

TURNER:

Hello and welcome back to Wisconsin Law in Action, a podcast where we discuss new and forthcoming scholarship with University of Wisconsin Law School professors. I'm your host, Kris Turner. My guest today is a very special one, Professor Stewart Macaulay. Professor Macaulay needs no introduction, but I'll still do my best. Professor Macaulay is one of the common law world's leading scholars of the law of contracts and of the law in action approach to the study of law.

TURNER:

Since the late 1950s, he has published numerous groundbreaking articles, casebooks focused on the teaching of contracts and the concept of law in action. That's the very same law in action that this podcast is named after, by the way. Professor Macaulay's work is an absolute must read for legal scholars and has also attracted attention from scholars in other disciplines, such as sociology and economics.

TURNER:

Well, I could go on about Professor Macaulay's accomplishments and accolades. We are here today to discuss a new book that collects works from the past 60 years that may not have been previously widely available. The book is called Stewart Macaulay: Selected Works, and is now available from Springer. Thank you for joining the podcast today, Professor Macaulay.

PROF. MACAULAY:

Well, you're very welcome. Thank you for having me.

TURNER:

It's an absolute privilege. I'm looking forward to our discussion. We usually start our podcast by asking about our guest's background, specifically, their research and scholarly writing interests. Let's talk about what first drew you to writing about contracts and law in action.

PROF. MACAULAY:

Well, I liked contracts as a student. It was a subject that I liked. I did fairly well at the Stanford Law School. I got to be Chief Judge William Denman's law clerk. He was the Chief Judge of the Federal United States Court of Appeals for the Ninth Circuit. Then, I went to University of Chicago. This was Chicago at the time that the jury project was going on there, which was one of the first big attempts to study something quite important, other than the law and the books, and this sort of thing.

PROF. MACAULAY:

Then, I wound up at Wisconsin. Now, to get the job at Wisconsin, I was looking very craftily, I hope, at what was it they would likely need? You could say you wanted to teach constitutional law, but hey, everybody want this constitutional law. What was it they were likely to need that I could stomach? Some of them I didn't want. That was contract. I did that and pushed very much along those lines.

PROF. MACAULAY:

Of course, being fairly, not well, not quite as dumb as I look, I used the contracts casebook that was being used by the professors here at Wisconsin. That was Lon N. Fuller's casebook on contract, which was a very radical book for its time. The whole idea was he put damages first. It started talking about

remedies. Again, a legal realist, he would say, "Who gives a damn?" The subheading of that first chapter is, Don't spend your time pondering offer and acceptance, unless you know a difference it makes. It was very much that way.

PROF. MACAULAY:

I was reading all of Fuller's writings and doing all of this kind of thing, trying to figure out what the great man was talking about, so I do have something to deal with in class. My late wife, she took care of me very well. She said I was the Boy Wonder. It was a wonder they had a boy doing a man's job. You're about 10 seconds ahead of your class when you're beginner and doing these kinds of things. I was trying to master all of the Fuller stuff and so on.

PROF. MACAULAY:

Jackie was the daughter of the retired former general manager of SC Johnson & Son's in Racine. Of course, we had to take our young one over to meet the grandparents, and so forth and so on. He asked me, "Well, what was I teaching you this contracts course?" I started explaining for him Fuller and Perdue, Fuller's idea of the three interest, that was the expectation, the reliance, the restitution.

PROF. MACAULAY:

Well, what are they? Well, the expectation was that the law of contract payment tries to put you where you would have been at the contract being performed. That's the standard thing. He, I don't know if it's fair to say, roared, maybe, "No, if you have to even talk to a lawyer, you will not be where you would have been at the contract being performed." I see.

PROF. MACAULAY:

Then, he told me two stories, or really, one big story. During the Depression, when he was the head of Johnson's, there were three companies that supplied the containers that their products were put into. In those days, there were tin cans. They'd be plastic bottles today. Johnson's, during the Depression, tried to place their orders with the firm that needed the most to stay alive. This is a world that we have trouble seeing just how bad it was. We think we've been through some bad times, but that was even worse. They were doing that.

PROF. MACAULAY:

They could have had them bid against each other to lower the price and that sort. No, they didn't do that. They tried to keep all three of them in business. He said, "Well, five years later, we were in World War II, and steel was rationed. You can imagine what the ration for cans the put floor wax in. Almost nothing." He said, "But we never wanted a can." They owed us one. Notice, not a matter of contract, because there was an order, that part of thing, but the thought that you were going to make up for it in World War II, that wasn't part of the contract. That was part of keeping long-term continued relations going. Well, at that point, I fell down the rabbit hole to wonderland the way business worked." He said, "Well, I know that I'm an old man and a curmudgeon and so forth, and you're not going to believe me. Why don't you talk to some of my friends?" You begin seeing where this is going. I did. They started telling me stories.

PROF. MACAULAY:

Now, of course, if you talk to salespeople, they're not quite the same as you're talking to purchasing agents. If you're talking to people in finance, their stories are a little different. If you're talking to the lawyers, the in-house counsel and the outside lawyers, and I talked to all of these people, the stories are a little bit different. Basically, suing people for breach of contract and spending time negotiating such just didn't strike them as something that they wanted to do too much of.

