AN EMPIRICAL VIEW OF RELATIONAL CONTRACTS UNDER ARTICLE TWO OF THE UNIFORM COMMERCIAL CODE

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INTRODUCTION

The need for empirical studies of contract law is a theme that has pervaded this Conference on Contract Law: From Theory to Practice. Both Jim White and Jeff Harrison have undertaken empirical studies as part of their presentations. White examined the reported decisions in the six most recent volumes of the Uniform Commercial Code Reporting Service, focusing on the amount of litigation under various sections of the Uniform Commercial Code ("U.C.C.").[1] Harrison tried to determine the extent to which judicial decision-making had been influenced by economic theory.[2] He identified a number of significant law and economics articles dealing with contract law and conducted a computer search to determine the extent of citation of these works.

While the articles by Peter Linzer and Gerry Spann did not present empirical research, they did develop theoretical frameworks in which empirical studies would play an important role. Relational contract theory, the topic of Linzer's article, demands that courts take into account the relationship between the parties in deciding contract disputes.[3] To understand relationships, courts must have information about the transactions between the parties and about the industries in which they function. Even critical legal studies, viewed by many scholars as impenetrably theoretical, implicitly recommends a strong dosage of empirical medicine. If doctrine is deconstructed, courts must instead

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1. See White, Promise Fulfilled and Principle Betrayed, 1988 Ann. Surv. Am. L. 7.

2. See Harrison, Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law, 1988 Ann. Surv. Am. L. 73.

3. See Linzer, Uncontracts: Context, Contorts and the Relational Approach, 1988 Ann. Surv. Am. L. 139.

turn to context and circumstance to decide cases.[4]

The emphasis on the need for more empirical work prompted me to examine previous empirical work in contract law.[5] I found a modest body of scholarship, employing a variety

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4. See Spann, A Critical Legal Studies Perspective on Contract Law and Practice, 1988 Ann. Surv. Am. L. 223.

5. An initial problem that I encountered when I began my research was to determine what is an "empirical" study. In particular, how do such studies differ from traditional scholarship? I began my investigation with the belief that an empirical study was one that was quantitative, that would provide hard, scientific data about the system of contract law. After reviewing some of the literature on empirical work, however, I learned that this definition was not totally satisfactory. Of course, many, perhaps even most, empirical studies do contain quantitative data. E.g., Note, The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices, 66 Yale L.J. 1038 (1957). However, in a number of empirical projects the quantitative component is small or nonexistent. Stewart Macaulay's famous study on the use of contracts in business is illustrative. The interpretive portion of that article is much more significant than the modest quantitative foundation on which it rests. See Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963).

In particular, one well-recognized form of empirical research is the case study. The researcher conducting a case study examines in detail a particular individual or situation. See J. Monahan & L. Walker, *Social Science in Law: Cases and Materials* 52-54 (1985)[hereinafter Monahan & Walker]. Professor Richard Danzig's book, *The Capability Problem in Contract Law: Further Readings on Well-Known Cases* (1978), is a good example of the case study in contract law. Danzig defines capability problems as problems which "impede and distort efforts to further preferred values through a legal system." Id. at 1-2. His book presents material on several well-known contract cases to illustrate the presence of capability problems before litigation, during trial, and on appeal. His research ranges beyond appellate opinions to include excerpts from trial transcripts, historical material, and interviews.

What then is an empirical study? One major social science treatise defines empirical research as follows:

> Empirical research, the foundation of the scientific approach, refers to any activity that systematically attempts to gather evidence through observations and procedures that can be repeated and verified by others. The scientific approach requires that all claims be exposed to systematic probes. Statements, theories, and assertions, regardless of how plausible they seem, must be testable. . . . It is this demand for publicly observable evidence that hallmarks the objective nature of the empirical approach.

J. Neale & R. Liebert, *Science and Behavior: An Introduction to Methods of Research* 7 (2d ed. 1980), quoted in Monahan & Walker, supra, at 35. This definition highlights what I think is the key distinction between empirical research and policy analysis, the traditional form of legal scholarship. Empirical research requires that propositions be provable or disprovable by gathering evidence. Policy analysis, by contrast, requires logical consistency, but not verifiability.

of social science methodologies.[6] Review of this literature, however, led me to focus on a distinction in the approaches to empirical work that I had not previously grasped, the distinction between "sociological" and "internal" studies.

