I REMEMBER JEAN

Stewart Macaulay*

Jean Braucher was my valued professional colleague and good friend for over 30 years. I am one of many who will miss her wisdom and wit. The process of mourning a family member or a good friend who has died is not easy. I know something about this because I lost my wife to cancer in January of 2000. We had been married 45 years, and I still miss her greatly.

Several years before my wife died, our next-door neighbor Niki Plaut lost her husband. He had a fatal heart attack while he was teaching a chemistry class at the University of Wisconsin. In May of 2000, Niki and I happened to meet. She offered her sympathy and said: "It never gets better, but it gets different." After all this time, I have come to believe what she meant was that we never forget what we have lost, but as time passes we become better able to focus on what we had when our friend or family member was with us.

When Keith Rowly[1] asked me to offer some personal remarks about Jean at a conference after her death, I looked through the letters and emails on my computer. My search for mention of "Jean Braucher" or "Jean" turned up a surprising number of hits. Reading this material provoked both sadness and joy. At the outset, I had played the role of mentor. I was almost 20 years older than Jean, and, indeed, Jean's father, Professor Robert Braucher, had been one of my mentors. In the early 1990s, Jean adopted for her class *Contracts: Law in Action*,[2] the novel contracts casebook that several of us at Wisconsin had created.[3] As time passed she contributed to later editions, and finally she became the executive editor of the third published edition.[4] Jean and I commented on drafts of each other's articles and book chapters over the course of many years. She joined in planning a conference honoring my work, and she edited several papers for the book that was published after the event. Throughout this long relationship, she exhibited great skill as an editor, giving me much insight and knowledge. She also

---

* Malcolm Pitman Sharp Hilldale Professor Emeritus, University of Wisconsin-Madison. I wish to thank Bill Whitford for his comments on a draft of this Article. As always, all mistakes are mine.

1. Professor of Law, UNLV William S. Boyd School of Law.
2. 1 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION (1st ed. 1995).
3. The authors of the first published version were John Kidwell, William Whitford, Marc Galanter, and myself. Many others worked on the book during its days as a photocopied product of the University of Wisconsin Law School Copy Shop.
4. 1 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION (3d ed. 2010).

shared many expressions of friendship, and her delightful sense of humor. The letters and emails I found serve as a welcome reminder of our wonderful friendship.

My mentorship role involved answering Jean's questions and writing letters advocating the merit of her work. In 1986, I wrote in response to a letter from the Dean of the University of Puget Sound Law School where Jean had begun her teaching career. He asked whether an article that Jean had published in the *Wisconsin Law Review*[5] "showed her thinking through all the ramifications of a substantial legal problem in a manner which makes an original and worthwhile contribution to legal knowledge." I responded that it did because:

> (1) First, she stresses that legal rights do not implement themselves, and the amounts involved in consumer transactions may be significant to many consumers but they are often not large enough to warrant paying very much to a lawyer;
>
> (2) Second, she argues that the law should be crafted to aid in informal dispute resolution. She shows how some parts of present law hinder and some aid settlement;
>
> (3) Third, she deals with the American legal system as it is and not as some idealistic/ideological model suggests that it ought to be.

Jean moved to the University of Cincinnati in 1987, and she planned to interview lawyers who handled individual bankruptcy cases about their practice. She wrote me a long letter asking many detailed questions about how to gain access to busy practitioners and how to be sure that they were offering accurate descriptions of their practices rather than what they thought she wanted to hear. I had been interviewing lawyers for more than 25 years by the time of this exchange of letters. I offered advice, and shared some of the common problems I had with interviewing lawyers.[6] Many lawyers will take valuable time to talk to a law professor about their practices, and they will be ideal informants, but at least some lawyers can be expected to refuse to do so. Many will wall off certain topics as confidential and refuse to discuss them. At least a few will tell entertaining stories that suggest that the unusual "happens all the time," and some will be misleading and say what they think makes them look good.

In 1994, Jean published *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*.[7] This reported the results of the lawyer interviews that we had discussed earlier. She sent me a reprint, and I responded with great enthusiasm, praising the article. I wrote:

---

5. Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405.

6. I have also written about the problems of interviewing lawyers more recently. *See* Stewart Macaulay, *Notes on the Margins of Lawyering, in Three and a Half Minutes*, 40 HOFSTRA L. REV. 25, 34–38 (2011).

7. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993).

> As you conclude: "Arm-chair policy analysis in this field, as in many others, is doomed to be wrong." Moreover, it does seem odd that after almost a century of university legal education, we are just beginning to get an idea of what lawyers do. Good job! Loud applause is heard off stage coming from Madison.