PROF. MACAULAY:

Now, there were cases where you did. Those were special cases. It wasn't the general situation. There was much more reliance on long-term continued relations. Well, does that do?

TURNER:

Yes, that's amazing. What a great story to start this whole thing out with. I love hearing how this all started, and about just that discussion with the grandparents has led to a series of groundbreaking casebooks, that just to start studying that and going down the rabbit hole, as you said, where you are Alice in Alice's Contract Wonderland.

PROF. MACAULAY:

Absolutely. Now, of course, I should make very clear that I was having lunch once a week with Willard Hurst, who was very much my mentor. Willard, he kindly suggest I should read this or I should read that. I was getting quite a reading list. At the same time, my wife, Jackie, she was a graduate student in social psychology. I had a lot of help going on. It wasn't completely adlibbing things.

TURNER:

But boy, I wonder I had a little bit of support from Batman and from other places as well. I think that's amazing.

PROF. MACAULAY:

Yeah, Batman.

TURNER:

Well, this all led, of course, to having so many of your articles and your books make such an impact on the legal world in contracts and otherwise. Let's focus on the newest collection, the Springer's work about Selected Works. It's divided into four parts. The first section contains two essays that provide fresh accounts of your work as a whole and serve as an introduction to your scholarship. How do these essays help guide new researches? How do they begin reviewing your scholarship?

PROF. MACAULAY:

Well, very flattering sort of thing. I think, for me, I see them as very well done. Now, again, we're talking about three of my good friends, Brian Bix, who does the one on contracts. Again, looking and trying to say that it's one thing to worry about offer and acceptance and good stuff like that, which is part. I've often taken the saying that contract law is irrelevant. No, no, no. It's relevant sometimes. But which times? That's a thing. He makes that point.

PROF. MACAULAY:

Let's look at contract law as delivered. You have to go get it. It doesn't have little legs and crawl down off the statute books for you. Going and getting it means you have to pay somebody some money. That's one of the things I'm very proud of in our contracts casebook. It's been there in the various editions. First case, the last paragraph in it denies lawyers fees because that's not part of the damages. That's edited out when that case is used by many, many other casebooks. We have that front and center.

PROF. MACAULAY:

Notice, your handicapping a horse race. Yes, it's going to cost me this amount of money to get what amount of damages, if I win. It's deciding to go ahead. Just bringing a contracts lawsuit is a tough decision. That's one of the propositions that's simple. Law isn't free. Now, some places, somehow, it can be helped out. But most of the time, you have to buy your own lawyer and your expert witnesses, and so on. Then, you're always up to, well, what's the payoff? Maybe, it's just the claim in bankruptcy. It's a tough penalty. I want that at the beginning my contract scores [crosstalk 00:11:58].

TURNER:

There's some cruel arithmetic that goes into filing a contracts lawsuit, say, who's getting it?

PROF. MACAULAY:

Absolutely. And you study it. Now, part of this comes back to, Frank Remington put it very well. He was the great criminal law scholar who did wonderful things for this law school. He said that, if you wanted to understand the criminal law, first you better figure out the elements of the crimes and all that good stuff. What does it take to have a burglary? A one, two, three, and so on. You got to do that.

PROF. MACAULAY:

But then, he says, which one or two is going to ride in the squad car in a big city on a hot summer night? I always like that. That's a good story because it's quite true. Beth Mertz is involved in this second part of this thing, made the point. She does have a Ph.D. in anthropology. When you've done the ride in the squad car, find a way to get into the crowd looking at the squad car.

TURNER:

It's three sides to the same coin, so to speak. You have the elements. You have you're in the squad car. Now, you're facing the crowd seeing what the squad car is doing. You put those together and you're starting to see the whole picture here.

PROF. MACAULAY:

That's right. I think, again, in contracts, are we going to spend time negotiating? Sometimes, we are. What do we do if they're trouble? One of my favorite stories in the contract thing, a student in my contracts class was older. He had been a salesman of machinery that went into paper mills. This was the day in which Wisconsin had lots and lots of paper mills in the northeastern part of the state.

PROF. MACAULAY:

He described he had a Lincoln. Why did he drive a Lincoln? It had the biggest trunk of any car available. In that trunk, he could put tools and parts. If one of the paper-making machines had broke down, the guy who was the head of the factory would call him. At night when nobody else knew that the machine

had broken down, the two of them would fix it. You see, the guy in the factory didn't want people to know that the machine he had lobbied for and recommended wasn't perfect. The salesman what? Did this kind of thing. I just was fascinated.

TURNER:

That's an agreement to, "Hey, this is a great piece of machinery and it never breaks."

PROF. MACAULAY:

That's right. That's right. Again, it starts talking about the power of long-term continued relationship. There's a salesman who would like to sell something else again. Thank you. The person who's running the factory would like to keep his position and his recommendations having some bite within his own operation.

