

STEWART MACAULAY: A FEW PERSONAL REFLECTIONS

BY ELIZABETH WARREN*

Stewart Macaulay has influenced legions of scholars. I count myself among their fortunate ranks.

I first met Stewart in July, 1981, at the University of Wisconsin. The Association of American Law Schools had organized a week-long conference for contracts teachers,¹ and, as best I could tell, all the leaders of the field showed up. Most of them talked about their casebooks, and, in the best moments, they argued with each other about contract law and teaching contract law. Most of the other seventy or so participants seemed to be there to cheer on their favorites in some sort of highbrow knock-off of the Indy 500.

I had three years of teaching under my belt, and I'd never seen anything quite like this. We met every day in a big classroom. Panelists hammered on each other, then people in the audience lobbed in their own stump-the-chump questions.

Even in this "Legends of Racing," Stewart was a standout. Everyone argued and everyone scored points, but Stewart was the one who had so much *fun*.

Back then, Stewart didn't have a casebook, but everyone was familiar with his work. His ground-breaking article, *Non-Contractual Relations in Business*,² was part of the canon, it was the article where he laid the groundwork for the modern empirical tradition.³ In that study, he interviewed businesspeople and lawyers across Wisconsin to determine the role that contracts played in business relationships.⁴ His research revealed that businesses seldom use legal sanctions to adjust their relationships. Rather, they "prefer to rely on 'a man's word' in a brief letter, a handshake, or 'common honesty and decency'—even when the

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1. See Charles D. Kelso, *The 1981 AALS Conference on Teaching Contracts: A Summary and Appraisal*, 32 J. LEGAL EDUC. 616, 616 (1982).

2. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

3. *Id.* at 55 n.2.

4. *Id.* at 55.

transaction involves exposure to serious risks.”⁵ Reputation, repeat business, and other informal “sanctions” proved far more influential on business relationships than legal remedies such as damages.⁶ This finding was the skunk at the picnic, forcing one Grand Theorist after another to admit that perhaps his own scholarly undertaking might not be the center of the universe that the luminary had so confidently asserted.

In fact, most of the references by other eminent scholars seemed more defensive than complimentary, as in, “of course, Macaulay would argue here that we don’t really know what happened” or “we’ll have to wait for Macaulay to do the study to see exactly how my theory works out.” It was fun to watch.

As the week wore on, Stewart cheerfully threw darts at almost every speaker, constantly reminding each of them—and the rest of us—that appellate law was merely a minor character in a big book of how contracts help shape private relationships.

I didn’t know any of these people and I barely knew their work, but I understood enough to know that every question that Stewart asked hit home. He prodded and provoked, reminding people of basic points reiterated throughout his career, like law isn’t free⁷ and most people don’t know the law.⁸ It seemed to me that he challenged each Grand Theorist with a basic question: What good was the theory if it strayed so far from reality?⁹

I readily credit Stewart with helping turn my own scholarship toward empirical work. Whether he wishes to claim some ownership or not, he provoked a deep hunger in me to find out how law really works and, in the process, to find out more about how the world works—and ultimately to learn for whom the law works. Only a few months after my week of watching Stewart, I found my first coauthors: an extraordinarily gifted demographer, Dr. Teresa Sullivan, and a very experienced bankruptcy expert, Professor Jay Westbrook.¹⁰ Together we set off on a

5. *Id.* at 58.

6. *Id.* at 63.

7. Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC’Y REV. 507, 511 n.3 (1977); Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 L. & POL’Y 149, 152 (1984).

8. Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, *supra* note 7, at 168.

9. Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, *supra* note 7, at 511–12.

10. Dr. Teresa Sullivan established her credentials as a very talented sociologist before she turned to academic administration. She is currently the President of the University of Virginia. Professor Jay Westbrook is the Benno C. Schmidt Chair of Business Law at the University of Texas and, in addition to being a leading scholar of

multipart exploration of the American bankruptcy system.¹¹ From there, I headed into studies of the economic instability of America's working families.¹² And from there, into a world of advocating for a level playing field that would help rebalance a legal system that worked best for those with money and power.

I would like to report that Stewart encouraged me in my work, but it wouldn't quite be true. Once I read Stewart's work and listened to him poke holes in more theoretical work, I was a goner. Further encouragement wasn't necessary. Instead, a more accurate assessment would be that Stewart teased me about my work—or, I should say, teased me about the enthusiasm with which I pursued it. When I got into an argument with someone over how deeply unfair it was to use contract law to enforce lopsided and unreadable terms in a credit card agreement or how bankruptcy laws should be expanded to offer more protection for people facing medical hardships, Stewart would cheerfully mock my passion to change the world, calling me "Sister Elizabeth."

But Stewart didn't fool me. Charles Kelso chronicled the 1981 Wisconsin conference. In Kelso's write-up, Stewart is quoted defending his own work: "I am a romantic. I believe in the rule of law. Honor to those who fight the good fight."¹³ He made it clear that the failure to achieve justice was not a reason to give up or an excuse to despair. "Do what you can."¹⁴

Why did Stewart have so much fun? I never asked, but I thought I found the answer in my first empirical study with Terry Sullivan and Jay Westbrook: we learned about a narrow slice of what really happened in the world. It seemed to me that to know how something worked opened up the possibility—however remote—to make it work better.

Since that conference in 1981, I've had many occasions to think about one of Stewart's most accurate and concise observations: "Real life, unfortunately, is messy."¹⁵ For him, that was a reason to dig harder to understand what was going on. It was a great example for a young teacher, and an even better example for a U.S. Senator.

Thank you, Stewart.

bankruptcy law, is also the country's leading expert on international business transactions.

11. See, e.g., TERESA A. SULLIVAN, ELIZABETH WARREN & JAY WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989).

12. See, e.g., ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003).

13. Kelso, *supra* note 1, at 625.

14. *Id.*

15. STEWART MACAULAY, ET AL., *CONTRACTS: LAW IN ACTION: THE CONCISE COURSE 234* (2d ed. 2003).