

# Scholars of Contract Law: Individuals and Themes

## Scholars of Contract Law: Individuals & Themes

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### I. Introduction

This book is the second in a series of edited collections concerned with scholars of private law and follows the publication in 2019 of the inaugural volume on *Scholars of Tort Law* ('*STL*').<sup>1</sup> The reviews of *STL* provided some reassurance that the project on which we have embarked with this series is a worthwhile one.<sup>2</sup> We hope that readers of this second volume on *Scholars of Contract Law* will agree. In this introductory chapter we begin by reprising certain of the more important points about the project as a whole that we made in the introduction to *STL*,<sup>3</sup> before considering the implications of our methodology for this volume in particular. We go on to offer some observations on the individual scholars discussed in the book and to explore some key themes which run through the chapters that follow. This introductory chapter should be read in conjunction with William Twining's fascinating afterword ([chapter 15](#)), in which he combines personal

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<sup>1</sup> J Goudkamp and D Nolan (eds), *Scholars of Tort Law* (Oxford, Hart Publishing, 2019) (hereinafter referred to as *STL*).

<sup>2</sup> See N McBride [2020] *CLJ* 183; M Wilde (2020) 41 *Journal of Legal History* 221; B McDonald (2020) 42 *Sydney Law Review* 483; P Vines [2021] *University of New South Wales Law Journal Forum* 1; TT Arvind (2021) 37 *Professional Negligence* 114.

<sup>3</sup> J Goudkamp and D Nolan, 'Pioneers, Consolidators and Iconoclasts: The Story of Tort Scholarship' in *STL* (n 1).

recollections of, and observations on, some of the scholars who are considered in this volume with broader reflections on contract law scholarship past and present.

The *Scholars of Private Law* project was born of the belief that in the common law world insufficient attention has been paid to the role played by scholars in legal development, as compared with the role played by judges and the cases the judges decide. Hence the project explores and highlights the importance of scholarship in the development of private law, by focusing on the contribution which individual scholars have made to particular subject areas. In our view, the project both complements and is complemented by other work focused on the role of scholars in legal development in both common law and civilian systems.<sup>4</sup> Research of this kind not only serves to underline the part played by legal scholarship in legal development, but may also enable legal academics and their employing institutions to achieve a more historically informed understanding of the role of legal scholars themselves, and hence perhaps to challenge contemporary assumptions about the value of law schools and those who work in them. In the words of Susan Bartie:

Better understandings of the efforts and endeavours of our predecessors—examining their ambitions and priorities—provides material which may be used to challenge dominant narratives and values, and encourages legal academics to develop an appreciation of a broader range of activities, perhaps with the ultimate goal of liberating law schools and universities from current ways of thinking about their role in society ... A discipline that has little history or tradition and no real understanding of its identity or where it comes from is vulnerable to external policies that fail to thoughtfully respond to the needs of society. It is at greater risk of losing its sense of self.<sup>5</sup>

The project on which we have embarked is not overtly biographical in nature but should instead be understood primarily as an exercise in intellectual history.<sup>6</sup> Hence, while many of the contributors to the two volumes so far completed understandably include in their chapters a short

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<sup>4</sup> See, eg, S Grundmann and K Riesenhuber (eds), *Private Law Development in Context: German Private Law Scholarship in the 20th Century* (Cambridge, Intersentia, 2018); S Bartie, *Free Hands and Minds: Pioneering Australian Legal Scholars* (Oxford, Hart Publishing, 2019).

<sup>5</sup> Bartie (n 4) 4–5, 6.

<sup>6</sup> Though the categories of course overlap, and we certainly have no quibble with the characterisation of our project as belonging to ‘a sub-genre of ... legal biography’: V Barnes et al, ‘On Legal Biography’ (2020) 41 *Journal of Legal History* 115, 120.

biographical sketch of the scholar under scrutiny, this is not the main focus of enquiry, but is instead designed to set the scene for the discussion of the scholar's contribution to the discipline that follows. Our primary interest lies not in the details of the scholar's life, therefore, but in the scholar's influences and motivation, the nature of their scholarly contribution, and their influence on the law and on future scholarship. At the same time, we of course recognise that no sharp dividing line can be drawn between the life and the work, and it is certainly possible in some cases to identify life experiences that may help us to understand a particular scholar's motivation or scholarly focus.<sup>7</sup>

The choice of scholars whose contribution is explored and assessed is bound to be controversial, and so it is important that we emphasise that our approach to this difficult question was the same as in *STL*. We wish to draw attention to three particular matters in that regard. First, the project is not a comparative one, and hence only common lawyers are included. In the case of contract, this meant that we excluded from the list of possible subjects two continental scholars whose impact on the common law of contract is of the highest order of significance, namely Robert Joseph Pothier and Friedrich Carl von Savigny. The influence of Pothier and Savigny on the common lawyers discussed in this volume will, however, be readily apparent from the chapters that follow, and is also addressed later in this chapter.<sup>8</sup> Second, we again excluded scholars who are still alive and research active, since we consider it important that the work of a scholar be considered in its entirety. And third, as with *STL* we conferred closely with our contributors to determine which scholar would be their subject, with the result that the final list of scholars is in large measure down to their individual choices. Having said that, had it been necessary to do so, we would have intervened to ensure that certain scholars were considered, on the basis that their omission would have left too large a hole in what is in one sense the story of contract law scholarship in the common law world. That list would certainly have included the Englishmen Sir Frederick Pollock and Sir William Anson and the Americans Samuel Williston and Arthur Corbin. One final point that arose in connection with the contract project is that we decided to focus in this

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<sup>7</sup> For example, it seems likely that Fleming James's experiences as a lawyer working for a railroad company during the Great Depression had an influence on his tort scholarship, and it has been argued that the single-mindedness with which he pursued his 'loss-spreading' agenda was attributable to his being the son of a missionary: see G Calabresi, 'Professor Fleming James Jr (1904–1981)' in *STL* (n 1).

<sup>8</sup> See text to nn 276–300 ('Civilian Influences').

volume on scholars of general contract law, rather than scholars whose principal interest was in the application of general contractual principles in more specific contexts, such as sales, insurance or carriage. Hence there are no chapters on the leading lights of commercial law scholarship, such as Judah Benjamin, Sir Mackenzie Chalmers and Karl Llewellyn, despite their undoubted contributions to the general law of contract.<sup>9</sup> (We hope that these scholars will feature in a later volume on scholars of commercial law.)

In any case, as with the tort volume we consider that the list of scholars who are considered in this volume is defensible, although one criticism that could fairly be made of the list (no doubt among others) is that it is somewhat Anglo-centric. In our view, the most obvious omission is probably Oliver Wendell Holmes.<sup>10</sup> It was originally intended that there would be a chapter on Holmes, but unfortunately the contributor in question had to withdraw from the project for personal reasons. Some readers may also be surprised to see no discussion of Christopher Columbus Langdell, or of influential modern schools of American contract scholarship, such as the Wisconsin school, the Chicago school – and economic analysis more generally – and the new formalists, although to some extent these omissions are explicable by the ongoing research activity of the principal figures.<sup>11</sup> And while the book is somewhat skewed towards English scholars, there are yet others who could quite plausibly have been included, such as John Joseph Powell, the author of the first published work on the common law of contract,<sup>12</sup> and Joseph Chitty, whose name remains attached to the leading English practitioners' work, nearly two centuries after he published

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<sup>9</sup> On Llewellyn and contract, see A Schwartz, 'Karl Llewellyn and the Origins of Contract Theory' in JS Kraus and SD Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge, Cambridge University Press, 2000).

<sup>10</sup> There is already a substantial body of work on Holmes's contract scholarship: see, eg, PJ Kelley, 'A Critical Analysis of Holmes's Theory of Contract' (2000) 75 *Notre Dame Law Review* 1681.

<sup>11</sup> In the case of the Wisconsin school, the omission is ameliorated somewhat by the extensive discussion of the work of Stewart Macaulay in J Braucher et al (eds), *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Oxford, Hart Publishing, 2013) and in the chapters by Brian Bix, and Elizabeth Mertz and Lawrence Friedman, in D Campbell (ed), *Stewart Macaulay: Selected Works* (Cham, Springer, 2020). As for Langdell, see DP O'Gorman, 'Langdell and the Foundation of Classical Contract Law' (2022) 70 *Cleveland State Law Review* 459.

<sup>12</sup> JJ Powell, *An Essay upon the Law of Contracts and Agreements* (London, J Johnson and T Whieldon, 1790).

the first edition of his contract treatise in 1826.<sup>13</sup> It would be invidious to try to draw up a more comprehensive list of ‘missing scholars’, and indeed such a task would surely be an impossible one. We hope that it will be enough to emphasise that the volume is not intended as a ‘pantheon’ of leading common law contract scholars, but as an exercise in intellectual history, in which the contributors focus their attention on a scholar in whom they have a particular interest, and whose contribution to the law of contract they consider merits sustained analysis and evaluation.

It will be apparent to those familiar with *STL* that the temporal scope of this volume is considerably wider, since while the earliest of the tort scholars to be considered was Thomas McIntyre Cooley (whose principal work on tort law was published in 1879), the principal works of the first three scholars considered here significantly predate Cooley’s, in the case of Sir Jeffrey Gilbert by almost two centuries. That is no coincidence. We explained in the introduction to *STL* that the scope of that book rested on a distinction ‘between the study of causes of action, cases and so on that are now treated as part of tort law, and “tort law” as a subject of study in its own right’.<sup>14</sup> Hence we excluded from the tort project writers (such as Sir William Blackstone) who worked at a time before tort came to be recognised as a distinct legal category in the second half of the nineteenth century. By contrast, it is arguable that contract was already an established legal category in England by the early eighteenth century. Admittedly, there is very little discussion of contracts in the early eighteenth-century work on English law by Thomas Wood,<sup>15</sup> or in Blackstone’s mid-century *Commentaries*.<sup>16</sup> And as Stephen Waddams says, this indicates that ‘Blackstone did not visualise contracts as a body of controlling principles from which legal obligations were derived’, but that ‘he thought of contracts as “part of” several different areas of the law—a means of effecting various legal consequences—and hence to be found in several

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<sup>13</sup> H Beale (ed), *Chitty on Contracts*, 34th edn (London, Sweet & Maxwell, 2021). The first edition was published in 1826: J Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal* (London, S Sweet, 1826).

<sup>14</sup> Goudkamp and Nolan (n 3) 4.

<sup>15</sup> See W Swain, *The Law of Contract 1670–1870* (Cambridge, Cambridge University Press, 2015) 31.

<sup>16</sup> W Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1765–69).

different places’ on his map of English law.<sup>17</sup> However, the unpublished work of Gilbert, along with *A Treatise of Equity*<sup>18</sup> (attributed to Henry Ballou, and containing extensive discussion of contracts), shows that ‘early 18th-century English lawyers did have a clear concept of what constituted a contract’,<sup>19</sup> and hence the devotion of a chapter to Gilbert in a volume on scholars of contract law seems to us to be justified.

## II. The Scholars

In the introduction to *STL* we divided the scholars considered in that volume into three categories: pioneers, consolidators and iconoclasts. We do not employ the same typology here, as in our view it works much less well when it comes to the scholars considered in this collection. Nor do we simply consider each scholar in the order in which they appear in the book (namely, by birth date). Instead, we have grouped them in the discussion that follows along roughly chronological lines, but with some variations, in a way that we hope will best enable us to highlight continuities and differences between them, as well as allowing us to focus on two particularly interesting pairings on either side of the Atlantic, namely Pollock and Anson in England, and Williston and Corbin in the United States. One advantage of this way of proceeding is that a strict chronological treatment by order of birth date would give rise to some difficulties, especially in the case of Anson and Pollock, since although Anson was born before Pollock, Pollock’s principal work on contract predates Anson’s, and for this and other reasons the latter was clearly more influenced by the former than vice versa. Similarly, for reasons that we hope will become apparent, it makes sense

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<sup>17</sup> S Waddams, ‘Nineteenth-Century Treatises on English Contract Law’ in A Fernandez and MD Dubber (eds), *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford, Hart Publishing, 2012) 127.

<sup>18</sup> [H Ballou], *A Treatise of Equity* (London, D Browne and J Schuckburgh, 1737).

<sup>19</sup> M Lobban, ‘Mapping the Common Law: Some Lessons from History’ [2014] *New Zealand Law Review* 21, 32.

to consider Patrick Atiyah alongside Friedrich Kessler and Ian Macneil, and hence before his Oxford predecessors Geoffrey Cheshire and Cecil Fifoot, and his Oxford contemporary Sir Guenter Treitel. The classification that we employ is therefore as follows: Gilbert, Colebrooke and Leake; Anson and Pollock; Williston and Corbin; Kessler, Macneil and Atiyah; and Cheshire and Fifoot, Treitel and Coote.

## A. Gilbert, Colebrooke and Leake

The principal works of the three early English contract scholars considered in this book were written between the early 1700s and the mid-nineteenth century. None of the scholars was a professional academic, employed by (and teaching in) a university. Gilbert was a judge who rose to become Chief Baron of the Exchequer. Henry Thomas Colebrooke was a colonial administrator and independent scholar, a polymath with no legal training who was the founding father of Sanskrit scholarship in Europe. And Stephen Martin Leake was an independent legal scholar who after an early career at the London Bar retired to his family seat in Hertfordshire to write, and who is probably best known today for his work with Edward Bullen on pleading, which has survived into the modern era as *Bullen and Leake and Jacob's Precedents of Pleadings*.<sup>20</sup>

The contribution of this motley crew of pioneering contract scholars cannot be understood in isolation from the work of others active in the same period. Hence although Gilbert's only recently published work on contract<sup>21</sup> can lay claim to being the first systematic treatment of the subject in writing by a common lawyer, Ballow's 1737 *Treatise of Equity*<sup>22</sup> has been described as 'the first published English work on contract with any pretension to treat the subject on an abstract basis'.<sup>23</sup> As we have seen, the efforts of Gilbert and Ballow stand in contrast to the treatment of

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<sup>20</sup> W Blair et al (eds), *Bullen and Leake and Jacob's Precedents of Pleadings*, 19th edn (London, Sweet & Maxwell, 2020).

<sup>21</sup> M Lobban (ed), *Jeffrey Gilbert on Property and Contract* (London, Selden Society, 2019).

<sup>22</sup> Ballow (n 18).

