Cases and Materials on Contracts: Exchange Transactions and Relationships. IAN R. MACNEIL. Mineola, New York: The Foundation Press, Inc. 1971. Pp. xlii, 1344. $18.50.

Authors of contracts casebooks often purport to be hesitant about adding still another "contribution" to this highly competitive field, apparently from a fear that in its measurable qualities the book will be essentially fungible with its competitors. Reviewers also must be somewhat cautious in asserting that a new contracts casebook is different from its predecessors. It is nevertheless my very strong conviction that Ian Macneil has produced a casebook which is substantially different from its competitors, and one which I hope will establish a precedent for future entrants in the market.[1]

The useful history of contracts casebooks[2] begins with the work of Dean Christopher Langdell[3] and Professor Samuel Williston.[4] They attempted, through the study of appellate cases, to assemble an internally consistent set of propositions which could be deductively applied to determine the "right" and "wrong" answers to any legal issue that could arise in a contractual transaction. As Holmes observed, however, the life of the law is not reason but experience. The legal realists of the nineteen-twenties and nineteen-thirties rediscovered this insight and in so doing initiated a lengthy period of contracts scholarship and teaching during which Williston and his *Restatement*[5] have been accorded steadily less influence.

Attacks by the realists led to three types of changes in contracts scholarship which have largely shaped the current crop of contracts casebooks. First, cases have come to be judged as "right" or "wrong" not in terms of whether they are consistent with a set of propositions

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1 Macneil graciously acknowledges suggestions I made to him after using prepublication drafts of his book in my contracts course at the University of Wisconsin. P. xvii. Because of this involvement with Macneil prior to the book's publication, I have in some degree a conflict of interest (although not an economic one) in writing this review. I write the review anyway because I am convinced that my contributions, if any, were small and that they reached Macneil too late to have substantial effect on the book's organizational themes or structure. Moreover, let me assure the reader that I made many suggestions which Macneil did not accept. Finally, as Macneil will learn if he reads this review, I am unscrupulous enough to make criticisms here that did not occur to me or that I did not regard as valid at the time I was sending him my suggestions.

2 Much of the discussion in the next few paragraphs is developed much more carefully in Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805.

3 C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1st ed. 1871).

4 S. WILLISTON, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1st ed. 1903).

5 RESTATEMENT OF CONTRACTS (1932).

based on logic but rather in terms of whether they represent "good" policy. Many realists, of course, were and are vague about how they derive standards of good policy. There has always been some notion that it is necessary to discern the impact on behavior of a decision or legal principle. With some notable exceptions,[6] however, few contracts scholars have attempted to measure this impact; policy determinations have tended to be based on common sense assumptions about a decision's probable commercial or social impact.[7] This first change in attitudes about contract law has had less impact on contracts casebooks than others. Thus most of the early casebooks by realists were still organized around doctrinal problems.[8] Policy considerations have been introduced into contracts courses more frequently through questions from the teacher than through the casebook itself. In at least one important instance a casebook was organized very much around policy issues, but they were derived mostly from philosophical sources rather than based on empirical studies of the effects of contract law on behavior.[9]

A second change stimulated by the realists has been the emergence of remedies as perhaps the single most important subject in a contracts course. After all, as far as the parties to a lawsuit are concerned, a case is important only in terms of its results. Today it is quite common to begin a course in contracts with a study of remedies.[10]

A logical corollary of a concern for the policy impact of a decision is the realization that contract rules have different effects in different settings: that a consumer sale of goods presents problems different from those presented by a requirements contract between businessmen, that both of these transactions are quite different from a real estate transaction or a collective bargaining contract, and so forth. This real-

6 Probably the most famous exception is Franklin Schultz's famous study of bid shopping in the construction industry. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952).

7 An important distinction should be drawn between Karl Llewellyn and other realists who based policy judgments on their common sense. With his rich personal background and experience in the commercial world, Llewellyn was typically able to make sensible and perceptive judgments on the impact of commercial law; many of those judgments are now being ratified by more systematic empirical research. *Compare* Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 718-22 (1931), *with* Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963). That the personal observer approach to empirical research is not always the most valid, however, is illustrated by the mess Llewellyn (I assume he bears at least part of the blame) made of UNIFORM COMMERCIAL CODE § 2-207. *See* Friedman & Macaulay, *supra* note 2, at 818.

