BOOKS

The Resurrection of Contract


Reviewed by Lewis A. Kornhauser*

In a series of lectures in 1970, Professor Grant Gilmore pronounced the death of contract. The announcement heralded a renaissance in contract scholarship. The renaissance has reached maturity: in the past two years no less than four major books have been published on contract, and these books do not exhaust the multitudinous positions on contract that have been espoused in the law reviews, economic journals, and other books in the decade since Gilmore wrote the obituary.

Intellectual curiosity might explain this spate of scholarly energy. At its death contract law, while not aged as legal doctrines go, constituted a fully and elegantly articulated set of rules that had played a central role in the modern conception of law. Henry Maine had argued that the history of law was the history of the movement from status to contract. The pedagogical method that still dominates legal education had been spawned by contract. Two great treatises had rationalized the mass of judicial decisions; fifty American jurisdictions had adopted a single codification of those decisions.

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I gratefully acknowledge the comments of my colleagues Samuel Estreicher, William Nelson, and Lawrence Sager.

1. The lectures were given at Ohio State Law School and later published as G. Gilmore, The Death of Contract (1974).


4. A cynic would offer quite a different explanation. While contract may have died, contract professors have not.


Scrutiny of such a brief but important life might well reveal much about the nature of law, how it comes to be, and what its relation to other social institutions is. Giants do not die every day.

The controversy that has raged over contract in the past decade does raise fundamental questions about law, but the scholars do not raise them quite so neatly as might be hoped or expected from a group of pathologists scraping over a body. The division is too heated, too rancorous, and too basic. For some do not believe that contract is dead at all, and so the fight rages not over events passed but over current cases. The debate might thus be described as one over what contract is and what it would mean for contract to be "dead."

This review seeks to delineate more clearly the various conceptions of contract at issue in the debate. I shall examine four contrasting positions. Two are represented by the books under review. Charles Fried's *Contract as Promise* contends that the moral principles embodied in promise underlay, and continue to underlie, contract. Ian Macneil's *The New Social Contract* relies on his view that contract has evolved beyond promise. Macneil regards promissory relations as only one type of the broader category of relations covered by contract. Fried's view that contract never died and Macneil's that it is resurrected (or metamorphized) contrast sharply with the third conception, which is that contract is dead. This third position is not unitary. The people holding it—including Gilmore, Patrick Atiyah, and Duncan Kennedy—differ greatly in their views of the history of contract, of the nature of law, and of the methodology of legal scholarship. For convenience, I shall call them "tort theorists," as Gilmore argued that contract had receded into tort. The economic analysis of contract represents the fourth position examined. Superficially, at least, it too contends that contract is alive. But these crude characterizations do not adequately describe the divisions and confusions in the debate over contract.

This review has two parts. Part I discusses the principles or "gestalt" of the theories under discussion, suggesting the type of arguments the different theorists habitually deploy. Part II examines a very different aspect of the theories. Most theories about law implicitly assume a relation between law and social behavior; Part II makes explicit the different views of the role of law in society that contract theorists have adopted.

I.

A. Contract as Promise

Charles Fried's elegant book defends the "classical" view of contract: the principle that "persons may impose on themselves [through 'promise'] obligations where none existed before." 9 This defense has two parts. First, Fried articulates the moral basis of promise10 and shows how the promise principle rationalizes the core doctrine of offer and acceptance,11 besides providing a

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9. C. Fried, supra note 2, at 1.
10. Id. ch. 2.
11. Id. ch. 4.
basis for systematic criticism of the doctrine of consideration. Second, Fried argues that those doctrines and lacunae of contract law that have been used to undermine the classical view are either derivative of or consistent with the promise principle.

The doctrines and lacunae addressed by Fried in the second part of his book are many and varied, including, for example, the principles of mistake, frustration, impossibility, duress, and unconscionability. In addition, Fried investigates the questions of good faith in dealing and performance and of reliance and restitutionary damages. Throughout he offers two types of arguments about the predominance of promise.