TURNER:

That's a mutually agreeable position to get that fixed and have them saying, "Look, we have this great position going forward, that we are in agreement," and keeping it a relationship strong that way.

PROF. MACAULAY:

Again, you will find big multi-million dollar contracts where it is worth going to court and this body of law can be used. But when? What else is going on there? It's only one sort of normative and sanction system. The long-term continued relations are very important. Essentially, Brian Bix suggests that, I'm saying, let's see the whole picture, because we are going to start saying, "Well, this is a good rule because it'll lead to this conclusion." You're judging rules as to what's going to happen.

PROF. MACAULAY:

Well, one way you can do that is play a kind of law and economics game that I don't like very well, which is look at the ceiling and see what a reasonable man would do, which is a way of simply saying, what I would do, of course. Of course, there are a couple of opinions by University of Chicago type who's now an appellate judge on the Seventh Circuit, where he talks about, when you get a product, the first thing you do is you open up the box, you get the owner's manual out, and you read what the warranties would be.

TURNER:

I cut an eyebrow when you said that.

PROF. MACAULAY:

I want to know what world he lives in. It isn't the one I live in, for sure. Just crazy. On the other hand, once we have a picture of this kind of thing, then we can make much better judgments about, well, what's likely to happen if? You see. If that's what you're doing. Brian Bix opens that up. Then, more generally, if you want to know what's going on, that leads to the next article.

PROF. MACAULAY:

Again, two of my best friends. I met Lawrence I think in 1959. We've been friends for a long time and written articles together. We've got the sociology of law materials we put together in the mid-'60s. Have gone through four editions in that. They talk about the kinds of things I've been interested in and

written about. Really, again, it's saying, you're teaching law to people that are going to become lawyers. There's more to it than just what. What constitutes consideration? Now, you have to know that. That's a little like saying, if you memorize the handbook but I've never driven a car...

TURNER:

I don't want you driving me around if you didn't pass the test.

PROF. MACAULAY:

There's a little more to it than just memorizing the handbook. They looked at it. I'm very honored, flattered. A little imposter syndrome comes when your good friends are that nice to you.

TURNER:

I wish I had friends that nice. I'm going to ask my friends to write essays in my honor and see what they come up with. It's not going to be pretty, but I'll try it anyway. Well, that's great. Let's move on to the second part of the book, which focuses on work that has been previously less available, specifically, on the contracts area. Why are they deserving of inclusion here? Are there any that you are especially happy to see receive more attention?

PROF. MACAULAY:

Well, all of them, I would say.

TURNER:

I know that's kind of a tough question.

PROF. MACAULAY:

Of course, they are things that are hidden away. We have one that was published in Spanish. Now, there are a lot of people in this world speak Spanish, but lot of people don't. That limits what you do. That's about a talk I gave in Lima, I guess, in the 1990s and such, you have things like that. There are a number of papers that I gave on trips to Europe. That's nice.

PROF. MACAULAY:

I think that the two I will say something about here is the one on lawyer advertising, and then, the one that comes after it, called private government. The story of the two was I was working on the lawyer advertising thing. This is right when we knocked down the rules that said lawyers couldn't advertise. Then, you got where the people that were saying the world has come to an end and law is no longer a profession. It's going to be everybody out there, hustling the product and all of this. Versus, suddenly the world is a great place if people will be directed to people that can help them, and so on. Just overstatements on both sides.

PROF. MACAULAY:

I tried to look at the arguments that were being made and what evidence there was, and suggested that, maybe, the real question, which was access to justice, was being hidden, and that just making lawyers more available in the telephone book or the blurb on the television set and so forth doesn't exactly get you into court. It may help a little, but it's not enough.

PROF. MACAULAY:

Well, what happened was I submitted that to the University of Michigan Law Review. They didn't decide, didn't decide. Then, we went through a whole summer. They weren't doing anything. I was asked to write the thing on private government for this book. It also turned out that they had some problem with the editors of the book. One was [Stan Wheeler 00:21:24], who was another good friend of mine. Well, a lot of people who were going to write for them dropped out. He thought there should be something about this. Isn't there a private government aspect of this, and a section on this so forth?

PROF. MACAULAY:

A lot of it was looking at all of the people who, essentially, were legal philosophers. Most of them were coming from a Marxist position this kind of thing. This was very popular. This is what a lot of people were writing about at the time and such. Well, I try to read philosophers and things like that, but I wouldn't ever try to write something. That just isn't me. I just don't have the background. I think, to dare go in that, you have to have read one heck of a lot and mastered one heck of a lot. I have a type, not in a systematic way. It's sort of I pick up things that look interesting. That leaves lots of holes, I think. All we get is what?

PROF. MACAULAY:

I sort of took them on, and I tried to say, well, if we just think of law as delivered, is it going to mystify people as the Marxist types started talking about? Well, he prompt, maybe, middle class people get mystify. I'm not sure if they do, because people tend to work it out. A lot of people with pretty good idea of what law as delivered looks like, and such. It's not that they like it. They're not mystified into saying, "This is the greatest place in the world."

