-Williston theory actually led to enforcing such contracts, but there was nothing in the theory that precluded such enforcement. Counter-examples like this test the soundness of the theory.


15 Id.
The positional theorists have the advantage of understanding that contract is more than magical incantation or the proper following of a mystical mechanism, even a mechanism where enlightened religion has replaced superstition. However, positions asserted and changed address only a narrow spectrum of the problems presented in contracts. While a positional theorist might offer some explanation as to why certain contracts should or should not be enforced, no guidance is given as to how contracts without promises are created, what role expectation interests should have, what one should do with executory contracts, how to handle ongoing contracts, what to do when promises or representations are presented imperfectly and how to analyze the myriad of other technical contract problems from missing terms to damages.

These difficulties have caused other contract theorists to view the attempt of the positionalists to get beyond the mechanistic views of earlier theorists by casting a wider net as to the scope of data and of concepts to be used in contract litigation as insufficient. The failure of the positionalists was that the net was not cast even wider. These other theorists might be labeled as social theorists and again, come in two varieties: consequential and direct. The social consequential theorists are, in general, those associated with the law and economics movement. Contracts are, if not a branch of economics, part and parcel of the economic system. Those factors which motivate economic behavior inform contract analysis. Thus, utility theory and rational methods of risk allocation become factors in judging what set of behavior is contractual and how it should be treated. Contracts serve as a vehicle for achieving efficiency as rational wealth-maximizers use contractual exchange in an open market to attain their goals, usually but not necessarily economic goals.

Others within the social theory grouping disagree that individuals are solely or even primarily motivated by economic factors, suggesting that a large range of sociological indicators is necessary. This is the position of direct social theorists, such as Ian Macneil. Macneil claims that the economic or consequentialist social view is too limited, as contracts are not mere isolated or discrete events, but part of a larger, social, business, and interpersonal network.

16 The best known proponent of this approach is Richard Posner. See Richard Posner, Economic Analysis of Law, 3rd ed. (1986). An early sampling of the theory can be found in Anthony Kronman & Richard Posner, eds., The Economics of Contract Law (1979). There are many examples of this approach in the law reviews, including a substantial portion of the work done in the Journal of Legal Studies.

17 The largest group of theorists over the last two decades have belonged to the law and economics group, perhaps because it has the closest ties to the dominant political ideology of this period, but significantly it is the band which has moved farthest from the work of ordinary lawyers and judges.

Any contract theory should draw from the wisdom and strength of these three types of theory: the mechanical with its certainty in identifying what conduct is contractual, the positional with its justification for why party behavior ought to impose an obligation, and the social for which contract is part of the large cultural backdrop.

That said, none of these theories do an adequate job of culling from the set of possible contenders or putative contracts which agreements should be enforced or are being enforced by the courts. The mechanical theory is both over and under inclusive, arguably leaving in blackmail and slavery but not on-going supply contracts or contracts with missing terms. The positional theory inspects behavior, looking to individual conduct rather than the transaction itself. Often lost is the ability to allow contracts to succeed, to accomplish the larger purposes of the freedom to change, to manage, and to improve one's affairs. Finally, the social theorists notice the social nature of contract and understand its vitality as a way for individuals to control their lives. But, in looking to social science rather than developing a legal method for figuring out which possible contracts are legally enforceable, generality has caused a loss of analytical and doctrinal usefulness.

As potentially the most powerful theory, both in its analytic ability and its descriptive comprehension, the social theory bears closer scrutiny when measured against the balance theory. This scrutiny has already begun in Professor Macneil's criticism of both the balance theory and the type of theoretical enterprise it represents generally. These two criticisms are related, but it is his general criticism that is both primary and indicative. That general criticism is this: a theory, such as the balance theory, fails because it is uninformative as to a large number of contractually related facts, facts that while not "discretely" part of the formal contract, nevertheless "relate" to contractual activity and play an essential role in molding that activity. These relational facts, far from being peripheral, are essential to any understanding of the basic contractual concepts.

The concepts of voluntariness, fairness, assumed obligation, contract expectations, and administrative difficulty employed in the balance theory - are not only discrete concepts, worse, in Macneil's estimate, they are extremely discrete, too emaciated to do the work necessary to explain the multi-faceted relational contracting world. Thus, the "balance-theory does not help us to 'know' relational contract," while "we cannot even understand a promise outside its relational context."20

Completeness is certainly an unassailable goal. However, a theory and a description are two different things. The goal of a contract theory, such as the balance theory, is to provide a solution to questions concerning what is a valid contract within the common or statutory law. It is not the purpose of a legal theory to provide a listing of all those characteristics of the contracting process found in society.

