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THE DISCRETE, THE RELATIONAL, THE SELFISH, AND THE SOCIETAL: ELEMENTS PRESENT IN ALL TRANSACTIONS

*Christine Liyanto**

I. INTRODUCTION

Is the heart of the modern contract individual self-interest, or is it society? Are modern contractual relations more like discrete contracts or relational contracts?

Modern contracts are becoming increasingly relational, but that does not mean that they are shedding their discrete¹ characteristics. The modern contractual relationship requires elements from *both* the discrete model of contracts, which runs strongly on a principle of individual self-interest, *and* the primitive relational model of contracts, which is heavily society-oriented. In other words, modern contracts have both discrete *and* relational characteristics, and the core of modern contractual relations is built upon both self-interest *and* society.

This article will examine (1) the characteristics of discrete contracts and their association with a goal of self-interest, (2) the characteristics of primitive relational contracts and their association with a focus on society, and (3) how all transactions contain elements from both of those contractual models, reflecting both a goal of self-interest and a focus on society.

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1. IAN R. MACNEIL. *THE NEW SOCIAL CONTRACT* 10 (Yale University Press 1980).

II. THE PURELY DISCRETE MODEL

A. QUALITIES OF THE PURELY DISCRETE CONTRACT

Discrete contracts are those “in which no relation exists between the parties apart from the simple exchange of goods.”² In contrasting the traits of purely discrete contracts against primitive relational contracts³ (an example of pure relational transactions), Ian R. Macneil addresses the following eleven factors: (1) “personal relations,” (2) “numbers,” (3), “measurement and specificity,” (4) “sources of contractual solidarity,” (5) “commencement, duration, and termination,” (6) “planning,” (7) “future cooperation,” (8) “sharing and dividing benefits and burdens,” (9) “obligations,” (10) “transferability,” and (11) “attitudes.”⁴ This section will focus on five of these factors: personal relations, measurement and specificity, sources of contractual solidarity, future cooperation, and attitudes.

1. Personal Relations

In the purely discrete contract personal relations are extremely limited.⁵ “Communications in discrete transactions are limited, linguistic, and if of any length, formal.”⁶ The relations in discrete contracts are so limited because the aim of the transaction is simply a one-shot economic exchange, for example, buying gasoline for cash at a self-service station.⁷

2. Measurement and Specificity

Discrete transactions are “carefully measured and specified.”⁸ They are transactions that Macneil characterizes as “the paradigm of measured reciprocal exchange.”⁹ Such particular specificity and measurement makes sense because of the character of discrete transactions as one-shot economic exchanges, with limited personal relations.

2. *Id.*

3. In discussing pure relational contracts or transactions, this paper focuses on Macneil's description of “primitive contractual relations” as an example of pure relational transactions.

4. MACNEIL, *supra* note 1, at 13-17.

5. *Id.* at 13.

6. *Id.*

7. *Id.*

8. *Id.* at 14.

9. *Id.*

3. Sources of Contractual Solidarity

In discrete transactions, there are barely any mechanisms in play that promote and reinforce contractual solidarity.¹⁰ In other words, there are very few mechanisms that “hold the parties together enough so that they will not kill and steal in preference to exchanging.”¹¹ As Macneil states:

In the discrete transaction, apart from the immediate gains each party sees in exchanging, no contractual solidarity exists except for that external god providing social stability, enforcement of promises, and other basic requirements. Within these rigid confines the parties are free to maximize individual utilities to their hearts' content.¹²

Since the discrete transaction is not based on a continuing relationship but is rather marked by a short¹³ and fleeting relationship, that there is minimal promotion of contractual is not inconceivable.

4. Future Cooperation

Discrete transactions involve almost no future cooperation.¹⁴ This is because “[e]ach party simply produces either the commodity or the money at the time and place promised.”¹⁵ This factor, like the other factors described regarding purely discrete transactions, is very much in line with the economically calculated and narrow nature of the discrete exchange.