Later that year, the Dean asked me to write supporting Jean's promotion to a named chair at the University of Cincinnati Law School. Again, I responded with enthusiasm. I said that if Jean Braucher had done nothing but write *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, she would still merit the promotion. Of course, she had written other excellent articles as well. I argued:

> First, this project involved a great deal of work—far more than most law professors must invest in producing an article;
>
> Second, and more importantly, the empirical work is the servant of excellent analysis;
>
> Third, the article contributes to the solution of an important problem and corrects conventional wisdom. As she says, "The study also provides dramatic evidence for the proposition that law in action is very different from either the law on the books or law according to elegant theory."

In 1992, Jean decided to use *Contracts: Law in Action* for her class materials. This was the photocopied version that had been produced by those of us at Wisconsin who taught the first-year course. By this time, John Kidwell, Bill Whitford, Marc Galanter and I were the authors. John Kidwell and I each sent Jean copies of our class notes. A year later I wrote Jean that Bill Whitford had told me about a conversation that he had with her: "I am relieved to hear that you like the materials." In an article in the *Northwestern University Law Review*,[8] Jean applauded *Contracts: Law in Action*.[9] In the same article, she also defended me from Grant Gilmore's attack in his *The Death of Contract*[10] where he found my work completely without interest.[11] She said that he had badly misread my writing.[12] Gilmore's dismissal and contempt had hurt. I was grateful that she had defended me so strongly.

---

8. Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49 (1995) [hereinafter Braucher, *Afterlife*].

9. She said: "Their book weaves the history, philosophy, sociology, and doctrine of contract into a vibrant if troubling picture, confronting students with the conflicts, complexities, and above all, the limits of the subject. They challenge students to become 'skeptical idealists' in the practice of law. Their approach is both theoretically sophisticated and thoroughly practical." *Id.* at 52–53.

10. GRANT GILMORE, THE DEATH OF CONTRACT (Ronald K.L. Collins ed., 2d ed. 1995).

11. *Id.* at 1, 1 n.1.

12. My wife and I particularly liked Jean's statement: "Gilmore also could be bafflingly obtuse. He utterly failed to appreciate the power of Stewart Macaulay's sociological research and practical realism as a perspective on late twentieth century law in action. Gilmore willfully misunderstood Macaulay, who deserves the last laugh." Braucher, *Afterlife*, *supra* note 8, at 51–52.

Jean used *Contracts: Law in Action* for many years. In November of 2007 she accepted our offer to be the editor-in-chief of the third edition of the book. We had a deadline imposed by the publisher if we wanted the book to be available for our fall classes. Moreover, the publisher had set a page limit such that if we wanted to add anything, we had to cut something else from what had appeared in the second edition. These factors combined gave the new editor-in-chief a good deal of power. The original editors understood this, but our high regard for Jean allayed our worries.

We held a conference to gain ideas for how to revise the new edition of the book. We invited those who had used *Contracts: Law in Action* and a few others who were familiar with our approach. Jean came to Madison and played a major role in the event. We got an earful. Our audience wanted us to bring things up-to-date. We had to do even more to offer students real contracts problems, and not a history of law and the British industrial revolution. We also had to do even more to put the legal materials into context so that students could understand the problems presented and appraise the legal solutions offered.

After the conference, we held a dinner at my house. Our old cat, George, was very big and very friendly. He roamed seeking attention. Jean almost stepped on him, and, while trying to avoid the cat, she fell. Fortunately, another guest caught her, and she escaped injury to anything but her dignity. I emailed Jean that George thanked her for not stepping on him. She responded: "I have been without a cat for nearly a year, since my 20-year old puss died last spring. I've been waiting to do some home improvements before getting another, but seeing the noble George made me realize I need a cat ASAP."

Jean turned to producing the third edition of *Contracts: Law in Action*. She edited a great deal of text in the second edition before she allowed it to go into the third. Jean's edits were far more than checks of grammar and typos. She reorganized and restated. For example, she reworked the introduction to the book. I had done most of the writing of this material back when we were in our photocopied days, and I had reason to be fond of the existing text. For one thing, my late wife had edited the original version just before she had reinvented herself by becoming a law student at age 48. Moreover, we had received some very positive feedback about it from students and, indeed, from Jean herself.[13] Jean wrote the other editors: "I have edited the first chapter to update it without lengthening it. All the old material is there, but I have reorganized it to start with an overview of what the law in action approach is about." Then she offered a long paragraph about the other changes she had made. We accepted Jean's revisions with only a few minor quibbles. She later said she had posted the revised introductory chapter to SSRN, and she reported that we had almost 350 downloads at the time she sent me an email about it. Jean also pressed the rest of us to reinvent the parts of the second edition to which we were assigned, in large part to

13. "The thirty-three-page introductory chapter to Volume I reviews the schools of thought in American law and the recent history of contracts teaching materials. This chapter is densely loaded with important insights and bears rereading many times by student and teacher. Its inclusion in the book sets a high level of ambition for students . . . ." *Id.* at 79–80.

meet the challenges our guests at the preliminary conference had thrown at us. All of us were pleased with the final product, and we have received positive comments from other professors who have used the book and from students.