8 *E.g.*, A. CORBIN, CASES ON CONTRACTS (1921).

9 F. KESSLER & M. SHARP, CONTRACTS, CASES AND MATERIALS (1953).

10 *See, e.g.*, J. DAWSON & W. HARVEY, CONTRACTS AND CONTRACT REMEDIES (2d ed. 1969); L. FULLER & R. BRAUCHER, BASIC CONTRACT LAW (1964).

ization is the third change in orientation stimulated by the realists. It follows from this realization that policy-oriented legal rules will frequently need to be different from transaction to transaction, a need the law has long recognized by establishing, more often than not through legislation, special rules for special transactions. Some authors of contracts casebooks responded to this realization by organizing their books around transaction types.[11] More importantly, law schools have responded to the needs of the profession by establishing specialized courses in a vast range of contractual transactions. For example, today we have courses in labor law, real estate transactions, sales of goods, secured financing, negotiable instruments, insurance, and, with increasing frequency, consumer transactions.

As specialized areas of law have emerged to cover most of what used to be the domain of general contract law, contracts courses have been stripped of much of their utility. Lawrence Friedman's study of one hundred years of contract litigation in Wisconsin suggested that few cases litigated in appellate courts today are governed by general rules of contract law.[12] Stewart Macaulay's research has shown that even in those situations in which a dispute, if it went to litigation, would be decided in accordance with general contract law, the parties tend to resort to other settlement mechanisms (largely private negotiation) which in substantive result seem to show a considerable disdain for orthodox contract rules.[13]

The net result is that most contracts courses now take one of two approaches. They may take a contextual approach and cover a little about numerous specialized bodies of law to which most students will be exposed in greater depth in later law school years—an essentially anecdotal method. Or they may cover a coordinated, complete body of law known as contract law, which is coming to have little relevance to what happens outside the walls of a contracts classroom. Law may lag behind social change—that is a debatable issue[14]—and law school curricula may lag behind the law—there is little doubt about that—but already some people are noticing and saying that contracts teachers are wearing no clothes.[15]

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11 The first casebook to be so organized was H. HAVIGHURST, CASES AND MATERIALS ON THE LAW OF CONTRACTS (1934). More contemporary examples are Professor Addison Mueller's casebooks. A. MUELLER, CONTRACT IN CONTEXT (1952); A. MUELLER & A. ROSETT, CONTRACT LAW AND ITS APPLICATION (1971).

12 L. FRIEDMAN, CONTRACT LAW IN AMERICA (1965).

13 Macaulay, *supra* note 7.

14 *See* Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 72-77 (1967).

15 *See, e.g.*, L. FRIEDMAN, *supra* note 12, at viii-ix.

Macneil's casebook is an effort to establish a new justification for a first year law school course called contracts. He has explained his justification, more eloquently than I could, in a paper delivered in the genesis period of his casebook[16] and in the preface to the book itself. Macneil has attempted to derive some general contract principles applicable to all types of transactions, focusing on both the behavior of persons who come into contact with contracts, including appellate judges, and on the reaction of law and society to that behavior. His casebook is organized around these principles and his overall purpose is to inquire into them.

One of his principles is that all contracts represent in part efforts to plan for the future; the practicing lawyer in negotiating and drafting a contract is performing an important economic and social planning function. The entire second half of the casebook is organized around this principle. To a certain degree this part of the book attempts to evaluate how much and how well lawyers actually plan, but the major emphasis is on issues that lawyers desiring to plan intelligently must address. This part, therefore, has a strong preventive law orientation.[17] In the course of examining these issues, the book presents cases and problems that are the grist of most other casebooks—cases about agreements to agree,[18] about the battle of the forms,[19] about forfeitures[20] and frustration.[21] Macneil's inquiry however, is not confined to examining how a court should decide such cases. The more important purpose is to illustrate how the decisions reached present difficulties for achieving the planning objectives of a lawyer and his client. Whether contract doctrine should strive for certainty—in the sense that its application by a court to a new state of facts is easily predictable—is an important concern of the second part of the book.[22]

16 Macneil, *Whither Contracts?*, 21 J. LEGAL ED. 403 (1969).

17 In this respect I should note that Macneil's casebook has won the annual Emil Brown Fund Preventive Law Prize Award.

18 Pp. 716-31. Because of the inclusion of so much new material, Macneil has been forced to abbreviate consideration of many doctrinal issues. Thus the problem of when preliminary negotiations ripen sufficiently to yield contractual liability is relegated principally to one case, Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965). P. 617. Moreover, the organizing themes of the book frequently cause doctrinal problems to be raised at times at which the student has not had the doctrinal background typically provided by a casebook organized primarily around traditional doctrinal themes. *See* note 48 and accompanying text *infra*. When I first used Macneil's text, these problems bothered me considerably. Now I have concluded that the problems are more or less inevitable in a book of this type, and that the book's many innovations make this price well worth paying.

