Stewart Macaulay: Law and Society

"It is a capital mistake to theorise before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts."
— Sherlock Holmes, in "A Scandal in Bohemia"

When Californian Stewart Macaulay joined the University of Wisconsin law school faculty in 1957, he taught contracts in the traditional way.

Doctrine first, doctrine second, doctrine third — all the way through the course.

The young professor's wife was from Wisconsin, and her father was a business executive in Racine. Not surprisingly, the talk often turned to contracts when Macaulay and his father-in-law got together.

"I would take the kinds of problems I had in the Fuller casebook on contracts and I'd go talk to him about them," Macaulay, now 50 years old, recalled recently.

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"My father-in-law kept laughing at me," Macaulay added. "His whole position was if he had to sue someone, that was disaster. Lawsuits were for sleazy people, and you didn't do business with sleazy people."

Macaulay soon realized that the kinds of doctrinal issues raised in his contracts class were "almost silly" to people who dealt with contracts on a day-to-day basis in the business world.

Before he came to the UW, Macaulay had heard the academic argument that legal rules don't completely determine how people act. But to learn first-hand that businessmen like his father-in-law didn't pay much attention to formal contracts was quite a shock.

"I was very confused, and it took a great deal of sorting out and going into a research project to start seeing that contract law, and indeed all law, plays a role — but a marginal role," Macaulay said.

The research project wasn't anything fancy, but it was a sharp break from traditional legal research, which involves digging through appellate court decisions to extract various nuances of doctrine.

Instead of staying in the law library, Macaulay went outside for a look at the business world his father-in-law had hinted at. An empirical study, in social-science terms.

"I started following my nose, and it really was not very theoretical at that moment," Macaulay said. "It was largely, 'What in the world is going on?' "

Macaulay's colleagues at the UW law school encouraged his empirical investigations. Willard Hurst and Jake Beuscher were important influences, and some of the ideas circulating among the faculty were pretty exciting.

"I was certainly influenced by (professor) Frank Remington — not particularly direct contact, but just the idea that the criminal law has to be viewed from the squad-car level," Macaulay remembered. It was a short step from that notion to the thought that "maybe contract law has to be observed at the purchasing agent/sales manager level."

So that's where he focused, beginning some 20 years ago. The knowledge he gained from interviewing businessmen and business lawyers led to articles in scholarly journals, articles with titles like "Non-Contractual Relations and Business: A Preliminary Study" and "The Use and Non-Use of Contracts in Manufacturing Industry."

Macaulay found that when businessmen make a deal, they often prefer a handshake and a general feeling of good will to the intricate detail of contract. Agreements can be made more quickly with such an approach, and it also leaves the businessmen with a certain flexibility to work out any problems that may surface.

Negotiation solves such problems far more often than rigid enforcement of contract, Macaulay found.

"You can settle any dispute if you keep the lawyers and accountants out of it," one businessman told him.

That may have been an exaggeration, but Macaulay came away from his early studies with a feeling that contract law as it was traditionally taught didn't have much real-world importance.

"I suppose I overreacted in my first thinking about it — you know, 'law doesn't matter,' " he said. "But I think the proper reaction has got to be that law may matter, law may matter a tremendous amount, but when, where, and how are empirical questions to which we don't have certain answers."

The type of research Macaulay was doing in the early 1960s has blossomed over the years at the UW and elsewhere. But two decades ago, Macaulay was a fairly lonely pioneer.

What Macaulay showed was that the world described in the appellate opinions and in the rules they talk about is a fairyland, Alice-in-Wonderland world which bears almost no relationship to the way real businessmen operate the real economy.

Duncan Kennedy, a contracts professor at Harvard law school, calls Macaulay an under-recognized but "incredibly significant figure" in the field of contract law.

"For a hundred years of the teaching of contract law in American law schools, the basic assumption was that you were really reading about the American economy when you read the facts of the legal opinions and what rules the judges applied to those facts," Kennedy said.