I
SOCIOLOGICAL AND INTERNAL EMPIRICAL STUDIES

Empirical research into contract law is usually identified with the "sociology of law." Sociological studies, in broad terms, seek to determine the relationship between the legal system and some aspect of the general society.[7] For example, how do rules of law affect the behavior of those who are not part of the formal legal system? What impact has social and economic change had on legal doctrine?

Scholars have produced a modest number of sociological studies of contract law. Much of this work seeks to determine the impact of contract doctrine on the behavior of people who are not a part of the formal legal system, such as businesses and consumers. The best known empirical examination of contract law, Stewart Macaulay's "Non-Contractual Relations in Business: A Preliminary Survey",[8] illustrates this approach. Macaulay's article was an attempt to determine the extent to which business people actually used contract law. He found that complex transactions were characterized by a large degree of planning involving specialized contracts, while more routine transactions were handled through standardized contracts.[9] Macaulay also found, however, that the settlement of disputes was much less influenced by contractual principles than was the case with contract formation. Many disputes were compromised without reference to the terms of the contract. In particular, businesses usually allowed their customers to cancel contracts without penalty.[10] Other sociological studies of contract law have been undertaken by Kessler,[11]

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6. For an excellent discussion of social science methodologies for the novice, see Monahan & Walker, supra note 5, ch. 2.

7. See generally L. Friedman & S. Macaulay, *Law and the Behavioral Sciences* (2d ed. 1977).

8. 28 Am. Soc. Rev. 55 (1963). See also Macaulay, The Use and Non-use of Contracts in the Manufacturing Industry, 9 Prac. Law. 13 (Nov. 1963).

9. 28 Am. Soc. Rev. at 57.

10. Id. at 61.

11. Automobile Dealer Franchises: Vertical Integration by Contract, 66 Yale L.J. 1135 (1957).

Friedman,[12] Hurst,[13] Whitford,[14] and Brandt and Day.[15]

Some sociological studies draw on data about business or consumer behavior to argue for change in the legal system. For example, Professor Franklin Schultz undertook a study of the bidding practices in the construction industry in Indiana. His work called into question the need, or even the desire, of general contractors to have legal protection against the withdrawal of bids by their subcontractors.[16] A number of other studies have also drawn on empirical data to argue for change in contract doctrine.[17]

In reviewing the empirical studies of contract law, however, I found a few articles that took a different approach, one that I characterize as "internal" rather than "sociological." By this I mean that the studies focused on the decisions of judges in contract disputes, rather than the relationship between contract law and the behavior of actors outside the legal system.

One example of the internal approach is Professor Robert

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12. L. Friedman, *Contract Law in America: A Social and Economic Case Study* (1965).

13. J. Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (2d ed. 1984).

14. Whitford & Laufer, The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act, 1975 Wis. L. Rev. 607; Grau & Whitford, The Impact of Judicializing Repossession: The Wisconsin Consumer Act Revisited, 1978 Wis. L. Rev. 983. These studies attempt to determine the impact of the repeal of a creditor's right of self-help repossession on the availability and cost of credit.

15. Brandt & Day, Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending, 7 U. Mich. J.L. Ref. 297 (1974).

16. Schultz, The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry, 19 U. Chi. L. Rev. 237, 284-85 (1952). See also Lewis, Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry, 9 J. Law & Soc'y 153 (1982); Note, Another Look at Construction Bidding and Contracts at Formation, 53 Va. L. Rev. 1720 (1967).

17. L. Trakman, *The Law Merchant: The Evolution of Commercial Law* (1983), reviewed in Williams, Book Review, 97 Harv. L. Rev. 1495, 1500-04 (1984). Berman, Excuse for Nonperformance in the Light of Contract Practices in International Trade, 63 Colum. L. Rev. 1413 (1963); Braucher, An Informal Resolution Model of Consumer Product Warranty Law, 1985 Wis. L. Rev. 1405; Davis, Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts, 63 Va. L. Rev. 841 (1977); Davis, Revamping Consumer-Credit Contract Law, 68 Va. L. Rev. 1333 (1982); Note, The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices, 66 Yale L.J. 1038 (1957).