PROF. MACAULAY:

I just was saying, before we had this idea of mystification. Now, does it mystify sometimes? Sure. But under what circumstances? How much? What else is going on, and so forth? Indeed, one of the things coming out of the sociology of law kind of thing was a study. People have an idea. They sort of figure out what the law must be, because that's what I think is reasonable and that's what I do.

PROF. MACAULAY:

People, generally, don't sit around reading law books. This is not how most people. Maybe, they learn about random learnings watching television or something like that. It's one of those kinds of situations. Well, we had in our political times protests against the war in Vietnam, late '60s and so forth. We had a young man who had something to do with the birds on the lawn of Bascom Hill.

TURNER:

The flamingos?

PROF. MACAULAY:

Flamingos and all of that. He was a part of all of that. He ran for district judge. He's gone to law school and this kind of thing, but he was all involved in protests and stuff. Part of his campaign poster was the thing, "Obey good laws." Nothing is more American than that.

TURNER:

That's a political slogan, and all political slogans right there.

PROF. MACAULAY:

There you go. The idea that people are mystified, it strikes me. To some degree, maybe, and so forth. But kind of general notion that these fools, just they are thinking that the laws or the power, it doesn't exist and stuff. People have some idea about what's going on, and such. Really, we had to look at the law as delivered and who gets what knowledge and so forth. That's in the private government article.

PROF. MACAULAY:

I found it quite challenging, because here I was reading a lot of stuff that was new to me. It was the popular thing at that time. I was working on that. It was very hard. Then, the University of Michigan Law folks come back with a lawyer advertising piece. They want all kinds of changes. Essentially, what they were upset about, being good third year law students, is they want some answers.

PROF. MACAULAY:

The article says, "Hey, wait a minute. To find out what lawyer advertising will do is going to be a very tough empirical question." I haven't got any answers. Nobody else does, either. No, they wanted me to come down with. I just basically put that aside and thought, "Well, I'd get back to it once I got the private government thing." Government thing really took all the time. By the time I wanted to get back to it, this became the one for the file drawer.

TURNER:

Now has seen the light of day. That's great.

PROF. MACAULAY:

I've seen the light of day. Now, it's obviously quite dated. On the other hand, it still raises some questions about lawyer advertising that we can open up things.

TURNER:

Access to justice is, of course, still a very relevant topic that is being discussed and debated about how to get people in rural areas or low income or whoever access to trials.

PROF. MACAULAY:

And the rural area problem. We have this problem. We haven't got any doctors for them and we haven't got any lawyers for them. We have the whole business of how do you get a defense lawyer so that you can have the trial.

TURNER:

More complicated. I don't understand why you couldn't come up with an answer for those, your third year law students at that time. I don't think we really have a good answer yet.

PROF. MACAULAY:

I don't think so, either. I would say I kind of like the fact that private government is more available to people, because it was a book, that sort of thing. Having a lawyer advertising there, too, is at least... There's some parts of it that still are alive and relevant.

TURNER:

That's great. It helps flesh out your career more as you're exploring the different areas. Like you said, with the private government, you're in a new area for you, which I think it challenges you to write more.

PROF. MACAULAY:

Absolutely. You're sitting there thinking, "Oh, my God, I've said this." Maybe, anybody that knows the area will know this isn't because Jones said this, and you don't know that.

TURNER:

It puts you on the stressor, but also makes you, hopefully, right at a higher level. I will take it, though. I'm pretty confident you wrote at a higher level of that one, fair to say. Let's move on to the third part of the book. This is your core works on contracts. What aspects of these works have made them so endearing and so influential?

PROF. MACAULAY:

Well, a lot of people had come up with ideas about how the law of contracts was what kept free market economic systems going, that it was critically important. Hernan De Soto has a book that was reviewed in the LA Law Journal at that time in the '90s and so forth, where he was very critical of a situation in Peru, where he worked, because the merchants and such were dealing with long-term continuing relations. That's what they did. They didn't go to court because their courts were just completely out of reach for them.

PROF. MACAULAY:

He said, "Well this just cuts down the amount of transaction." Now, being a good economist type, what he really wants is sort of an auction market with anybody can bid on the whole thing and this sets up, and so on. Here, what we've got is a system where we can rely on people because they want to stay part of the family. Well, in that kind of a piece, I wanted to say, "Well, look, there's something to this long-term continuing relationship. It means that contract law, sometimes, will be very important, but sometimes not." I think that that's part.

PROF. MACAULAY:

Now, I have been taken there. The person who really lit into me was Grant Gilmore, who is a famous law professor University of Chicago, Yale Law School, and so on. He called me the Lord High Executioner of the Contract is Dead Movement. Well, it's cute. You laughed.

TURNER:

Quite the honorific you've earned on that one well. I'm impressed.

PROF. MACAULAY:

Yeah. Of course, I didn't think contract law was dead. When it's alive, the analogy I used in responding to him was the dead rattlesnake. When I was a little boy in Laguna Beach California, there were

rattlesnakes along the cliffs overlooking the beach. The thing that they would tell a little boy is never pick up a dead rattlesnake, because, of course, the rattlesnake sunning itself out there looks dead and is quite alive. I think contract law is a bit of a dead rattlesnake, if you are going to say this. When it's alive, it can bite.