<sup>23</sup> DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, Oxford University Press, 1999) 218.

contract by the eighteenth-century institutional writers Wood<sup>24</sup> and Blackstone,<sup>25</sup> neither of whom spent much time discussing contracts, which both tied to notions of personal property. However, it is not clear how much should be read into this. Warren Swain plausibly argues that the cursory treatment of contract in these works was a reflection of their audiences, whose primary interests would have lain elsewhere, most obviously in the law of real property.<sup>26</sup> In any case, the publication of a slew of books on contract from 1790 onwards attests to the perceived significance of the subject by that time, and bolsters the argument that ‘contract’ or ‘contracts’ was conceived of by common lawyers as a legal category some time before ‘tort’ or ‘torts’.<sup>27</sup> The two most important of the contract works of this period by English authors not considered in this volume are those of Powell (1790) and Chitty (1826), both adverted to previously.<sup>28</sup> (Details of the other works of this period can be found elsewhere.<sup>29</sup>) Powell’s *Essay* has been described as ‘a significant work but not a comprehensive one’,<sup>30</sup> with a heavy weighting towards equity and to decisions before 1750, features that ‘meant that he had more in common with someone like Ballou than the nineteenth century textbook writers’.<sup>31</sup> At the same time, however, his work gave ‘some measure of conceptual unity to contracts as a subject’<sup>32</sup> while his emphasis on principles and his reliance on the natural lawyers and the centrality of ‘mutual consent’ presaged much of the work that followed. By contrast, Chitty’s treatise of 1826 was a more comprehensive treatment of the subject,

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<sup>24</sup> T Wood, *An Institute of the Laws of England in their Natural Order* (London, B Lintot and R Williamson, 1720).

<sup>25</sup> Blackstone (n 16).

<sup>26</sup> Swain (n 15) 31–33.

<sup>27</sup> The first significant common law works on tort were F Hilliard, *The Law of Tort or Private Wrongs* (Boston, Little, Brown & Co, 1859) and T Addison, *A Treatise on the Law of Torts or Wrongs and their Remedies* (London, Stevens & Sons, 1860).

<sup>28</sup> Text to nn 12–13.

<sup>29</sup> See, eg, the list in J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, Clarendon Press, 1991) 254–55 (which includes American works). See also AWB Simpson, ‘Innovation in Nineteenth Century Contract Law’ (1975) 91 *LQR* 247, 253–54.

<sup>30</sup> Swain (n 15) 148.

<sup>31</sup> *ibid.* For a discussion of Powell’s work which situates it within the context of changes in law book publishing in the late eighteenth century, see TA Baloch, ‘Law Booksellers and Printers as Agents of Unchange’ [2007] *CLJ* 389, 415–18. According to Baloch (at 415), Powell’s *Essay* was an example of a book which could be published in the light of those changes and ‘perhaps would not have been before’.

<sup>32</sup> Waddams (n 17) 130.

in which the author sought to ‘extract principles from the authorities rather than attempting to set down individual decisions at any length’, thereby enabling him ‘to impose a strong external framework on the material’.<sup>33</sup> This approach seems to have borne fruit, as the treatise developed over time into the leading practitioners’ work on the English law of contract.

In his chapter on Sir Jeffrey Gilbert in this volume ([chapter two](#)), Michael Lobban argues that his work on contract ‘demonstrated the unity of the subject in a way which was not possible in the fragmentary treatment offered in Abridgments and manuals of pleading’,<sup>34</sup> and that he had a highly developed will theory of contractual obligation, which sought to reconcile ‘a notion of contract based on the meeting of minds with the doctrine of consideration’.<sup>35</sup> This analysis has important implications for the familiar historical narrative according to which a will theory borrowed from continental jurisprudence was introduced into English law in the nineteenth century to provide an intellectual framework for the substantive legal rules that emerged as a result of the decline of trial by jury and changes in the rules on pleading. As Lobban says, the importance of Gilbert’s work therefore lies not so much in its influence on subsequent developments – which was rather limited – as in the insight that it gives us ‘into a lawyer’s understanding of English contract law in the early eighteenth century’.<sup>36</sup> Not only can we observe in his work the influence of will theory before Pothier, but we can also see a clear appreciation of the distinction between form and substance well in advance of the nineteenth-century developments, as well as an emphasis on formal contracts, which were excluded from later works such as Chitty’s.<sup>37</sup> More generally, the appeal of Gilbert’s works (which extended far beyond contract) lies in their ‘lucidity and system by comparison with the chaotic Abridgment format of merely collecting together cases on a particular point which went before’.<sup>38</sup>

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<sup>33</sup> Swain (n 15) 178.

<sup>34</sup> Lobban, [chapter two](#) of this volume, p [XXX](#).

<sup>35</sup> *ibid* p [XXX](#). On Gilbert’s analysis of consideration, see further, S Waddams, *Principle and Policy in Contract Law* (Cambridge, Cambridge University Press, 2011) 59–61.

<sup>36</sup> Lobban, [chapter two](#) of this volume, p [XXX](#).

<sup>37</sup> See Waddams (n 35) 62.

<sup>38</sup> M Macnair, ‘Sir Jeffrey Gilbert and his Treatises’ (1994) 15 *Journal of Legal History* 252, 258.

All told, Gilbert has a good claim to having written ‘the first serious work on [contract] in England’.<sup>39</sup> Nevertheless, his analysis had its limitations. His was a common law treatise which did not encompass the large swathes of contract law embodied in equity doctrine. And unlike later writers, such as Chitty and Leake, who sought to identify principles that explained the cases, Gilbert’s work was little more than a commentary on the case law, which descended as it progressed into ‘commonplacing of an “Abridgment” type’.<sup>40</sup> Finally, his idea of contracts as a transfer of rights was borrowed from Thomas Hobbes, and it is unclear to what extent this vision went beyond the transfer of property rights – though Lobban argues for an expansive reading – and hence to what extent, if at all, Gilbert’s conception of contract extended beyond the attenuated Blackstonian idea of contract as primarily an adjunct of property.

Still, there is no doubt that, along with Ballou, Gilbert was a ‘genuine pioneer’, and it was not until Henry Thomas Colebrooke that ‘this sort of project was attempted again’.<sup>41</sup> As Joanna McCunn demonstrates in her chapter on Colebrooke in this volume ([chapter three](#)), his attempt in his 1818 *Treatise on Obligations and Contracts*<sup>42</sup> was ultimately unsuccessful, but there is a great deal of interest in the story that she tells, and we can learn as much from his failure as we can from the successes of some of the other scholars considered in this book. The roots of that failure lay in the highly unorthodox approach that Colebrooke adopted, in which he eschewed common law method and the positive law as set out in the cases, and focused instead on abstract principles derived from a range of secondary sources, most of them civilian.<sup>43</sup> The result is that (for a common lawyer) ‘perhaps the most striking feature of the *Treatise* is its almost total disregard for

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<sup>39</sup> Ibbetson (n 23) 216.

<sup>40</sup> Macnair (n 38) 258 (speaking of Gilbert’s works in general).

<sup>41</sup> Swain (n 15) 276.

<sup>42</sup> HT Colebrooke, *Treatise on Obligations and Contracts* (London, Black, Kingsbury, Parbury and Allen, 1818).

<sup>43</sup> According to the breakdown of his sources by McCunn, [chapter three](#) of this volume, [p XXX](#), 70% of them were civilian.

case law’, with a mere 36 cases cited in the entire work, all of them derived from the earlier literature on contract.<sup>44</sup>

Colebrooke relied heavily on civilian writers, especially Pothier, but unlike other English scholars he did not even attempt to integrate the work of the civilians with common law sources, by using them to explain and systematise the case law. Instead, he simply set out the principles that he derived from these secondary sources, as if they had been handed down from on high, and regardless of their fit with the positive law.<sup>45</sup> The effect was ‘to demand of his readers their assent to and understanding of’ the complex conceptual claims being made, but ‘without explanation of how they relate to practical consequences or to English law’, and to make this demand ‘on his own authority’.<sup>46</sup> McCunn also points out that, apart from its unusual methodology and dense style, Colebrooke’s *Treatise* lacked originality, as he ‘did not add anything new’ to the texts from his sources, but ‘simply condensed them and fused them together’, so that in the entire work there ‘are only a few points that he did not substantially derive from another writer’.<sup>47</sup> The result was ‘a fantasy of contract law, based on the works of the natural lawyers and conjured up for the benefit of laymen with judicial postings in India’.<sup>48</sup> It is hardly surprising that a work ‘which offered little usable guidance to the actual content of English law’<sup>49</sup> was a total flop in England itself. As for its intended audience in India, McCunn suggests that although such a work might have had some utility there, Colebrooke’s was too difficult to read and use. It was in any case superseded by William Macpherson’s more orthodox work of 1860<sup>50</sup> and rendered almost completely otiose by the passing of the Indian Contract Act 1872.

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<sup>44</sup> *ibid* p XXX.

<sup>45</sup> Colebrooke’s approach was grounded in natural law thinking according to which contract law was a universal set of principles derived from reason and common sense. Such thinking was pervasive in the late eighteenth and early nineteenth century: see M Lobban, ‘Contract’ in W Cornish et al, *The Oxford History of the Laws of England: Volume XII* (Oxford, Oxford University Press, 2010) 301.

<sup>46</sup> S Waddams, ‘The Authority of Treatises in English Law (1800–1936)’ in M Godfrey (ed), *Law and Authority in British Legal History 1200–1900* (Cambridge, Cambridge University Press, 2016) 284–85.

<sup>47</sup> McCunn, chapter three of this volume, p XXX.

<sup>48</sup> *ibid* p XXX.

<sup>49</sup> Waddams (n 35) 9.

<sup>50</sup> W Macpherson, *Outlines of the Law of Contracts as Administered in the Courts of British India* (London, RC Lepage, 1860).

Despite its flaws, Colebrooke's *Treatise* should not be dismissed altogether.<sup>51</sup> According to McCunn, it 'had a clear, streamlined structure', which transcended local concerns with the forms of action and the common law/equity divide.<sup>52</sup> She also argues that much of his treatise prefigured later developments, and that his work paved the way for later nineteenth-century writers who sought to systematise English contract law, using concepts that he first introduced into the common law literature, such as the distinction between unilateral and bilateral contracts. He was, for example, the first English scholar to discuss mistake in any depth, and his consent-based analysis of mistake – inspired by Pothier – was subsequently adopted by other writers. It also seems likely that the failure of Colebrooke's work influenced later contract scholars, who avoided making the same mistakes by firmly rooting their discussion in the English case law, and by seeking to blend any principles borrowed from civilian sources with the domestic authorities.<sup>53</sup>

One such scholar was Stephen Martin Leake, a transitional figure who served as a bridge between the early contract writers (such as Powell, Colebrooke and Chitty) and the great systematisers of the late nineteenth century, Anson and Pollock. In her chapter in this collection ([chapter four](#)), Catherine MacMillan argues that Leake was an ambitious jurist whose work on contract law 'was a part of a larger and grander scheme to attempt to understand the whole of English law in a rational and systematic manner'.<sup>54</sup> By the time that his treatise *The Elements of the Law of Contracts*<sup>55</sup> was published in 1867, reforms to the pleading rules and the decline of jury trial meant that a raft of substantive questions of law were beginning to emerge from contract litigation. This created the conditions for a more scientific and systematic approach to the subject,

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<sup>51</sup> See also Swain (n 15) 149: 'as the most theoretical work then in existence [Colebrooke's treatise] was an impressive achievement'.

<sup>52</sup> McCunn, [chapter three](#) of this volume, [p XXX](#).

<sup>53</sup> See Waddams (n 35) 10, referring to Chitty and Addison as examples of later writers who avoided the pitfalls of Colebrooke's approach.

<sup>54</sup> MacMillan, [chapter four](#) of this volume, [p XXX](#). On his wider ambition, see C MacMillan, 'Stephen Martin Leake: A Victorian's View of the Common Law' (2011) 32 *Journal of Legal History* 3.

<sup>55</sup> SM Leake, *The Elements of the Law of Contracts* (London, Stevens & Sons, 1867).

which was congenial to a scholar who had studied mathematics at Cambridge.<sup>56</sup> As MacMillan shows,<sup>57</sup> Leake's work was a 'distinct break' from what had come before, and was highly original in two respects: first, in 'the reasoned use' of civilian writings 'as an analytical device to synthesise and analyse English law'; and second, in the organisation of the subject around a highly ordered<sup>58</sup> set of generally applicable rules and principles, such that he 'wrote of a law of contract, rather than laws of contracts'.<sup>59</sup> The result has been described by Swain as a 'new sort of contract treatise', which was more successful than its predecessors 'in presenting the law of contract as a single body of doctrine rather than an accumulation of individual types of contract'.<sup>60</sup> Moreover, because Leake was an expert on civil procedure and had made an in-depth study of the cases on contract, he was able for the first time to extract from the English authorities principles of privity, acceptance, mistake and duress, impossibility of performance, damages and quasi-contract,<sup>61</sup> and to ground his pioneering analysis of subjects such as mistake firmly in the case law, as opposed to theory or the civilian literature.<sup>62</sup> This enabled him, for example, to reject Pothier's position on the uncommunicated withdrawal of an offer as inconsistent with the cases and contrary to principle.<sup>63</sup> It also resulted in a work which, although limited to general principles, completely dwarfed Colebrooke's (which had come in at about 250 pages) at some 700 pages in its first edition and no less than 1,300 in its second.<sup>64</sup>

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<sup>56</sup> '[Leake's] vision was of a jurisprudence based on principle, of conceptions, rather than an accumulation of precedents': MacMillan (n 54) 6.

<sup>57</sup> MacMillan, [chapter four](#) of this volume, [p XXX](#).

<sup>58</sup> According to MacMillan (n 54) 8, '[t]he science of law Leake espoused was primarily one of order'.

<sup>59</sup> Hence he wrote in the preface to the second edition of his treatise that it was limited to the 'general part' of contract law, 'the ground work common to all species of contract': SM Leake, *An Elementary Digest of the Law of Contracts* (London, Stevens & Sons, 1878) ix (quoted by Lobban (n 45) 307).

<sup>60</sup> Swain (n 15) 202–203.

<sup>61</sup> On Leake's pioneering work on mistake, see C MacMillan, *Mistakes in Contract Law* (Oxford, Hart Publishing, 2010) Ch 7. As she shows, it was Leake who first identified *Raffles v Wichelhaus* (1864) 2 H & C 906; 159 ER 375 and *Couturier v Hastie* (1865) 5 HLC 673; 10 ER 1065 as authorities on that subject. Leake also proposed a novel justification for the parol evidence rule, a version of which was later adopted by Corbin: see Waddams (n 35) 43–44.