Not too long ago, Jean began preparing for the production of a new fourth edition of our contracts casebook. We added Kathryn Hendley and Jonathan Lipson to the panel of editors. Each had used the book and each brought unusual experiences to their new role as authors. We held a meeting of our new editorial board and we began assigning and accepting tasks. In most instances, each author would be assigned to a particular chapter or series of chapters as the author of the first draft of the revision. Bill Whitford and I both ended teaching classes on December 5, 2013, and there was a nice retirement celebration. Everyone assumed that Jean, Kathie, and Jonathan would march forward, perhaps asking Bill or me for a suggestion or reaction now and then. Jean's death changed this too. Now Kathryn Hendley has the burden of keeping the show moving, and Bill and I will play bigger roles despite our retirements.

Jean and I were close professional colleagues, and we engaged in the most basic practice involved in that status. I wrote comments on the drafts of articles and book chapters that she had written and sent to me, and she had much to say about mine. We trusted each other, which is essential to this relationship. Neither of us would offer praise just to make the other happy. Both of us felt free to object and raise what we saw as serious problems. We each valued the other's outlook on law and legal scholarship so much that, if the other had questions, we knew they were worth serious consideration.

As I reviewed my collection of emails that reflected such comments and reactions, I was delighted by some of the asides and tangents. A favorite example of how interesting it was to work with Jean was when she was writing *The Sacred and Profane Contract Machine: The Complex Morality of Contract Law in Action*.[14] She asked me to read a draft and comment. She argued that sometimes one was morally obligated to release another from a promise. She turned to an 1859 novel by Harriet Beecher Stowe for an example.[15] In the novel, Mary loves James, but Mary's mother disapproves of him. James goes to sea and Mary receives a report that James has drowned. Mary's mother persuades her to become engaged to the Minister, a famous Calvinist theologian who preaches against slavery. James returns, and the novel considers whether the Minister has a moral obligation to release Mary's promise to marry him because of her mistaken belief that James had died. Jean thought that similar situations could arise in business contexts. I suggested that in light of relational norms and sanctions, the Minister also had reason to release Mary in his own self-interest. Mary might become a dutiful wife, but I doubted whether she was likely to become a happy or loving one. Jean liked the suggestion and said that she would mention it. Jean pointed out that in Stowe's story the Minister did release Mary and later finds a much more suitable wife. We decided that moral obligations and relational norms and sanctions occasionally pointed in the same direction and reinforced one another.

---

14. 45 SUFFOLK U. L. REV. 667 (2012).

15. HARRIET BEECHER STOWE, THE MINISTER'S WOOING (Penguin Classic 1999) (1859).

We moved from the Minister and Mary to the film *Casablanca*. The plot is far too complicated and messy to even sketch here.[16] However, those who know the film will recall that the problem is created when Rick and Ilsa, Humphrey Bogart's and Ingrid Bergman's characters, have an affair in Paris. Ilsa mistakenly thinks that her husband, a Czech fighter against the Nazis, is dead. She discovered that she was wrong; her husband was still alive and needed her help. She cannot get word to Rick because it is the day that the Germans are occupying Paris. Rick was waiting for her at a railroad station where he had space for them on the last train out of Paris. Jean and I had fun finding parallels to and differences from the Minister and Mary in the Harriet Beecher Stowe story. Rick escapes to Casablanca, and Ilsa and her husband arrive there later. Jean was certain that Rick and Ilsa were not going to leave Ilsa's husband behind at the mercy of the Nazis. Everyone had to sacrifice for the greater good of fighting the Nazis. We talked about how they could have ended the story in a Hollywood picture made in the early 1940s. Whatever film experts might have said, we were having a good time.

In another message, Jean wrote about a panel on which she was to appear with a noted contracts teacher. She said that Professor X "is a nut case, but usually a very good presenter and practiced at being funny to keep a hostile audience at bay."