19 Pp. 901-10.

20 Pp. 1017-30.

21 *E.g.*, pp. 1201-09.

22 The emphasis, of course, is not merely on how vague doctrine creates problems

The cases in this part are also used to illustrate practical problems that arise in the course of a transaction and that a lawyer might well anticipate and plan for. Macneil makes an effort to show that these planning problems are encountered in most contractual transactions, even though the detailed rules of law applied by courts may vary considerably according to transaction type, thus requiring different substantive plans. This effort is illustrated by the titles of the chapters that constitute the second part of the casebook: "Planning for Performance,"[23] "Planning for . . . Self-Help Remedies,"[24] "Planning for . . . Processes for Conflict Resolution,"[25] and so forth.

In the first part of the book Macneil explores a number of other principles, which he perceives as common to nearly all contractual transactions, concerning the interrelationships among the law, the participants in a contractual transaction, and society.[26] The first chapter develops the idea that remedies are designed to reinforce and encourage economic exchanges by promoting reliance on promises, and that such exchanges are essential to any economic system which relies on division of labor. In the course of the chapter the student is exposed to the basic rules of contract damages, with particular emphasis on the notion of the expectation interest; the chapter also contains excerpts from textual material, including a considerable amount of original text by Macneil, discussing basic concepts and their relationship to our socio-economic structure.[27]

The second chapter, a counter-theme to chapter one, develops another of Macneil's behaviorist principles underlying contractual transactions. The basic principle of this chapter is that in many, perhaps most, contractual transactions there is a strong element of social as well as economic exchange, or as Macneil prefers to phrase it, of cooperation. The result is that the basic doctrines of the law of contractual remedies often do not work well and with regard to many transaction types have had to be modified. The chapter begins with the obvious example of the family transaction and the notion that specific performance will

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for the lawyer as contract planner, but also on whether lawyers when planning pay enough attention to doctrine to make it worthwhile for a court to worry about the goal of certainty. An excellent means for bringing out the issues, I have found, is Cardozo's comment on his decision in Sun Printing & Publishing Ass'n v. Remington Paper & Power Co., 235 N.Y. 338, 139 N.E. 470 (1923), contained in his *The Growth of the Law*. B. CARDOZO, THE GROWTH OF THE LAW 110-11 (1924). Macneil does not include this material in his book, however.

23 Ch. 7.

24 Ch. 10.

25 Ch. 11.

26 Henceforth I shall describe these principles as behaviorist.

27 *E.g.*, pp. 1-5.

often be denied in this setting even if it is the only effective way to protect an expectation interest. Macneil then moves into collective bargaining contracts, explores reasons for the use of mediation and arbitration as the primary dispute settlement mechanisms, and introduces the continuing controversy[28] as to whether the labor arbitrator is or should be an industrial statesman or a judge bound by the terms of the contract. The purpose is to raise questions about whether traditional contract remedies, largely based on the model of a single arm's length transaction, can be applied sensibly to the much more common transaction in which the parties contemplate a long term involvement. In keeping with Macneil's belief that there are principles common to many transaction types, the collective bargaining materials are followed by materials concerning relatively typical commercial transactions, such as building contracts, which suggest the existence of similar problems in a different context. Chapter two closes with materials on third party beneficiaries, which show again that because of the often complicated, long term relationships among the promisor, promisee, and beneficiary, the law often cannot maintain a single-minded concern with protection of the expectation interest.[29]

Chapter three turns to a new theme, the need for social control in facilitating and regulating contractual transactions. Only a sampling of social control topics is provided, with primary emphasis on illegal contracts[30] and unconscionability. In keeping with an overall behaviorist orientation the chapter places a strong emphasis on remedial issues, the principal question being in what ways the law might penalize undesirable conduct to achieve social control objectives more efficiently. With occasional exceptions,[31] however, this chapter deals with transaction types that are the common subject of contracts courses. Chapter four

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28 *See, e.g.*, Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, which Macneil quotes in the casebook. Pp. 105-08.