20 Id. at 502.
Macneil's fondness for description is tied to his loyalty to social science. Macneil's survey article and his works in general are punctuated by references to economics, micro-economics, sociology, neo-economic models, and, in general, the terminological trappings of social science. Law is, for Macneil, only a small part of the greater social scene. Social science is not only necessary to understanding law, but offers a prospective by which to judge legal theory. For example, the limited "discrete" exchange described by contract theory is only a small part of the economic picture: "it is inevitably a relatively small part of the overall economic activities of any given society."{21}

Law is not social science and contract is not economics. In that law is a behavioral activity, it can be studied by social scientists, but then so can the activity of chemistry or mathematics. What is interesting, informative and useful about law (or chemistry or mathematics) is not that people do it, but how well it is done, what purposes the activity serves, and what ends it achieves.

Those who see law as a mere subset of social science naturally view ordinary legal description as incomplete. The rules of contract are one small part of economics, and whether labeled "discrete" or "relational" are inadequate to describe the variety of reasons that precipitate contract situations. However, they are not intended to do so and are hardly the worse for it.

Legal rules are constructed without concern for legal completeness. They, in general, were not designed to achieve explicitly economic goals (efficiency, productivity, internalizing externalities, etc.). Rather, fairness has historically been the consistent purpose. The rules in empirical legal systems are neither consistent nor universally agreed upon. The balance theory, in offering a particular picture of the common law of contracts, makes a normative claim beyond pure description: that one way for common law lawyers and judges to assess the validity of a contract is to use the balance equation. Economics in contract theory is irrelevant in this matter.

Macneil criticizes not only the purpose, but the mechanics of the balance theory. Several of the criticisms are based on a misunderstanding, whether due to a misreading or to inartful expression.

First, Macneil claims the balance theory "is a promise-centered synthesis."{22} The theory does not employ the term "promise", but Macneil believes it to be implied by the requirement of an assumed obligation. This may be a terminological quibble. We have not relied on the term "promise" because it artificially divides express from implied-in-fact contracts, and because a focus on whether an utterance is a promise, prediction, forecast, bragging, vow, plea, or other expression is not pertinent. Contractual obligation can be (more or less) sharply separated from tortious obligation by understanding the source of the duty. If an obligation

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21 Id. at 490.
22 Id. at 500.
is imposed by society, regardless of the obligor's intentions, it is a tort (or criminal law) duty. If the obligor took the obligation upon himself, the duty is contractual. If this distinction commits us to a hidden promissory premise, so be it. However, this is neither the ordinary use of the term, nor the use given in such promise-based theories as that of Charles Fried.23

Macneil criticizes the balance theory for not making "assumed obligation" an expressed element for detailed exposition. If promise in the ordinary sense was a requirement, that would have been a substantial oversight. Assumed obligation serves several, less grand purposes. It allows a clear distinction between contract and tort, a crucial distinction when remedies are considered. It serves as a handle or placeholder to attach voluntariness and fairness. Finally, it names a social act, which needs to meet a certain minimal description in order to judge whether the putative contract is valid. In that this last purpose is complicated, our treatment may have been too hasty. The normal difficulty, though, in applying assumed obligation is in measuring voluntariness and fairness, not in assessing the minimal intent necessary to begin the contract and obligation process.24

Second, Macneil suggests the concepts of voluntariness and fairness are "simply inadequate" to do the work required. He attacks them in turn. Macneil claims that all decisions are made from pressured positions, "pressures which 'coerce' people into those arrangements, irrespective of how they happen to have reached their present circumstances."25 This is a position that H.L.A. Hart labeled, in another context, that of the "disappointed absolutist."26 Because individuals rarely have completely free choices (no pressure, no coercion, no difficulties, just "should I have a hot fudge sundae or a sacher tort"), Macneil believes no such thing as "voluntariness" exists. However, that perfect choice is unavailable does not imply that no choice is available. (That dietary considerations motivate grapefruit rather than sacher tort does not mean there is no choice: a grapefruit grower's gun to one's head probably does).