5. Attitudes

There is a particular set of attitudes associated with the parties in a discrete transaction.¹⁶ One of these attitudes deals with a very “sharp and conscious individualistic focus.”¹⁷ That is, there is a “focus on the divisiveness and selfishness inherent in exchange, rather than on its cohesive and cooperative aspects.”¹⁸ Related to this attitude is the idea that parties in a discrete exchange have no sense of “unity” in their perception

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 15.

14. *Id.* at 16.

15. *Id.*

16. *Id.* at 18.

17. *Id.*

18. *Id.*

of the exchange between them.¹⁹ “[I]n the discrete transaction there is no sense of unity whatsoever; it is a case of me and him, in that order, and strangers evermore.”²⁰

The notion of time is involved in another attitude of discrete transaction participants.²¹ Discrete transaction participants deal with all future events in the present, by making present plans — with extreme precision — for what will happen in the future, also known as “presentiating.”²² Accordingly, because of such precision in planning for the future “as if it were in the present,” there is also an attitude among discrete transaction participants that they are not supposed to run into any “trouble”²³ in carrying out a contractual exchange because “every conceivable contingency is entirely planned.”²⁴

B. BASIS OF THE PURELY DISCRETE TRANSACTION

The basis of the discrete contract is well illustrated by the classical contract theory model of contract. According to the classical contract theorist, the basis of contract is self-interest. It is a perspective in which contracts are a game of “one-shot/one exchange transactions,”²⁵ and where the players are “self-interested, rational contracting parties [who have] the single objective of maximizing their wealth.”²⁶ In other words, parties come together and make contracts with each other in order to gain something — some kind of a benefit — for each of themselves. That is, each party is not interested in obtaining a benefit for anyone other than himself, except for perhaps the benefit to the party he is contracting with (but the first party’s interest in the second party’s benefit is only insofar as it will secure the first party’s own benefit).

The aims of self-interest are furthered by identifying contracts under this theory as focusing on the individual, and “assume[ing] that parties make contracts in an individually autonomous way,”²⁷ as Alice Belcher has characterized. Belcher further adds that, “In classical contract law, the

19. *Id.*

20. *Id.*

21. *Id.* at 19.

22. *Id.*

23. *Id.*

24. *Id.*

25. Mary Keyes & Kylie Burns, *Contract and the Family: Whither Intention?*, 26 MELB. U. L. REV. 577, 585 (2002), available at <http://kirra.austlii.edu.au/au/journals/MULR/2002/30.html>.

26. *Id.*

27. Alice Belcher, *A Feminist Perspective on Contract Theories from Law and Economics*, 8 FEMINIST LEGAL STUDIES 29, 35 (2000).

contract itself signifies a strong, precise, assertive and rational choice.”²⁸ The core of contract being self-interest, it follows that under classical contract theory, the framework for contract is “private autonomy”²⁹ and the freedom to contract as one individually and self-interestedly chooses. As Belcher writes, under the classical theory of contract, “[p]arties should be as free as possible to make agreements on their own terms without interference from the courts and their agreements should be enforced by the courts.”³⁰

The language of classical contract theory, under which the root of contractual transactions is self-interest, is thus an “agent-centered” language.³¹ It is a theory of contract where the justifications for enforcement are, accordingly, agent-centered justifications.³² As Gillian Hadfield writes, “It is agent-centered contract logic that responds, ‘we enforce this obligation because you chose to be obligated.’”³³ And one chooses to be obligated because of one’s self-interested goals. That is, one chooses to enter into an agreement in order to fulfill a desire to obtain an individual right — a right created by one’s very entrance into the agreement:

In this view, law does not judge the formation, performance, or breach of a contract on the basis of external juristic values; law acts only as a surrogate for the values created by the parties themselves. . . . Law aims exclusively to give effect to the arrangements and to protect the interests voluntarily created by contracting parties.³⁴

Hence, the basis of the discrete contract, following the example of the classical model of contract, is a kind selfishness and self-interest that stands in contrast with the elements — and corresponding basis — of the purely relational model of contract, described in the next section.

III. THE PURELY RELATIONAL MODEL

A. QUALITIES OF THE PURELY RELATIONAL CONTRACT

In discussing the nature of purely relational contracts, Macneil

28. *Id.*

29. *Id.*

30. *Id.*

31. Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. Pa. L. Rev. 1235, 1252 (1998).