First, he identifies those areas that the promise principle resolves by implication. For example, the doctrine of duress refuses enforcement to promises procured by a threat to violate the rights of the promisor; such promises have no moral force. Similarly, promise explains various uses of reliance as a measure of damages. For instance, reliance may be used because no more accurate measure of the expectation interest exists. Alternatively, reliance may be used because the contract "included" an implied warranty of fitness for the use foreseen by the promisor.

Second, Fried admits that promise does not exhaust the principles of contract liability. A variety of accidents connected with the exchange of promises may occur; resolution of the disputes occasioned by these accidents may require the application of nonpromissory principles. Mistake, frustration, and impossibility highlight "the inevitability of using noncontractual principles to resolve failures of agreement." Similarly, failure to agree at all may require the use of a nonpromissory reliance principle, as in *Hoffman v. Red Owl Stores, Inc.*, while failure to perform may sometimes require the use of restitutionary principles, as where a landowner pays in advance an oilwell driller who fails to drill when it becomes clear no oil lies beneath the land.

Fried, therefore, resurrects contract by returning to its roots in promise. But, as the above brief discussion indicates, nonpromissory principles now govern many of the cases treated in traditional contracts courses.

**B. Tort Theorists**

Fried recognizes that tort theorists do not represent a unified "school," but he does not offer a detailed and discriminating account of their differences. He groups together Professors Atiyah, Gilmore, Kennedy, Anthony Kronman, and Macneil, only intermittently suggesting distinctions among

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12. Id. ch. 3.
13. Id. at 92-94.
14. Id. at 61.
15. 26 Wis. 2d 683, 133 N.W.2d 267 (1965). This is Fried's example. See C. Fried, supra note 2, at 24-26.
16. This, too, is Fried's example. See C. Fried, supra note 2, at 114-16.
17. E.g., id. at 3.
their positions. Those distinctions are neither clearly delineated nor adequately analyzed. Thus, it is unclear from Fried's characterizations precisely which tort-theorist view is being referred to. For instance, at one point Fried contrasts his own view that the individual creates her own contractual obligation with the tort-theorist view that the community creates all legal obligation.  

Later he identifies the nonpromissory principles of redistribution and "sharing" and reliance and restitution as tort principles. At a third point, Fried states that tort principles are communitarian. In this section, I shall attempt to delineate more clearly several contrasting positions a tort theorist might hold.

Those who believe contract dead agree only that promise neither does nor should underlie the law governing exchange. The tort theorists disagree violently among themselves as to the actual and desirable basis of contract. To begin, it is useful to distinguish between theorists who believe law incorporates morality and those who deny a necessary link between law and morals. Fried has argued elsewhere that law ought to reflect morals and that the morality to be incorporated is a morality of rights and not utilitarianism or any other purely consequentialist ethic. From Fried's perspective, therefore, one could make three types of errors in a theory of contract.

First, one might accept the idea that law follows morality but adopt the wrong morality. For example, some tort theorists may be utilitarians and therefore deny the centrality of promise to contract doctrines. In utilitarianism, individuals are obliged to act to maximize the welfare (or pleasure or preferences) of all. Thus, enforcing promises would only play a role if one were a rule utilitarian and could identify a class of promises that generally promoted the social good. Further, the principles of reliance and restitution would depend not on the occurrence of contractual accidents but on the extent to which they promoted the welfare of the community.

Other tort theorists making the first type of error might reject both utilitarianism and the deontological version of morality to which Fried adheres. Duncan Kennedy and Roberto Unger, Fried suggests, have a nonutilitarian concept of ethics that depends on a principle of altruism. Under their view, the appropriate model for understanding individual contractual obligations is not an individualistic one in which people voluntarily accept personal obligations, but rather an altruistic one, in which obligations to a community may override or modify those voluntarily undertaken.

A second "mistake" tort theorists might make is to adopt the deontological ethic adhered to by Fried but to believe that contract law is the repository

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18. C. Fried, supra note 2, at 2-3. Fried distinguishes this tort-theorist position from an historicist view that contract arose during the eighteenth century when communal control ceded discretion to individuals. The historicist position is, in fact, akin to the one Fried ascribes to tort theorists, as each relies on the community's ability to determine legal obligation.