The balance theory defines voluntariness in relative terms. "An obligation is voluntary to the degree that it is chosen consciously and willingly by the obligor."27 Contract responsibility (or liability) is made similar to responsibility in the matter of choice generally: the greater the consent and the less the duress, the greater the voluntariness and the more willing society (through its courts) is to impose compliance on the potential obligor. One consequence of ignoring voluntariness alto-

23 Fried, supra note 13.
24 This view is now predominant in the law of sales contracts. See U.C.C. §§ 2-204 and 2-207(3).
25 Macneil, supra note 19, at 505.
27 Levin and McDowell, supra note 6, at 28.
gether as a fictional impossibility is that the pressures which motivate a supply contract under difficult circumstances and a supply contract under monopolistic circumstances are conflated.

Of course, pressure often sparks contract behavior. One borrows money, seeks new employment, pays a carpenter to fix a leaky roof, or purchases additional insurance because not all is quite right with the status quo. Such contracts are ordinarily enforced, and should be under either the traditional theory or the balance theory. However, not every pressured contract has been or should be enforced. Where the willingness to become obligated moves from making the reasonable choices of an ordinary member of the Twentieth Century tumult to a desperate seeking to avoid unconscionable or coerced alternatives, voluntariness abates. In order for voluntariness to be viable, the background duress, historically ubiquitous and now too often prevalent in underdeveloped societies, must be absent. As distressing as the pressure to keep up payments on a second car and the newly added family-room may be, such distress does not evoke the background coercion necessary to affect voluntariness significantly.

Macneil also criticizes the concept of fairness in the balance theory. Macneil claims fairness as a concept is either so broad that it “offers little guidance” or so narrow that “relational factors will be omitted.”

The use of fairness in the balance theory is severely circumscribed. A contract is fair to the extent that it is one (although not necessarily the one) which the parties might have reached had they sufficient knowledge to understand all relevant aspects of the transaction and one where the obligor is not a “bargaining dwarf”.

Certainly, any concept to be useful must walk a line between platitudinous overbreadth and precise, but narrow, uselessness. The particular conception of fairness we employed is not unlike the one courts routinely use to fill in missing terms of implied contracts. It is tied to knowledge rather than directly to justice, and prevents, for example, rash enlistment contracts: those readily entered into by parties who do not understand the full implications of the terms, where the implications are ones any knowledgeable obligor would dearly want to avoid.

Macneil suggests but fails to demonstrate that the concept of fairness thus used indicates knowledge of relational conditions, and that inclusion debilitates the concept itself. This suggestion simply misunderstands a basic premise of the balance theory. Foresight is part of knowledge, as what might happen to alter the conditions of performance or the scope of duty can affect the fairness of contract. Macneil’s example of a contract which he believes our definition of “fairness” cannot adequately resolve is:

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28 Macneil, supra note 19, at 505.

29 An interesting and perhaps extreme example of this is Aetna Ins. Co. of Hartford Conn. v. Licking Valley Milling Co., 19 F.2d 177 (6th Cir., 1927), where the court found an oral contract of insurance and by implication filled in the missing terms of the duration of the contract, the identity of the insurer, the amount of the premium, and whether the insured was to be extended credit.
... if the UAW were to challenge collective bargaining agreements made a few years ago on the grounds of "unfairness" does its knowledge include the more-rapid-than expected recovery of the automobile companies, and the obscene bonuses managers were to give themselves? If the answer is yes, "fairness" incorporates without identification a good many important relational factors, such as reciprocity, decent handling of power, and role integrity. If the answer is no, then those important factors are omitted from consideration.30

Although not mentioned, apparently the labor union made major wage concessions. Later in the life of the contract, management experienced great profits and gave its managers large (Macneil uses the more emotive term "obscene") bonuses. Is such a contract rendered unfair?

This, like many of Macneil's questions, is impossible to answer from what we are told. Complex contracts involve many factors. Labeling a contract unfair, voluntary, or much of anything else from a one or two sentence summary is nearly pointless. However, obscene bonuses or not, this does not appear in any obvious way to be an unfair contract. One can assume that knowledgeable, experienced negotiators were employed by the union, and that, in exchange for wage concessions, the union received something it valued. Moreover, the UAW is hardly known to be a bargaining dwarf. If it ridiculously allowed a contract predicated on the historical improbability that an economic recovery was impossible or that management could be counted on to be altruistic, these alone would not appear to be reasons to term the deal unfair. Many contracts are gambles. A life insurance contract is not unfair because the insured lives too briefly or too long. Using contract law to create a perfect society is not only foolish and dangerous social engineering: it destroys a useful social institution and cripples freedom of action.