32. *Id.*

33. *Id.* at 1254.

34. *Id.* at 1261-62.

describes what he calls “primitive contractual relations,”³⁵ which serve as a theoretical paradigm of purely relational transactions. Such relational transactions, unlike discrete transactions, do not have a purely individualistic focus. Instead, they are society oriented and community driven. Like discrete transactions, the characteristics of purely relational transactions (exemplified by primitive contractual relations) can be assessed with respect to the following categories: personal relations, measurement and specificity, sources of contractual solidarity, future cooperation, and attitudes.

1. Personal Relations

While personal relations in discrete transactions are extremely limited, personal relations are a key component of relational transactions.³⁶ Participants in primitive contractual relations, or relational transactions, “derive complex personal noneconomic satisfactions and engage in social exchange, as well as what an outside observer might call economic exchange.”³⁷ Personal relations, thus, are a defining aspect of purely relational contracts.

2. Measurement and Specificity

As previously articulated, discrete transactions are meticulously measured, specified exchanges. Relational transactions, on the other hand, are far less specified:

In primitive contractual relations the most important subjects of what an outsider might call economic exchanges will have no measurable monetary market values. Amounts and relative values are likely to be vague. And the remainder of the relation and obligations arising from it are likely to be very diffuse, and hence unmeasurable.³⁸

3. Sources of Contractual Solidarity

Unlike the theoretical paradigm of purely discrete transactions, under the model of purely relational transactions there exist numerous

35. MACNEIL, *supra* note 1, at 11.

36. *Id.* at 13.

37. *Id.*

38. *Id.* at 14.

reinforcements that promote contractual solidarity between parties.³⁹ There is a continuing “interdependence” between parties because relational transactions are all about “continuous social relation[s],” as articulated by Marshall Sahlins.⁴⁰ In other words, the relations between parties, and between each party and society as a whole, largely govern exchange in the relational transaction model.

4. Future Cooperation

Future cooperation is much more relevant in the relational transaction context than in the discrete transaction context.⁴¹ This can be explained by the fact that adjustment in the relations between parties is an essential characteristic of the relationship itself.⁴² As Macneil characterizes in discussing relational transactions (as illustrated by primitive contractual relations), “[A]s the future unfolds, adjustments will have to be made to deal with new circumstances,” since the transaction is not a rigidly measurable, readily calculable, singular economic transaction.⁴³ As such, continued cooperation is crucial.

5. Attitudes

Just as there is a particular set of attitudes prevalent among discrete transaction participants, so, too, exists a collection of attitudes that are aligned with parties in the relational model of transactions.⁴⁴ While discrete transactions maintain an individualistic focus, relational transactions focus on group gains, cohesiveness, and cooperation.⁴⁵ And while discrete transaction participants lack a sense of unity, those involved in relational transactions have a very strong sense of unity.⁴⁶ Such a pronounced sense of unity enables participants in the purely relational transaction model to more readily “view their individual interests as coextensive with the interests of the overall relation.”⁴⁷ In other words, instead of having an attitude that declares, “I want that from you, and you want this from me,” as is the case under the discrete transactional model,

39. *Id.*

40. *Id.* at 14-15.

41. *Id.* at 16.

42. *Id.*

43. *Id.*

44. *Id.* at 18.

45. *Id.*

46. *Id.*

47. *Id.*

the mantra in the realm of purely relational transactions goes something more like, "We share the same interests, therefore we should work together to benefit from our mutual interests."⁴⁸

Another attitude, as discussed previously regarding parties to discrete transactions, relates to the idea of time. Unlike parties to discrete transactions, who take great pains to account and plan for all details of a transaction — present and future — well in advance, parties to purely relational transactions, or primitive contractual relations, exercise far less precision in planning, which "leave[s] the future where it is; waiting to happen."⁴⁹ Naturally flowing from this attitude is an acceptance among primitive relational transaction participants that getting into trouble — or running into problems that were not immediately accounted for at the initiation of the relationship — is "a normal aspect of life."⁵⁰