19. Id. at 77.

20. Id. at 3-5.

21. Id. at 21.


23. C. Fried, supra note 2, at 76-77, 84, 90-91.
of a different aspect of that ethic than the aspect argued for by Fried. For example, one might substitute enforcement of reliance, restitution, or wealth redistribution interests for Fried’s enforcement of promise-keeping. Fried does not deny that, in some circumstances, the law ought to implement the ethical obligations arising out of reliance and restitutioary interests. Nor does he deny that a just society would distribute wealth more equitably than ours. Fried simply denies that these ethical concerns should govern the resolution of disputes arising out of promissory behavior.

Finally, tort theorists might deny that contract law reflects any particular ethic. Instead, contract law might simply promote some particular community policy or goal. For instance, one might interpret some tort theorists to propose that contract law reflects the interests of the commercial classes rather than any ethic. These tort theorists, from Fried’s perspective, make the same mistake that the economic analysts do. The economic analysts of contract, to be discussed below, argue that contract law ought to promote efficiency. To some, efficiency is an ethical goal, but one might more plausibly defend the economic analysts’ view, and the view of this third class of tort theorist, as one that seeks to promote efficiency as a matter of policy rather than as one of principle.

C. Economic Analysts

The economic analysts of contract substitute efficiency for promise as the basis of contractual liability. Two distinct senses of efficiency are used in the literature. The first sense is Pareto efficiency; under a Pareto efficient rule of law, neither party can be made (subjectively) better off without making the other contracting party (subjectively) worse off. The second sense equates efficiency with wealth maximization: the efficient rule of law maximizes the (dollar) value of goods and services traded in the market. In the following discussion, efficiency is used in the first sense, in conformity with the common usage of economists.

The economic conception of contract superficially resembles Fried’s promise-based theory of contract. Both the economic analysts and Fried focus on the voluntariness of exchange in explicating contract. But exchange plays a very different role in the two theories. In the economic analysis, markets are the institutions that allow the realization of efficiency. Thus, the economic analysis of contract is market based, not promise based. Under the market-based theory, the exchange merely evidences the improvement in efficiency. A voluntary trade implies that both parties are better off after the exchange. But

24. See generally M. Horwitz, supra note 3, at 188-201.
26. Shavell, Damages for Breach of Contract, 11 Bell J. Econ. 466 (1980), is an example of the use of the first sense of efficiency. R. Posner, Economic Analysis of Law 65-100 (2d ed. 1977), is an example of the second. For general comments on the ambiguities and difficulties in these two senses, see Kornhauser, A Guide to the Perplexed, Claims of Efficiency in the Law, 8 Hofstra L. Rev. 591 (1980).
voluntary trades are neither necessary nor sufficient for achieving efficiency. One might attain efficiency without markets. For example, a centrally planned economy can achieve efficient allocations if it has sufficient information about production possibilities and consumer preferences. Similarly, there might be instances when markets fail to realize efficient outcomes because not all beneficial trades are made. In such cases contract law should deny enforcement to promises that bar a path to efficiency.

In a promise-based theory, on the other hand, voluntary exchange is the source of the obligation. Whether the exchange benefits all parties to it or whether it facilitates the realization of efficient outcomes is, under a promise-based theory, irrelevant to the decision to enforce the promise.

The economic analysis of contract is just one aspect of the economic analysis of law, which attempts to explain and unify through the concept of efficiency all legal doctrines, including tort and property. From this perspective, no difference between tort and contract exists; both are market based. Tort rules are selected to yield the results that markets, if they existed, would produce. The economic analysts therefore would agree with Gilmore that contract and tort are one, but to the economic analyst it is tort, not contract, that is dead.

D. The New Social Contract

Macneil has a relational conception of contract that may be best defined in contrast to the market-based and promise-based conceptions, both of which Macneil regards as flawed in similar ways. For Macneil, contract concerns exchange, but the concerns extend beyond expressions of will: "By contract I mean no more and no less than the relations among parties to the process of projecting exchange into the future."27 The flaws in the market-based and promise-based views of contract arise from a misunderstanding of the "processes of projecting exchange into the future."