29 The third party beneficiary section is built on two very intriguing but very difficult Supreme Court decisions considering the relationship among the employee, his union, and his employer. Vaca v. Sipes, 386 U.S. 171 (1967); Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960). These cases are supplemented by both the old and the new *Restatement* sections concerning third party beneficiaries (RESTATEMENT OF CONTRACTS § 133 (1932); RESTATEMENT (SECOND) OF CONTRACTS §§ 133, 147 (Tent. Draft No. 3, 1967)) and by some problems which permit application of the relevant concepts (pp. 162-69).

30 This is a subject too often ignored by contracts casebooks since it is one area of traditional doctrine that is litigated with some frequency. *See* L. FRIEDMAN, *supra* note 12, at 220.

31 *E.g.*, Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970), a landlord-tenant case involving a retaliatory eviction. Chapter three also contains some materials on the tort of misrepresentation, illustrating the role of this tort doctrine in the social control of contractual transactions. Pp. 206-12.

shifts to less orthodox materials in exploring social control issues such as the duty to bargain in good faith in collective bargaining and the desire to prevent racial discrimination in real estate and employment transactions. The issues are remarkably similar to those explored in chapter three. What was largely implicit in chapter three, however—the inherent conflict between freedom of contract and social control—is made arrestingly obvious by the chapter four materials. Examination of these materials reveals that the most important reason for our failure to achieve social control objectives is that the regulatory statutes establishing the objectives are equally concerned with preserving a very large measure of freedom of contract. This observation leads naturally into an inquiry about why freedom of contract is considered so important. The book could have offered more assistance on this issue by including, for example, materials on the difficulties of central planning in socialist countries.[32] As it is, the teacher is left to explore the benefits of freedom of contract largely on his own.

Chapters five and six are more orthodox, although they too provide some basis for formulation of behaviorist hypotheses. In doctrinal terms, chapter five is a brief introduction to the doctrines of consideration and promissory estoppel. In behavioral terms, it illustrates the law's attempt to distinguish promises of a gift from economic exchanges.[33] The attempt is only partly successful, of course, for just as chapter two teaches that economic exchanges contain a good deal of social exchange, so this chapter teaches that social exchanges often contain an element of economic exchange. Chapter six develops the theme that rights based on contract are recognized as a species of property which may be bought and sold. The principal doctrinal area considered is assignments, including transactions governed by article 9 of the Uniform Commercial Code.[34] The pervasiveness of the concept of contract rights as property is illustrated by brief reference to other doctrines as well. There is, for example, a very interesting section on the tort of

32 For this purpose Macneil does include at pages 348-60 a set of materials on Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N. D. Ill. 1969). I have found these materials inadequate to raise the points I want to make and have substituted for them a lecture or two on contracts and central planning in socialist countries. Macneil included materials on the latter subject in an earlier casebook he authored. I. MACNEIL, CONTRACTS: INSTRUMENTS FOR SOCIAL COOPERATION: EAST AFRICA 65-104 (1968).

33 The chapter includes two cases illustrating the tax law analogue to this problem: whether a payment is a gift and taxable as such, or alternatively part of an economic exchange and taxable to the recipient as ordinary income. Macneil had earlier characterized this tax problem as "the only legal question on the point that really matters these days." Macneil, *supra* note 16, at 409 n.7.

34 Pp. 521-22, 542-45.

intentional interference with contractual relations,[35] analogous, of course, to the tort of trespass.

Part I of the casebook, then, explores a number of different themes about contracts. In the process a number of doctrinal problems and policy issues common to all contracts courses are explored. Some organizing themes are traditional and are to a degree common to other casebooks, although usually given less behaviorist emphasis. Other themes are very original with Macneil. His most substantial contribution is an effort, largely successful in my view, to demonstrate that these themes are characteristic of a wide variety of transactions; they are not limited to the occasional oddball case which today is decided on the basis of general contract law.