The most serious test of a contract theory is its ability to resolve the real problems raised by the wide variety of contract cases. This is just the test Macneil believes the balance theory fails. He suggest that the theory is tested only by application to "neo-classical contract cases",31 and that he would "rather doubt" its application to those situations he tags "relational".

30 Macneil, supra note 19, at 505.

31 Another criticism Macneil levels against us is that in selecting examples to demonstrate how our theory works, we chose primarily casebook examples of discrete contracts, a charge of selectively presenting the evidence in order to put our theory in the best light. We selected the cases, not because they were either first year cases or discrete contract situations, but because they belong to the common core of cases which all American lawyers having studied from standard casebooks would know without detailed presentation of facts and background. They form part of the educational heritage of lawyers. It is true that none of them involved what Macneil and his colleagues would call a relational contract situation.
Macneil considers the number of discrete contracts to be limited, so that the value of a theory concerned with such cases is concomitantly limited. However, neither the classical theory of contract, with its mechanistic apparatus of offer, acceptance, consideration, and mutuality, nor the many plugs and patches applied to that theory, including such concepts as "reliance" and "duress", are considered adequate by anyone to handle discrete contracts. Providing a definitive test to separate putative from valid discrete contracts would appear to be some accomplishment, regardless of how (to Macneil's mind) modest. Certainly, there are no other thorough-going, general theories which make a claim to providing such a test.

However, it is simply not true that the balance theory has such restricted application. This can be demonstrated by applying the theory to a contract situation Macneil would clearly label relational: that faced by the court in *Laclede Gas Company v. Amoco Oil Company.*

*Laclede* involved a complex requirements transaction where the defendant Amoco agreed to supply plaintiff Laclede with all the propane gas needed for various residential developments until natural gas lines were extended to these developments. If the plaintiff needed propane in any given development, it would so request in a supplemental form letter; and if defendant decided to supply the propane, it would bind itself to do so by signing this supplemental form. Consistent with the needs of a long-term supply arrangement, there was a flexible pricing provision - price was set by reference to "the Wood River Area Posted Price for propane. . . ." Amoco agreed to maintain facilities sufficient to produce and deliver the propane, while Laclede agreed to maintain all distribution facilities from the point of delivery.

During the winter of 1972-73, Amoco experienced a shortage of propane and limited its customers, including Laclede, to no more than 80% of their previous requirements. Laclede objected and demanded 100% of the developments' needs. Amoco then notified Laclede that its Wood River Area Posted Price of propane had been increased by three cents per gallon. Laclede objected to the increase and Amoco's response was to send a letter terminating the original agreement.

Laclede sued for specific performance, or in the alternative, for damages. The trial court denied relief on the ground that the agreement lacked mutuality, because it found that Laclede had the right to "arbitrarily cancel the agreement" without a corresponding right in Amoco.

On appeal, the United State's Court of Appeals for the Eighth Circuit reversed, holding that mutuality existed because there was an implied promise by Laclede not to purchase propane elsewhere. It then went on to determine that Laclede was entitled to specific performance.

This litigation grew out of a situation replete with relational contracting elements: a long term for performance with a flexible time for ter-

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32 522 F.2d 33 (8th Cir., 1975).
mination, variable quantities to be supplied, a floating price, and numerous places of delivery. Ongoing adjustments and modifications were expected. Furthermore, the ultimate breakdown in this scheme of ongoing relational and reciprocal transactions was caused by the larger relational system the supplier had with its other customers. Due to circumstances entirely outside its control, Amoco could not fulfill the contractual expectations of its customers and decided (in what seems to be a defensible and fair arrangement) to deliver an equal proportion of its limited supply to all of its customers.

Under Macneil's analysis, the parties should have been willing to make whatever adjustments were necessary to maintain the relation. That did not happen and the courts were faced with a problem requiring legal, not economic, standards for resolution. The fact that a transaction was relational in its creation and its performance does not make it relational for purposes of litigation.

_ Laclede_ presents the problem of whether this type of long-term requirements contract is enforceable. (It also presents the problem of whether specific performance should be given. In allowing the trial court broad discretion to determine the remedy, the appellate court did what modern courts tend to do: it ignored the bright line distinction between grounds for damages and specific performance, and allowed the trial court to fashion an appropriate remedy with a formal nod to and working disregard of an archaic and indefensible, medieval set of remedy rules).