In The New Social Contract, as in a series of articles on which the book draws,28 Macneil distinguishes between discrete and relational contracts. Discrete contracts are ones "in which no relation exists between the parties apart from the simple exchange of goods."29 The paradigmatic discrete exchange is an impersonal market transaction, such as a purchase of securities on a stock exchange. It requires that the parties have had no relations prior to the exchange and that they have none afterwards. The planning of the transaction is complete; no gaps in the contract exist. In promise-based terms, the parties have clearly expressed their will on every possible contingency; in economic terms, the parties have entered a complete contingent claims contract that

27. I. Macneil, supra note 2, at 4.
29. I. Macneil, supra note 2, at 10.
specifies each party's actions in every possible state of the world. No contract in the real world even remotely approximates the ideal, discrete transaction, most obviously because the goods traded are not identified with sufficient specificity. One generally contracts for a good of normal quality and the extent of the warranty of that quality varies with the interpretation of "normal."

While Macneil thinks of contractual behavior as varying along an axis that extends from discrete to relational transactions, he does not precisely define the pure relational transaction. Instead, Macneil identifies a number of factors that differentiate relational contracts from discrete. Most important among these factors are (1) the transaction extends over time, (2) parts of the exchange cannot be measured or specified precisely, and (3) the interdependence of the parties to the exchange extends at any given moment beyond any single discrete transaction to a range of social interrelationships. Consideration of these factors reveals a sociology of relational exchange that differs significantly from that of discrete exchange. From this difference in the nature of the transaction, Macneil concludes that the governing rules of contract should differ.

One could offer three distinct justifications for the proposed difference in law occasioned by the difference between discrete and relational transactions. First, one might regard relational transactions as giving rise to obligations different from those (promissory) ones that arise in discrete transactions. Second, one might argue that, though the law must promote the same policies in relational and discrete transactions, the actual rules adopted must differ to meet the differing social realities. Third, one could maintain that relational contracts give rise to a different set of policies to be promoted than do discrete transactions. Unfortunately, because Macneil does not identify these three arguments, his discussion of the factors distinguishing relational from discrete transactions admits of all three interpretations.

It is clear, however, that contract encompasses more than the principle of promise for Macneil. In fact, the principles of benefit (restitution) and reliance play particularly significant roles in Macneil's analysis. The factors of extension in time, nonmeasurability, and increased interdependence ensure that no agreement captures the full texture of the relationship between the parties. Attention to the flow of benefits and the flow of reliance between the parties thus produces legal rules more appropriate to the relation.

II.

The prior section suggested that the contesting sides in the contract debate differ in their views of the set of principles that underlie contract law. Fried, the economic analysts, and Macneil advocate, respectively, promise-

30. Id. at 10-11.
31. Id. at 10-35.
32. Id. at 52-56.
based, market-based, and relational-based views of contract. While Fried wishes to restrict contract to the principles flowing from the obligation to keep a promise, Macneil wishes to extend contract to a wider set of principles that evolve from a long-term relation among parties. The economic analysts, on the other hand, strictly follow some conception of efficiency, a conception which may or may not call upon any considerations of fairness or morality. The tort theorists, of course, deny that the principles governing contract differ from those governing tort.

The three schools and the tort theorists may be classified along another dimension as well. Fried, Macneil, and the economic analysts have different views of the relation of law to other social institutions and to individual behavior in general. The tort theorists, who agree only that contract is dead, display as much diversity in their views of the relation of law to society as the three schools of contract law.\textsuperscript{33}

In order to achieve a useful classification of the contract schools, I shall employ three contrasting views of the relation of law to behavior: instrumental, adjudicative, and expressive. These visions are neither mutually exclusive nor exhaustive. An instrumentalist regards the law as one means of social control; individual behavior can be channeled and directed by announcing the appropriate legal rule. A purely adjudicative vision of the law would confine the effects of court rules to the resolution of disputes without regard to other behavior the rules might affect. Finally, the law and judicial action might be seen as expressing some important aspect of society such as primal values or an ideology that underlies the social structure.