TURNER:

Even if it looks like it's dead, it can come back to bite you.

PROF. MACAULAY:

That's right. There's a reason for doing these kinds of things. I think that just saying, "Let's look at law as delivered," it doesn't seem to me such as a big exciting thing to say. The old legal realists, after all, they saw it and they said that we should do empirical research. But they never got around to doing very much of it.

PROF. MACAULAY:

Karl Llewellyn has, I'm blanking on which Indian tribe it is. It's an Indian tribe that he went and studied. The answer was he interviewed people for 10 days. That was it. Well, an awful lot was filled in with Llewellyn's imagination, I would say. In any event, it was good. He had a good imagination. It's a contribution, but there was a lot more that could have been done.

PROF. MACAULAY:

Suddenly, I just said, "Hey, wait a minute. Let's look at this." I had interviewed people and found something. Now, I also have to say, one, I had Willard Hurst who was my mentor. Then, Willard sent me to take a trip to New York. Willard had a big Ford Foundation grant. It was nice that it paid for the plane trip. I went to New York to see his friend, Bob. Bob was Robert Merton, maybe, the most famous sociologist going at that time. Bob invited me to give the paper at an American Sociological Association meeting. I did. Then, Bob told the American Sociological Review that they ought to publish it. Disinterested blind review.

TURNER:

The rest is history, as they say. It does help to know. Exactly, it does help. Then, that paper, of course, went on to have an enormous impact all over the place, which is wonderful. On to the fourth part, you mentioned the old legal realists. Now, let's talk about the new legal realism and how you wrote about that a little bit. You began writing about legal realism a little bit later in your career. What motivates you kind of turn your writing towards legal realism and law in action?

PROF. MACAULAY:

Well, again, we were thinking about legal education and how could we get people in law schools to pay more attention to things like this, that it isn't just contracts that has to be delivered. All bodies of law have to be delivered. There is a question where they come from. The choices made as to what laws we enforce, it's very, very complicated. If you're going to teach administrative law, there should be some empirical side to it as the way things work, and so forth.

PROF. MACAULAY:

Well, there were a lot of people talking about. We were starting to get a group of people on various law faculties who had both a law degree and a Ph.D. in a social science. Beth Mertz is a good example. She has a Ph.D. in anthropology and a Northwestern Law School degree. There are others, too, that are around, and so forth.

PROF. MACAULAY:

One of the things that happened was there was a group of people who started applying state-of-the-art statistics to government datasets. It tended to be a thing for law professors to learn how to do these statistics and do this kind of thing. We've got all kinds of things. Well, one of the things that happens, of course, is state-of-the-art statistics applied to, bad data produce bad studies.

PROF. MACAULAY:

Fancy statistics doesn't make bad data get better. You can control for some things, but it is still bad data is bad data. If you're talking about government data, there have been lots of exposes of, say, the police statistics in New York City, the crime statistics. It can't make the police look bad. We have our ways of adjusting it so that it comes out. What you want apparently is you don't want crime to be rocketing up to scare the public. But you want a little bit so you'll get more appropriations.

TURNER:

Sweet spot of stats there, huh?

PROF. MACAULAY:

There you go. There you go. Apparently, one of the things and one of the exposes that always abuse me is a homeless person who had been killed. You just marked it down there. It was a homeless person, dead. The police weren't going to look into it and that sort of thing. It wasn't going to be put down as a murder. Well, there are all kinds of little goodies like that.

PROF. MACAULAY:

Again, somebody has to. There's the event that happened in the world. Then, somebody has to put it in a little box, has categorized it, and put it some place. Well, one of the things that we, really, Beth Mertz and I, it was Beth got me into the thing. We were talking about we really had to translate that social science didn't give you a bunch of facts just sitting there to pick up and plug into your grand theory, that you had to know what its limits were, what it was good for. Sometimes, you had to recognize that, if it was an important question, you should use the best methods. As I used to point out to my class, the word, "best," may mean least bad.

TURNER:

All too true.

PROF. MACAULAY:

If you think about studying things in law, how many of them people want to keep confidential? This is a political hot topic. They're not going to let you sit there and watch them do things. There was a study that came out. I guess it was [Sarad and Fellstiner 00:39:17]. They sat in lawyers conducting meetings with their clients who wanted a divorce. They got about 20 some of them with a number of turn balance

way, way more than that. Well, you can't say it was a sample. But they got in the door and got something, which was kind of a miracle. I didn't think they can get that.

TURNER:

It sounds like the least bad, or a.k.a, best sample you're going to get.

PROF. MACAULAY:

Yet, what lawyers do in those kinds of conferences is something we should know about. It's an important thing. It's the same sort of thing. If you want to study the police, the best studies of the police are people that hang out with the cops. The cops forget they're there.