The trial court was tied to traditional contract theory. Because Laclede (arguably) could choose to buy or not to buy oil, it was not bound. The obligation on Laclede's part was thus illusory, and the contract lacked validity because it lacked mutuality of obligation. In rejecting this analysis, the appellate court held that because the Laclede's right to cancel was not explicitly unrestricted, a duty to buy oil can be inferred, making for a valid contract. The reviewing court rejected the traditional analysis, could name no new theory it wanted to endorse but, essentially, adopted a balance theory approach. That is, the Court of Appeals neither followed the old line nor threw up its hands at being unable to name a new.

The reason the court would find the balance theory congenial is that it asks the same question the court asked: did the putative obligor undertake an obligation which was voluntary and fair? Incorrect theory can lead to asking the wrong question. Traditionalists would inquire whether the writing guarantees mutuality of obligation; promise theorists would inquire whether Amoco promised (for good consideration) to supply the oil; Macneil would ask if all the proper relational factors were assembled and considered. _Laclede_ presents a case where properly applied traditional or promise theory would not find a valid contract, while it is unclear what theory Macneil would apply or what result he would reach after he had succeeded in identifying all the relational complications.

In _Laclede_, the requirements for validity under the balance theory are clearly met. Amoco voluntarily undertook an obligation. The obligation was fair as to it and was one whose consequences could hardly have come as a complete surprise. This is not an agreement which is outside the
normal expectations of society or one the courts would be loath to enforce. A requirements contract is a sensible risk for a corporation handling many buyers and many supply sources throughout the world.

The Court of Appeals found that there were implied restrictions on the cancellation clause of the obligee and an implied duty on its part to buy. Why did it bother to draw those implications, to find a contract where the facts fell sufficiently short of a traditional contract to justify a finding of no contract? That is, why did the court look for ways to enforce, rather than defeat, the obligation allegedly breached?

The answer is embodied in the values made explicit as elements in the balance theory. Individual choice of action is a basic political, ethical and economic value highly prized within the common law. Unlike tort duties, individuals choose to be obligated in the contract area, placing themselves under a potential obligation or risk because of possible gains or benefits. In so doing, they express their preferences, earn their incomes, buy property, invest, insure, build, educate, publish, heal, counsel, and generally exercise their freedom. Courts have traditionally been loath to restrict these choices when they are voluntary and show the fairness of intelligent decision-making.

What Macneil would label as "non-discrete" factors are largely irrelevant to the creation of the legal duty. A propane requirements contract between a local utility and a national oil company can be, not surprisingly, related to the vicissitudes of the national propane market. Further, the contract required several years to perform, called for flexible pricing, and involved a network of other parties. However, neither party in Laclede had the contracting naiveté of an eight-year-old trading a baseball bat for his friend's bicycle horn; nor should we suddenly abandon any hope of solving contract problems within our legal system because Laclede (and other cases like it) does not resemble the dealings of eight-year-olds.

Amoco made a contract it later regretted. Many factors led to this regret, but calling them relational, rather than discrete, changes little about the fairness of the contract and should change nothing about its enforceability. An unexpected, avuncular gift of a bicycle horn to the eight-year-old would lead to that child's dismay over trading his baseball bat. It is the strength of the balance theory that it can analyze such disparate contracts under a single structure. In a legal system premised on fairness, one wonders why disappointments due to the falling propane market and the unaccountable vagaries of uncles justify different treatment.

A second kind of contracting situation which Macneil believes beyond the resources of the balance theory is that raised by the termination of employees at will. In fact, Macneil is struck by "the incredibly difficult economic and social issues relating to the employment-at-will now being raised regularly in court (and above all in personnel offices and the like.)" While not underestimating the social turmoil inherent in the apparent wane of the employment-at-will situation, the contract problems, at least under the balance theory, are not peculiarly difficult.

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33 See Macneil, supra note 19, at 507.
The apparent difficulty in employment contracts is imposed by traditional promise-centered contract analysis. Typically, there is no discussion, let alone a promise, concerning duration, nor is it unexpected that rational contracting parties would fail to make specific commitments. Perhaps, employers not knowing future economic conditions would not incorporate a permanent obligation, while employees of any skill or self-confidence might not want to contract themselves into permanent servitude. More likely, the parties simply failed to agree on or to include a duration clause. Absent such a clause, the arrangement appears, under traditional contractual analysis, scarcely binding. Without a promise for permanent employment being implied, there is no obligation on either side beyond compensating for past performance and perhaps for giving some reasonable notice of termination. This then has led to the neat black letter law formulation that a contract lacking a specified duration is terminable at the will of either party with or without cause.