<sup>62</sup> See Lobban (n 45) 471.

<sup>63</sup> See Waddams (n 35) 22–23.

<sup>64</sup> The scale of the second edition drew critical comment from Pollock: see Waddams (n 17) 142.

According to MacMillan, it was from Leake's 'meticulous efforts' that 'a modern conception of contract law, a law organised rationally around underlying principles, emerged'.<sup>65</sup> His treatise was also important 'because of the influence it had not only upon judges but also upon later English common law writers'.<sup>66</sup> And yet Leake's work has often been overlooked, and his reputation overshadowed by the likes of Chitty, Anson and Pollock. In her chapter, MacMillan puts forward various possible explanations for Leake's relative obscurity, including the fact that he was a somewhat isolated figure, far removed in rural Hertfordshire from both the great universities (though he examined the Bachelor of Civil Law degree at Oxford) and legal London, and so not well placed to market his work to either students or practitioners. It may also be attributable to the limits of Leake's 'scientific' method, which was primarily focused on organisation and order rather than conceptual analysis.<sup>67</sup> For all Leake's undoubted qualities as a contract scholar, therefore, his contribution to the discipline was soon eclipsed by the famous works of Anson and Pollock, although his treatise survived until the 1930s.<sup>68</sup>

## B. Anson and Pollock

Unlike the early English contract writers, Anson and Pollock were academic jurists, who both held positions at the University of Oxford. In each case, their reputation as a contract scholar rests on a single text – ostensibly concerned with the 'principles' of contract law<sup>69</sup> – which ran to multiple

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<sup>65</sup> MacMillan, chapter four of this volume, p XXX.

<sup>66</sup> MacMillan (n 61) 123.

<sup>67</sup> See MacMillan (n 54) 20.

<sup>68</sup> The last edition was RRA Walker, *Principles of the Law of Contracts*, 8th edn (London, Stevens & Sons, 1931).

<sup>69</sup> This was no accident, but reflected the tradition of the treatise writers of the time, who 'inherited and claimed to express the belief that private law consisted essentially of a latent scheme of principles whose workings could be seen in and illustrated by the decisions of the courts': AWB Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *University of Chicago Law Review* 632, 666. See also Waddams (n 35) 17.

editions under their pen.<sup>70</sup> Both clearly owed a debt of gratitude to Leake,<sup>71</sup> and it has been said that it was his ‘systematisation of the common law of contract’ which enabled them to construct their own treatises on the subject.<sup>72</sup> And yet they went far beyond Leake in constructing ‘a theoretical and systematic framework of legal principle into which specific legal decisions could be fitted’.<sup>73</sup>

Sir Frederick Pollock’s treatise on contract was published in 1876.<sup>74</sup> This was three years before Anson’s,<sup>75</sup> and 11 years before Pollock’s equally famous treatise on tort.<sup>76</sup> Writing after Pollock’s death, Lord Wright commented that ‘Leake’s book was for practitioners, while Pollock’s book was for students of principles and legal thinkers’.<sup>77</sup> More recently, it has been said that it was ‘the first English book on contract law that could reasonably claim to be an academic work’.<sup>78</sup> Writing in the immediate aftermath of the Judicature Act 1873, Pollock succeeded in producing the first unified and coherent account of the English law of contract encompassing both common law and equity, an achievement highlighted in the title of his book. In his treatise he ‘sought to present contract law in a scientific light’, as ‘a system of divisions or classifications arranged according to underlying principles’.<sup>79</sup> As James Gordley says in his chapter on Pollock in this volume ([chapter six](#)), the result was that his ‘work shaped the way we still define such basic

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<sup>70</sup> Pollock also wrote numerous shorter articles and notes on contract issues. Anson wrote very little else on private law.

<sup>71</sup> See MacMillan (n 54) 21.

<sup>72</sup> *ibid* 27–28.

<sup>73</sup> PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Oxford University Press, 1979) 682.

<sup>74</sup> F Pollock, *Principles of Contract at Law and in Equity* (London, Stevens & Sons, 1876).

<sup>75</sup> W Anson, *Principles of the English Law of Contract* (Oxford, Clarendon Press, 1879).

<sup>76</sup> F Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (London, Stevens & Sons, 1887). Pollock’s contribution to tort scholarship is critically examined in R Stevens, ‘Professor Sir Frederick Pollock (1845–1937): Jurist as Mayfly’ in *STL* (n 1).

<sup>77</sup> Lord Wright, ‘In Memoriam: Sir Frederick Pollock, 1845–1937’ (1937) 53 *LQR* 151, 154.

<sup>78</sup> S Waddams, Book Review (2005) 55 *University of Toronto Law Journal* 1023, 1023. See also Gordley (n 29) 216 (‘in England and the United States, contract theory never became truly systematic until the time of Pollock’).

<sup>79</sup> MacMillan (n 61) 147. On Pollock’s conception of law as a science, see *ibid* 145.

concepts as contract, consideration and consent’, though it ‘was also responsible for the problems we still face in using these concepts to understand the law of contract’.<sup>80</sup>

In seeking to systematise English contract law, Pollock relied heavily on civilian writers, and especially Savigny. Pollock’s profound debt to Savigny was reflected in the close – but not slavish<sup>81</sup> – alignment of his treatise with the will theory; hence, he described a contract as ‘before all things a transaction in which two or more persons consent’,<sup>82</sup> and he was the first English writer fully to embrace the continental doctrine of ‘intention to create legal relations’.<sup>83</sup> However, as time passed Pollock’s references to Savigny and other continental sources diminished,<sup>84</sup> perhaps out of concern that this might detract from the appeal of his treatise as a work on the *English* law of contract. Furthermore, from the third edition of his work onwards there was a clear movement away from the subjectivism of the will theory towards a more objective approach of the kind that came to dominate twentieth-century common law scholarship, and which emphasised the reasonable expectations and reliance of the promisee.<sup>85</sup> This shift – which seems to have come about in part because of the influence of Holmes and Thomas Erskine Holland<sup>86</sup> – reflects a more general flexibility in Pollock’s writing on contract, where he repeatedly showed that he was willing, albeit sometimes reluctantly, to change his views.<sup>87</sup> It also demonstrates that ultimately Pollock was a pragmatist willing to sacrifice doctrinal purity when it conflicted with the case law

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<sup>80</sup> Gordley, chapter six of this volume, p XXX.

<sup>81</sup> See, eg, Pollock’s rejection of Pothier’s position on the uncommunicated withdrawal of an offer, discussed in Waddams (n 46) 285–87.

<sup>82</sup> Pollock (n 74) 1.

<sup>83</sup> Ibbetson (n 23) 233.

<sup>84</sup> See Gordley, chapter six of this volume, p XXX.

<sup>85</sup> See Waddams (n 35) 50–53.

<sup>86</sup> Both OW Holmes, *The Common Law* (Boston, Little, Brown & Co, 1881) and TE Holland, *The Elements of Jurisprudence*, 2nd edn (Oxford, Clarendon Press, 1882) featured attacks on Savigny and the will theory. See further on Pollock’s change of emphasis, MacMillan (n 61) 162–66.

<sup>87</sup> See, eg, his gradual coming to terms with the ‘postal rule’ (which he initially opposed), and his change of mind over the decision of the Court of Appeal in *Chandler v Webster* [1904] 1 KB 493 (CA), both traced by Waddams (n 35) at 30–31 and 142–44, respectively.

and what he saw as ‘common sense’ outcomes;<sup>88</sup> as his intellectual biographer Neil Duxbury has said, ‘[t]o claim, as Pollock did, that the common law is founded on reason, is not the same as claiming that it is rational, or even potentially rational’.<sup>89</sup> At the same time, the radical changes that were made to the introductory material in Pollock’s book were not always carried through to the discussion of substantive issues in the remainder, and there was never a complete break from Savigny and the will theory.<sup>90</sup>

Sir William Anson’s contribution to contract scholarship was very different from Pollock’s. The preface to his book made clear that his primary motivation was to write a text suitable for students, particularly those who from 1877 onwards took a paper on ‘Principles of the Law of Contract’ in the School of Jurisprudence at Oxford.<sup>91</sup> As Robert Stevens emphasises in his chapter in this volume ([chapter five](#)), Anson was an effective and enthusiastic teacher, whose main interest lay in legal education. Although his book ‘truly began the modern story of student law textbooks’,<sup>92</sup> it lacked the scholarly ambition of Pollock’s work. For a start, it was ‘a small volume of 338 (relatively small) pages’,<sup>93</sup> in which the somewhat scant references were put in marginal sidenotes rather than footnotes. This was because Anson ‘sought to provide an outline of the principles of English contract law rather than an exhaustive study’.<sup>94</sup> The book was also very derivative. The influence of Leake and especially Pollock was obvious and acknowledged,<sup>95</sup> and it seems clear that Anson could not have written his work without the benefit of their efforts.<sup>96</sup>

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<sup>88</sup> N Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford, Oxford University Press, 2004) 196. See the revealing quotation from the ninth edition of his contract treatise reproduced in *ibid* 214: ‘Legal rules exist not for their own sake, but to further justice and convenience in the business of human life ...’. *cf* Stevens (n 76), arguing that in his tort scholarship Pollock was inflexible and stubborn, and failed to adapt his treatise to take account of new developments.

<sup>89</sup> Duxbury (n 88) 282.

<sup>90</sup> See Swain (n 15) 205–206; MacMillan (n 61) 166–69 (discussing Pollock’s treatment of mistake).

<sup>91</sup> See Anson (n 75) v.

<sup>92</sup> Stevens, chapter five of this volume, [p XXX](#).

<sup>93</sup> PS Atiyah, Book Review (1981) 1 *Legal Studies* 100, 100.

<sup>94</sup> MacMillan (n 61) 170.

<sup>95</sup> Anson (n 75) vii.

<sup>96</sup> ‘Anson’s book was very closely based ... on Pollock’s’: Waddams (n 17) 142.

And yet, '[p]ossibly because his ambition was more modest than Pollock's, Anson was more successful in realising it'.<sup>97</sup> Whereas the last edition of Pollock's treatise was published in 1950,<sup>98</sup> not only did Anson's textbook dominate the student market throughout the early twentieth century, but it continues to flourish today, the longest lasting student text in law in the anglophone world.<sup>99</sup>

Much of the appeal of Anson's book lay in its lucidity and directness,<sup>100</sup> which contrasted favourably with Pollock's somewhat ponderous and indirect style of expression.<sup>101</sup> He also 'took great care in the arrangement and proportion of his subject',<sup>102</sup> structuring his text around the chronology of a contract, which he traced through 'how a contract is made, what is needed to make it binding, what its effect is, how its terms are interpreted, and how it is discharged and comes to an end'.<sup>103</sup> This scheme was a brilliant innovation, with obvious pedagogical appeal, which has been imitated in countless other texts, such that 'it often seems as though much of the present shape of the law was actually created by Anson'.<sup>104</sup> Another explanation for the success of Anson's work was that it was less theoretical than Pollock's. He was 'not concerned about grandiose expositions of theory',<sup>105</sup> and although he also drew upon Savigny and other civilian jurists, he did so with a lighter touch than Pollock.

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<sup>97</sup> MacMillan (n 61) 170.

<sup>98</sup> PH Winfield, *Pollock's Principles of Contract*, 13th edn (London, Stevens & Sons, 1950).

<sup>99</sup> J Beatson et al, *Anson's Law of Contract*, 31st edn (Oxford, Oxford University Press, 2020).

<sup>100</sup> According to MP Furmston, Book Review (1960) 23 *MLR* 206, 206, 'Sir William Anson's treatment combined accuracy and lucidity to a remarkable degree'.

<sup>101</sup> For an example of a 'convoluted assembly of qualified and counter-qualified double negatives' of Pollock's, see Waddams (n 35) 77. Contrast also the way that Pollock and Anson set out the principle that the adequacy of the consideration is not relevant (*ibid* 99–100). For trenchant criticism of Pollock's style, see Stevens (n 76) 75–76.

<sup>102</sup> MacMillan (n 61) 170.

<sup>103</sup> Atiyah (n 93) 100. As with most contract works of this era, remedies for breach were considered outwith the boundaries of the subject and not discussed.

<sup>104</sup> *ibid* 101. On the organisation of American contract works, see EA Farnsworth, 'Contracts Scholarship in the Age of Anthology' (1987) 85 *Michigan Law Review* 1406, 1434–37.

<sup>105</sup> MacMillan (n 61) 170.

There was, however, a flipside to Anson's focus on brevity and clarity, which was that he frequently glossed over difficulties or over-simplified. Unlike Pollock, who was careful to hedge about his claims with qualifications where necessary, Anson strove to present the law in as straightforward a manner as possible, even when the true position was more complex.<sup>106</sup> He himself admitted that in seeking to make his work accessible to students he often ran 'the risk of seeming to dogmatise',<sup>107</sup> and the absence of footnotes 'wholly precluded any secondary discussion of complexities, or any qualification' of the assertions made in the text.<sup>108</sup> And while Pollock demonstrated flexibility in moving away from the will theory over time, Anson stuck with it more doggedly,<sup>109</sup> so that a simplified form of the approach taken in Pollock's first edition was 'crystallised' in successive editions of Anson's work.<sup>110</sup> This is not of course to deny that Anson was capable of great sophistication and insight, and of substantially advancing the discussion of substantive questions.<sup>111</sup> Nevertheless, as Stevens says, in the end his 'contribution was of clarity, rather than of originality'.<sup>112</sup>

Both Anson and Pollock were in their own ways exceptionally influential scholars of contract law, with Pollock's influence more directly on the courts, and Anson's on the generations of law students for whom the study of contract law began (and, no doubt, often ended) with his

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<sup>106</sup> See, eg, Waddams (n 35) 78 (contrasting Pollock's 'cryptic and tentative' approach to issues of privity with Anson's 'plain and dogmatic' approach); and Duxbury (n 88) 202 (contrasting Anson's dogged assertion that all contracts must entail an offer and an acceptance with Pollock's more nuanced view).

<sup>107</sup> Anson (n 75) vii.

<sup>108</sup> Waddams (n 17) 143–44.

<sup>109</sup> Hence the disagreement between the two on revocation of offers, where Anson's room for manoeuvre was limited by his insistence that in general simultaneous mutual assent was required for a contract to be formed: see Waddams (n 35) 26–28.

<sup>110</sup> Waddams (n 17) 144. This may in part be because Anson's other commitments prevented him from revising his work as thoroughly as he might otherwise have done: see MacMillan (n 61) 178.

