Revisiting the Contracts Scholarship of Stewart Macaulay. Eds Jean Braucher, John Kidwell and William C Whitford

And vibrate in the memory as the song
Of no other bird – not even
the love-note of the curlew –
Can do!

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REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY. Eds Jean Braucher, John Kidwell and William C Whitford
Oxford and Portland, Oregon: Hart Publishing (*www.hartpub.co.uk*), 2013. xiii + 443 pp. ISBN 9781849463010. £60.

The contract scholarship of Stewart Macaulay, whilst familiar to academics in both the US and UK, is unlikely to have been encountered by many practitioners on this side of the Atlantic during their legal studies. This new book, offering a multi-authored retrospective of Macaulay's work, thus offers a useful opportunity to those less familiar with Macaulay to assess the relevance and importance of his scholarship to modern contract law; those already familiar with Macaulay's writing will appreciate the detailed critique of his scholarship contained within the work.

The book comprises fifteen essays by predominantly US contract scholars (as well as two English ones), preceded by reprints of three of Macaulay's influential articles (including his seminal "Non-contractual Relations in Business – A Preliminary Study" (1963) 28 Am Soc Rev 1 (hereafter "Non-Contractual Relations")) and followed by a bibliography of all of his publications to date. The Preface provides an introduction to the subject of the book: Macaulay is the Wisconsin legal scholar famous for being one of the two main founders of what came to be styled "relational contract theory", the other being the Scotsman Ian Macneil, who emigrated to the US and became a respected contract scholar (and later, after retiring back to Scotland, the Chief of the Clan Macneil).

"Non-Contractual Relations" was a profoundly influential piece of scholarship. It drew attention to the important way in which much of the regulation of business relationships is undertaken extra-contractually, without recourse to the terms of remedies available under contract, and the way in which parties with established business relations often do not worry about certain infractions of contract terms in the interest of preserving the relationship as a whole. As such, "Non-Contractual Relations" was not really an essay about contract law as traditionally understood, but about the actual relational interaction of parties who happened to be in a contractual relationship: it was an essay on the social and economic realities of relationships made against a background of law.

The book is divided into four principal sections: (1) Relational Contracts and Theory; (2) Contractual Relations between Businesses: Law and Behaviour, (3) Contractual Relations with Individuals: Law and Behaviour; and (4) Relational Critiques of Contract Doctrine. Not all of the essays in these sections can be mentioned individually, but comments on a selection of them follow.

Chapter 3, by Robert Scott, will be useful for anyone unfamiliar with relational contract theory, as it explains much of the history of this branch of contract scholarship. Scott suggests a new approach by which both the (as he styles them) "fundamentalist" and "perfectionist" camps within relational contract scholarship can be reconciled. Another valuable chapter is

that by David Campbell (chapter 5), who argues that the terms "non use" of contract and "non contractual" relations which have come to be associated with Macaulay are not useful terms and should be dispensed with as suggesting a non-existent link with the "death of contract" scholarship of Grant Gilmore. In his discussion of Macaulay's fundamental definition of contract, Campbell reminds us that Macaulay sees exchange as the root of contract, and not legally enforceable promises (as the common law's classical contract model posits). This approach (approved of by Campbell) is worth emphasising, because it shows up a weakness at the heart of Macaulay's contract scholarship at least so far as Scots law is concerned. In Scots law, a contract need not be about exchange: while most contracts are mutual in nature, Scots law also recognises the gratuitous contract, in terms of which one party obliges itself to do something for another without receiving anything in exchange. If for Macaulay then, classical contract law's weakness is in not focussing on exchange, for a Scots lawyer the weakness of Macaulay's approach might be said to lie in the fact that exchange does not capture all of the transactions identified as contracts by the peculiarly Scots classical contract theory. An approach to contract crucially tied to the idea of exchange will never be one which can explain all of Scots contract law, even if it might be applied to mutual contracts. One answer to this criticism might be that gratuitous contracts, not being exchanges, ought not to be seen as contracts at all but rather acts of (in effect) donation; but that is not how Scots law sees matters. Relational contract theory is very much a child of the Common law.

Those who are not socio-legal scholars might wonder, however, what use a relational theory of contract actually serves to the practice of contract law. An attempt, in part, to answer this question is found in Part III of this work, which includes discussion of two issues which are very much topical ones in modern contract jurisprudence: (1) whether a party to a contract should in all cases be entitled to claim restitution of value conferred following a breach of contract by the other party; and (2) to what extent contractual context should affect the interpretation of a contract's terms.