Childres' study of judicial enforcement of express conditions.[18] Childres examined 168 judicial decisions that cited the provisions of the Restatement of Contracts dealing with conditions. He found that while courts often gave lip service to the principle of strict enforcement of conditions, they rarely enforced a condition unless it was "material." Of the decided cases that he reviewed, only 6.1 percent involved strict enforcement of nonmaterial conditions.[19]

Another example of this internal approach is Professor White's 1977 study of the impact of the U.C.C.[20] White and his assistants studied reported cases under Article Two of the U.C.C. from New York, California, and Ohio for the years 1973, 1974, and 1975.[21] He first looked at the cases in gross to determine the extent of litigation under the U.C.C. He found that "the resounding message of these data is that, warranty litigation aside, appellate and presumably lower courts deal only infrequently and sporadically with article 2 of the Code."[22] He then compared frequency of citation of sections of the U.C.C. with comparable sections of the Uniform Sales Act ("U.S.A."), the predecessor of the U.C.C., to determine if there had been any significant shift in litigation under the U.C.C. He found that some U.C.C. sections (sections 2-201 and 2-509, for example) produced less litigation under the U.C.C. than the comparable provision of the U.S.A.[23] On the whole, however, "the Code has not caused a radical change in the type of sales litigation that appears in the reported decisions."[24] Finally, White attempted to determine whether there was an improvement in the quality of judicial decisions under the U.C.C. from decisions under the U.S.A. He found little evidence of significant improvement.[25]

It seemed to me that internal empirical studies were a relatively neglected form of research and that such an approach might provide useful insights into issues of contract law. To test this idea I decided to attempt an internal empirical study of my

18. Childres, Conditions in the Law of Contracts, 45 N.Y.U. L. Rev. 33 (1970).

19. Id. at 37.

20. White, Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Empirical Expedition, 75 Mich. L. Rev. 1262 (1977).

21. Id. at 1264.

22. Id. at 1272.

23. Id. at 1274.

24. Id. at 1275.

25. Id at 1276-85.

own. I chose as the subject of my study the theory of relational contract law.

II
THE STUDY

Relational Contract Law.—Relational contract law, one of the four theories of contract law presented in this symposium, is usually identified with the scholarship of Ian Macneil.[26] In a series of works, Professor Macneil has developed a theory of contract law based on the distinction between discrete and relational contracts. In discrete contracts, according to Macneil, the parties do not have an on-going bond or association. The paradigm of the discrete contract involves the sale of gasoline at a service station to a one-time customer.[27] In contrast, relational contracts involve significant links between the parties lasting over a period of time.[28]

Macneil argues that classical contract law was based on the assumption that contracting behavior principally involves discrete transactions.[29] He claims, however, that relational transactions actually predominate over discrete contracts.[30] While neoclassical contract law has incorporated some relational elements, Macneil finds that this response to the discrete emphasis of classical contract law is inadequate.[31] Accordingly, he argues that contract law should be reformulated on the basis of relational principles.[32]

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26. I. Macneil, *The New Social Contract* (1980); Macneil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 Nw. U.L. Rev. 854 (1978)[hereinafter Macneil, Adjustment]; Macneil, Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus", 75 Nw. U.L. Rev. 1018 (1981); Macneil, Efficient Breach of Contract: Circles in the Sky, 68 Va. L. Rev. 947 (1982); Macneil, The Many Futures of Contracts, 47 S. Cal. L. Rev. 691 (1974)[hereinafter Macneil, Many Futures]; Macneil, Relational Contract: What We Do and Do Not Know, 1985 Wis. L. Rev. 483; Macneil, Restatement (Second) of Contracts and Presentiation, 60 Va. L. Rev. 589 (1974); Macneil, Values in Contract: Internal and External, 78 Nw. U.L. Rev. 340 (1983).