<sup>111</sup> According to Atiyah, 'at times Anson's writing seems to have been almost prophetic' (Atiyah (n 93) 101, giving examples). See also B Coote (edited by R Bigwood), *Contract as Assumption: Essays on a Theme* (Oxford, Hart Publishing, 2010) 24 (crediting Anson with identifying 'the secret paradox' in cases where a promisor undertakes to do something which he or she was already obliged to do under a contract with a third party); and MacMillan (n 61) 212 (Anson's interpretation of *Smith v Hughes* (1871) LR 6 QB 597 'has become the modern treatment of the case').

<sup>112</sup> Stevens, [chapter five](#) of this volume, [p XXX](#).

textbook. But their joint impact was also greater than the sum of their individual contributions. The publication of the first editions of their works within three years of each other in the late 1870s marked the birth of the modern law of contract and gave it the distinctive shape and structure which it in large part retains to this day. In Atiyah's words:

To put it at the lowest, it seems to me that these two academic giants are probably entitled to just as much of the credit for the creation of the general law of contract as all of the nineteenth century judges put together. The judges may have provided the bricks, but the design of the building was largely the work of the writers.<sup>113</sup>

### C. Williston and Corbin

If Anson and Pollock are the 'academic giants' of English contract law, the equivalent figures in the United States are Williston and Corbin. For both men, the multi-volume treatise that bears their name was the crowning glory of an extraordinarily prolific and influential scholarly life focused mainly on contract law. Both were 'consolidators' in the sense in which we used that term in the introduction to *STL*, and they share many of the characteristics of the tort consolidators that we identified there: they were career academics; they are associated with canonical texts; their scholarly methodologies were relatively constant; they had a remarkable work ethic;<sup>114</sup> they were pragmatists who were sceptical of theory; and 'their influence came not ... from a handful of "big ideas", but from the accumulated impact of their writings on a host of different topics, ranging

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<sup>113</sup> PS Atiyah, *Pragmatism and Theory in English Law* (London, Stevens & Sons, 1987) 173. See also Atiyah (n 73) 683 (it is to Anson and Pollock 'that we owe much of the power of the concepts of the law of contract').

<sup>114</sup> Williston wrote in his autobiography that he consistently worked in the evenings, at weekends and even on vacation: S Williston, *Life and Law* (Boston, Little, Brown & Co, 1941) 303 (cited by AD Boyer, 'Samuel Williston's Struggle with Depression' (1994) 42 *Buffalo Law Review* 1, 39). He published his last law review article at the age of 88 (S Williston, 'The Law of Sales in the Proposed Uniform Commercial Code' (1950) 63 *Harvard Law Review* 561), some 62 years after his first. Corbin was 76 when the first edition of his treatise was published, and 89 when the second edition came out. According to Twining, much of Corbin's greatness 'lies in the consistency, patience and rigour with which he approached his chosen field of specialization': W Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (Cambridge, Cambridge University Press, 2012) 30.

across the entirety of the subject'.<sup>115</sup> It is also telling in this regard that the widely admired *Restatement of Contracts*<sup>116</sup> – a classic example of scholarly ‘consolidation’ – was the result of a fruitful collaboration between the two men.

It is impossible to appreciate the contribution of Williston and Corbin to American contract scholarship without some sense of what came before them, though space constraints preclude a detailed discussion, which must therefore be sought elsewhere.<sup>117</sup> According to the American contract scholar Allan Farnsworth, [c]ontracts scholarship was slow in coming to this side of the Atlantic’ and in the early nineteenth century, ‘American lawyers leaned heavily on English writers’,<sup>118</sup> as evidenced by the publication of American editions of the books of (among others) Powell, Chitty and Leake. The first significant works on contract by Americans were the mid-century treatises of William Story<sup>119</sup> and Theophilus Parsons,<sup>120</sup> both of which were aimed primarily at practitioners. These were followed in 1871 by Langdell’s casebook,<sup>121</sup> the first of a long line of such works that have dominated the student market in the United States ever since.<sup>122</sup> A decade later, Holmes published *The Common Law*.<sup>123</sup> Though numbering less than a 100 pages, the three lectures devoted to contract in that book had a bigger impact on the subject than any previous work by an American author, most famously through Holmes’s espousal of an objective

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<sup>115</sup> Goudkamp and Nolan (n 3) 23.

<sup>116</sup> *Restatement of Contracts* (Philadelphia, American Law Institute, 1932). Grant Gilmore, admittedly prone to hyperbole, described the contracts *Restatement* as ‘not only the best of the Restatements’, but ‘one of the great legal accomplishments of all time’: G Gilmore, *The Death of Contract* (Columbus, Ohio State University Press, 1974) 59.

<sup>117</sup> For a very thorough account, on which the following text draws, see Farnsworth (n 104) 1407–24.

<sup>118</sup> *ibid* 1407.

<sup>119</sup> WW Story, *A Treatise on the Law of Contracts Not Under Seal* (Boston, Little, Brown & Co, 1844). William is not to be confused with his father Joseph, the great treatise writer.

<sup>120</sup> T Parsons, *The Law of Contracts* (Boston, Little, Brown & Co, 1853). This was a popular work, which ‘supposedly, sold more copies than any other American treatise’: LM Friedman, *A History of American Law* (New York, Simon and Schuster, 1973) 541.

<sup>121</sup> CC Langdell, *A Selection of Cases on the Law of Contracts* (Boston, Little, Brown & Co, 1871). The second edition of this work was accompanied by an appendix consisting of short essays on the topics in its index, which was subsequently published separately as CC Langdell, *A Summary of the Law of Contracts* (Boston, Little, Brown & Co, 1880).

<sup>122</sup> See generally, Farnsworth (n 104).

<sup>123</sup> Holmes (n 86).

theory of contract that stood in stark contrast to the will theory that had dominated English contract thinking up until that time. However, despite the gauntlet thrown down by Holmes, the next 40 years saw no significant new American books on contract,<sup>124</sup> and the tradition of reliance on English works continued, with multiple American editions of Pollock's treatise (including one by Williston in 1906) and of Anson's textbook (including three by Corbin, in 1919, 1924 and 1930), as well as the publication in 1891 of a bizarre book in which text from Leake's treatise was interspersed with cases from an English casebook modelled on Langdell's.<sup>125</sup>

The end of the 'lean years'<sup>126</sup> was marked by the publication of Samuel Williston's four-volume treatise in 1920.<sup>127</sup> That monumental work was preceded by a healthy stream of periodical literature on contract in the American law reviews, and full account must of course be taken of the contribution that Williston made to that literature when assessing his contract scholarship, as well as of his work as Reporter for the *Restatement of Contracts*.<sup>128</sup> But pride of place must go to the treatise. *Williston on Contracts* was a remarkable work, one of the four 'ultra-treatises'<sup>129</sup> which mark the pinnacle of the American tradition of treatise-writing, along with *Scott* on trusts,<sup>130</sup> *Wigmore* on evidence<sup>131</sup> and *Corbin* on contracts.<sup>132</sup> As Todd Rakoff says in his chapter on Williston in this volume ([chapter seven](#)), even though the treatise was clearly written for a

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<sup>124</sup> The reasons for this are explored in Farnsworth (n 104) 1420–24, who argues that the most plausible explanation is the case method of teaching first adopted by Langdell at Harvard in 1870.

<sup>125</sup> W Keener, *Selections from Leake's Elements of the Law of Contracts and Finch's Cases on Contracts* (New York, Baker, Voorhis & Co, 1891). The casebook was GB Finch, *A Selection of Cases on the English Law of Contract* (Cambridge, Cambridge University Press, 1886). Unsurprisingly Keener's book was not successful and the experiment was not carried into further editions.

<sup>126</sup> Farnsworth (n 104) 1413.

<sup>127</sup> S Williston, *The Law of Contracts* (New York, Baker, Voorhis & Co, 1920).

<sup>128</sup> *Restatement of Contracts* (n 116). He also wrote or edited numerous casebooks, and published treatises on commercial law topics, most notably sale of goods: S Williston, *The Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act* (New York, Baker, Voorhis & Co, 1909).

<sup>129</sup> Simpson (n 69) 674.

<sup>130</sup> AW Scott, *The Law of Trusts* (Boston, Little, Brown & Co, 1939).

<sup>131</sup> JH Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (Boston, Little, Brown & Co, 1904).

<sup>132</sup> AL Corbin, *A Comprehensive Treatise on the Rules of Contract Law* (St Paul, West Publishing, 1950).

professional audience of lawyers and judges, its contents amounted to much more than mere exposition. Williston used the space that the multi-volume format gave him to explore the history of the topic under discussion, to consider rival solutions to doctrinal problems, and to test the fit of those solutions with the law on related topics and against ‘his society’s sense of justice’,<sup>133</sup> with all this accompanied by extensive footnotes setting out the position in the different states of the union. Rakoff also argues that – unlike nineteenth-century English writers, such as Pollock – Williston did not generally reason deductively, drawing his conclusions from higher principles: his ‘typical analysis does not proceed from a strong internal hierarchy of premises, such that many specific rules or doctrines proceed from a small number of strongly entrenched major propositions’.<sup>134</sup> This leads Rakoff to question the characterisation of Williston as a ‘formalist’ that pervades the existing literature on his scholarship, including the revisionist analysis of Mark Movsesian in his important article ‘Rediscovering Williston’.<sup>135</sup>

Movsesian described Williston as a ‘pragmatic-formalist’ and argued that pragmatism was a central – perhaps *the* central – characteristic of his scholarship (as indeed it was for other private law consolidators of the early to mid-twentieth century, such as the tort scholars Sir Percy Winfield and William Prosser<sup>136</sup>). Hence Williston glossed the nineteenth-century conception of law as a ‘science’ by calling it a ‘pragmatic science’,<sup>137</sup> described his early Harvard colleagues (with apparent approval) as ‘pragmatists’ who ‘felt themselves engaged in a practical profession’,<sup>138</sup> and wrote in the preface to his treatise that he had ‘endeavored to keep my discussions within the limits of practical usefulness’.<sup>139</sup> His pragmatism also manifested itself in a distaste for high theory. He

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<sup>133</sup> Rakoff, [chapter seven](#) of this volume, [p XXX](#).

<sup>134</sup> *ibid* [p XXX](#).

<sup>135</sup> ML Movsesian, ‘Rediscovering Williston’ (2005) 62 *Washington & Lee Law Review* 207.

<sup>136</sup> See Goudkamp and Nolan (n 3) 22, and the chapters on Winfield and Prosser in *STL* (n 1). Although Rakoff takes issue with the ‘pragmatic’ as well as the ‘formalist’ half of Movsesian’s description, this is because Rakoff equates pragmatism with functionalism and efficiency, which we do not. By ‘pragmatic’ we mean sceptical of theory, abstraction and doctrinal ‘purity’, and focused instead on practical considerations and the real-world implications of legal rules.

<sup>137</sup> [Williston \(n 114\)](#) 202 (quoted by Movsesian (n 135) 231).

<sup>138</sup> S Williston, *Some Modern Tendencies in the Law* (New York, Baker, Voorhis & Co, 1929) 11 (quoted by Movsesian (n 135) 268).

<sup>139</sup> Williston (n 127) vol 1, iv (quoted by Rakoff, [chapter seven](#) of this volume, [p XXX](#)).

had no truck with the will theorists and warmly embraced Holmes's rival objective approach to contractual obligation,<sup>140</sup> while more generally he cautioned against the academic tendency 'to get too far from the earth'.<sup>141</sup> Furthermore, practical considerations underlay Williston's commitment to keeping the law as simple, certain and comprehensible as possible. According to Allen Boyer – who connects this quest to Williston's struggle to reassert control over his mental health following bouts of depression – he 'held up simplicity and certainty as intrinsic values toward which the law should aspire', not for their own sake, but because this would result in clear rules that could be relied on without litigation.<sup>142</sup> Williston's quest for simplicity (and, concomitantly, for broad general rules across all contract types) was criticised by legal realists such as Walter Wheeler Cook, who argued in a review of the second edition of Williston's treatise that his methodology was underlain by 'an assumption that the legal universe is far simpler than the "realist" believes it to be',<sup>143</sup> and that the general, 'unified' law of contract portrayed by works such as Williston's was a myth. However, such criticism left Williston unmoved, and in his autobiography he attacked what he called 'the so-called functional approach', which 'if pushed to its limit' would require that 'a rule must be established for each separate state of facts', thereby returning contract law to a state of 'pre-Langdellian chaos'.<sup>144</sup>

Although some late twentieth-century legal historians painted a one-dimensional portrait of Williston as a reactionary classical formalist – in Morton Horwitz's words, 'a leading exemplar' of 'a legal ideology of formalism' that disguised 'gross disparities of bargaining power under a façade of neutral and formal rules of contract law'<sup>145</sup> – that caricature has since been attacked by other scholars, who have argued that Williston was a non-ideological conservative who shared

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<sup>140</sup> See Boyer (n 114) 25.

<sup>141</sup> S Williston, 'The Necessity of Idealism in Teaching Law' (1908) 2 *American Law School Review* 201, 203 (quoted by Movsesian (n 135) 233).

<sup>142</sup> Boyer (n 114) 23.

<sup>143</sup> WW Cook, 'Williston on Contracts' (1939) 33 *Illinois Law Review* 497, 504.

<sup>144</sup> The final phrase is Boyer's (n 114, 43), not Williston's. We might take it to mean more generally the state of the subject prior to the late nineteenth-century system-builders.

<sup>145</sup> MJ Horwitz, *The Transformation of American Law 1780-1860* (Cambridge, MA, Harvard University Press, 1977) 201. cf Friedman (n 120) 543, 593, which, although also hyperbolic ('volume after volume of a heavy void'; 'fully armored against the intrusion of any ethical, economic, or social notions whatsoever'), does not make the same insinuation of ideologically driven duplicity.

some, though not all, of the concerns of the scholarly progressives of his era.<sup>146</sup> And although (as Rakoff emphasises) Williston's treatise was heavily focused on case law, and he showed little interest in the statutory regulation of contracts, that work and the *Restatement* did at least break the hold which English cases had hitherto had over the American contract literature.<sup>147</sup>

One of the progressives of Williston's era was Arthur Corbin, who himself produced an extraordinary six-volume treatise on contracts in 1950, towards the end of a career marked by a prolific output of law review articles and other publications, including a casebook of some 1,500 pages that was first published in 1921, and which ran to three editions.<sup>148</sup> In his chapter in this collection ([chapter eight](#)), Gregory Klass argues that for Corbin:

[T]he task of both legal education and legal scholarship is not merely to transfer legal knowledge from teacher to student, author to reader, but to disabuse the student or the reader of their false sense of certainty about the law and to help them to see it as a contingent, evolving institution, one that builds on generalisations from past experience, but which must also attend to the changing demands of a social world.<sup>149</sup>

Corbin was an avowed objectivist, describing the 'main underlying purpose' of contract law as 'the realization of reasonable expectations that have been induced by the making of a promise'.<sup>150</sup> He was also a pragmatist, whose non-elite mid-western background manifested itself in a modest and understated style that eschewed sweeping claims and grand theory,<sup>151</sup> as well as an insistence

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<sup>146</sup> See Boyer (n 114) 23 ('There is ... little which is reactionary about his philosophy'), 28; M Movsesian, 'Williston as Conservative-Pragmatist' (2007) 32 *Southern Illinois University Law Journal* 1.