As one would expect with materials having such a behaviorist orientation, the casebook contains a broader range of materials than is common in contracts casebooks. A statutory and administrative regulation supplement contains, *inter alia*, all the sections of the Uniform Commercial Code one would ordinarily use in a contracts course,[36] extensive provisions from the National Labor Relations Act, various provisions concerning racial discrimination in housing and employment, and assorted government contract regulations. The casebook itself contains numerous selections from law reviews and other periodicals; in addition, the form contracts of the American Institute of Architects are excerpted liberally as an excellent example of the advantages of planning by form contract. Macneil has also written a considerable amount of original text explaining how the various materials relate to their socio-economic context. In one instance a major doctrinal area, the parol evidence rule and related issues of interpretation, is covered quite successfully without any use of traditional case mate-

35 Pp. 487-507.

36 The inclusion of Uniform Commercial Code sections in the supplement raises one of my pet peeves. There is a marked tendency for casebook authors to reprint the Code, or some part of it, in a supplement. Usually the supplement version is less adequate for some reason than the official text. Macneil, for example, omits most of the comments. Countryman and Kaufman reproduce the entire Code in the supplement to their recent casebook on commercial law, but the print used makes the Code all but unreadable. V. COUNTRYMAN & A. KAUFMAN, COMMERCIAL LAW: CASES AND MATERIALS (1971).

The inclusion of the Code in a statutory supplement puts the law teacher to a difficult choice. Usually he asks his students to purchase the supplement for the non-Code material it contains; but since it usually contains most of the relevant Code material, he is reluctant to ask them to invest further in the official text, even though that would be more adequate for his purposes. From the student's point of view, since he will undoubtedly use the Code in several courses, it surely would be more economical to purchase a copy of the official text at the beginning of his law school career instead of buying several different statutory supplements whose cost is inflated by the inclusion of all or a substantial part of the Code.

rials. Instead Macneil reproduces extracts from several leading law review articles discussing the issues, and follows with some problems which permit application of the concepts explained in the articles.[37]

Despite Macneil's use of some unorthodox materials, he remains committed to the appellate case. The book contains about 180 appellate cases, most of them decided since 1950. Macneil's use of so many cases is quite intentional; he makes it very clear[38] that even though he desires to provide a behavioral perspective to a contracts course, he has no desire to abandon the traditional analytic goals of a first year course, summarized as "learning to think like a lawyer."

In my judgment Macneil pays a considerable price for this commitment to the use of appellate cases. Time and again he uses appellate cases when other materials would have developed his point or theme more adequately. For example, when suggesting that commercial transactions, like collective bargaining and family transactions, frequently rest so heavily on anticipated cooperation that rigorous adherence to the expectation interest norm would be inappropriate,[39] he relies principally on three appellate cases[40] involving the availability of specific performance in a continuing contract situation. The cases suggest Macneil's point, of course, but there is better evidence available.[41] At the beginning of chapter one Macneil quotes from an article by Macaulay[42] reporting his findings on the contracting behavior of businessmen.[43] The excerpt comes in the context of a general introduction to the relationship between the expectation interest and economic exchanges, however, and appears as a mild antidote to some of the more conventional ideas expressed by Karl Llewellyn and Harold Havighurst.[44] The excerpt is proper where it is, but in chapter two Macneil could have profitably expanded on its ideas, drawing on other material prepared by Macaulay.[45]

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37 Pp. 860-901. In my view Macneil might have used this techniqne in several other places—for example, where the enforceability of contract modifications and related consideration problems are examined. Pp. 732-76.

38 *Preface*, pp. xiii-xvi.

39 Pp. 118-33.

40 Thayer Plymouth Center, Inc. v. Chrysler Motors Corp., 255 Cal. App. 2d 300, 63 Cal. Rptr. 148 (4th Dist. 1967); Grayson-Robinson Stores, Inc. v. Iris Constr. Corp., 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960); Staklinski v. Pyramid Elec. Co., 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959).

41 *E.g.*, Macaulay, *supra* note 7.

42 Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, 9 PRAC. LAW., Nov. 1963, at 13, 14-17.

