Legal Studies (2023), **43**, 762–766
doi:10.1017/lst.2023.31

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The Society of Legal Scholars

CURRENT DEVELOPMENTS: BOOK REVIEW

Scholars of Contract Law

edited by James Goudkamp and Donal Nolan. Oxford: Hart Publishing, 2020, xix + 416 pp (£85 hardback) ISBN: 978-1-50-993846-9

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This reviewer of *Scholars of Contract Law* must admit that little unwelcome effort was needed to earn his review copy, for if the main function of a book reviewer is to assist the review's reader to decide whether to read the book itself, then this was performed easily. The essays in this collection are all interestingly and enjoyably written by contributors of indisputable authority who the editors have done very well to assemble; and the editors' own introductory chapter valuably reflects not only on what their contributors say of those individual scholars but also on the nature and purpose of contract scholarship, and such reflections are developed in an afterword by William Twining. The ease with which the reader can be recommended to read this book is in contrast to the difficulty which answering the questions these general reflections must provoke: what effect, if any, can or should learning about these scholars have on contract scholarship and contract doctrine?

The chapters on individual contract scholars are: Sir Jeffrey Gilbert by Michael Lobban; Henry Thomas Colebrooke by Joanna McCunn; Stephen Martin Leake by Catherine MacMillan; Anson by Robert Stevens; Pollock by James Gordley; Williston by Todd Rakoff; Corbin by Gregory Klass; Cheshire and Fifoot by Warren Swain; Kessler by Hugh Collins; Treitel by Andrew Burrows, now Lord Burrows JSC; Macneil by Jonathan Morgan; Coote by Stephen Waddams; and Atiyah by one of the editors, James Goudkamp. In each chapter of a work focused on 'intellectual history',[1] biographical information is subordinate to an overview of the subject scholar's work and a critical evaluation of that work. Not only is every chapter, as I have said, interesting and enjoyable, but every chapter about which I can make an informed judgment is accurate – though saying this does not, of course, entail agreement with all that is said in those chapters.

I am unable to form a judgment of this nature about the chapters on the historical figures of Gilbert (1674–26), Colebrooke (1765–1837) and Leake (1826–93), about whom the biographical information provided is necessarily and helpfully more full than it is in regard of other scholars. I am not sure I knew Gilbert and Colebrooke even as names, and I am comforted to learn as an incident of conversation with one of the Commonwealth's outstanding contract scholars, who has contributed to the history of the subject, that he was in the same position. Dr McCunn is very frank about those aspects of Colebrooke's work that made him – and no doubt will continue to make him – marginal to our understanding of contract, but her account of his work spurs reflection on both the nature of legality during British imperial rule and on some aspects of legal reasoning generally. Professor Lobban, in contrast, is able to stress Gilbert's contemporary relevance, particularly for perennial disputes about consideration, and I am sure I will not be alone in taking up his suggestion that we should pursue Gilbert's 'surprisingly useful' 'insights into doctrine'.[2]

[1]J Goudkamp and D Nolan 'Scholars of contract law: individuals and themes' in J Goudkamp and D Nolan (eds) *Scholars of Contract Law* (Oxford: Hart Publishing, 2020) p 2.

[2]M Lobban 'Sir Jeffrey Gilbert (1674–1726)' in Goudkamp and Nolan (eds), above n 1, p 74.

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Professor Macmillan is able to go further than this by showing that Leake, though he is of course better known as an authority on civil procedure, 'was instrumental in the creation of the modern form of contract law'.[3] Leake's contract treatise published in 1867 was one of those eclipsed by Anson, Chitty and Pollock, but it is shown to have been of significance in establishing the crucial role the textbook has come to play in the common law. One does not have to share the extent of my belief that much of contemporary contract law cannot be understood without a thorough engagement with its Victorian origins to find MacMillan's chapter to be of an interest which, not for the first time with her work, bears comparison with the late Professor Simpson.