27. Macneil, Adjustment, supra note 26, at 856-57.

28. Macneil distinguishes discrete from relational contracts on a number of grounds, such as duration, degree of planning, and number of participants. For his taxonomy of distinguishing factors see id. at 902-05 (Appendix). These distinguishing factors are discussed in more detail in Macneil, Many Futures, supra note 26, at 744-805.

29. Macneil, Adjustment, supra note 26, at 862-65.

30. Macneil, Many Futures, supra note 26, at 725.

31. Macneil, Adjustment, supra note 26, at 884-86.

32. Id. at 889-901.

Methodology.—The study was an attempt to answer three questions: (1) What is the relative incidence of discrete and relational contracts in litigated cases under Article Two of the U.C.C.? (2) Has the relative incidence of discrete and relational contracts changed from the inception of the U.C.C. to the present? (3) In those litigated cases involving relational contracts, has the existence of a relationship affected the court's reasoning in the case?

To answer these questions my research assistant and I undertook an analysis of all decisions under Article Two of the U.C.C. that were reported in volumes 1, 26, and 42 of the Uniform Commercial Code Reporting Service.[33] Volume 1 included forty-nine decisions from 1956 through 1963. A few of these cases were pre-U.C.C. Volume 42, the most recent volume in the series at the time we undertook the study, contained 112 decisions rendered in 1985 and 1986. Volume 26, which was chosen at random by my research assistant to reflect a sample of cases from the intermediate period between the inception of the U.C.C. and the present, included 101 decisions from 1978 and 1979.

To determine the relative incidence of discrete and relational cases, my research assistant and I read and classified each of the cases as either discrete or relational. In making this classification we adopted the following operational definitions.[34]

> A case was classified as *relational* if the facts reported in the opinion showed that the parties had entered into more than one contract over a period of time or if the facts showed that the parties had entered into a long-term contract with repeated occasions for performance. A case was classified as *discrete* if the facts showed that parties had entered into a single contract not involving repeated occasions for performance.

In making these classifications we encountered several problems. First, a number of cases involved on-going negotiations between the parties in an effort to resolve a dispute that had developed. For example, if a consumer purchased a defective car, the consumer would often take the vehicle back to the dealer on

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33. The U.C.C. Reporting Service includes the full text of almost all of the cases it reports. There are a few cases in each volume, however, in which the editors have chosen to provide only headnotes, rather than full text. E.g., Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759, 42 U.C.C. Rep. Serv. (Callaghan) 229 (1985). The study includes these cases as well.

34. An operational definition specifies those factors that are to be observed. See Monahan & Walker, supra note 5, at 41-42.

several occasions in an attempt to have the defect repaired. The mere fact that there may have been such on-going negotiations was not treated as sufficient to make the transaction relational. Macneil's use of the term relational contract refers to the process of agreement and performance, not to post-breach negotiations.[35]

Second, some cases involved multiple parties. For example, an employee may have been injured by a product purchased from a manufacturer. The employee may have had an on-going relationship with his employer, but not with the manufacturer. We classified these cases based on the relationship between the parties to the principal issue in the case.

A more fundamental problem was the fact that some cases appeared to be discrete, i.e., they involved only one transaction, but we suspected that the parties may have had an on-going relationship. We resolved this problem by basing the classification only on the facts revealed in the cases. If those facts showed only one transaction, the case was treated as discrete. We concluded that it would have been speculative to treat a case as relational simply because we suspected that a relationship existed. This choice, however, does make our study susceptible to the charge that it overstates the number of discrete transactions relative to relational ones. In those cases in which it was difficult to determine if a relationship existed, however, it is unlikely that any relationship had an impact on the court's decision in the case.

Among the cases that were classified as relational, we also attempted to determine whether the relationship had an effect on the decision. We treated the relationship as having an impact if the relationship appeared to be a factor, even though not necessarily conclusive, in the decision of the case.