<sup>147</sup> See Farnsworth (n 104) 1439–41.

<sup>148</sup> A Corbin, *Cases on the Law of Contracts* (St Paul, West Publishing, 1921).

<sup>149</sup> Klass, [chapter eight](#) of this volume, [p XXX](#).

<sup>150</sup> Corbin (n 132) § 1.

<sup>151</sup> Corbin 'had little interest in or use for abstract doctrine': G Gilmore, 'Friedrich Kessler' (1975) 84 *Yale Law Journal* 672, 674.

that the law must remain in step with the values and expectations of the community it serves.<sup>152</sup> But while Williston's pragmatism drove a quest for simplicity and certainty, Corbin's led him to embrace a certain degree of complexity and instability.<sup>153</sup> Hence Corbin's scepticism (highlighted by Klass<sup>154</sup>) about substantive definitions, as exemplified by his approach to consideration, which he argued was not a single definable concept, but an umbrella term embracing 'many doctrines serving different policies'.<sup>155</sup>

The question of whether Williston was a formalist finds an echo in the question of whether Corbin was a realist, which again admits of no simple answer. Corbin 'belonged to an in-between generation—he came after the Willistons and before the Llewellyns',<sup>156</sup> and so it is not surprising that he is difficult to pigeon-hole. Although clearly he was a modernist who was very comfortable challenging convention and tradition, Kessler wrote after Corbin's death that he 'did not join the realist movement' and 'was rather critical of its tenets, and particularly of the position that decisions were not determined by rules and principles'.<sup>157</sup> At the same time, however, Corbin was clearly respected and even revered by leading realists,<sup>158</sup> shared their scepticism about legal certainty and abstract generalisations, and agreed with them that 'facts, not legal doctrines, play the major role in judicial decisions'.<sup>159</sup> Moreover, although he recognised the importance of legal

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<sup>152</sup> See F Kessler, 'Arthur Linton Corbin—A Tribute' (1954) 64 *Yale Law Journal* 164, 168; MJ Horwitz, *The Transformation of American Law 1870–1960* (New York, Oxford University Press, 1992) 49 ('an earthy, pragmatic skepticism'). Corbin's no-nonsense attitude is reflected in his homely style, which is one of the attractions of his work: see, eg, AL Corbin, 'Discharge of Contracts' (1913) 22 *Yale Law Journal* 513, 519 ('If a man promises to dig a well yesterday, or to build a house on the sun, or to make a road to China on a straight line, no obligation is born').

<sup>153</sup> 'Professor Corbin refrains from making things clearer than they are': F Kessler, 'Arthur Linton Corbin' (1969) 78 *Yale Law Journal* 517, 523.

<sup>154</sup> Klass, [chapter eight](#) of this volume, [p XXX](#).

<sup>155</sup> Kessler (n 153) 521.

<sup>156</sup> Gilmore (n 116) 60.

<sup>157</sup> Kessler (n 153) 519. See also G Gilmore, *The Ages of American Law* (New Haven, Yale University Press, 1977) 79: 'Corbin took no part in the Realist controversy'.

<sup>158</sup> See Gilmore, *ibid*, and, for an example, see the praise heaped on Corbin by J Frank, 'Corbin on Contracts Volume Three' (1952) 61 *Yale Law Journal* 1109.

<sup>159</sup> HG Havighurst, 'Corbin on Contracts Volume Six' (1952) 61 *Yale Law Journal* 1139, 1139. This was reflected in the way that Corbin treated cases, which was quite different from, say, Williston: see Gilmore (n 157) 79–80.

rules, this was also true of all but the most extreme ‘realists’, and besides Corbin constantly emphasised that such rules were not immutable and eternal, but merely ‘defeasible generalizations from past experience—working rules in a constantly evolving social practice’.<sup>160</sup> Corbin’s emphasis on the mutability of what he called ‘tentative working rules’<sup>161</sup> reflected his belief that legal development was an evolutionary process, in which the ultimate test of theories, principles and rules was ‘survival in conflict’.<sup>162</sup> And because this meant that legal change was inexorable, he believed that the creativity of the judges who made the law should be both acknowledged and celebrated.<sup>163</sup>

The degree of the contrast between Corbin and Williston is controversial. The historians who branded Williston a classical formalist tended to emphasise their differences, casting Corbin as a revolutionary figure instrumental in bringing down the edifice which Gilmore termed the ‘Holmes-Williston’ construct.<sup>164</sup> However, more recent scholarship – including the chapters on the two scholars in this volume – has challenged key assumptions underlying these claims, and in so doing cast doubt on the extent, though certainly not the existence, of the differences in their outlook and scholarship.<sup>165</sup> Perhaps the best we can do is to say that there is an element of Yin and Yang (or vice versa) to the relationship between Harvard’s Williston and Yale’s Corbin, and also to make the point that, regardless of those differences, these two greats of contract law scholarship clearly respected and liked each other.<sup>166</sup>

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<sup>160</sup> Klass, [chapter eight](#) of this volume, [p XXX](#).

<sup>161</sup> AL Corbin, ‘The Law and the Judges’ (1914) 3 *Yale Review New Series* 234, 239.

<sup>162</sup> *ibid* 247. Corbin had studied science at the University of Kansas and been ‘deeply impressed by the theory of evolution’: Twining (n 114) 27.

<sup>163</sup> Hence ‘Cardozo is his hero’: Kessler (n 153) 520. For an analysis by Corbin of Cardozo’s contract judgments, see AL Corbin, ‘Mr Justice Cardozo and the Law of Contracts’ (1939) 52 *Harvard Law Review* 408.

<sup>164</sup> See, eg, Gilmore (n 116) 57–58; LM Friedman, *American Law in the 20th Century* (New Haven, Yale University Press, 2002) 382 (calling Corbin ‘the great anti-Williston’).

<sup>165</sup> But *cf* Twining, [chapter 15](#) of this volume, [p XXX](#) (stressing the differences between the two).

<sup>166</sup> For compelling evidence in this regard, see AL Corbin, ‘Samuel Williston’ (1963) 76 *Harvard Law Review* 1327, 1329 (describing Williston as ‘above all an affectionate and lovable elder brother’).

## D. Kessler, Macneil and Atiyah

Williston and Corbin have sometimes been typecast as epitomes of two very different styles of contract scholarship, which we might label ‘traditional’ (or ‘classical’) and ‘modern’ (or ‘realist’). Even if that is an over-simplification when applied to these two men, this dichotomy – or something like it – may have some utility when it comes to other twentieth-century common law contract scholars. In particular, when we turn to consider the remaining jurists whose contributions are discussed in this volume, there would seem to be a fairly clear line between Kessler, Macneil and Atiyah, on the one hand (the ‘modernists’) and Cheshire and Fifoot, Treitel and Coote (the ‘traditionalists’) on the other. As a result, in our view it makes sense to divide the remaining discussion of individual scholars in this chapter along this line, beginning with the modernists.

One advantage of dividing up our discussion in this way is that we come next to Friedrich Kessler, whose greatest influence was Corbin,<sup>167</sup> and who embraced Corbin’s vision of contract law as ‘not a closed system of harmonious rules but an open system of social action rich in dynamic complexity and full of contradictions’.<sup>168</sup> Unlike the scholars considered thus far, Kessler’s main contribution to contract scholarship came not through a single expository work encompassing the entire subject, but through a series of articles on distinct but related themes, as well as three editions of a casebook, which was co-authored with (variously) Malcolm Sharp, Grant Gilmore and Anthony Kronman.<sup>169</sup> Although the quantity of Kessler’s writings on contract was modest by comparison with some of the other scholars considered here, his influence on the subject was immense. A highly original thinker, Kessler was adept at identifying and exploring in his work issues that would come to dominate contract law and scholarship in the decades that followed. Indeed, so prescient was he that many of his key ideas and insights acquired the air of orthodoxy within a relatively short space of time.<sup>170</sup>

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<sup>167</sup> See Collins, chapter ten of this volume, p XXX.

<sup>168</sup> F Kessler, ‘Corbin on Contracts Volume One’ (1952) 61 *Yale Law Journal* 1092, 1094.

<sup>169</sup> F Kessler and M Sharp, *Contracts: Cases and Materials* (New York, Prentice Hall, 1953). The later editions were published in 1970 and 1986.

<sup>170</sup> See Gilmore (n 151) 675.

Kessler's three most famous articles are the subject of close analysis in Hugh Collins's chapter on him in this volume ([chapter ten](#)), and his scholarly contribution has also been considered by Gilmore,<sup>171</sup> George Priest<sup>172</sup> and Christian Joerges.<sup>173</sup> Several common themes emerge from these studies. One is Kessler's emphasis on the relationship between contract law and freedom. By the time that he published his seminal article on 'Contracts of Adhesion' in the 1940s,<sup>174</sup> the ideal of freedom of contract had been substantially undermined by the development of monopolistic companies which used what Kessler called 'adhesion contracts' to impose their standard terms of business on their contracting partners.<sup>175</sup> Not only did Kessler identify the link between classical contract theory and *laissez-faire* economics, he showed how the classical dogma of 'freedom of contract' had in fact become a tool of oppression in the hands of these monopolists, who could use it to impose 'a new feudal order' on 'a vast host of vassals'.<sup>176</sup> It is important to note that for Kessler this was not just a matter of *economic* exploitation, but a deeply *political* problem, in that the ability of the monopolist to dictate contract terms threatened an abuse of the legislative power inherent in the contractual form which he considered not only anti-democratic but positively fascistic.<sup>177</sup> A second theme of these studies of Kessler is his radicalism, which is perhaps most apparent from his casebook, a work which marked a complete break from the traditional

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<sup>171</sup> *ibid.*

<sup>172</sup> GL Priest, 'Contracts Then and Now: An Appreciation of Friedrich Kessler' (1995) 104 *Yale Law Journal* 2145.

<sup>173</sup> C Joerges, 'History as Non-History: Points of Divergence and Time Lags between Friedrich Kessler and German Jurisprudence' (1994) 42 *American Journal of Comparative Law* 163; C Joerges, 'Demos vs Ethnos in Private Law: Friedrich Kessler and his German Heritage' (1995) 104 *Yale Law Journal* 2137.

<sup>174</sup> F Kessler, 'Contracts of Adhesion—Some Thoughts About Freedom of Contract' (1943) 43 *Columbia Law Review* 629.

<sup>175</sup> Although this problem is now closely bound up with the idea of 'consumer protection', as Collins points out ([chapter ten](#) of this volume, [p XXX](#)), Kessler did not focus on consumers as such in that article, which pre-dated the idea of consumers as a legal category. Moreover, Kessler's later work on vertical integration by contract concerned not consumers but franchisees: see F Kessler, 'Automobile Dealer Franchises: Vertical Integration by Contract' (1957) 66 *Yale Law Journal* 1135.

<sup>176</sup> Kessler (n 174) 640.

<sup>177</sup> According to Priest (n 172) 2147, 'Kessler concluded that modern contractual practice was the principal threat to contemporary political and economic freedom'.

organisation of the subject,<sup>178</sup> included a series of entirely novel chapters on types of contract subject to high levels of regulation, and (in a quintessentially realist move) paired together cases that reached contradictory results on similar facts. Kessler's radicalism also manifested itself in the methodology of his seminal article on automobile franchises,<sup>179</sup> which anticipated the later empirical studies of Stewart Macaulay.

A final theme that threads through accounts of Kessler's scholarship is the influence of his training as a lawyer in Germany during the Weimar Republic. Unlike Treitel, who emigrated to England as a child to escape the Nazis, Kessler – whose wife was Jewish – travelled to the United States in 1934 as a fully qualified German academic, who had completed his doctorate and his 'habilitation' (both as it happens on American law). Kessler's civilian training made him more theoretically minded than other American modernists, such as Corbin and Macaulay, and may also explain his commitment to legal doctrine, albeit to the 'radically new doctrines' appropriate for the 'radically changed circumstances' in which he believed the modern law of contract was operating.<sup>180</sup> Furthermore, Kessler's roots enabled him to keep a foot in both the American and German scholarly camps throughout his career, and to bring a civilian perspective to bear on common law problems, most famously in his comparative analysis of 'culpa in contrahendo' and good faith,<sup>181</sup> the third of Kessler's articles – along with 'Contracts of Adhesion' and 'Automobile Franchises' – that Collins explores in his chapter.

Like Kessler, the work of Ian Macneil would not have been possible without the realist revolution in American legal thought. However, Macneil took contract scholarship in a very different direction, so much so that Gilmore categorised him (perhaps unfairly) as a 'New Conceptualist', who had 'forsaken the pluralism' of scholars such as Corbin, Llewellyn and

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<sup>178</sup> Chapter headings included 'Fairness of the Bargain and Equality. Exchange Justice' and 'Formalism in Our Law of Contracts'.

<sup>179</sup> Kessler (n 175).

<sup>180</sup> See Gilmore (n 151) 677; and for evidence, see Kessler (n 152) 165 (referring to the need for constant re-examination of concepts, doctrines, principles and institutions). Gilmore (*ibid* 681) observes that Kessler was unusual in his generation for having decisively rejected doctrinal orthodoxy but at the same time seeming 'never to have been tempted to go on to some form of antidoctrine as salvation'. He attributes this in part to Kessler's civilian training.

<sup>181</sup> F Kessler and E Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study' (1964) 77 *Harvard Law Review* 401.