A. Economic Analysts

The economic analysts hold the purest instrumental vision of the law. To the economic analyst legal rules—statutory and judicial—are like prices: they determine the costs of various courses of action. Accordingly, an individual, in deciding on a course of action, chooses in light of the applicable legal rules just as the individual selects her purchases on the basis of her preferences and the prevailing market prices. In making a contract, every potential contractor has five decisions to make: (1) how to search for a contracting partner, (2) whether to form a contract once she encounters a potential partner, (3) what terms to include in a contract once she decides to form one, (4) whether to perform an executed contract, and (5) how much to rely on the promise of performance of a contracting partner. In theory, contract rules affect the costs and benefits that might accrue to an individual at each stage in the decision process. Consequently, the individual, at each decision point, weighs these costs and benefits and chooses the act that yields her the greatest value (\textit{ex ante}).

\textsuperscript{33} I shall not analyze the views of the tort theorists, whose attack on contract has largely focused on the unity of principles underlying contract and tort and not on the relation of law to behavior. To use the classification system described in the next paragraph of the text, however, I would consider Kennedy to hold a largely expressive view of the law, Gilmore to regard the law as adjudicative but based on nonpromissory principles, and someone like Morton Horwitz to view the law as used instrumentally by the commercial or industrial classes.
The economic approach has many virtues. It allows the analyst to separate the effects of the law on contracting behavior from those of other social institutions. In particular, it permits the study of the interaction of legal rules with insurance markets and with other social institutions such as reputation. Further, it permits some examination of the impact of risk and risk aversion on behavior; indeed, research in related areas of economic theory suggests that moral-hazard problems—situations in which one party cannot monitor the behavior of another—will yield to analysis in a legal context.

Ideally, the studies of the economic analysts should suggest empirical tests to verify the assumed instrumental relation between law and behavior. Regardless of the actual testing of the relation, however, the economic view rests solely on the premise that legal rules guide behavior and that behavior should be guided to an efficient outcome.

B. Fried

Fried takes a dramatically different view of the relation of law to social structure. Fried not only seeks to ground contract law in a concept of moral obligation, but he also implicitly denies that law has an important instrumental function. For example, Fried attacks the utilitarian position that would permit enforcing (or not enforcing) contracts solely on the ground that it would promote keeping certain kinds of promises (even though Fried regards promise-keeping as right and desirable). Rather, one enforces a promise only because it is just to keep one's promise. The role of the court, therefore, is simply to adjudicate the rights between the parties, not to encourage them to do right in the future, although any such encouragement would be a desirable side effect. Nor does Fried place much emphasis on the expressive qualities of the law. Enforcing contracts does not play a symbolic function in society as some criminal penalties once did (or might still do), or as the sitting of the Assizes in eighteenth-century England did. The law enforces promises simply because justice requires it.

C. Macneil

Contract law, for Macneil, has both significant instrumental purposes and significant expressive purposes. Macneil, however, offers a radically different articulation of the instrumental purposes and mechanisms than do the

37. Holmstrom, Moral Hazard and Observability, 10 Bell J. Econ. 74 (1979).
38. See Kornhauser, supra note 26, at 591, 656 n.106.
39. C. Fried, supra note 2, at 15-17.
41. P. Hay, Property, Authority and the Criminal Law, in Albion's Fatal Tree (1975).
economic analysts. Similarly, the values he believes the law expresses differ dramatically from the moral values that Fried contends the law implements through adjudication of contract claims.

1. Instrumental Purposes. An instrumental view of law requires a theory of how people respond behaviorally to legal rules. Any theory of behavior will specify both the psychology of decision of individuals and the environment in which these individuals act. Macneil's specification of these two aspects of an instrumental theory differs radically from the specification of the economic analysts. First, markets do not mediate exchange in Macneil's relational contracts in the same way they mediate exchange in the discrete contracts of the economic analysts. Second, Macneil's relational contractors have a different psychology than the contractor of the economic analysts.