The inclusion of chapters on Gilbert, Colebrooke and Leake show the range of interests the editors tried to satisfy when choosing the subjects of the chapters. They of course faced an impossible task. These three chapters speak to an interest in legal history; the other chapters address the obvious interest in discussing those whose influence on the contemporary law is unquestionable. In Anson, Pollock, Williston, Corbin, Cheshire, Fifoot and Treitel, the editors have included some of those who have given us the existing law as much as almost any individual judge or legislator;[4] and in Kessler, Macneil and Atiyah contributors of comparable standing but who, were they economists, would be called heterodox; the editors call them 'modernists' in opposition to the 'traditionalism' of the former group.[5] The reader will, of course, have her or his opinion about the selection; Williston, Corbin, Kessler and Macneil certainly, but even if Holmes' omission, though it was originally intended he be included,[6] could be justified by not regarding him as a contract scholar in the relevant sense, where are Langdell[7] and Fuller?[8] But this book is not an encyclopaedia, and the editors' choices, which they defend without being at all precious about things,[9] is, with the possible exception of the chapter on Colebrooke, a perfectly rational exercise of judgement.

In his afterword, Twining suggests it would have been better to include Stewart Macaulay instead of Macneil,[10] and it cannot be disputed that Macaulay has had the greater influence over contract, and far more influence over legal theory generally. But, as the editors themselves note,[11] though I have no idea to what degree this influenced them, Macaulay's prominence actually is a good reason for the choice of Macneil. Dr Morgan's chapter is only the fourth general account of Macneil's work, and the first for more than 20 years. There is, in contrast, a large literature focused upon Macaulay, with much being written at or after the time of his retirement from full-time teaching in 2008.

The chapter I have so far done no more than list is that on the late Professor Brian Coote. I do not think it can be maintained that Coote's contribution was at the level of the other modern contributors discussed. But these things are, of course, relative, especially when those others populate the stratosphere of contract scholarship, and Coote's inclusion is entirely justified by the interest and impact of his work. That inclusion also provides a counterweight to what would otherwise be a book exclusively about northern hemisphere, indeed, leaving a quibble about Kessler aside, UK and US scholars.[12]

[3]C Macmillan 'Stephen Martin Leake (1826–93)' in Goudkamp and Nolan (eds), above n 1, p 106.

[4]It is intended that Chalmers will be included in a planned volume on commercial law: Goudkamp and Nolan, above n 1, p 3.

[5]Ibid, p 21. Though focused on *Cheshire and Fifoot*, W Swain 'Professor Geoffrey Cheshire (1886–1978) and Cecil Fifoot (1899–1975)' in Goudkamp and Nolan (eds), above n 1, pp 230, 235–66 interestingly hints at what I independently believed to be the case, that Fifoot poses particular problems for any classification of this sort.

[6]Goudkamp and Nolan, above n 1, p 3.

[7]Ibid.

[8]It is intended that Llewellyn will be included in a planned volume on commercial law: ibid.

[9]Goudkamp and Nolan, above n 1, pp 2–5.

[10]W Twining 'Afterword: understanding contracts – a realist perspective' in Goudkamp and Nolan (eds), above n 1, p 400.

[11]Goudkamp and Nolan, above n 1, p 4 fn 11.

[12]As the editors are aware (ibid, pp 3, 34–36), their wise decision to confine the selection to scholars of the common law gave rise to a particular problem in that the exclusion of Pothier and arguably Savigny meant the exclusion of scholars who of course had a great all but direct influence on the common law of contract, as is shown throughout the book.

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In sum, I hope I have made it clear that as legal history and theory this book has indisputable value, and surely this in itself is its sufficient justification. But the book naturally gives rise, as the editors intended, to consideration of 'the role played by scholars in legal development, as compared with the role played by judges and the cases the judges decide'.[13] Scholars may play a direct role when they get involved in legislation or even are elevated to the bench, and what we might call a proximate role when they seek to form the minds of the students who will become the personnel of the legal system.[14] But it is the 'subtle and indirect, and frequently imperceptible'[15] influence of scholarship itself that is of the greatest interest, and I would say importance. Our increased awareness of, or preparedness to acknowledge, the role of scholarly writing, of course principally the textbook, in introducing certain important specific doctrines into the common law of contract, and even more in furnishing that law with such overall coherence as it possesses, justifies the editors in claiming that 'it was the jurists – and not the judges – who really "created" the modern law of contract, and gave it its distinctive shape and structure'.[16]