Kessler.<sup>182</sup> Macneil was in any case a scholar of great complexity, and although he clearly rejected what he called the ‘Willistonian’ approach to contract, and accepted the allegations of doctrinal incoherence made against the classical model, he conceded that that model ‘has been of enormous, and continues to be of substantial, value’.<sup>183</sup> He could also be highly critical of post-realist movements such as Posnerian economic analysis and critical legal studies.<sup>184</sup>

Before studying law, Macneil had majored in sociology, and his contract scholarship is markedly inter-disciplinary in character, with a consistent emphasis on ‘the embeddedness of all contracts and contractual behaviour in ongoing social relations’.<sup>185</sup> His sociological/anthropological approach manifested itself in a central focus not on contract *law*, but on contract *itself*, which he defined broadly as ‘the relations among parties to the process of projecting exchange into the future’.<sup>186</sup> Nowhere is this clearer than in his casebook, which exceeded even Kessler’s for its radicalism, and which Macneil said was based on the ‘fundamental assumption ... that contract encompasses all human activities in which economic exchange is a factor’, including marriage, corporate structures and collective bargaining.<sup>187</sup> The casebook was ‘organised functionally’,<sup>188</sup> and in the second edition the latter half of the work was structured around the concept of contract planning,<sup>189</sup> a concept Macneil had first explored in a 1975

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<sup>182</sup> Gilmore (n 157) 107–108, 147.

<sup>183</sup> D Campbell, ‘Ian Macneil and the Relational Theory of Contract’ in I Macneil (edited by D Campbell), *The Relational Theory of Contract: Selected Works of Ian Macneil* (London, Sweet & Maxwell, 2001) 8.

<sup>184</sup> On economic analysis, see IR Macneil, ‘Efficient Breach: Circles in the Sky’ (1982) 68 *Virginia Law Review* 947; and on critical legal studies, see Macneil (n 183) 302–303.

<sup>185</sup> Morgan, chapter 12 of this volume, p XXX. The ‘all’ is important, as in Macneil’s view even seemingly ‘discrete’ transactions take place within a web of social relations and (generally) a network of other contracts concerning the provision of credit and the like: see S Wheeler, ‘Visions of Contract’ (2017) 44 *Journal of Law and Society* S74, S85.

<sup>186</sup> IR Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven, Yale University Press, 1980) 4.

<sup>187</sup> IR Macneil, *Contracts: Exchange Relations and Transactions* (Mineola, Foundation Press, 1971).

<sup>188</sup> J Feinman, ‘The Reception of Ian Macneil’s Work on Contract in the USA’ in Macneil (n 183) 65.

<sup>189</sup> IR Macneil, *Contracts: Exchange Relations and Transactions*, 2nd edn (Mineola, Foundation Press, 1978).

article.<sup>190</sup> Too unorthodox to be widely adopted, the second edition of the casebook was also the last, although its structure was later emulated in a more accessible work produced by Macaulay and his colleagues at the University of Wisconsin.<sup>191</sup>

Macneil is best known as the co-father (along with Macaulay) of ‘relational contract theory’, as set out in his case in numerous articles and his 1980 book *The New Social Contract*,<sup>192</sup> a book which has generated a veritable flood of secondary literature and which is analysed in depth in Jonathan Morgan’s chapter in this volume ([chapter 12](#)). A reviewer of the book summarised the central tenets of Macneil’s relational theory as follows:

[T]here are certain norms common to all contractual relations, that a concept of contractual relations based on the ‘discrete transaction’ cannot comprehend the range of contractual relations, or adequately utilise (weigh, balance) the shared norms, and consequently that we must start to construct a law ... that is predicated upon the existence of the relational contract.<sup>193</sup>

It will be apparent from that synopsis that Macneil’s work on relational contract was not especially legal in character. As Morgan says, he examined ‘contracting practices and norms solely as *social* phenomena—to which contract law was at best incidental, at worst distorting’.<sup>194</sup> When coupled with his expansive definition of contract, this focus on the ‘sociology of the contracting process’<sup>195</sup> gave Macneil’s work an extraordinary breadth.<sup>196</sup> And while this seemed not to bother him, it did concern others, who questioned what the boundaries of his theory were, and why, for example, it

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<sup>190</sup> IR Macneil, ‘A Primer of Contract Planning’ (1975) 48 *Southern California Law Review* 627.

<sup>191</sup> S Macaulay et al, *Contracts: Law in Action* (Charlottesville, The Michie Co, 1995).

<sup>192</sup> Macneil (n 186).

<sup>193</sup> M Elliott, Book Review (1981) 44 *MLR* 345, 346.

<sup>194</sup> Morgan, [chapter 12](#) of this volume, [p XXX](#) (emphasis in original).

<sup>195</sup> Wheeler (n 185) S83.

<sup>196</sup> See J Feinman, ‘Relational Contract Theory in Context’ (2020) 94 *Northwestern University Law Review* 737, 741 (the theory encompasses ‘an astonishingly wide range of transactions’). See also the summary of Macneil’s social theory in Macneil (n 183) 46–53.

was limited to ‘future-looking’ exchange relations.<sup>197</sup> Furthermore, the nature of Macneil’s enterprise meant that (like the empirical work of Macaulay), it was primarily descriptive in character, and while he clearly believed that the reality he described had implications for contract doctrine, a recurrent criticism of Macneil is that he did not do more to identify what those implications were.<sup>198</sup> Another observation frequently made about Macneil’s work is that it is complex and difficult to follow (at least for lawyers).<sup>199</sup> This has been said to ‘mask the conceptual depth of his theoretical contribution’,<sup>200</sup> and may in part explain why Macneil’s ideas have so often been misunderstood, typically by assuming that he identified a distinct *category* of ‘relational contracts’, when in fact his theory posits that *all* contracts are ‘relational’, at least to some extent. Nevertheless, he must surely be the most important student of contract as a social phenomenon, and as a result is unquestionably a major figure in the history of the scholarship of contract law.

No criticisms could be made of the style of Patrick Atiyah, whose voluminous writings on contract law, history and theory are consistently engaging, and who ‘eschewed complicated prose and obscure terminology’.<sup>201</sup> Like Kessler and Macneil, Atiyah was a post-realist contract scholar who rejected the classical tradition.<sup>202</sup> And although he was predominantly a scholar of English law, intellectually Atiyah was much closer to Kessler and Macneil than he was to the more traditional school of twentieth-century Commonwealth contract scholarship represented in this

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<sup>197</sup> Elliott (n 193) 347. See also at 351 (characterising Macneil’s work as ‘the promulgation of a new and all inclusive social theory’). As has been pointed out, ‘relational analysis may be applied ... to any social interaction in which reciprocity is the dominant element’ (P Vincent-Jones, ‘The Reception of Ian Macneil’s Work on Contract in the UK’ in Macneil (n 183) 73). *cf* the opposite criticism made by Twining, [chapter 15](#) of this volume, [p XXX](#), that Macneil ‘would have done better to root his vision in a broad ... theory of social co-operation rather than a more restricted one of exchange’.

<sup>198</sup> See, eg, Elliott (n 193) 349; RE Barnett, ‘Conflicting Visions: A Critique of Ian Macneil’s Relational Theory of Contract’ (1992) 78 *Virginia Law Review* 1175, 1190.

<sup>199</sup> See, eg, Elliott (n 193) 345; Feinman (n 196) 63 (‘The style and complexity have put off many contract scholars, and certainly have prevented the work from being widely read by practising lawyers and judges’).

<sup>200</sup> Wheeler (n 185) S86.

<sup>201</sup> Goudkamp, [chapter 14](#) of this volume, [p XXX](#).

<sup>202</sup> On Atiyah’s realist tendencies, see *ibid* [p XXX](#). See also Atiyah’s more general works, such as Atiyah (n 113) and PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford, Clarendon Press, 1987).

volume by Cheshire and Fifoot, Treitel and Coote.<sup>203</sup> This is apparent not only from Atiyah's fundamental beliefs about the nature of contract, but also from the opening chapter of his *An Introduction to the Law of Contract* ('Introduction'),<sup>204</sup> which focuses on contract as a social phenomenon, and from the profound inter-disciplinarity of his work, which ranges across law, economics, philosophy, political theory and history, and which, like Macneil's, is often only incidentally concerned with contract *law*.

Apart from Pollock, Atiyah is the only scholar considered in this volume who also featured in *STL*.<sup>205</sup> In the introduction to that book, we classified Atiyah as an 'iconoclast',<sup>206</sup> and, as James Goudkamp points out in his chapter on Atiyah in this volume (chapter 14), his work on contract was also characterised by an enthusiasm for challenging orthodoxy.<sup>207</sup> Drawing on the work of Fuller and Purdue,<sup>208</sup> Gilmore<sup>209</sup> and Horwitz,<sup>210</sup> Atiyah launched a multi-pronged attack on the idea of contract as a distinct legal category concerned with the enforcement of promises, in which the default remedy was and should be expectation-based. Instead, Atiyah argued, contractual liability was better understood as grounded on reliance and benefit, from which it followed that there was generally no justification for the enforcement of wholly executory contracts or for the award of expectation damages, and that the supposed boundary between contract on the one hand and tort and unjust enrichment on the other was an illusion. This conception of contract – which Coote later labelled the 'reliance theory'<sup>211</sup> – underlay both the works of Atiyah explored in depth

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<sup>203</sup> See, eg, PS Atiyah, 'Consideration: A Restatement' in his *Essays on Contract* (Oxford, Oxford University Press, 1986), the original version of which Atiyah says (at 179) was inspired by Corbin's work and which 'remains thoroughly Corbinian in intent'.

<sup>204</sup> PS Atiyah, *An Introduction to the Law of Contract* (Oxford, Clarendon Press, 1961) Ch 1.

<sup>205</sup> J Goudkamp, 'Professor Patrick Atiyah (1931–2018)' in *STL* (n 1).

<sup>206</sup> Goudkamp and Nolan (n 3) 27–28.

<sup>207</sup> Goudkamp, chapter 14 of this volume, p XXX.

<sup>208</sup> LL Fuller and WR Purdue, 'The Reliance Interest in Contract Damages' (1936–37) 46 *Yale Law Journal* 52, 373.

<sup>209</sup> Gilmore's *Death of Contract* (n 116) was the catalyst for *Rise and Fall*: see Goudkamp, chapter 14 of this volume, p XXX.

<sup>210</sup> For Horwitz's influence on Atiyah, see Swain (n 15) 7fn.

<sup>211</sup> Coote (n 111) 21–22. This is however somewhat misleading as it ignores the role played by ideas of benefit in the thinking of Atiyah and other adherents to the same analysis. Though less elegant, 'reliance/benefit theory' would therefore be a more accurate label.

by Goudkamp, namely *The Rise and Fall of Freedom of Contract* ('*Rise and Fall*')<sup>212</sup> and *Promises, Morals, and Law* ('*PML*'),<sup>213</sup> as well as *Introduction* and the key periodical writings collected in his *Essays on Contract*.<sup>214</sup>

In his towering work of intellectual history, *Rise and Fall*, Atiyah sought to trace the modern history of the 'ideology' of freedom of contract, which he argued had flourished in the century from 1770 to 1870, but thereafter fallen into (seemingly terminal) decline. Atiyah associated that ideology with the classical model of contract law, and its 'decline and fall' with the disintegration of that model amidst a twentieth-century resurgence of reliance-based and benefit-based liabilities. Naturally, the connection between classical contract law and *laissez-faire* economics which Kessler had first identified pervaded this analysis.<sup>215</sup> The thesis put forward in *Rise and Fall* was subsequently bolstered in *PML* by a philosophical investigation of promises which led Atiyah to the radical conclusion that they were not in and of themselves a source of moral obligation. The claims made in *Rise and Fall* and *PML* have met with a good deal of criticism,<sup>216</sup> and political and legal developments since the 1970s have cast significant doubt on the reliance theory and the supposed 'death of contract'.<sup>217</sup> As a result, it may be that Atiyah's more 'Corbinian' work on modern contract doctrine – as exemplified by the five editions of *Introduction* – will have more lasting influence than these two books. Nevertheless, Atiyah's

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<sup>212</sup> Atiyah (n 73).

<sup>213</sup> PS Atiyah, *Promises, Morals, and Law* (Oxford, Oxford University Press, 1981) (hereinafter referred to as '*PML*').

<sup>214</sup> PS Atiyah, *Essays on Contract* (Oxford, Oxford University Press, 1986).

<sup>215</sup> See, eg, Atiyah (n 73) 398.

<sup>216</sup> On *Rise and Fall*, see especially JH Baker, Book Review (1980) 43 *MLR* 467 (the book is 'least convincing' in 'its legal aspect', where 'it shares some of the weaknesses of its American precursors'). On *PML*, see especially J Raz, 'Promises in Law and Morality' (1982) 95 *Harvard Law Review* 916, 938 ('an untenable view of promises'). Waddams has also pointed out (n 35, 174) that Gilbert's treatise is inconsistent with some of the central claims that Atiyah made in *Rise and Fall* about the state of contract law in the eighteenth century. There is no mention in *Rise and Fall* of Gilbert's work, which was not widely known about in the 1970s, although references had been made to it in Simpson (n 29).

<sup>217</sup> Politically, the rise of the 'New Right', heralded by the victory of the Conservatives under Margaret Thatcher in the UK general election of 1979 (the very year *Rise and Fall* was published). Legally, the resilience of contract as an autonomous source of obligation and of the boundaries separating it from unjust enrichment (a boundary reinforced by the publication of P Birks, *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1985)) and tort (a boundary reinforced by the more restrictive approach taken by the English courts in the late 1980s to negligence claims for pure economic loss).

scholarly range and dexterity, coupled with the sheer volume of consistently stimulating work which he has left behind him, undoubtedly make him one of the pre-eminent twentieth-century contract scholars of the common law world.

## E. Cheshire and Fifoot, Treitel and Coote

The persistence of more traditional forms of doctrinal contract scholarship notwithstanding the challenges posed by the realists is demonstrated by the four scholars discussed next. It is no coincidence that all four were based in the Commonwealth, where the impact of realism, though still seismic, was less marked than in the US. Nor is it a coincidence that apparently Atiyah singled out the books written by Cheshire and Fifoot and Treitel for persistent criticism in his lectures at Oxford,<sup>218</sup> since the intellectual gulf between him and them was every bit as wide, if not wider, than that between Williston and Corbin. Like Atiyah, Geoffrey Cheshire and Cecil Fifoot were Oxford dons who had a wide range of scholarly interests – indeed Cheshire is best known for his seminal studies of real property<sup>219</sup> and conflict of laws,<sup>220</sup> and Fifoot as a legal historian.<sup>221</sup> Their reputations as contract scholars rest almost entirely on their influential textbook *The Law of Contract* ('*Cheshire and Fifoot*'), a work first published in 1945,<sup>222</sup> and which has so far run to 17 editions. *Cheshire and Fifoot* was the first significant challenger to the dominance of *Anson* in the

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<sup>218</sup> See Goudkamp, [chapter 14](#) of this volume, [p XXX](#).