The following cases illustrate our method of classification:

In *Northern States Power Co. v. ITT Meyer Industries*,[36] the defendant contracted to supply the plaintiff with screw anchors which were to be used to support towers carrying an electrical transmission line. Several of the anchors broke causing five towers to collapse, and the buyer brought suit for breach of warranty.[37] In its decision, the Court of Appeals for the Eighth Circuit noted that the plaintiff had entered into a contract with

35. Post-breach contact is not one of the factors Macneil uses to distinguish discrete from relational contracts. See note 28 supra.

36. 777 F.2d 405, 42 U.C.C. Rep. Serv. (Callaghan) 1 (8th Cir. 1985).

37. Id. at 406, 42 U.C.C. Rep. Serv. (Callaghan) at 2.

the defendant after it became dissatisfied with the products of other manufacturers.[38] We classified this case as discrete.

Similarly, in *Metalcraft, Inc. v. Pratt*,[39] the plaintiff had purchased a marine casting business from the defendant, giving the defendant a promissory note payable in installments.[40] The plaintiff brought suit seeking credit against the note for damages suffered as a result of an alleged breach of the warranty of title.[41] Because there was no evidence of any other transaction between the parties, we classified the case as discrete.

By contrast, in *Custom Roofing Co. v. Alling*,[42] the plaintiff entered into a subcontract to provide roofing on a school construction job. The contract specified the use of materials from the defendant, Owens-Corning Fiberglas Corp. ("Owens-Corning"). Owens-Corning had two offices in Phoenix, Arizona, one in Branch and the other in Supply. The Branch office sold only to approved contractors. While the plaintiff was not an approved contractor, it had purchased Owens-Corning materials from the Supply office "for many years." The plaintiff placed an order for materials from the Supply office, which defendant Owens-Corning later cancelled because the plaintiff was not an approved contractor.[43] Owens-Corning contended that no contract was formed and that even if one had been formed, it did not comply with the statute of frauds.[44] The Court of Appeals of Arizona rejected these arguments and in doing so gave weight to the business relationship between the parties. "In the context of the long-standing business relationship between [the buyer] and [the seller], it is hard to imagine circumstantial evidence more strongly probative of acceptance."[45] We classified this as a relational case in which the result was affected by the relationship.

In *Spinnerin Yarn Co. v. Apparel Retail Corp.*,[46] the plaintiff was a supplier of yarn to garment manufacturers, while the defendant

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38. Id., 42 U.C.C. Rep. Serv. (Callaghan) at 3.

39. 65 Md. App. 281, 500 A.2d 329, 42 U.C.C. Rep. Serv. (Callaghan) 14 (1985).

40. Id. at 285, 500 A.2d at 331-32, 42 U.C.C. Rep. Serv. (Callaghan) at 15.

41. Id. at 287, 500 A.2d at 332, 42 U.C.C. Rep. Serv. (Callaghan) at 16.

42. 146 Ariz. 388, 706 P.2d 400, 42 U.C.C. Rep. Serv. (Callaghan) 63 (Ct. App. 1985).

43. Id. at 389, 706 P.2d at 401, 42 U.C.C. Rep. Serv. (Callaghan) at 63-64.

44. Id. at 389-90, 706 P.2d at 401-02, 42 U.C.C Rep. Serv. (Callaghan) at 64.

45. Id. at 390, 706 P.2d at 402, 42 U.C.C. Rep. Serv. (Callaghan) at 64.

46. 614 F. Supp. 1174, 42 U.C.C. Rep. Serv. (Callaghan) 65 (S.D.N.Y. 1985).

was an "off-price" buyer of garments.[47] The plaintiff contended that the defendant had breached an oral agreement to pay for yarn ordered by a manufacturer, Stoll, which was to be fabricated into goods for the defendant.[48] The evidence in the case showed that the defendant had established a $500,000 line of credit to permit Stoll to make purchases and that a number of transactions had taken place with the plaintiff pursuant to this line of credit.[49] Nonetheless, the District Court for the Southern District of New York found that the defendant was not liable to the plaintiff because the evidence failed to establish that the defendant had agreed to pay for the yarn sent to Stoll or that Stoll was acting as its agent.[50] We classified this as a relational case in which the relationship did not affect the result.