Jean moved from Cincinnati to the University of Arizona Law School in Tucson in 1998. She wrote many articles in the bankruptcy and consumer protection areas. Then in 2008, she produced *Cowboy Contracts*,[17] an article to celebrate the 50th anniversary of the Arizona Law Review. She emailed me a draft and asked for comments. She said:

> I'm writing something on Arizona contract law. I love Arizona contract law, which is consistently anti-formalist and highly attuned to fairness . . . . You will see the influence of the *Contracts: Law in Action* book. This is also a product of 10 years of teaching the Arizona contracts cases discussed in the essay.

The title of the article comes from the autobiography of Sandra Day O'Connor and her brother.[18] Their father made a handshake deal with the buyer of his calves for delivery six months later. "The family's economic life depended on relationships of trust and interdependence with buyers as well as employees."[19] The western person had no use for silly city slicker tricks such as asserting written contract clauses to evade what had been promised.

While Jean may have loved Arizona contract law, she did not forget her new legal realist values. Her article ends with a very qualified and careful conclusion. She did not think that Arizona courts' demand for fairness would

---

16. *See generally* ALJEAN HARMETZ, ROUND UP THE USUAL SUSPECTS: THE MAKING OF CASABLANCA—BOGART, BERGMAN, AND WORLD WAR II (1992).

17. Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191 (2008) [hereinafter Braucher, *Cowboy Contracts*].

18. SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST (2002).

19. Braucher, *Cowboy Contracts*, *supra* note 17, at 193.

matter much except in the unusual transaction. Sophisticated parties making and performing large deals could bargain and adjust in the shadow of the law. They were unlikely to ever see an Arizona court. When the deal involved non-negotiated contracts between a business and an individual, most individuals will never even go to a lawyer, much less sue. She concluded that:

> A focus on the expressive power of law suggests that indirect effects may be significant, influencing people's attitudes about what is socially acceptable and changing their behavior independent of the sanctions that the law would impose if invoked . . . .[I]t is important that the Arizona Supreme Court has weighed in heavily . . . against exploiting poor people by selling them worthless merchandise on credit at exorbitant prices while getting them to put their homes at risk of foreclosure along the way. When these types of bad behavior not only happen, but are pronounced acceptable by justices in black robes, a downward spiral in social norms is likely.[20]

Jean and I debated her conclusion about indirect effects. I was sympathetic but unsure. I thought perhaps that the indirect effects of judicial statements are negligible. However, perhaps today more people will hear of what high courts say about bad behavior by particular businesses through social media. If judicial opinions fire shots through catchy language, maybe someone will post at least some of what has been said online.

I suggested that she deal with an argument that might be made by some: A court's practice of using imprecise norms of fairness could affect business negatively in a state. Some firms would not do business there and others might have to bear the burden of the costs of potential large damage awards against them. She pointed to Arizona's booming economy to suggest that any such consequence of its approach was unlikely.[21]

Jean also offered comments on an article that Bill Whitford and I had written. Bill had interviewed Joe Hoffmann, the plaintiff in *Hoffman v. Red Owl Stores, Inc.*[22] This case involved reliance by one party on promises made before a binding contract was formed.[23] The defendant refused to enter the contract, and Hoffmann sued for his reliance on the promise that he would get a grocery franchise if he sold his bakery.[24] The case appears in many, if not most, casebooks. Bill and I were very disappointed when the *Wisconsin Law Review* rejected the article. The case almost certainly is the most important Wisconsin contracts decision that is widely known. Jean read our manuscript and wrote us that the *Review* had done us a favor because, as written, one had to wade through a

---

20. *Id.* at 226.

21. *Id.* at 194–95 ("Furthermore, there is no evidence that Arizona's common law fairness tradition has impeded the explosive growth of its economy; more likely it has helped to promote growth by reinforcing trust in contractual relationships.").

22. 133 N.W.2d 267 (Wis. 1965).

23. *Id.* at 268–69.

24. *Id.*

jungle of facts before arriving at the key points. We were trying to tell too many stories; the interviews and the documents raised too many interesting points. Jean then offered four pages of suggestions, and we were smart enough to accept almost all of them. Our revised article was then published in San Francisco's *Hastings Law Review*.[25] Whatever our brilliant analysis, the articles editor of that volume had come from central Wisconsin where most of the action in the case had taken place. Although we don't know how much this coincidence mattered, Jean thought that it was very funny.

Finally, Jean commented on an article that Bill Whitford and I wrote about the development of the approach in *Contracts: Law in Action* for a presentation to the Wisconsin Law Faculty.[26] Jean had used these materials for 22 years and had edited them for seven. She noted in her comment on the book: "The law does not march forward so much as stumble on . . . . Law is about social struggle, and we never get to neat, perfect conclusions."