Though made with particular reference to the 'new legal realism' which he is playing a part in establishing as an important approach to legal reasoning, the main point of Twining's afterword can stand without that reference, and follows from the 'law in context', or 'law in action', or 'socio-legal studies', or whatever approach that Twining has done at least as much as any other Commonwealth scholar to advance. Taking such an approach 'involves criticising the dominance of the doctrinal traditions in Western academic law and the self-sufficiency or exclusiveness of legal dogmatics'.[17] Twining goes to some length to say the issue is one of 'avoiding caricatures' composed of 'crude versions of "black-letter law" or "formalism"',[18] whilst aiming 'to right an imbalance in the heritage of western traditions of academic law by insisting that the empirical dimensions of understanding contractual relations have been relatively neglected',[19] the neglect being manifested in excessive focus on doctrine and in particular on what is to be found in the law reports.[20]

Twining's 'tentative suggestions' for future improvement are very extensive:

> broaden the vision of Contracts as an academic field to include contract formation and contractual behaviour; broaden the audiences of Contracts scholarship to include all human beings, especially those who in their work are concerned with creating and preserving social co-operation rather than focusing on clearing up messes; extend the use of sources for understanding contracts and contracting to actual contracts, standard forms, relevant findings and insights of socio-legal scholarship and accessible data about different contexts of social relations; do not assume that data is mainly relevant for the light it throws on doctrine; acknowledge the dark side of contracts and the existence of alternative markets; better integrate Contracts and Commercial Law and test all generalised statements about doctrine against different contexts and different kinds of contractual relations; emphasise the differences as well as the affinities between Contracts and Torts as fields of law; recognise that Contracts is a very large, varied and important field and deserves more space in the legal imagination.[21]

This would seem to go beyond law in context to become law as context, for though Twining insists that doctrine should not be lost,[22] it would be markedly subsumed in what seems to be an overall sociology of law. But will even those persuaded about law in context find this strong version of it desirable?

[13]Ibid, p 1.
[14]Ibid, p 45.
[15]Ibid.
[16]Ibid, p 46.
[17]Twining, above n 10, p 382.
[18]Ibid, p 385.
[19]Ibid, p 381.
[20]Ibid, pp 387–389.
[21]Ibid, p 403.
[22]Ibid, p 381.

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I would suggest that contract scholarship must be strongly distinguished from the sociology of law because the former *should* be highly focused on doctrine. Denying that doctrinal reasoning is self-sufficient must not entail a denial that doctrine possesses, to adapt a phrase from Louis Althusser, an 'index of effectivity'. It is as doctrine developed though precedent that liberal democratic law is insulated against direct determination by the political and the social. This insulation does not itself rest on law. It rests on a political and social commitment to the value of the rule of law. But the reproduction of the insulation requires that adjudication must, to put it in a way relevant to our concerns here, take a doctrinal form in which engagement with the political and social is minimised.

The principal distinction between the good and the bad in contract scholarship emerges from the handling of precedent after it is realised that the insulation of doctrine has to be, should be, and is, limited. To varying degrees, all the modern scholars discussed in this book realise this, for, as Twining emphasises,[23] none of them occupy the caricature positions. It is axiomatic to general hermeneutics that meaning is a product of the 'reciprocity' of the 'grammatical' and the 'psychological', and the particular stress placed on grammar in legal doctrine cannot and should not annihilate the political and social values the judge must and should bring to the application of precedent, even though one of these values is the rule of law itself. There could hardly be a better illustration of this than the common law of contract, the modern development of which has turned on the shift in the influence of individualist and welfarist values that made it appear necessary for the courts to find liability in *L'Estrange v F Graucob Ltd*[24] in 1934, and not to find it in *Lloyd's Bank Ltd v Bundy* 40 years later.[25] Contract scholarship can and should explicate such influences to a degree that adjudication itself, though subject to those influences, cannot and should not.