B. BASIS OF THE PURELY RELATIONAL TRANSACTION

Relational contract theory is in opposition to the classical theory of contract, the latter's principles, again, being associated with discrete contract model principles. While the classical theory of contract is centered on the individual, where the crux of contract is the goal of self-interest, under the relational theory of contract, the goal is cooperation — i.e., an interest in working with others — and the center is society. As Macneil writes, "The fundamental root, the base, of contract is society."⁵¹ As he further elaborates:

Never has contract occurred without society; never will it occur without society; and never can its functioning be understood isolated from its particular society.⁵²

Thus, the goal of contract, under this assessment of relational contract theory, is cooperation, which fosters relationships, and which produces good for a society as a whole. The primary interests at stake are not the interests of the individual, but the interests of society, under this theory of contract. Contract law under relational contract theory is not focused on individual wealth and individual welfare, but rather *social* wealth and *social* welfare.⁵³

48. *See Id.*

49. *Id.* at 19.

50. *Id.*

51. *Id.* at 1.

52. *Id.* at 1-2.

53. Hadfield, *supra* note 31.

IV. DISCRETE AND RELATIONAL QUALITIES ARE NOT MUTUALLY EXCLUSIVE

Despite their stark differences, and despite what has been suggested by certain theories of contract, the components of the discrete and relational transactional models are not mutually exclusive. If elements associated with one of the two models is detected in a transaction, it does not mean that there cannot coexist any elements from the other model, within the same transaction. This section will first describe why in practice, no transaction can be purely discrete nor purely relational, as defined by their respective conceptual paradigms, because characteristics from both are readily identifiable in every transaction. Next, this section will show how the particular goals, or bases, associated with the models of pure discrete transactions and pure relational transactions — goals of self-interest and societal cooperation, respectively — are also identifiable in every transaction.

A. CHARACTERISTICS OF THE DISCRETE AND THE RELATIONAL ARE PRESENT IN ALL TRANSACTIONS

The concepts of the purely discrete transaction and the purely relational transaction are simply that — just concepts. They are illustrations, or “constructs,”⁵⁴ of extreme models of a contractual relationship. For example, in discussing discrete transactions, Macneil states that they are not supposed to get into trouble “*if* the concept is carried to its extreme[.]”⁵⁵ (Emphasis added.) In other words, both the purely discrete transaction and the purely relational transaction are “fictional constructs.”⁵⁶ As Macneil characterizes:

The description of the primitive contractual relation is a highly generalized and therefore largely fictional summary of anthropological studies of widely disparate primitive communities, widely disparate both in space and in time. Even more important, at the other end of the spectrum the discrete transaction is entirely fictional.⁵⁷

Hence, in practice outside of the theoretical world of fictional constructs, it is impossible to have a purely discrete transaction, and just as impossible to have a purely relational transaction. This article previously distinguished purely discrete transactions from purely relational

54. MACNEIL, *supra* note 1, at 11.

55. *Id.* at 19.

56. *Id.* at 11.

57. *Id.*

transactions based on Macneil's categories of (1) personal relations, (2) measurement and specificity, (3) sources of contractual solidarity, (4) future cooperation, and (5) attitudes. However, using these categories as a starting point, it is evident that characteristics from both the pure discrete transactional model and the pure relational model are found in all transactions.

1. The Impossibility of a Purely Discrete Transaction: Personal Relations and Future Cooperation

It is impossible in practice to have a purely discrete contract because every contract involves personal relations, which are heralded by the purely relational model. As Macneil states, "every contract . . . involves relations apart from the exchange of goods itself."⁵⁸ Even the transaction of neoclassical microeconomics, a theoretical transaction that Macneil labels as the paradigm of the discrete contract, involves such relations.⁵⁹ "Since exchange in any meaningful economic sense is impossible outside a society, even the purest discrete model necessarily does postulate a social matrix."⁶⁰ Even in the most discrete transactions, in the most "instantaneous"⁶¹ transactions, there is a need for relational, social elements: "the modern contractual relation does not become simply a bunch of discrete transactions."⁶² As Macneil further points out, "the very complexity of modern technology calls for processes and structures tying even the most specific and measured exchanges into ongoing relational patterns."⁶³