The first of these questions is considered by William Woodward Jr (chapter 12), who locates his analysis within the context of the provisions of the US Restatements (Second) of Contract and the Restatement (Third) of Restitution and Unjust Enrichment concerning restitution following breach of contract. §373 of the Restatement (Second) of Contract provides that when one party to a contract repudiates that contract, the other party "is entitled to restitution for any benefit that he has conferred on" the repudiating party "by way of part performance or reliance". This provision applies equally to the victim of a breach who had made a bad bargain (i.e. one under which it would have made a loss) or a profit-making bargain, and so opens up the possibility of the innocent party under a bad bargain gaining more by way of restitution than it would have by way of damages (under the latter remedy, the unfortunate outcome of a bad bargain would have to be taken into account in assessing "performance"/"expectation" measure damages). The Restatement (Third) of Restitution and Unjust Enrichment takes a different approach: it provides for a "contract rate" approach which values the benefit actually conferred by the innocent party as a percentage of the total value contracted for, applying that percentage to the contract price (so, in a building only 50% of which was built before breach, the innocent builder would get 50% of the contracted-for price). Woodward argues that the new approach may be based on false behavioural prediction of parties, the principal prediction being that someone who has made a bad bargain will attempt to induce the other party to commit a breach. Such a prediction fails, argues Woodward, to take account of "highly variable, unique, rich relational contexts".

The second area in which one might test relational theory's utility is in the field of interpretation of contract. Lord Hoffmann famously developed a new, more contextual approach to interpretation in *ICS* v *West Bromwich Building Society* [1997] UKHL 28. One could take the view that this represents something of a victory for relational contract theory,

and indeed John Wightman argues as much (chapter 13), developing the view that the old "pre-realist" approach to interpretation in English contract law has been replaced by a new "expanded objective" approach more attuned to the context of business relations. Wightman explains that Hoffmann's contextualist approach has also been extended to the law of damages, as manifested in *The Achilleas* (*Transfield Shipping of Panama Ltd* v. *Mercator Shipping (The Achilleas)* [2008] UKHL 48).

There is much more that might be said about this fascinating book, though restraints of space do not permit further substantive discussion of its content. In summary, this is an excellent collection of essays on the scholarship of a leading figure in US contract law. As the collected papers of a conference in praise of Macaulay's work, the book is somewhat lacking in more critical perspectives of Macaulay's approach, but for anyone wishing either an introduction to relational contract theory or a thorough examination of both its present state and its potential for developing specific areas of contract law, this is an excellent place to look.

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Brian Sloan, INFORMAL CARERS AND PRIVATE LAW
Oxford: Hart Publishing (*www.hartpub.co.uk*), 2013. xxix + 260 pp. ISBN 9781849462815. £62.

In twenty-first century Britain the spectre of care is everywhere: news reports tell of the care needs of the ageing population and, at the other end of the life cycle, the crisis in childcare. Vignettes of modern life illustrate how the care requirements of infancy and old age are sometimes conflated. For some, this conflation gives rise to apparent mutual benefit through the utilisation of grandparent carers, while others see in it a double-dose source of stress for the "sandwich generation" who, due to late parenthood and longer mortality, often find themselves caring for their young offspring and aged parents simultaneously. Political attention is increasingly focused on the needs of carers and associated resources: better financial support, access to increased services and respite facilities have all been the subjects of fierce debate in the context of the current austerity measures, and we are often reminded by campaigners of the plight of individual carers and the potential threats to their health and wellbeing in what can be highly demanding and stressful circumstances.

Part of this debate has emphasised the place of obligation and responsibility with a burgeoning interest developing in the appropriation of rights and their application in this area. In fact the recent political and media attention given to the relationship between law, policy and care, along with the sudden growth of academic literature on the subject could give the misleading impression of a new phenomenon, whereby the search for legal solutions has arisen in response to the myriad of care dilemmas which have emerged as a feature of contemporary life. Of course, the challenges posed by how best to respond to the requirements of care in both personal and societal contexts have been around for as long as humankind's existence. Issues of dependency and interdependency are among the few static features of life and, rather than there being anything particularly new in the demands of care's recipients, it is the supply and availability of *carers* that has changed alongside a generally heightened awareness that relationships and behaviour – however intimate and altruistically motivated – might, in various ways, have a presence in law through both its civil and criminal manifestations.