<sup>219</sup> GC Cheshire, *The Modern Law of Real Property* (London, Butterworth & Co, 1925).

<sup>220</sup> GC Cheshire, *Private International Law* (London, Butterworth & Co, 1935).

<sup>221</sup> See, eg, CHS Fifoot, *History and Sources of the Common Law: Tort and Contract* (London, Stevens & Sons, 1949).

<sup>222</sup> GC Cheshire and CHS Fifoot, *The Law of Contract* (London, Butterworth & Co, 1945) (hereinafter referred to as '*Cheshire and Fifoot*'). The authors also published a companion casebook, GC Cheshire and CHS Fifoot, *Cases on the Law of Contract* (London, Butterworth & Co, 1946), which ran to seven editions.

English student market<sup>223</sup> and clearly filled a gap.<sup>224</sup> It seems to have been the leading textbook for some time after it appeared on the scene,<sup>225</sup> and at least until the 1960s, when the competition stiffened with the revival of *Anson* by Anthony Guest<sup>226</sup> and the arrival of Treitel's *Law of Contract*.<sup>227</sup>

The driving force behind *Cheshire and Fifoot* was clearly Cheshire,<sup>228</sup> although Fifoot's involvement doubtless explains the close attention to the historical development of the law and may also have brought to bear a more critical perspective. Cheshire's books were characterised by the building up of general propositions from the case law, which was incorporated into the text rather than being relegated to footnotes. His works were also admired for their elegant and clear style,<sup>229</sup> and the freshness of *Cheshire and Fifoot* was commended by reviewers.<sup>230</sup> The lucidity of the text may also be connected to the fact that the authors were well-established academics who

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<sup>223</sup> J Salmond and PH Winfield, *Principles of the Law of Contract* (London, Sweet & Maxwell, 1927) clearly did not thrive and made it to only one further edition (J Salmond and J Williams, *Principles of the Law of Contract*, 2nd edn (London, Sweet & Maxwell, 1945)). The book was based on materials left by Sir John Salmond on his death in 1924. FH Lawson recounted being told by a German law professor that 'it did not read like an English law book at all, but like a book of German Pandekten, so clear and even was the flow of doctrinal statement': FH Lawson, 'Doctrinal Writing: A Foreign Element in English Law?' in E von Caemmerer et al (eds), *Ius Privatum Gentium: Festschrift für Max Rheinstein* (Tübingen, JCB Mohr, 1969) 202–203.

<sup>224</sup> See FH Lawson, 'Geoffrey Chevalier Cheshire, 1886–1978' (1980) 65 *Proceedings of the British Academy* 611, 623 (a book on contract 'was badly needed', as 'all the existing books had originally appeared a long time previously and later editions still betrayed older habits of thought').

<sup>225</sup> See Atiyah (n 73) 686 ('[*Cheshire and Fifoot*] largely replaced *Anson* as the leading students' work'); GH Treitel, 'Vicissitudes of an Academic Lawyer' (2019) 26 *Zeitschrift für Europäisches Privatrecht* 133, 151.

<sup>226</sup> AG Guest, *Anson's Law of Contract*, 21st edn (London, Stevens & Sons, 1959). Guest also revived *Chitty on Contracts* and resurrected *Benjamin's Sale of Goods*.

<sup>227</sup> GH Treitel, *The Law of Contract* (London, Stevens & Sons, 1962).

<sup>228</sup> See Lawson (n 224) 623.

<sup>229</sup> See, eg, the comment about Cheshire's *The Modern Law of Real Property* that its 'peculiar excellence ... lies in its intelligibility not only to the swift but to the halt and lame': GDG Hall, Book Review (1950) 13 *MLR* 402, 402.

<sup>230</sup> See, eg, D Hughes Parry, Book Review (1949) 1 *Journal of the Society of Public Teachers of Law (New Series)* 301, 301 (review of second edition).

had taught contract law for decades;<sup>231</sup> as Warren Swain says in his chapter in this volume ([chapter nine](#)), *Cheshire and Fifoot* ‘was a work of mature reflection compiled after many years spent teaching the subject’.<sup>232</sup> For this and other reasons, the work was readily adaptable, as is shown by the success of the local editions which appeared in the 1960s in Australia<sup>233</sup> and New Zealand,<sup>234</sup> and – much later – in Singapore/Malaysia.<sup>235</sup>

Swain also makes the point that *Cheshire and Fifoot* was in the tradition of doctrinal English contract scholarship exemplified by the works of Pollock and Anson. In the preface to the first edition of the book the authors described one of their aims in publishing it as being to ‘examine the principles underlying the English law of Contract’,<sup>236</sup> a statement that nailed their colours firmly to the mast of the classical model, as did the structure of the work, which closely followed that of *Anson*. And while the reference to English law in that statement is unexceptionable – after all, it was a book about English law – the emphasis on it was echoed in the somewhat insular feel of *Cheshire and Fifoot*, which was sparing in its references to other jurisdictions. That insularity occasionally bubbled to the surface, as in the authors’ claim that the idea of bargain was ‘fundamental to the English conception of contract’, with the result that ‘An Englishman is liable, not because he has made a promise but because he has made a bargain’.<sup>237</sup> (This claim – which was presumably directed at the American tendency to define a contract as an enforceable *promise*,

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<sup>231</sup> Indeed, it seems likely that parts of the text were based on their lectures. There is a possible analogy here with another very successful textbook of the same era, Sir Percy Winfield’s *Text-Book of the Law of Tort* (London, Sweet & Maxwell, 1937), the first edition of which was published when Winfield was in his late 50s. For the suggestion that the stylistic appeal of that work may have been connected to the experience of its author, see D Nolan, ‘Professor Sir Percy Winfield (1878–1953)’ in *STL* (n 1) 179–80.

<sup>232</sup> Swain, [chapter nine](#) of this volume, [p XXX](#).

<sup>233</sup> See JG Starke and PFP Higgins, *Cheshire and Fifoot’s Law of Contract, Australian Edition* (Sydney, Butterworths, 1966) and subsequent editions.

<sup>234</sup> See JF Northey, *Cheshire and Fifoot’s Law of Contract, New Zealand Edition* (Wellington, Butterworths, 1961) and subsequent editions.

<sup>235</sup> See ABL Phang, *Cheshire, Fifoot and Furmston’s Law of Contract: Singapore and Malaysian Edition* (Singapore, Butterworths Asia, 1994) and subsequent editions.

<sup>236</sup> *Cheshire and Fifoot* (n 222) iii.

<sup>237</sup> *ibid* [XXX](#).

rather than an enforceable *agreement*<sup>238</sup> – was later described by Roscoe Pound as ‘an example of the cult of local law for the sake of its localism which has been a feature of English institutional texts from the beginning’.<sup>239</sup>) Despite its conservatism, however, *Cheshire and Fifoot* – like Cheshire’s other books – has been said to have ‘introduced a new stage in the development of [an] important [branch] of English law by raising [its] literary treatment to a higher level and subjecting [it] to reasoned criticism’.<sup>240</sup> The book was eventually taken over by Michael Furmston, who was the sole author of nine editions, and whose name was added to its title in 1986.<sup>241</sup> As is typical of the more heavyweight style of student textbook, the work considerably expanded over time, almost doubling in length between the first and most recent editions.

That last mentioned characteristic has also been a feature of Sir Guenter Treitel’s magisterial book on contract, the first edition of which was published in 1962. Indeed, Treitel’s work – though still styled as a textbook – has expanded to such an extent (it now runs to over a 1,000 pages<sup>242</sup>) that it has become difficult to classify, since the level of detail and sophistication makes it particularly useful for practitioners, but also tends to put off all but the most committed and able of students.<sup>243</sup> In any case, regardless of its somewhat ambiguous audience, the niche that *Treitel* – since 2007 under the authorship of Edwin Peel – occupies in the now saturated market of contract law texts is an important one, and it stands as a testament to the immense contribution that its author made to the law of contract in England and beyond.

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<sup>238</sup> Perhaps it was also a dig at *Anson*, a work which defines a contract as an enforceable promise: see, eg, Beatson et al (n 99) 1–2.

<sup>239</sup> R Pound, *Jurisprudence* (St Paul, West Publishing, 1959) vol 3, 218. Pound’s remark is quoted by Coote (n 111) 12.

<sup>240</sup> FH Lawson, P North revd, ‘Cheshire, Geoffrey Chevalier (1886–1978)’ in *Oxford Dictionary of National Biography*.

<sup>241</sup> MP Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract*, 11th edn (London, Butterworths, 1986). On Furmston’s contribution to contract scholarship, see A Phang, ‘Theory as Practice and Practice as Theory: The Integrated and Integral Contract Scholarship of Professor Michael Furmston’ (2014) 31 *Journal of Contract Law* 12.

<sup>242</sup> Since its twelfth edition, the work has been authored by Edwin Peel. The current edition is E Peel, *Treitel’s The Law of Contract*, 15th edn (London, Sweet & Maxwell, 2020).

<sup>243</sup> This issue was raised as early as a review of the third edition, by which time the work already stretched to almost 900 pages. See B Coote, Book Review (1971) 2 *Otago Law Review* 373, 375. See also ABL Phang, ‘Giants of Contract Law—Some Personal Reflections’ (2022) 2 *Singapore Law Journal* 1, 26–27.

Like Kessler, Treitel was born in Germany and left that country for good in the 1930s to escape Nazi persecution. Unlike Kessler, however, Treitel made the trip to his new home in England as a boy, one of the thousands of Jewish children who escaped on the famous ‘Kindertransport’.<sup>244</sup> Treitel was later educated in the common law tradition at Oxford – where, other than a brief initial stint at the London School of Economics, he spent his entire academic career – and his connections with German law and scholarship were much weaker than Kessler’s, though he did publish an important work on comparative contract law.<sup>245</sup> In contrast to Cheshire, Fifoot and Atiyah, Treitel’s scholarly writings were almost all concerned with contract, either in general or in its application to specific commercial contexts, such as overseas sales and carriage of goods by sea.<sup>246</sup> In addition to his work on numerous editions of *Chitty*, his writings on general contract law consisted of 11 editions of his textbook, six editions of a shorter expository work,<sup>247</sup> three monographs,<sup>248</sup> and a long list of shorter contributions in the form of articles, book chapters and casenotes.

As Andrew Burrows emphasises in his chapter on Treitel in this volume ([chapter 11](#)), he was a doctrinal legal scholar in the traditional mould, and his scholarly style stands in sharp contrast to that of his Oxford contemporary Atiyah.<sup>249</sup> Whereas Atiyah was an acerbic iconoclast fond of making sweeping and sometimes overstated claims about the law and its development, Treitel was measured and understated and his analysis ‘rigorous, relentless and, above all,

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<sup>244</sup> For the story of that journey and its aftermath, see GH Treitel, ‘A German Childhood 1933–1942: Persecution and Escape’ (2020) 28 *Zeitschrift für Europäisches Privatrecht* 591.

<sup>245</sup> GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988). This was described as ‘a masterly and weighty survey of an important topic’: T Weir, Book Review [1989] *CLJ* 152, 153.

<sup>246</sup> An exception is GH Treitel, ‘Jane Austen and the Law’ (1984) 100 *LQR* 549.

<sup>247</sup> GH Treitel, *An Outline of the Law of Contract* (London, Butterworths, 1975) and later editions.

<sup>248</sup> Treitel (n 245); GH Treitel, *Frustration and Force Majeure* (London, Sweet & Maxwell, 1994) and two further editions under his pen (see now E Peel, *Frustration and Force Majeure*, 4th edn (London, Sweet & Maxwell, 2021); GH Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford, Clarendon Press, 2002).

<sup>249</sup> Sadly, after an early collaboration (PS Atiyah and GH Treitel, ‘Misrepresentation Act 1967’ (1967) 30 *MLR* 369), the two men fell out and their personal relationship was thereafter strained – or perhaps more accurately non-existent: see J Goudkamp, ‘Patrick Atiyah 1931–2018’ (2020) 19 *Biographical Memoirs of Fellows of the British Academy* 149, 174.

precise'.<sup>250</sup> Treitel's writings were characterised by a 'detailed and exhaustive but succinct and clear examination of doctrine',<sup>251</sup> in which general statements were typically qualified by a long list of exceptions so as to provide a coherent and comprehensive statement of the relevant law. He had little or no interest in theory, and generally took the law as he found it, with the result that his textbook was described by Coote, in a review of the third edition, as 'a rather conservative work'.<sup>252</sup> It would, however, be a mistake to paint Treitel as a died-in-the-wool formalist. (There are echoes of Williston here, especially in Treitel's emphasis on the internal coherence of legal rules, or in other words their consistency with each other.) As Treitel's last monograph – which was based on his 2001 Clarendon lectures – shows, he was a scholar with a keen eye for the practical consequences and policy implications of legal rules.<sup>253</sup> And it is telling that when his textbook first appeared in the 1960s, it engaged much more thoroughly than its rivals with the statutory interventions that were beginning then to reshape aspects of the common law of contract.<sup>254</sup> Treitel was also far from insular, and regularly taught in US law schools, including alongside two of the co-authors of Kessler's casebook, Malcolm Sharp and Grant Gilmore, in Chicago.<sup>255</sup> Although this experience seems to have had little impact on Treitel's scholarly mindset (a realist he assuredly was not!), it did give him a good knowledge of American contract law, which was made manifest in his books on remedies and frustration, and which he could draw upon when discussing issues of English contract law.<sup>256</sup>

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<sup>250</sup> Obituary, Sir Guenter Treitel QC, *The Times* (21 June 2019).

<sup>251</sup> F Reynolds, 'Guenter Treitel 1928–2019' (2020) 19 *Biographical Memoirs of Fellows of the British Academy* 129, 135.

<sup>252</sup> Coote (n 243) 375.

<sup>253</sup> See, eg, [Treitel \(n 248\)](#) 23, 38, 118–19. As a reviewer of Treitel's book on remedies observed, '[i]f the opinions and value-judgments seem hard to distinguish from the descriptions, that is because they are so reasonable and dispassionate as to seem equally objective': Weir (n 245) 153.

<sup>254</sup> See Burrows, [chapter 11](#) of this volume, [p XXX](#). However, Treitel was sceptical about codification, which he thought would preserve the common law in aspic and inhibit beneficial developments: see Treitel (n 225) 165; [Treitel \(n 248\)](#) 4–9.

<sup>255</sup> Treitel (n 225) 155.