43 Pp. 9-12.

44 Pp. 6-7, 12-14.

45 Macneil does quote liberally (pp. 121-22) from some congressional testimony

The second part of the casebook, which deals with issues a lawyer planning a transaction needs to address, contains many more such instances where Macneil might better have served his behaviorist objectives had he been less committed to the value of reading appellate cases. Since so few contract disputes actually go to litigation, especially appellate litigation, it would be surprising if a lawyer could determine from reading appellate cases all the planning issues he might face in preparing a contract. Put in other terms, it would be a poor lawyer who would concentrate primarily on problems that might be the subject of a lawsuit appealed to the New York Court of Appeals. Macneil recognizes this difficulty, and Part II contains many textual notes filling in some of the gaps created by primary reliance on appellate cases.[46] It seems to me that more could have been done. In chapter eight, for example, Macneil stresses the importance to the lawyer as planner of considering insurance and allied concepts as ways to control risks. Although Macneil recognizes that the lawyer needs to know about the types of coverage available, how to secure them, and so forth, he states that one "cannot hope as a law student to become expert in such subjects."[47] Instead the chapter explores some doctrinal problems that arise in particular types of insurance arrangements: the hold harmless clause and payment and performance bonds. But such doctrinal issues are covered elsewhere in a more comprehensive fashion,[48] and deep consideration of them at this point is largely a waste of time. The cases seem to be designed primarily to expose the student to examples of possible insurance arrangements. Assessment of the utility of the various insurance possibilities illustrated can be made in light of the commercial settings described in the opinions, but this end could be accomplished more efficiently by the use of textual excerpts than

Macaulay gave on the operation of the Dealer's Day in Court Act. 15 U.S.C. §§ 1221-25 (1970). The testimony is relevant to a case which is included in the book. Thayer Plymouth Center, Inc. v. Chrysler Motors Corp., 255 Cal. App. 2d 300, 63 Cal. Rptr. 148 (4th Dist. 1967). Much more useful, however, would have been some of Macaulay's work on how automobile dealer-manufacturer disputes are settled in practice. This material could have demonstrated a real parallel between dispute settlement in collective bargaining and commercial transactions. *See* S. MACAULAY, LAW AND THE BALANCE OF POWER (1966). When I reach this point in Macneil's book, I supplement his material with excerpts from the Macaulay book and a portion of an unpublished supplement that Macaulay once prepared for use with the Kessler and Sharp casebook. F. KESSLER & M. SHARP, *supra* note 9. Macaulay's supplement describes in more detail the results of the interviews with businessmen that he reported in Macaulay, *supra* note 7.

46 *E.g.*, pp. 1103-13.

47 P. 808.

48 For example, interpretation issues are explored in chapter 9, section 1 and illegality is explored in chapter 3, section 2A.

through study of long-winded appellate opinions focusing on doctrinal problems that are essentially diversionary. A textual approach could also permit students to become acquainted with more types of available insurance arrangements.

All this is not necessarily to say that Macneil was wrong in remaining so committed to appellate materials. Any further elimination of them would raise at least two issues. The first is whether sufficient alternative materials relevant to Macneil's themes are available. Legal scholars generally, and contracts scholars in particular, have been historically remiss in researching the relation of law to society and social change. Fortunately, this omission is now being redressed, particularly in areas commonly called public law, but also in many private law areas.[49] It is probably still true, however, that information about the relation of law to contractual transactions is simply insufficient—particularly in terms of the broad scale behaviorist theories that interest Macneil—to permit construction of a contracts course chiefly around materials other than appellate opinions. I believe, however, that Macneil could have made greater use of such materials than he did.

When other materials do become available, a difficult pedagogical issue will be raised for teachers who wish to concentrate on behaviorist themes. Law school courses, and particularly first year courses such as contracts, traditionally have been taught almost entirely from materials which can be assembled into a single volume. Efforts have been made to assemble non-case materials with a primary behaviorist orientation into a one-volume set of teaching materials,[50] and on the whole have been fairly successful. It is my opinion, however, that excerpting articles and books often deprives the reader of much feeling for the different contexts in which the law operates. When an empirical study is excerpted, only the author's theoretical conclusions tend to be retained.[51] This suggests that law school courses should go the way of courses in other fields and make use of the growing paperback market. Yet it would be unfortunate if a first year course were to analyze nothing but a collection of paperback studies and periodical reprints. The greatest virtue of the single text approach is that it provides a meticu-

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49 This is particularly so in the area of accident law. *See, e.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS (1970).

50 L. FRIEDMAN & S. MACAULAY, LAW AND THE BEHAVIORAL SCIENCES (1969); R. SCHWARTZ & J. SKOLNICK, SOCIETY AND THE LEGAL ORDER (1970).