The two scholars on whom Twining spends most time, Macaulay and Macneil, were acutely aware of the shift in individualist and welfarist values; indeed this awareness was (as it was for Atiyah) the basis of their work. But both made what can, with the benefit of hindsight, be seen to be an important mistake in the way they treated this shift as a matter of contract scholarship,[26] though their influence on disciplines other than law shows how much they contributed to the (economic) sociology of contract. It is fruitless to deny that when he expressed his argument in terms of the 'non-use of contract' and 'non-contractual relations', Macaulay invited Gilmore's ordaining him 'the Lord High Executioner of Contract', though this badly mischaracterised Macaulay's ambition to reform, ie not pronounce dead, the law of contract, and was a title he sought to disavow. Such ambition was even more central to Macneil's work, but his doctrinal arguments showing the existing law of contract to be undermined by its failure to come to terms with its own relational basis were eclipsed by his sociological statements of a 'relational theory of exchange'. Though Dr Morgan convincingly argues that Macneil's 'indirect influence' has been 'substantial',[27] it is also fruitless to deny that this influence has amounted to far less than the imbuing of contract with awareness of its relational basis at which Macneil had aimed.

But if Macaulay and Macneil got the balance of the sociological and the doctrinal wrong in one way, surely this was caused by their anxiety to make express influences which the traditionalists acknowledged *sotto voce*, but nevertheless acknowledged. With one exception, the chapters on the nature of the achievement of these scholars demonstrate this. I can give only one example: Professor Klass shows that Corbin recognised the open nature of all language, 'however fully and carefully "integrated"', and saw meaning as reliant on shifting 'reasonable expectations' in an approach to interpretation cognisant that 'context is always relevant'.[28]

[23]Ibid, p 385.

[24][1934] 2 KB 394 (KBD).

[25][1975] QB 326 (CA).

[26]The current paragraph is a synopsis of the argument, supported by full referencing, in D Campbell *Contractual Relations* (Oxford: Oxford University Press, 2022) ch 2.

[27]J Morgan 'Professor Ian Roderick Macneil (1929–2010)' in Goudkamp and Nolan (eds), above n 1, p 330.

[28]G Klass 'Professor Arthur Linton Corbin (1874–1967)' in Goudkamp and Nolan (eds), above n 1, pp 223–24.

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The exception is Lord Burrows' claiming that Treitel's scholarship was 'black-letter',[29] and using Treitel as a springboard for a defence of scholarship in this style,[30] which, in order to 'avoid the unwelcome baggage' of the 'label', he calls 'practical legal scholarship'.[31] Strangely, this rechristening unproblematically follows quotation of one of the occasions on which Treitel told us that he thought black-letter law was a caricature which did not represent what he himself was doing.[32] Lord Burrows says that a not well known casenote[33] written in a style in part evocative of opinion of counsel is 'in many respects' his 'favourite' amongst Treitel's articles,[34] but makes only the most cursory mention[35] of Treitel's remarkable Clarendon Lectures.[36] In these lectures, Treitel examined some difficult 'landmark' cases such as *Beswick v Beswick*[37] in what can only be described as a law in context manner, and by so doing unquestionably deepened our knowledge of those cases in a way which raises the most interesting questions about the limits of their discussion in Treitel's textbook. Lord Burrows' chapter is no exception to the positive verdict I have passed on the contributions to this book, and indeed his account of the life and achievement of his friend is charming. But Lord Burrows' attempt to reduce contract scholarship to a doxology of judicial utterance does not make a contribution to the discussion of the fundamental issues of similar interest to that made by the rest of this book, including the other chapters on the traditionalists.

Scholars of Contract Law is the second of what is intended to be several collections of essays on scholars of private law, the first being on tort, with, I understand, reasonably firm plans having been made for two further books. On the evidence of the first two books, that this series is to be welcomed in the interests of legal history and theory goes without saying. But it is more important that the series should contribute to the our understanding of the way doctrine should be treated in legal scholarship, and of the role that the influences analysed in legal scholarship play in the formation of legal doctrine, and the book under review certainly does this.

[29]A Burrows 'Professor Sir Guenter Treitel (1928–2019)' in Goudkamp and Nolan (eds), above n 1, p 282.
[30]Ibid, pp 291–94.
[31]Ibid, p 285.
[32]Ibid.
[33]GH Treitel 'Damages for breach of a CIF contract' (1988) Lloyd's Maritime and Commercial Law Quarterly 458.
[34]Burrows, above n 29, p 281.
[35]Ibid, pp 280, 297 fn 27.
[36]GH Treitel *Some Landmarks of Twentieth Century Contract Law* (Oxford: Clarendon Press, 2002).
[37][1968] AC 58 (HL).

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