TURNER:

Blending into the background. You're seeing what actually is going on, yes. There's an old joke about how you can use statistics to prove anything. Seven out of 10 people know that. That kind of sounds like what we're talking about here a little bit, where here's the statistics. You have to be careful of understanding where it's coming from and how it might be being used going forward. Still, important to get some of that information, empirically, with the law.

PROF. MACAULAY:

Sure. And better than just looking at the ceiling tiles, as I say. That's where too many law professors get their data.

TURNER:

There's an ear on the back of their door and they say, "I got it. Eureka. Here we go."

PROF. MACAULAY:

Got it. Of course. One of the things we've been doing in the contracts area, and it's the kind of thing I think should be done, and that is, when you've got a big case that's important and so forth, study it. Yes, you want the official report of the court that is cited. Of course, you get that. Nobody has problem with that. How about the briefs? What's happened is it used to be we couldn't do it. There were two law librarians who were wonderful at going and shaking those briefs people and letting us borrow them and these kinds of things and doing it. Now, of course, they're all online. You just grab them.

PROF. MACAULAY:

Then, often, you can find, there may be a newspaper for the trade. When I was doing auto-dealer stuff, there's automotive news. I didn't know there was such a publication. You get your hot little hands on it, they cover a lot of what's going on in the background of all these things. Well, the whole idea is we should do what we can. That's part of a new legal realism. That's available. It's the sort of thing any law professor can do. Again, it's good to have some notion about the limits of what you want to do with that. That's good data for what it is, but don't push it too far without knowing what you're doing. Sometimes, you just have to push it because that's the best we got.

TURNER:

It sounds like it would kind of give you a bigger picture, but also, a messier picture in many ways. That might be frustrating.

PROF. MACAULAY:

Your word is one live view is many times, that there are people who really want neat pure logical and so forth. That is, we want a [Will Estonian 00:42:56] book on the law of contracts. The whole idea there is let's put it into a logical coherent fashion and simplify the number of assumptions you're making in this kind of thing. Well, one of the problems is we're Americans, and we want our cake and eat it too. We all should be independent and personally responsible. But on the other hand, we should bail people out. We believe both of those things. They're not totally consistent.

TURNER:

Not at all, not at all. It gets messier. It's harder to put that into a casebook where people are saying, "I understand this because it's simple or neat." It's not getting the fair. It's not fair to the students in many ways that way.

PROF. MACAULAY:

That's right. But on the other hand, this was one of the courses. The contracts course at Chicago was one that had sections in the materials, the doctrine of consideration over generalizations and over corrections.

TURNER:

Nice, nice.

PROF. MACAULAY:

It did describe the law. I still remember in the Corbin's Treatise on Contracts. He loves to say, although their case is the other way, they're ill-considered. No citation.

TURNER:

It's like your word for it, huh? Never mind the man behind the curtain. The case is buying the curtain. We have these that are not ill-considered cases, sir.

PROF. MACAULAY:

That's right. That's right.

TURNER:

How do you see the concept of law in action being taught at law schools going forward?

PROF. MACAULAY:

Well, I'm hoping that things like our sociology of law course. I think we were raising things such as, what is the legal system as delivered look like? It's very much a system that, at the margins, you have this formal kind of government way things that legislators passed the law, that ministrations does administers the law. Then, we have trials and all that kind of thing.

PROF. MACAULAY:

On the other hand, you'll discover that there's an awful lot of bargaining. Administrative agencies seldom go to the mat. They try to persuade the people, the big corporations, particularly, persuade

them to comply. Essentially, one of the things about persuading to comply often is, then, we'll drop all proceedings against you. Not always, but there's a lot of that.

PROF. MACAULAY:

Then, the simplest kind of thing that, I think, the law students who are going to be lawyers need to think about is, how did the police decide how many of us are there and where do we put them? What do they do? Those are all choices being made. They tend to put them where they think they're going to be busy.

TURNER:

That's the big "D" word of discretion about awareness.

PROF. MACAULAY:

Absolutely. This is one of the things, the amount of discretion. What do lawyers do? A lot of it is persuading your client to accept a settlement because that's the best. You can't pay me to go to court. I'm not going to do it for free. At that point, we begin talking about it. Or there are the simple little things.

PROF. MACAULAY:

One of the sadder days of my life was watching the divorce with my son and his now ex-wife, and this kind of thing. There were they were before the Family Court Commissioner. They had all kinds of things. A document had been drafted by the two lawyers. The two of them had glanced through it. How much had they done with this kind of thing?

PROF. MACAULAY:

The County Court Commissioner looked at them and said, "Well, now, let's see what we can do with this. If you want to go and try these issues, the first thing we have," then, he named a date three and a half months in the future. "On the other hand, if you would like to sign it now, we could do it right now."

TURNER:

Dangling the plum of just wrapping this up right now versus three and a half months in limbo.

PROF. MACAULAY:

Of course, they signed. It wasn't all that pretty. They kept finding out things that they agreed to.

TURNER:

There was the messiness in there.