51 An excellent example is the use typically made of Schultz's famous study on bid shopping in the construction industry (Schultz, *supra* note 6). *See, e.g.*, E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW 280-81 (1970). Macneil, admirably, quotes liberally from a more recent study on the same subject. Pp. 1270-81.

lous organization for the course, an organization that greatly aids understanding. The questions and problems that commonly appear in contemporary casebooks can be particularly valuable in this regard. Perhaps what courses emphasizing behaviorist themes will need, therefore, is a basic text to supply course organization, supplemented by a number of complete studies too lengthy to be included in full in the text.

The second issue raised by deemphasizing appellate cases concerns the proper goals of a first year course. Macneil adheres to the traditional belief in the training value of appellate opinions. Even though it is difficult to articulate precisely what skill is learned in this way and therefore difficult to determine whether the skill could be learned through study of other materials, the vast majority of the law teaching profession clearly shares Macneil's belief. At the same time, however, there is increasing sentiment that law schools have too long concentrated on appellate opinion reading in the first year to the virtual exclusion of nearly everything else. A respected group of law teachers recently suggested that the first year curriculum be revised to give more emphasis to such matters as advocacy skills and appreciation of the relation of law and the legal process to society and social change.[52] They would not have each course try to provide extensive training in each of these skills or perspectives. Rather they propose that one factor be assigned to each of the traditional subjects covered in the first year. Perhaps not unexpectedly, the group suggests that contracts courses could be used to train students in appellate opinion reading.[53] By reputation, at least, contracts is an area of the law that is almost completely dominated by judge-made law. Yet if the findings of Friedman, Macaulay, and others are correct,[54] a study of appellate opinions concerning contract law produces substantive knowledge that is relevant to almost nothing. Would it not be better to provide training in appellate opinion reading in a substantive area in which the appellate opinions reveal useful information? Contracts courses could then be assigned the tasks

52 ASSOCIATION OF AMERICAN LAW SCHOOLS, 1971 ANNUAL MEETING REPORT: TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1971).

53 *Id.* at 7-10, 15-18, 36-37. The committee also perceives that a contracts course could be used to provide perspectives on the relation of law to society:

> It should be emphasized that the program contemplates substantial flexibility in the designation of the legal topics used as vehicles for the pursuit of the several stated goals. It would be quite consistent with the concept of the program to substitute a course centered on the economic underpinnings of contract and property law for the offering centered on the social psychology of criminal law.

Id. at 37. My quarrel is with the suggestion that contracts could ever be a proper vehicle for training in appellate opinion reading.

54 Notes 12 & 14 and accompanying text *supra*.

of providing introductory perspectives on the relation of law to society and on the utility of practicing preventive law.[55] Macneil's book, it seems to me, provides ample proof that a contracts course can be oriented around such training.

I should probably emphasize more than I have that the book does not ignore the doctrinal problems and policy issues that constitute the core of most contracts courses. Yet Macneil's unique contribution is best viewed in the context of recent assertions of the irrelevance of contracts courses and of suggestions to revise the first year curriculum to emphasize skills other than appellate opinion reading. He demonstrates the feasibility of orienting a contracts course around something besides the analytic skills gained from reading opinions. In so doing he may have at least delayed the day when the contracts course is relegated to the junk pile. It is best, I believe, to view Macneil's book as only a first step. I hope that future casebook authors will carry Macneil's causes forward, perhaps emphasizing other behaviorist themes and in particular making greater use of non-case materials.

Until that time comes, however, I plan to continue to use Macneil's casebook. For the two years prior to publication Macneil was kind enough to provide me with pre-publication drafts, so I have already used the book for three years. It is eminently teachable and exciting in content. Time and again students have told me that they entered law school expecting contracts to be their dullest first year course, only to have those expectations pleasantly destroyed.[56] Most of the credit, I am convinced, belongs to Macneil. His book is relevant.

*William C. Whitford**

[55] Lest I be misunderstood, I should hasten to add that I certainly do not contemplate that a contracts course should ever dispense entirely with appellate cases, or even more importantly, statutes. As with nearly everything else in life, it is a matter of degree.

[56] Of course there have always been a number of students who have objected, particularly to the first part of Macneil, on the grounds that it constitutes social science nonsense and that they paid their tuition to learn law. I console myself, first with the hope that these students will get over their misconceptions of the purposes of law study, second with the knowledge that throughout the book Macneil has given consideration to most of the doctrinal problems treated in traditional contracts courses, and finally by recalling the more numerous student comments that are extremely favorable.

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