Another reason for why we cannot have a transaction that is purely discrete is that even in the most precise and immediate exchanges, like the example of paying for gas at the self-serve gas pump, there will always be expectations about the future, namely, "expectations that future exchange will occur,"⁶⁴ i.e., the kind of expectations represented by the relational transactional model. Indeed, Macneil notes that "the existence of an ongoing market for a product creates, without hierarchical command, expectations that production for that market may be worthwhile."⁶⁵ Furthermore, "[s]uch markets remain among our most important relational exchange-projectors, even though the relational web they create may be

58 *Id.* at 10.

59 *Id.*

60 *Id.* at 11.

61 *Id.* at 15.

62 *Id.* at 22.

63 *Id.*

64 *Id.* at 8.

65 *Id.*

highly impersonal.”⁶⁶ In other words, even in a straightforward exchange of money for a particular over-the-counter product, a relational web is created by way of the expectations that are promoted for the production of that product in its particular market. The one-shot exchange, thus, *does* involve personal relations and expectations about the future after all.

2. The Impossibility of a Purely Relational Transaction: Measurement and Specificity

Just as it is impossible to have a purely discrete transaction, it is also impossible to have a purely relational transaction. To begin with, in all transactions, there is at least some form of calculation involved. It is just that the calculation may be present in a different manner.⁶⁷ For example, with relational transactions, “calculation in the self-interest sense may be present, but calculation in the reckoning sense is muted.”⁶⁸ As Macneil points out, “modern technology demands extremely high levels of specification of products and services, and hence immense specificity is required in modern relational exchange.”⁶⁹ Hence, there is always some level of measurement and specificity in *all* transactions, which again, is a hallmark of discrete transactions.

3. Attitudes: Incorporating Attitudes Associated with Both the Discrete and Relational Paradigms

Three categories of attitudes — a sense of unity, an attitude about future planning, and an attitude regarding trouble — are manifested in all transactions in a way that incorporates both discrete and relational views. Aligned with the relational transactional model, there is something of a sense of unity in all transactions, though it may be present in varying degrees, depending on the nature of the transaction. As previously described, even in the straightforward transaction involving the purchase of a particular item in a store, there is an aspect of unity between the customer and the store. If the customer does not like the product, he may have to return to the store for a refund or a product exchange. In the alternative, if he *does* approve of the product, he will likely continue to frequent that store in the future for other products and purchases. Nonetheless, the unifying element is still limited, as the discrete model would emphasize.

66. *Id.*

67. *Id.* at 14.

68. *Id.*

69. *Id.* at 22.

The customer is still looking out for his own individual interests, and would probably not go so far as to view his interests as “coextensive with the interests of the overall relation.”⁷⁰

Turning to the attitude of planning for the future, in all transactions there is a need to plan and account for the future, but given the imperfections of human nature and thought, the relational model is correct in highlighting that there is no possible way to account for *every* kind of scenario that might turn up — hence, we need to be able to adjust accordingly. Even with the “100 percent complete and binding planning”⁷¹ that the purely discrete contract model⁷² purports to do, it is fundamentally impossible to absolutely prepare for every possible happening of the future, no matter how many contingencies the discrete model attempts to account for. On this note, the primitive relational contract model is accurate in regards to its acknowledgement that “the difference in viewpoint is likely to affect the way people respond to what the future actually brings.”⁷³

Finally, regarding the attitude towards “trouble” arising in contractual relations, the appropriate attitude to take in any transaction is a mixture of the discrete and the relational models’ attitudes. We do not want to just embrace that trouble will happen — i.e., embrace it so much that it becomes a “normal aspect of life.”⁷⁴ Nor should we be blind to the prospect of trouble, though. Rather, we should do as much as possible to prevent future trouble, while preparing to face trouble, should it come about.