In the discrete world, all goods are standardized goods, traded on well-developed markets that allow easy valuation and replacement. Specifically, the presence of the market means the buyer (or the seller) is not tied to his trading partner but may easily transfer his custom to another equally competent, equally profitable seller (or buyer). In relational exchanges, markets play a less significant role for two reasons. First, the "goods" exchanged are not standardized. Once a contractual relation begins, a situation akin to bilateral monopoly arises between buyer and seller. The buyer cannot quickly satisfy his needs by turning to different sellers because different sellers do not exist; they must be developed. Conversely, the seller, to produce the buyer's good, has had to invest specially, and the return on that investment can only be realized if the relation between the parties continues. Second, the market may fail even at the inception of the relation. Because of the nature of the subject matter of the exchange and the incapacities of the parties, it may not be possible to put the contract out to bid to arrive at competitive terms. This difficulty arises because the subject matter of relational contracts is in some sense more "complex" than that of discrete contracts and because the parties are less "rational."

For Macneil, relational contracts are more complex because they extend over greater lengths of time. The number of contingencies with which a contract must deal thus seems in some way greater than in contracts of shorter duration. Increased "complexity" in this sense presents problems either because the costs of drafting more complete contracts are too high or because the parties are in some way less capable of dealing with the complexity.

Macneil thus apparently suggests that the appropriate model of individual behavior under contract rules is one of "bounded rationality," a class of economic models first proposed by H.A. Simon. The bounded rationality of contracting parties may take a number of forms. First, it may mean that a

42. The concept of complexity is obscure. For instance, we conceptualize time as a continuum and the same infinite number of instants occur in a one-hour interval as in a twenty-year period. If contingencies are in one-to-one relation to the number of instants, the longer time period does not present more complex drafting problems.

43. H. Simon, Models of Man (1957).
party has imperfect foresight; she cannot list all possible states of the world because she cannot foresee all contingencies. Thus, as a performance runs its course, she may be surprised by nature. Second, a party may be able to foresee all possible states of the world, but be incapable of dealing with the information. She may, for instance, realize that she cannot assess the likelihood that each state will occur or that she cannot solve the maximization problem presented by all the data. Third, bounded rationality might mean that a party lacks clearly defined preferences perhaps because she lacks sufficient experience with the requested good or sufficient information about alternatives. More problematically, the party may have no clearly defined objective function because it is a group or a corporation whose members' goals do not aggregate in a "nice" way. Fourth, the party may have complicated preferences that weigh a large number of factors. It may be too costly to transmit accurately these concerns to her contracting partner.

These psychological aspects of the party to a relational contract contrast dramatically with the psychology of the contractor of the economic analyst. The latter (neoclassical) contractor lives in a less complex world to which her preferences and calculating abilities conform. As a result, this contractor can accurately forecast the value of entering any particular contract, while the relational contractor faces some unresolvable uncertainty.

In a complex world with boundedly rational agents, the pursuit of efficiency becomes for Macneil a less urgent goal. "Satisfactory" behavior suffices, and to attain satisfactory contractual behavior, Macneil suggests two instrumental goals for the law: (1) promoting mutuality, i.e., sustaining a balance of power between contracting parties not only before but throughout the unfolding of the exchange, and (2) promoting contractual solidarity, i.e., encouraging "the norm of holding exchanges together."

The law must promote mutuality because relational exchanges admit numerous possibilities for opportunistic behavior on the part of the contracting parties. As noted above, the absence of market-mediated exchange in relational contracts requires reliance by buyers on the performance of sellers and special investment on the part of sellers to produce the goods. As the relationship develops, opportunities for one party to exploit the other de-

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44. If one party is a group, its probability assessment may not reduce to a simple probability distribution that represents the group assessment.
45. Macneil has elsewhere discussed classical and neoclassical models of contract, see, e.g., Macneil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 Nw. U.L. Rev. 854 (1978), in which the psychology of the contractor is similar to that assumed by the economic analysts.
47. I. Macneil, supra note 2, at 84-90.
48. Id. at 52; see also id. at 90-102.
velop. Presumably, parties who know that law would limit such exploitation would be more willing to contract. Alternatively, a system of contract law might reduce expenditures necessary to limit the opportunism, such as by creating a presumption that all contracts forbid opportunistic behavior.

Macneil does not articulate the social process through which the law promotes mutuality or any other instrumental goal it might have. His discussion of mutuality does suggest that the process identified by the economic analysts—conscious, self-interested, maximizing behavior on the part of each individual agent—might be adapted to the mutuality concern. The process articulated by the economic analysts is, however, somewhat at odds with Macneil's emphasis on the bounded rationality of the individual agents and is greatly at odds with Macneil's discussion of solidarity and trust as a buttress of contract.