Results of the Study and Interpretation of the Data.—Tables I, II, and III show the results of our analysis for each of the volumes in question.[51]

Table I — Volume 1 U.C.C. Reporting Service

	Number of Cases	*Percentage of Total*
Discrete	43	87.8%
Relational — No Effect	3	6.1%
Relational — Effect	3	6.1%
Total	49	100.0%

Table II — Volume 26 U.C.C. Reporting Service

	Number of Cases	*Percentage of Total*
Discrete	74	73.3%
Relational — No Effect	11	10.9%
Relational — Effect	16	15.8%
Total	101	100.0%

47. Id. at 1176, 42 U.C.C. Rep. Serv. (Callaghan) at 66.
48. Id.
49. Id., 42 U.C.C. Rep. Serv. (Callaghan) at 67.
50. Id. at 1176, 42 U.C.C. Rep. Serv. (Callaghan) at 66.
51. The raw data on which these tables are based is available from the author.

Table III — Volume 42 U.C.C. Reporting Service

	Number of Cases	*Percentage of Total*
Discrete	84	75.0%
Relational — No Effect	15	13.4%
Relational — Effect	13	11.6%
Total	112	100.0%

The study shows a predominance of discrete over relational contracts in litigated cases from the inception of the U.C.C. to the present. In volume 1, 87.8% of the cases were discrete. This declined somewhat in volumes 26 and 42 to about 75% of the cases in both volumes. Even among those cases that are relational, in only about half did the relationship have an impact on the outcome of the case.

What accounts for the predominance of discrete over relational contracts? First, many of the cases litigated under Article Two of the U.C.C. involve defective products. Some of these cases deal with big-ticket consumer items. Because such purchases occur infrequently, they rarely involve a relational contract. Other defective product cases involve employees bringing suit against remote manufacturers with whom they have had no contractual relationship. Finally, even commercial defective product cases often involve one-time purchases.

Second, another group of cases involves disputes arising from one-time purchases, such as a seller's failure to deliver the goods, a buyer's failure to pay the purchase price, or a seller's attempt to reclaim the goods when the buyer has filed for bankruptcy.

Third, as a number of commentators have pointed out, parties to relational contracts often have incentives to preserve the relationship and avoid litigation.[52]

52. Beale & Dugdale, Contracts Between Businessmen: Planning and the Use of Contractual Remedies, 2 Brit. J. L. & Soc. 45, 47 (1975); Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55, 63 (1963); Mueller, Contract Remedies: Business Fact and Legal Fantasy, 1967 Wis. L. Rev. 833, 836. However, litigation of relational contracts can result if significant changes to the relationship take place. For example, the dramatic increase in oil prices during the early 1970's produced litigation over fixed-price fuel supply contracts, and the rise of the women's movement has produced litigation dealing with sexual harassment. See Macaulay, An Empirical View of Contract, 1985 Wis. L. Rev. 465, 471-77.

Limitations of the Study.—The study has several important limitations. First, Macneil's claim about the predominance of relational over discrete contracts is not a claim about their relative importance in litigated cases. His contention is that in terms of the overall fabric of society, relational contracts are much more important than discrete contracts. Discrete contracts merely exchange goods and services. Relational contracts structure social relationships.[53] Even if the results of this study are accepted as correct, they show only a predominance of discrete over relational contracts in litigated cases under Article Two of the U.C.C., not a predominance of discrete transactions in society as a whole.

Second, the study is limited to cases under Article Two of the U.C.C. It would not be safe to generalize from this study to make conclusions about all litigated contract cases. Indeed, the percentage of litigated relational contracts among all litigated contracts may be greater than the percentages shown in this study. For example, this study excludes litigation over employment contracts and leases, both of which are likely to be predominantly relational. On the other hand, many real estate and insurance contracts may well be discrete.

Third, as noted above, it was difficult to classify some cases. In a few cases the facts reflected only one transaction, but we suspected the existence of a relationship. Thus, the study could be criticized for overstating the number of discrete transactions.