In 2011, Bill Whitford organized a conference dealing with my contracts scholarship. Jean participated, and she edited some of the papers for the book that presented most of the conference's works. The editors decided to include three of my articles at the beginning of the book. Jean edited my *Private Legislation and the Duty to Read*,[27] so that only one-fourth of the old text remained. Perhaps this is understandable when we consider that the article was then 47 years old. Jean called it editing, but perhaps a more accurate term would have been rewriting. Nonetheless, I was pleased with the result. Not everyone could have made cuts this deep without disappointing the author. Jean could do it simply because she understood and respected my work and me.

I was, and still am, very moved and honored by all who participated in that conference. The reaction to the event and its subsequent book has also been a real honor.[28] Jean fashioned the title for the conference and the book. It was *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical*.[29] "Empirical" should be obvious in light of my own articles and my advocacy for seeing the law in action as delivered or not.[30] "Lyrical" calls for a little more explanation. Jean had long teased me about my habit of drawing on

---

25. William C. Whitford & Stewart Macaulay, Hoffman v. Red Owl Stores*: The Rest of the Story*, 61 HASTINGS L.J. 801 (2010).

26. Stewart Macaulay & William C. Whitford, *The Development of Contracts: Law in Action*, 87 TEMP. L. REV. 793 (2015).

27. Stewart Macaulay, *Private Legislation and the Duty to Read—Business by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966). Notice the nicely dated term "IBM Machine" instead of "computer."

28. *See, e.g.*, Richard R.W. Brooks, *On the Empirical and the Lyrical*, 2013 WIS. L. REV. 1299 (reviewing REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL (Jean Braucher et al. eds., 2013)); Elizabeth Warren, *Tribute: Stewart Macaulay: A Few Personal Reflections*, 2013 WIS. L. REV. 1295.

29. *See* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL (Jean Braucher et al. eds., 2013).

30. *See, e.g.*, Stewart Macaulay & Elizabeth Mertz, *New Legal Realism and the Empirical Turn in Law*, *in* LAW AND SOCIAL THEORY 195 (Reza Banakar & Max Travers eds., 2d ed. 2013).

song titles to use in the titles of my articles and in text headings.[31] *Things Ain't What They Used to Be* and *I'm Beginning to See the Light* work well, as does Cole Porter's *Anything Goes.*[32] I even ended a presentation at the Association of American Law Schools annual meeting by searching for just the right Duke Ellington song title to sum up what I had argued.[33] But I've even worked in *The Yellow Submarine.*[34] Thus, this explains "the lyrical" in her title for the conference and book.

How shall we continue the practice that amused Jean and me? Two Duke Ellington song titles seemed appropriate at the Arizona conference celebrating Jean Braucher's life. One was *All Too Soon*. Clearly, Jean should have had many more years, and we should have had much more benefit of her wisdom and wit. But, the other song reflects my neighbor's idea that "it gets different" when time passes and we are better able to focus on what her friends and family had as a result of our and their relationship with Jean. The conference and this issue of the *Arizona Law Review* will help all of us hum the Duke's: *I'm Just a Lucky So and So*. After all, we were privileged to know her.

---

31. However, Jean herself wrote: "[c]ontracts can seem like a field where nothing ever happens." Braucher, *Afterlife*, *supra* note 8, at 49. Then footnote one says: "I am reminded of the song lyric, 'Heaven is a place where nothing ever happens.'" *Id.* at 88 n.1. She went even beyond this later in the article, writing, "The death [of contract] may be operatic, with the tragically flawed hero rising to sing again and again, and yet a little more, before finally expiring, much to the audience's ultimate relief." *Id.* at 56–57. Then her footnote 44 reads: "See Jules Massenet, Werther, (libretto by Edouard Blau, Paul Milliet, and Georges Harmann), Act IV, Second Tableau (Lionel Salter Trans., 1979) (in which the hero, Werther, is mortally wounded at the beginning of the scene and rises up several times to sing before he finally dies)."*Id.* at 57 n.4. Jean was well acquainted with literature, music, and the arts. Her home in Tucson, Arizona, for example, displays an impressive collection of art.

32. *See* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365.

33. *See* Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of the Yellow Submarine*, 80 TUL. L. REV. 1161, 1194 (2006) ("While . . . *Perdido* is a fine tune in its many versions, I hope that the title fits the past rather than the future. [The word means "lost" in Spanish]. Staying with Ellington, I will offer as a new theme his *I'm Beginning To See the Light*."). I am well aware that fewer and fewer people will be familiar with Duke Ellington's song titles as the years pass. That is their loss.

34. *Id.*