B. THE RELEVANCE OF THE GOALS OF BOTH THE PURELY DISCRETE AND THE PURELY RELATIONAL MODELS IN MODERN CONTRACTS

1. Incorporating More Dimensions of Human Experience

The very nature of human thought makes it impossible to have a purely discrete or purely relational transaction. We do not think in purely discrete nor purely relational terms.⁷⁵ “Humans *do* think both discretely and relationally at the same time, and thus think irrationally.”⁷⁶ As Macneil states, “[W]e are at the same time selfish individuals and integral parts of a

70. *Id.* at 18.

71. *Id.* at 19.

72. Such as the “neoclassical microeconomic model” that Macneil describes.

73. MACNEIL, *supra* note 1, at 19.

74. *Id.*

75. *Id.* at 12.

76. *Id.*

social unity.”⁷⁷ In other words, from our nature as selfish creatures operating in a cohesive society, it follows that both the goal of self-interest, as represented by the pure discrete contract, and the goal of societal cooperation, as represented by the pure relational contract, are at work in all our transactions.

The nature of human thought, thus, is the source from which the goals of contract are derived — and it is neither composed of purely self-interest nor purely cooperation, but rather, a combination of both. A discrete-modeled goal of self-interest *and* a relational-modeled goal of cooperation are both relevant and crucial goals and understanding *both* of them as being at the heart of contract allows for a broader understanding of ourselves as humans beings — beings who value making rational choices calculated to serve their individual interests (the model under the classical theory of contract), and beings who also understand and value the rubric of care for others (the model under the rational theory of contract).

2. Redefining “Choice” to Fit Both Discrete Self-Interest and Relational Cooperation

Transactions are about choice. Choice is normally understood as driven by self-interest, hence entering a voluntary contract, i.e., making a choice to enter into an agreement with someone, is self-interest driven, as the classical theory of contract, partnered with the discrete model of contracts, argues. It is a rational calculation of the best ways to gain economic benefits. However, there is another way of looking at choice, which suggests that cooperation may also be driving choice in the contracts context. Hadfield describes Elizabeth Anderson’s concept of “rational choice as expressive choice,”⁷⁸ which is in line with this notion of choice as being driven by both rationally weighed self-interest as well as an allegiance to community, society, and cooperation-seeking:

[Elizabeth] Anderson’s conception of rational choice captures a greater share of the human experience without relinquishing rationality. Indeed, she defines rationality as requiring the integration of emotion, relation, and the possibility of growth into the process of valuing and choosing among alternatives. Moreover, she recaptures for rationality attributes of community and public meaning, releasing rationality from its narrow confines within our separate skulls.⁷⁹

77. *Id.*

78. Hadfield, *supra* note 31, at 1262.

79. *Id.* at 1258.

3. The Significance of the Goal of Cooperation and Society in Contract

One may easily agree that a self-interest in economic benefits to oneself is an undeniable goal of contract. We enter into a contract because there is something the other party can do for us, which we want. This is the seemingly self-evident proposition that the classical theory of contract advances. And one may be willing to concede that parties seek to achieve cooperation, but only as a means to an end — only as “instrumental”⁸⁰ to fulfilling the pursuit of those economic benefits, but not as an end in itself. This article argues, however, that cooperation, like the fulfillment of self-interest in economic benefits, is an end in itself in the realm of contract. To understand this, we must first consider a broader assessment of the scope of “cooperation.”

To cooperate means to “work or act together.”⁸¹ Hence, cooperation entails interaction. Such interaction necessarily involves communication. In entering into a contract, parties aim not only to obtain future benefits for themselves, but also to deliver *present* communications to each other. Consider Anderson’s “expressive choice” theory, which Hadfield describes in her essay.⁸² Anderson argues that in making a choice to enter into a contract, a person’s “promise-making”⁸³ is not just a means to obtaining future benefits but also an end in itself, an end of communicating, i.e., expressing, a message, as Hadfield describes in her assessment of Anderson’s theory:

Anderson’s conception of rational choice as expressive choice can endorse the idea that contracts are private orderings, but it disrupts the judicial indifference to contractual consequences that follows in conventional logic. For an expressive choice to enter into a contract may spring not from an assessment of the value of future consequences, but rather from a person’s judgment that, in the present moment, signing a given contract adequately expresses her valuation of a situation, another person, or herself. She may not have pointed at a particular good in the shop window because she judged it the best from the array offered, but rather because respect for the shopkeeper or disgust with herself required it. Thus, her choice may have been *fundamentally* an expression of her valuation of the present circumstances and not an expression of her consequential assessment of future options. She may have chosen to make a promise as an end in itself rather than as an instrument to bring about some future state of

80. *Id.* at 1262.