Conclusions.—Despite the limitations of the study, it is fair to conclude that discrete transactions remain significant in litigated cases under Article II of the U.C.C. This result has implications for the focus of analysis of Article Two cases. In addition to developing the distinction between discrete and relational contracts, Professor Macneil has argued that relational contracts reflect different norms from discrete contracts and that courts should use relational norms in decision-making.[54] If, as this study suggests, relational contracts are not as significant in Article Two litigation as has been thought, a total reformulation based on relational principles would not be warranted. For example, Article Two of the U.C.C. provides that a duty of good faith applies to the performance of a contract.[55] The duty of good

53. Macneil, Relational Contract: What We Do and Do Not Know, 1985 Wis. L. Rev. 483, 485-487.

54. Macneil, Values in Contract: Internal and External, 78 Nw. U.L. Rev. 340 (1983).

55. U.C.C. §§ 1-203, 2-103(1)(b) (1987).

faith could be interpreted to incorporate relational norms. But this approach may be undesirable since the bulk of litigated transactions under Article Two remain discrete.

III
INTERNAL STUDIES AS A FRUITFUL METHODOLOGY?

The absence of more empirical research is often a subject of lament. At the Conference on Contract Law, Professor Elizabeth Warren remarked:

> Contract law today is very little influenced, I think by empirical work.
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> I know as soon as I say that, you all will shout, "But Stewart Macaulay—" . . . He did a wonderful study but I want to know how many people did it after Stewart. It's been nearly twenty years ago, and how many more can you name behind Stewart?[56]

This article has referred to a few other empirical studies of contract law, but Professor Warren is right; the body of empirical work about contract law remains small. Why? There are a number of reasons, many of them related to the nature of sociological empirical work.

By definition, a sociological study requires the gathering of data outside the legal system. When such data is not in existence, it must be created, either by survey or experiment. Most law teachers are not trained in the skills necessary to conduct such studies. As a result, time must be invested to learn these skills, or the legal scholar must associate with another researcher who is familiar with these techniques. In addition, even when the data has been gathered, questions can be raised about the validity of the study.[57] Moreover, Stewart Macaulay's work has, in one sense, destroyed the incentive for legal scholars to undertake sociological studies of contract law. If contract law has little impact on the behavior of those outside the legal system, what is left to study? One could, of course, investigate the behavior of these non-legal actors, but if that behavior is little influenced by contract law, why should someone who is interested in contract law

56. Warren, Comments on Professor White's Paper, 1988 Ann. Surv. Am. L. 49, 53.

57. For a discussion of the "internal" and "external" threats to the validity of empirical studies, see Monahan & Walker, supra note 5, at 45-54.

undertake that work?[58]

By contrast, internal studies do not offer these same difficulties. Internal studies of contract law, like the study here of relational contracts, can be based on existing case materials. Indeed, with the advent of computer-assisted research, a vast data base is now available to be manipulated for research purposes. Moreover, a wide range of internal empirical questions can be formulated. Internal empirical studies could answer questions about change in the law. For example, some scholars have argued that courts are now more willing to grant specific performance[59] and punitive damages[60] for breach of contract than in previous times. Internal empirical studies could determine whether these claims are correct. Other internal empirical studies could focus on the operation of rules. By gathering data about the relative percentage of types of litigated cases, it would be possible to identify those rules of law that are frequently litigated. Focus could then turn to normative questions. Is the amount of litigation of a particular rule or doctrine a matter of concern? Are there alternative dispute resolution mechanisms that could be developed? Could the rule be reformulated to reduce the amount of litigation while still achieving its substantive goals?

Internal empirical studies can be criticized for their narrowness—for ignoring the relationship between law and society. Nevertheless, for those interested in litigated contract cases, internal empirical studies may provide some useful insights.

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58. Professor Macaulay has suggested that the irrelevance of contract law shows that it performs a variety of functions other than regulating the behavior of parties involved in voluntary transactions. Macaulay, Elegant Models, Empirical Pictures, and the Complexities of Contract, 11 Law & Soc. Rev. 507, 511-21 (1977).

59. E.g., Greenberg, Specific Performance Under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style," 17 New Eng. L. Rev. 321 (1982).

60. Sullivan, Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change, 61 Minn. L. Rev. 207 (1977).