PROF. MACAULAY:

[crosstalk 00:48:04]. Yeah, and we get that. Then, of course, we get the classic thing, that is the limits of effective legal action. We know that laws are not enforced 100%. I guess, one of the things in our sociology of law class we always used to ask was, if you got in your car and you got off the freeway, you were heading from Madison to Milwaukee, and you rigorously drove at the speed limit, how many cars would pass you? Of course, the students answer, wise-cracking students, always with, all of them.

TURNER:

They might be late, too. I don't know.

PROF. MACAULAY:

Well, it'd be an interesting experiment, but I suspect. If you think about it, also, and the simple little thing we use an example, wouldn't it be, if you really wanted the speed limit enforced on this drive from Madison and Milwaukee, couldn't the state highway patrol do it at a very low cost? That is, if it's a two-lane heading east highway, you get two state highway patrol cars and they drive at the speed limit, one next to the other. Are you kidding?

TURNER:

We have quite the uproar is what you would have from the society.

PROF. MACAULAY:

We start asking the class, "Then, what would happen?" We hadn't a little of this out on the beltline when they started cracking down. There were letters and all the rest of the thing. I guess, in Honolulu, they had a big protest. I guess they went to cameras on the stoplights, so that anybody that ran the red light, they had a picture of them.

TURNER:

Something that feels inherently unfair to a lot of people. This wouldn't really catch me. This is you're monitoring something.

PROF. MACAULAY:

That's right. That's right. There is this. I think, partly, we see a little of it right now with the people who don't wear masks. Going forward and teaching law students and lawyers, they should think about things like that. What are the limits of the actions? After all, governors who might want to crack down might want to get reelected. This sort of limits how far you go. I think that's going to be a very interesting thing as President Biden, what he does in terms of trying to enforce various regulations and such. I don't know how much power he has. After all, an awful lot of people voted for Donald Trump. In fact, there are studies of judges.

PROF. MACAULAY:

Well, the only place I know of in the law school where that was taught was our sociology of law course. There are studies of lawyers. Where do we teach that? I think we've got to at some point. One of the things I'm hopeful about is law schools, generally, have gone to clinical programs. When I started teaching, there was no such thing. Really, Frank Remington was one of the great pioneers of setting up the idea that we're actually going to do something. That's what we would do with a summer was the original kind of idea.

PROF. MACAULAY:

You get people were clinicians when they're teaching this. They start discovering things about the legal system. A few of them, at least, decide they're going to write an article about this little thing that doesn't come up in the appellate cases, but it's like, well, the simplest kind of thing, like teenage boys that get in trouble, can they understand what they're being told? The simple notion of, do we

communicate with them? Can we just lay on them something written by a lawyer? Not [inaudible 00:52:13].

TURNER:

Again, it doesn't come out in the appellate decisions. Last October, I did a podcast with [Michelle Levin 00:52:21] who wrote an article about making a murderer, and Brendan Dassey about how much he understood with his inability to comprehend some of the words that were being used. It's right along what you were just saying about how that doesn't really come out in the decisions. However, if you're watching the transcripts, reading the transcripts, watching the videos of the interrogation, and then learn about his backgrounds, it becomes very clear there's something else going on here.

PROF. MACAULAY:

Michelle is a good friend of mine. The two of us love jazz. Basically, we share the [inaudible 00:52:53]. He can play the piano. I play the CD player.

TURNER:

You need an expert at both of those to have a good jazz session, I'd say.

PROF. MACAULAY:

There you go. There you go [inaudible 00:53:04]. I guess, what I'm saying is that my hope is, Michelle is a good example, and she produced an article and I heard her give a talk to my daughter and son-in-law's linguistics program. I was invited along to see that. That was terrific.

TURNER:

Really, again, it really helps flesh out the context in which the law is being delivered in many ways to understand-

PROF. MACAULAY:

I'm just hoping that that's the push. Just see the darn system, as it works.

TURNER:

[crosstalk 00:53:47].

PROF. MACAULAY:

Again, I keep coming back and saying, "You still have to learn the elements of burglary. There's some law." Each of these courses has something to learn there. There's a tool [crosstalk 00:53:59].

TURNER:

You're not ignoring the elements that you still need. You still need the tools in order to apply that to these situations. You need the elements for contracts, for criminal procedure, or whatever it might be, so you apply it to these situations.

PROF. MACAULAY:

Yeah, absolutely. That's why I am not the Lord High Executioner, because I don't think it is dead. Or it's dead like the dead rattlesnake.

TURNER:

If nothing else, we have disabuse us of that notion that you are the Lord High Executioner of Contract Law. That's good. If nothing else, we've laid that to rest.

PROF. MACAULAY:

I hope so.

TURNER:

What do you most hope the readers take away from your work in this collection, or broadly?

PROF. MACAULAY:

How difficult it is to do things with law, but that law can have an influence. As I sometimes put it, to me, Brown versus Board of Education, in many ways, was a disappointment. People thought that, suddenly, there was no problem of race in the United States. It just got canceled out. Well, not quite. On the other hand, but it did. The southern segregationists were very proud of their position. They didn't hide it. We, at least, made it so that it wasn't politically correct to talk about it, which was some progress, but there still was a lot more to do.