Macneil suggests three ways in which the law promotes contractual solidarity. First, the law contributes to individual belief in solidarity, which is the keystone of contractual interdependence. Second, the law provides for the accomplishment of cooperation, as in, for example, rules of property and rules that facilitate contracts. Third, the existence of legal sanctions perpetuates exchanges that would otherwise founder. But Macneil offers neither evidence that the law does in fact play these three functions in society nor a theory of how the law might come to do this. Moreover, one cannot determine whether Macneil means that any set of legal rules would perform these three functions or that some sets would perform them better than others and that the current set of contract rules does a moderately successful job. If any set of legal rules will suffice, one has no criterion for selecting among legal rules. Thus, absent an articulation of how the rules might promote solidarity, one cannot apply the solidarity criterion to distinguish among sets of rules even if different sets have different effects.

2. Expressive Purpose. Macneil also asserts that the law is expressive of solidarity:

Closely related to the notion of law as a back-up system . . . is law's function as a relatively precise expression . . . of the great underlying and diffuse sea of custom and social practices in which human affairs are conducted. This function of law is to tell society what is most important among its customs and practices.

This expression sustains the solidarity belief among individuals and differs in two ways from Fried's analysis. First, Fried adopts an adjudicative approach

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50. I. Macneil, supra note 2, at 93.
51. Id.
52. Id. at 93-94.
53. Empirical evidence is hard to develop. See Griffiths, Is Law Important?, 54 N.Y.U. L. Rev. 339 (1979). The economic analysts, by contrast, have a clear theory; one can easily state the experiment the economists would like to perform.
54. I. Macneil, supra note 2, at 94.
under which the law would only incidentally express any principle whatsoever. Second, the "incidental" expression of Fried consists of moral principles distinct from Macneil's concept of solidarity.

Macneil's concept of expressiveness also differs from the one apparently offered by Kennedy, who contends that the law embodies, not necessarily consciously, ideological premises in society.\(^5\) While Kennedy relies on a background social theory informed by radical concepts of class structure, Macneil's analysis has no such comprehensive theory on which to draw.

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The preceding discussion indicates that Fried, Macneil, and the economic analysts differ not only in their identification of the principles underlying contract, but also in their view of the function of contract law in society. For Fried, contract law does justice in society by enforcing those promises that, morally, the promisor ought to have kept. The economic analysts contend that the rules of contract should be chosen to promote efficiency, and they specify with relative precision the manner in which the impact of a rule of law may be measured. Macneil vacillates between an instrumental and an expressive vision of the law, but the goal promoted is not the efficiency of the economic analysts, while the themes expressed are not the moral ones of Fried.

CONCLUSION

When Gilmore wrote of the death of contract, he did not mean that people no longer made agreements or that the courts no longer resolved disputes arising out of individual, planned transactions. He meant only that the intellectual structure that once unified the mass of cases treated in casebooks on the "law of contract" and indexed under "contract" in West's digests had crumbled.

The assault on the classical theory of contract has not been an isolated phenomenon. Certainly tort, and possibly property, have been equally battered over the past fifty years. Not only has the system of negligence with contributory negligence given way to a patchwork of strict liability, no-fault, and comparative negligence schemes, but also the nature of argument about tort has changed. The economic analysts have argued that tort law, too, is instrumental and ought to promote efficiency. Others have responded that tort law merely resolves disputes based on a deontological vision of ethics.

The contested issues in tort, as in contract, lie deeper than the doctrinal changes. The focus of scholarly debate about law has shifted from doctrine to the nature of law itself, and to the relation of law to society. The question of which morality law incorporates, or whether law is related to morality at all, now colors discussion not only of jurisprudence, but also of substantive law.

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Similarly, analysis of the "policy" implications of a doctrine frequently raises the more general question of the instrumentality of law. The books under review and the debate over contract, therefore, have a significance beyond the narrow interests of contracts scholars. They are representative not only of a resurrection of theory in contract but also of the renaissance in legal scholarship in general.