The obvious problem with this rule is that it leaves the employment contract, one of the most important contractual relationships in our society, with little obligatory content. Moreover, this rule neither reflects the way most employees and many employers view their relationship nor the way such a relationship has been recently treated by courts. If a primary purpose of Article 2 of the U.C.C. was to bring the contract law of sales closer to the expectations of the business community, then there should be, and in fact has been, a realization that such a reworking is also necessary in the law of employment contracts. Of course, much of that realization has been (in terms of the common law) disguised. It has widely occurred within the context of federal and state statutes governing labor relations agreements.

Disputes concerning employment-at-will come in two stages: is the contract one at will, and if not, was there an allowable reason under the contract (usually categorized as just cause) to terminate the employee? Under the balance theory, there is certainly the requisite assumed obligation to commit each party to the employment contract. This assumption allows employment generally. The question here, as with most contracts, is the extent, not the existence, of the obligation. Looking to promises made or missed, or agreed grounds for discharge, is futile. Instead, two matters are crucial: whether, under the entire circumstances of contractual performance, it is fair to saddle the obligor (inevitably the employer) with the requirement to discharge for just cause only, and whether it is fair to discharge the obligee/employee.

Macneil lists a number of specific, relational cases supposedly beyond the explanatory ken of the balance theory. The list is instructive. It includes a variety of employment contracts governed by civil rights, pen-

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34 This factor is so strong that courts have construed "permanent" employment to be terminable at will. See, American Standard, Inc. v. Jessee, 258 S.E.2d 240 (Ga. App. 1979); Mau v. Omaha Nat. Bank, 299 N.W.2d 308 (Neb. 1980); Hudson v. Zenith Engraving Co., Inc., 259 S.E.2d 812 (S.C. 1979).

35 For authorities supporting this common law rule and the recent exceptions which have been grafted onto it, see the Annotation at 12 A.L.R. 4th at 544 (1980).

36 See Macneil, supra note 19, at 506-507.
sion, bankruptcy and labor relations statutes. These statutes are all constraints on parties’ contracting freedom and contracting power. In that they impose duties aside from any assumption of a duty, they are akin to tort obligations, which, because of the judgments of Congress or state legislatures, are involuntarily imposed. It is no criticism of the balance (or any other) theory that it does not account for such statutorily imposed duties: it is to correct the common law, which the theories explain, that the statutes are passed. However, one merit of the balance theory is that many of the worst contractual abuses, remedied by statute only incompletely and in an ad hoc manner, are minimized or eliminated by the theory's application. For example, contracts involving slavery and indentured servitude, once valid and now restricted by constitutional and statutory enactments, are generally invalid under the voluntariness requirement of the balance theory. This mirroring or anticipating of statutory reform also occurs with regard to usury, blackmail, monopoly, juvenile, missing terms, and adhesion contracts. Where, though, there is a contract situation, for example, which involves reorganization through the bankruptcy courts, then contract analysis, after a point, simply runs out. To extend the contractual concepts is not just to stretch its merits, it is to break it.

The balance theory of contract and the relational approach are very different projects with different goals. The goal of the relational approach is to understand the transaction in all its ramifications. This tends to be a social scientific enterprise. The goal of the balance theory is to explain how the legal system, most particularly the courts, should resolve contract disputes. It is designed to answer the general questions lawyers pose to courts: is a contract valid, should it be enforced and what remedy is appropriate?

That is, rather than searching for invariably absent promises or indications of intent concerning unanticipated difficulties, courts have recently begun focusing on performance behavior. Juries are being asked not to search for a promise of ongoing employment, but to judge whether, under the circumstances of the employment contract, it is fair to discharge an employee. While society once may have had expectations that employment was terminable at will, that view has at least dampened. Fairness can be seen always to have been the determining test: what is considered fair simply changes.

Good theory tells which putative contracts are valid. It does not prescribe what an adherent of any particular economic or social school would suggest is a better way of running the entire contracting process, either economically or legally. This involves a different kind of theory, prescriptive and reformative. Again, the mere reporting of legal rules or legal situations is insufficient to constitute a theory. Rules are inconsistent, courts differ, doctrinal gaps exist, contract law blends with other legal areas. A contract theory can be judged successful only if it offers a method (or tests an analogue) for determining which rules or decisions are correct, not reasons which should be taken to be correct. This is the aim of the balance theory. Because common law courts tie cases together by the concept of fairness, the theory is also labeled as one seeking justice in voluntary obligations.