PROF. MACAULAY:

On the other hand, Major League Baseball allowed Jackie Robinson to display his talents at, roughly, the same era. I think that has a lot to do. Now, we suddenly are trying to deal with race and these sorts of things. Some of it is law. Some of it is just changing attitudes and these sorts of things. It's messy. It's complex. Yet, you can do a few things. You can make things a little better. You're not going to suddenly change and make life perfect tomorrow afternoon by passing a law or getting a big Supreme Court decision or something like that. But you can make things some better. It counts when you do it. Really, it would be better for the people who live in Northern Wisconsin to have an adequate number of lawyers to help them out and such.

PROF. MACAULAY:

If you want to take something away, it is both an appreciation of how difficult it is, how messy it is, and yet, not a cynical position, not a thing. You can read some of the stuff about the rule of law, and there's no discretion and all the rest. That's not a world we live in. Does that mean that the whole ideas of due process, the whole ideas of law and no one above the law, doesn't have some influence? It has, likely. We live in a better society because it's there. Maybe, that's just an act of faith on my part. That's where I think we can go.

TURNER:

I think that's wonderful. I think of the place where the attitudes and the laws affect each other is a very important place that a lot of people don't dwell upon, where they say it's either just the attitudes or, in other times, just the law where they want it really messy or very clean. Sometimes, it's right at that intersection of the two.

PROF. MACAULAY:

As they said, in the political slogan, obey good laws.

TURNER:

Exactly. Where can researchers find more of your work or learn about your career?

PROF. MACAULAY:

David Kennedy and William Fisher have a thing called The Canon of American Legal Thought. This is a very modest book. This canon traces the history of writing about legal reasoning and legal decision-making, and so forth. These are the 20 most important articles available. Now, alright, non-contractual relations in business is there. There's an essay on my work by Kennedy, which is in there. That's the Canon of American Legal Thought.

PROF. MACAULAY:

Then, when I retired, they held a conference. It was Jean Braucher who, then, was at the University of Arizona, John Kidwell, who sadly died just about that time, and Bill Whitford. There were 15 papers, at least. Some of it was about my work. Some of it was inspired by my work, and kind of thing. This is called Revisiting the Contract Scholarship of Stewart Macaulay on the Empirical and the Lyrical. This is Jean Braucher. She came up with the title.

PROF. MACAULAY:

Empirical, well, that's easy. That's what we do. The lyrical is, I like to use for titles or section headings songs. I'm a great Duke Ellington collector. For example, one of the titles of one of my articles is, Things Ain't What They Used To Be, which is a famous Johnny Hodges playing alto sax with Duke Ellington 1940s kind of thing. That's the lyrical part of the thing. She was teasing me on this. It turns out she loved opera and she was using some opera. She started using some operatic things on her [inaudible 00:59:53].

TURNER:

The lyrical inspiration there.

PROF. MACAULAY:

Then, there's one where I tell some of the stories that I told today. It's [Holiday and Smith 01:00:06] conducting long society research, reflections on methods and practices. A lot of what I've been saying today is also in my piece where they interviewed me in that one. That's a lot. Usually, what happens is you write an article, you offend somebody, a friend or two reads it, then, it just vanishes. It does seem to be that if I can influence the few people to start saying, "What does the legal system look like out there? How does this tie in with what we're trying to teach in (fill in the blank) whatever law school course you want?" Well, again, I'd be quite happy to have any influence. That would be the kind that I'd like.

TURNER:

I'm certain you have had that influence on many professors and many lawyers out there. Thank you very much for taking the time to speak with us today, Professor Macaulay. Do you have any other closing thoughts?

PROF. MACAULAY:

Only that. I think it's wonderful that we have these podcasts. It's good we get this. In some ways, wouldn't it be nice if we had the time of Willard Hurst and Fletcher?

TURNER:

Yes. Fortunately, at least, for Willard Hurst, we do have his oral history available online. If nothing else, we can listen to his story. We also have an oral history for you online in the same location where you spoke with the archivist here at UW-Madison for four or five hours about your career and your life, which is just amazing comprehensive overview. We will link to that as well. We want people to learn as much about your career and as much of your scholarship as possible. We'll get it all out there.

PROF. MACAULAY:

Well, great. Thank you.

TURNER:

As always, we'll link to Professor Macaulay's scholarship on our podcast page, including all the books that he just mentioned and the songs. Thank you very much for joining us today, Professor Macaulay. We've been discussing the newly published book, titled, Stewart Macaulay: Selected Works, now available from Springer. Thanks to everyone out there for listening. You can find a link to Springer's page on our podcast page, where you can purchase a digital or print version of Professor Macaulay's book.

TURNER:

For complete listing of all Professor Macaulay's work, you can also visit the University of Wisconsin Law School repository. Again, all these links are available on the podcast page at wilawinaction.law.wisc.edu. I hope that, by now, you're subscribed to our Wisconsin Law In Action podcast. But if you aren't, you can find us on the Apple iTunes Store or Stitcher, or listen to our full archive at wilawinaction.law.wisc.edu. Thank you all for listening, and happy researching.