81. THE OXFORD DESK DICTIONARY AND THESAURUS: AMERICAN EDITION 160 (1997).

82. Hadfield, *supra* note 31, at 1262.

83. *Id.*

affairs.⁸⁴

This “valuation” of a situation is necessarily founded on cooperation — because the cooperation includes communication, and in expressing valuation, one seeks to communicate one’s individualized valuation. As Hadfield writes:

Valuation and choice are rational, at least in part, because of their relationship to a coherent understanding of ourselves and our relationships to others. Choices are not just about achieving consequential goals, such as income. They are about defining and becoming who we are.⁸⁵

And with defining and becoming who we are in the agreements we choose to make with others in society, we seek to simultaneously make a communication to others of our self-definitions, which we achieve by our choice-making. As Eric A. Posner asks in describing the kind of contact and “networking”⁸⁶ we engage in when conducting business activities, which includes negotiating and entering into contracts, “. . . what does such contact consist of if not revealing information about oneself to others, and obtaining information about them in return?”⁸⁷ A possible counter-argument to this thought is that the interest in communication — a form of cooperation — is still instrumental to seeking out those economic benefits: in defining ourselves and communicating our self-definitions to others, are we not merely seeking to better position ourselves among others, and within society, in order to reap the most economic benefits possible? Maybe so. But an alternative argument can also be made, where our relationship to society, as opposed to our interest in economic benefits, is the end goal: it can be said that we are seeking to reap the most economic benefits as a means to better positioning ourselves in relation to others, and within society. These two interpretations precisely demonstrate that there is an active interplay between the two notions — society (and the cooperation with people) and self-interest (in economic benefits). This interplay justifies the argument that both notions, as such, are goals of contract, which exist together.

4. The Significance of the Goal of Self-Interest in Economic Benefits in Contract

With all the discourse on the importance of recognizing society,

84. *Id.*

85. *Id.* at 1260.

86. Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 755, 749 (1999-2000).

87. *Id.*

cooperation, and relationships, one might wonder why the relational theory of contract does not just sweep victory in the debate about what is at the root of contract. This section discusses why the pursuit of economic benefits should not be dismissed from the philosophical discourse of the foundation of contract, notwithstanding the presence of society and cooperation in that foundation.

As articulated previously, the importance of communication lends support to the notion of society as one of the roots of contract. This “vision of communication” comes from the relational theory of contract.⁸⁸ But something needs to supplement this vision of communication in the contract context in order to set it apart from communication in the non-contract context. And what is this “something?” It is the self-interested pursuit of economic benefits — and the principles of classical contract theory that are associated with it. It is the formal rules that this transactional self-interest produces — and within which the communication occurs — that make that communication a contract and that make it different from any other communication.

Macneil identifies “contract” as “relations among people who have exchanged.”⁸⁹ He states that “[e]xperience has shown that the very idea of contract as *relations* in which exchange occurs — rather than as specific transactions, specific agreements, specific promises, specific exchanges, and the like.”⁹⁰ Yes, the concept of contract is about relationships. But this article argues that contract is both a relationship *and* a transaction. The “exchange” is only an exchange because of a transaction, an agreement, a promise. The idea is that there is something about the relationship, which sets it apart from relationships generally. And that is the transactions in the relationship. It is in the transactions discourse of contracts that we find the self-interest in pursuing economic benefits. And it is in the relations discourse of contracts that we find the pursuit of cooperation and connection to society.

5. Contracts: A Mix of Business and Relationships

Law and economics scholars begin with the idea that we act in self-interested, profit-maximizing ways⁹¹ in entering into contracts with other

88. Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory – “Real” Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909, 934 (1999-2000).

89. Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 878 (2000).

90. *Id.*

91. Katharine T. Bartlett, *Cracking Foundations as Feminist Method*, 8 AM. U. J. GENDER SOC. POL’Y & L. 31, 41 (2000).

parties. It is clear, then, that self-interest, infused in the discrete contract model, is one of the foundational blocks contract. But without society and an attention to relationships, communication, and interaction — the components of the relational contract model — there would be no contracts at all. For a contract, by definition, needs more than one party. You cannot contract alone, by yourself. Hence, society is the other foundational block of contract. Business transactions, activity, contracts, are all about relations with other parties, relations with society. Relationships are essential. But we should not forget that self-interest is also an essential element because it is what makes a relationship a “transaction”; economic-based self-interest is what makes the relationship different from regular interactions with people and a community.

Posner illustrates this line of thought in his discussion of how business activity is all about relationships.⁹² He describes how “[p]arties to a contract are almost never anonymous.”⁹³ As such, fostering relationships with each other becomes just as important and fundamental to the contract as the transaction itself. This is illustrated by the fact that parties often are extremely concerned about their own reputations and the reputations of others.⁹⁴ This concern about relationships and reputations involves an interest in “loyalty”⁹⁵ and the spreading of good name to others in society:

In ordinary commercial contracts between merchants, both merchants expect to do business with each other in the future, or at least with other merchants who are likely to learn about the behavior of the parties. Banks lend money to firms in the expectation that the firms will return for credit in the future, an understanding often represented formally by a revolving credit contract. Employers and workers understand that employment contracts cannot describe all the behavior that will be required on each side. Workers behave properly in order to obtain bonuses and promotions and in order to avoid being penalized or fired. Employers behave properly in order to maintain the loyalty of their workers and to attract workers entering the market. Firms invest a vast amount of money in making themselves known to consumers, so that if a consumer has a satisfactory experience he will come back, and he will tell his friends about it.⁹⁶

We enter into contracts with parties who have good reputations, and who are trustworthy, and entering into successful contracts with parties is how such reputations and trustworthiness are further enhanced. Reputation has everything to do with society, for it is about one’s standing in society.

92. Posner, *supra* note 86, at 755.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 755-56. See Benjamin Klein & Klein B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981).

Cooperating and engaging in successful contractual relationships amounts to a good reputation. And this supports the notion of society, in addition to the economic benefits we get from good business, as a foundational block of contract. Posner goes further by likening contracting parties to “friends.”⁹⁷ He illustrates how fostering these friendships becomes one of the foundational blocks of entering into contracts with parties:

[P]arties spend a great deal of effort, time, and money trying to make friends. A book publisher might take a client out to lunch or dinner. Purchasing agents take suppliers to baseball games, plays and movies, even to strip-tease joints. Business deals are everywhere forged in bars, restaurants, and private drinking clubs. Business is almost always conducted in a highly social manner. First, they talk about sports, then, about their families; and only then, perhaps when the dinner or golf game is almost over, do they shake hands on the deal.⁹⁸

But again, they are different from the definition of “friends” generally insofar as a *transaction* is involved. And it is in recognizing *both* (1) the self-interest in pursuing economic benefits (most associated with discreteness in contractual relations) and (2) the relational pursuit of a cooperative society, that this distinction is preserved, making the realm of contract a realm not *solely* about relationships nor *solely* about economic benefits.

V. CONCLUSION

The discrete versus relational paradigms are not segregated concepts after all, but rather, they are part of a single continuous “spectrum.”⁹⁹ True, particular transactions may fall closer to one end¹⁰⁰ or another — one end being where the purely discrete transaction lies and the other end showcasing the purely relational transaction. But again, no transaction in the real world can be entirely discrete nor entirely relational. Ultimately, harmonizing the elements and goals of the relational model of contract with those of discrete model of contract is to embrace a liberal-minded, forward-thinking view of the basis, motivations, and characteristics of contractual relations in today’s generation.

97. *Id.* at 756.

98. *Id.* at 757.

99. MACNEIL, *supra* note 1, at 11.

100. *Id.*