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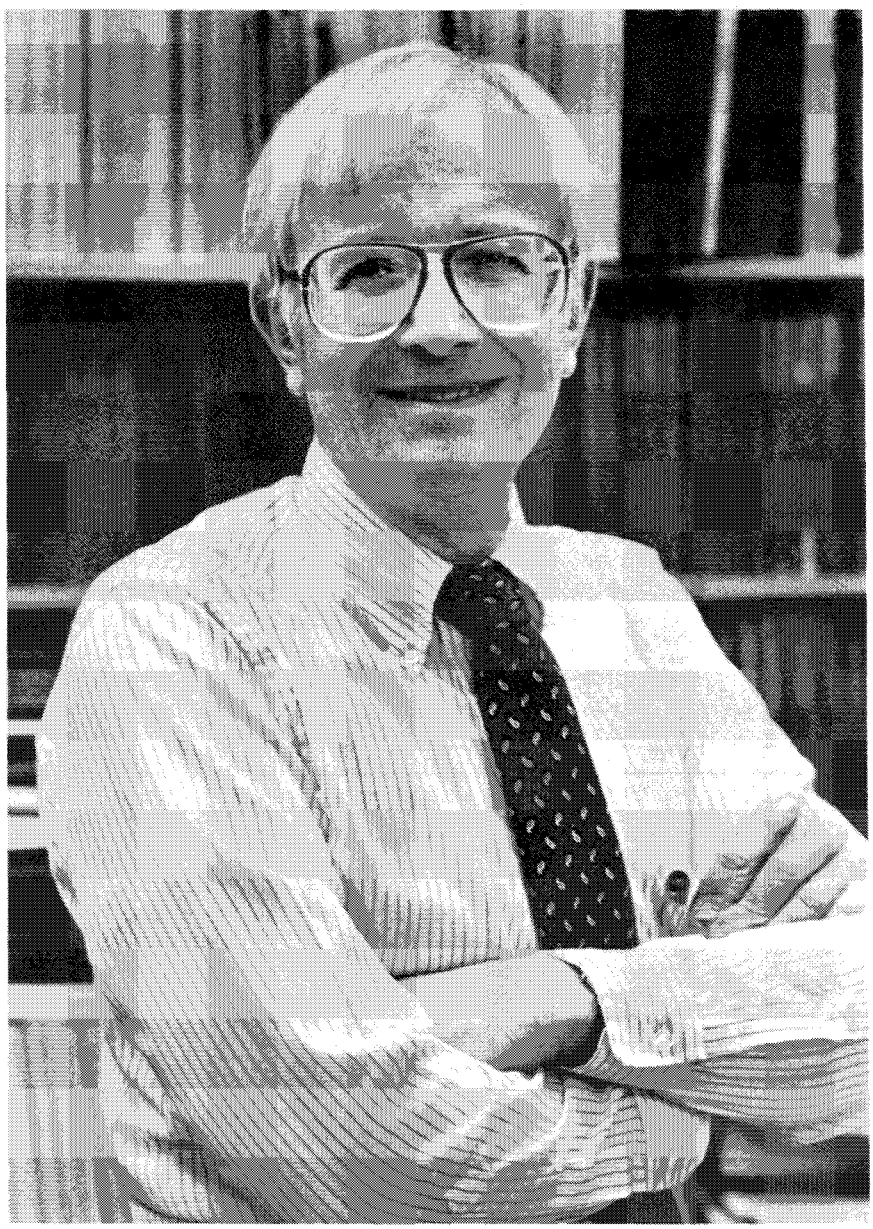

Prof. Stewart Macaulay

bears almost no relationship to the way real businessmen operate the real economy," Kennedy added.

"Macaulay established for the first time in the Western legal world, and more clearly than anyone had even said it before, that you couldn't assume that the descriptions in the appellate opinions of what was going on had any direct relationship to the way people behave."

Such a stance is bound to be controversial, and not everybody is as enthusiastic about Macaulay as Kennedy is.

For example, Grant Gilmore, a legendary contracts professor at Yale Law School, once characterized Macaulay as the "Lord High Executioner of the Contract is Dead school," adding that he was "completely uninterested" in the "sociological" types of work Macaulay was doing.

Others — like the Ford Foundation, the National Science Foundation, and U.S. Department of Justice — are very interested, however. With the help of a grant from Ford, the Disputes Processing Research Center, which carries on the research tradition pioneered by Macaulay, was established at the UW in 1977.

Centered in the law school, the program's two biggest projects right now are the Civil Litigation Research Project, a nation-wide study of the causes, costs, and outcomes of civil disputes; and the Milwaukee Dispute Mapping Project, an intensive study of consumer disputes in Milwaukee.

Such research has a practical goal, according to David Trubek, the law school's associate dean for research.

"We'd like to help make civil justice in the United States more efficient and more fair," said Trubek. "But if you want reform to be succesful you've got to base it on knowledge of how the system actually works — not only how the courts process disputes, but also what happens to disputes that are never brought to a court."

Macaulay's kind of research has also radically changed the way contracts courses are taught at law schools all over the country, but especially at the UW.

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Gone are Fuller and other weighty casebooks filled with doctrine. In their place are materials compiled (and updated yearly) by Macaulay and the seven other professors who teach contracts at the UW. Included in the materials is a selection by Macaulay titled, "Is the Law of Contracts Necessary?"

His answer? Yes, but not without some caveats.

Doctrine is still taught at the UW law school, of course, and even the contracts students get a healthy dose of it. In fact, Macaulay was on the board of advisors to the Reporter of the Restatement of Contracts Second.

But throughout the UW's contracts courses, there's a push for legal theory that take account of the law in action, not just the law as it appears in books of appellate court decisions.

Macaulay explained why.

"Theory that's not practical is games, it's not theory," he said.

— David Pritchard