<sup>256</sup> See, eg, *ibid* 100–102, where he defends legislative reform of the third-party rule by drawing comparisons with the judicial reforms effected in the US.

The final scholar considered in this collection is the New Zealander Brian Coote. Like Treitel, Coote was a doctrinal scholar who considered that ‘a main purpose’ of legal scholarship ‘was assisting to improve the application of the law as actually practised’.<sup>257</sup> However, unlike Treitel, Coote never wrote a major work on contract law as a whole. Instead, his reputation rests on a combination of his early monograph on what he called ‘exception clauses’<sup>258</sup> and a large body of journal articles on a broad range of contract topics, many of which were consolidated in three collections of his work that were published in the decade before he died.<sup>259</sup> Coote also made a major contribution to the development of contract law in New Zealand through his work for the Contracts and Commercial Law Reform Committee, which resulted in several important reforming statutes.<sup>260</sup>

In Coote’s seminal book on exception clauses, he argued that these should not be understood as defences to a prima facie liability that arose independently of them – ie, as ‘merely a shield to a claim for damages’<sup>261</sup> – but instead as setting out which obligations were being assumed by the promisor in the first place.<sup>262</sup> This conclusion followed from the central underlying themes of Coote’s contract scholarship, which were that contract was a facilitative institution which enabled contract parties to assume legal obligations and concomitant liabilities, and that these were binding ‘not because they have been imposed by law *ab extra*’, but because the parties ‘have themselves assumed them’.<sup>263</sup> According to Coote, these precepts did not stand in the way

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<sup>257</sup> P Watts, ‘Emeritus Professor Brian Coote, OBE, FRSNZ, Obituary’ (2020) 36 *Journal of Contract Law* 1, 3.

<sup>258</sup> B Coote, *Exception Clauses: Some Aspects of the Law Relating to Exception Clauses for the Carriage, Bailment and Sale of Goods* (London, Sweet & Maxwell, 1964).

<sup>259</sup> Coote (n 111); B Coote (edited by JW Carter), *Contract as Assumption II: Formation, Performance and Enforcement* (Oxford, Hart Publishing, 2016); B Coote (edited by JW Carter and J Ren), *Coote on the New Zealand Contract Statutes* (Wellington, Thomson Reuters, 2017).

<sup>260</sup> On the New Zealand contract statutes, see W Swain, ‘A Reputation for Boldness: Statutory Reform of Contract Law in New Zealand’ in TT Arvind and J Steele, *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Oxford, Hart Publishing, 2020).

<sup>261</sup> Coote (n 111) 81.

<sup>262</sup> It is interesting to consider whether Coote may have influenced, or been influenced by, Glanville Williams, who famously adopted an equivalent position in relation to the criminal law: see, eg, G Williams, ‘Offences and Defences’ (1982) 3 *Legal Studies* 233. Coote’s time at Cambridge overlapped with that of Williams.

<sup>263</sup> Coote (n 111) 1.

of extensive change to the classical law of contract, though whether it would or should so change depended in part on value judgments ‘about such questions as whether and to what extent the law of contract should be used as an instrument for social or economic control’ and the appropriate limits of paternalism.<sup>264</sup>

In a broad sense, therefore, Coote’s was a value-neutral conception of contract, albeit with the caveat that the ‘one characteristic essential to a contract is that it should be a means by which legal contractual liability can effectively be assumed by the party or parties to it’.<sup>265</sup> One consequence of Coote’s theory was that he saw no point in looking for (alternative) justifications for the existence of contracts and contract law, such as ‘upholding the institution of promising, or the sanctity of the human will, or protecting reasonable expectations’.<sup>266</sup> At the same time, however, the focus on the assumption, rather than the imposition, of obligation and the attendant potential liability did in his view have concrete implications for particular contract doctrines, including not only exception clauses, but also damages for breach (where he favoured a ‘performance’ measure<sup>267</sup>) and remoteness (where he argued that the extent of liability should depend on the degree to which the party in breach had assumed responsibility for the loss in question<sup>268</sup>).

Coote’s discussion of specific issues like these was firmly within the Commonwealth doctrinal tradition, and his theory was premised on the belief (*pace* Atiyah<sup>269</sup>) that ‘contract does, in an essential respect, differ from other forms of legal obligation’.<sup>270</sup> In his chapter on Coote in this volume ([chapter 13](#)), Stephen Waddams notes that in his valedictory lecture<sup>271</sup> he described

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<sup>264</sup> *ibid* 51.

<sup>265</sup> *ibid* 50.

<sup>266</sup> *ibid* 1. Coote subjects these sorts of theories to extended critique in B Coote, ‘The Essence of Contract (Parts I and II)’ (1988–89) 1 *Journal of Contract Law* 91, 183.

<sup>267</sup> B Coote, ‘Contract Damages, *Ruxley*, and the Performance Interest’ [1997] *CLJ* 537.

<sup>268</sup> B Coote, ‘Contract as Assumption and Remoteness of Damage’ (2010) 26 *Journal of Contract Law* 211.

<sup>269</sup> Text to n 208ff.

<sup>270</sup> Coote (n 111) 10.

<sup>271</sup> B Coote, *Contract: An Underview—A Souvenir of a Valedictory Lecture* (Auckland, Legal Research Foundation, 1995).

himself as a formalist, albeit employing such a broad definition of formalism as to encompass many scholars who would no doubt reject that label.<sup>272</sup> Waddams is not convinced by the self-description and besides any such ‘formalism’ was clearly flexible and pragmatic. This is shown, inter alia, by Coote’s writings on consideration,<sup>273</sup> and more generally by his view that it would be unrealistic to expect that internal self-consistency ‘could ever be fully achieved in a system of judge-made law’ – inconsistencies were inevitable at any given moment, since ‘development and change are continuous’.<sup>274</sup> The fact that Coote was far from being a blinkered formalist is also demonstrated by his openness to insights from other disciplines<sup>275</sup> and by his close involvement with the sometimes radical statutory reform of New Zealand contract law.<sup>276</sup>

### III. Themes

In this final substantive part of the chapter we introduce a number of general themes that run through many of the other chapters of the book. These are: (1) civilian influences; (2) the relationship between England and the United States; (3) the relationship between England as ‘metropole’ and the colonies/Commonwealth; (4) the audiences of the scholars; and (5) the tension between a law of contract and a law of contracts.

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<sup>272</sup> Waddams, [chapter 13](#) of this volume, [p XXXff](#). See also the defence of Coote’s work in this respect by Rick Bigwood in Coote (n 111) vi–vii.

<sup>273</sup> See, eg, B Coote, ‘Variations Sans Consideration’ (2011) 27 *Journal of Contract Law* 185.

<sup>274</sup> Coote (n 111) 31.

<sup>275</sup> See B Coote, ‘A Law Teacher Looks at His Trade’ (1968) 6 *Alberta Law Review* 270, 279.

<sup>276</sup> On the influence of Coote’s work on contract law throughout the Commonwealth, see A Phang, ‘Contract as Assumption—The Scholarship and Influence of Professor Brian Coote’ (2011) 27 *Journal of Contract Law* 247.

## A. Civilian Influences

The question of civilian influence on the common law of contract is a complex one which has been the subject of sustained analysis elsewhere.<sup>277</sup> In this brief discussion we merely highlight some aspects of that influence which come to the fore in the chapters that follow. We have already seen that the eighteenth- and nineteenth-century English writers on contract were heavily reliant on civilian scholarship, a reliance that ‘was closely connected with the search for a principled, reasoned, ordered and “scientific” approach to law’.<sup>278</sup> Colebrooke was an extreme case in this regard, with the majority of his sources being continental in origin, and no attempt made to reconcile the claims derived from them with the English case law. By contrast, other early nineteenth-century writers tended to use civilian sources in a more limited or indirect fashion, borrowing from Pothier, for example, ‘as and when they needed to explain developments in the case law’.<sup>279</sup> Later on, Pollock and Anson also employed civilian sources instrumentally to construct an overarching theoretical framework into which carefully curated English cases could be slotted. The difficulties to which this gave rise have been painstakingly exposed by legal historians such as Catherine MacMillan,<sup>280</sup> who observes:

There was a selective borrowing or transplant of ideas inherent in this process, and the English treatise writers sought to impose these ideas upon an existing system of contract law but they struggled to relate the borrowed ideas to this law ... The resulting body of law was often untidy, as principles were presented and expressed to have been established by cases which even a cursory examination revealed to be concerned with other matters. The process was not improved by inherent weaknesses in the borrowed theories of the civilians or by the fact that these theories were stripped from legal systems premised upon different rules and objectives than the common law.<sup>281</sup>

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<sup>277</sup> A seminal discussion is Simpson (n 29).

<sup>278</sup> Waddams (n 17) 135.

<sup>279</sup> Lobban (n 45) 303.

<sup>280</sup> MacMillan (n 61). See also Simpson (n 29); Gordley (n 29) Ch 6; Ibbetson (n 23) Ch 12.

<sup>281</sup> MacMillan (n 61) 4.

The central civilian figures in this now familiar story were the Frenchman Robert Joseph Pothier and the German Friedrich Carl von Savigny. As McCunn points out,<sup>282</sup> Pothier's *Traité des Obligations*<sup>283</sup> was the primary source for Colebrooke, who cited the Frenchman on average twice per page in his treatise. In his work of 1847, Addison also commended 'the elaborate and elegant works of Pothier',<sup>284</sup> and his influence continued to be felt throughout the remainder of the nineteenth century,<sup>285</sup> even if it faded somewhat towards the end.<sup>286</sup> The emphasis on general principles in Pothier's treatise, coupled with its plentiful examples, lucid style and clear structure, made him 'a useful guide',<sup>287</sup> who tended to be relied on 'in areas where English law lacked clarity or had little answer'.<sup>288</sup> The first English contract scholar to draw extensively on Savigny and his *System des heutigen römischen Rechts*<sup>289</sup> (published in the 1840s) was Leake. However, as we have seen Savigny's greatest impact came via Pollock, who described him as 'a man of true scientific genius',<sup>290</sup> and whose reverence for his work was such that he sometimes felt it necessary to cite it in the original German on the ground that no literal translation was possible.<sup>291</sup> Pollock's use of a conceptual structure inspired by Savigny to construct an English doctrine of mistake is a classic example of civilian influence on the nineteenth-century common law of contract.<sup>292</sup> Nor

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<sup>282</sup> McCunn, [chapter three](#) of this volume, [p XXX](#).

<sup>283</sup> RJ Pothier (translated by WD Evans), *A Treatise on the Law of Obligations or Contracts* (London, Butterworth, 1806).

<sup>284</sup> C Addison, *A Treatise on the Law of Contracts and Rights and Liabilities Ex Contractu* (London, W Benning, 1847) vii (quoted by Waddams (n 17) 130).

<sup>285</sup> See Swain (n 15) 176 (Pothier cited more than 400 times in the English courts in the nineteenth century).

<sup>286</sup> See Waddams (n 35) 130.

<sup>287</sup> MacMillan (n 61) 106.

<sup>288</sup> *ibid* 104.

<sup>289</sup> FC von Savigny, *System des heutigen römischen Rechts* (Berlin, Veit und Comp, 1840–49).

<sup>290</sup> Pollock (n 74) [2fn](#) (quoted by Waddams (n 17) 133).

<sup>291</sup> See Waddams (n 17) 133–34.

<sup>292</sup> See MacMillan (n 61) Ch 6.

should we overlook Savigny's influence on Anson, even if it was 'not nearly so pervasive as it was upon Pollock'.<sup>293</sup>

Although Pothier was admittedly a huge influence on early American contract law,<sup>294</sup> overall the impact of civilian writers on US contract scholarship was perhaps more muted – Holmes in particular warned against the dangers of importing legal concepts from the civilian tradition into common law analysis.<sup>295</sup> In any case, with the twentieth-century abandonment of the search for scientific principles, the appeal of civilian sources to common law contract scholars waned, and when modern English writers sought inspiration from abroad, they generally looked across the Atlantic rather than the Channel. As Brian Simpson rather caustically put it (writing in 1975):

In contemporary treatises on English Contract law you will find little trace of this internationalism [viz, the earlier reliance on civilian writers] ... such works as Anson (in its modern form), Cheshire and Fifoot, Treitel ... and Atiyah ... only occasionally relieve their insularity with references to other common law jurisdictions; they hardly ever step outside the common law world.<sup>296</sup>

Among the scholars considered in this volume, the most important exception to the late twentieth-century disinterest in civilian thinking and sources is Kessler, of whom Gilmore observed that his 'extraordinary achievement' as a legal emigré 'was to become a common lawyer without ceasing to be a civilian'.<sup>297</sup> We have already seen, for example, that aspects of Kessler's scholarship may have been attributable to his civilian training,<sup>298</sup> and it seems plausible to suppose that his path-breaking article on contracts of adhesion was influenced by German writings in the 1920s and

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<sup>293</sup> *ibid* 171.

<sup>294</sup> See JM Perillo, 'Robert J Pothier's Influence on the Common Law of Contract' (2005) 11 *Texas Wesleyan Law Review* 267, who points out (at 267–68) that one of 23 marble relief plaques in the chamber of the US House of Representatives depicting 'historical figures noted for their work in establishing the principles that underlie American law' is a portrait of Pothier.

<sup>295</sup> See MacMillan (n 61) 164.

<sup>296</sup> Simpson (n 29) 256.

<sup>297</sup> Gilmore (n 151) 673.

<sup>298</sup> See text to nn 180–81.

1930s on standard contract terms.<sup>299</sup> Kessler maintained strong intellectual connections with the country of his birth and published in German throughout his career.<sup>300</sup> He even wrote an article on the development of German contract scholarship in which he analysed the influence of Savigny.<sup>301</sup>

## B. England and the United States

Apart from Coote, the scholars considered in this collection worked primarily in either England or the United States, and when it comes to contract scholarship the relationship between the two countries and their legal systems is a close but complex one. The same is of course true of tort scholarship, and this was a theme that we also explored in the introduction to *STL*.<sup>302</sup> We made the point there that the decline of the civil jury in most Commonwealth jurisdictions had accentuated the divide between tort scholarship in those systems and the US in the twentieth century. In contract, that distinction is less important, with the result that in this area the common ground between anglophone legal systems is greater.<sup>303</sup> However, some of the same fundamental differences are observable. One is the multi-jurisdictional nature of the American legal system,<sup>304</sup> which tends to drive scholars in a more theoretical or empirical direction,<sup>305</sup> with much of the most important doctrinal work being channelled into multi-volume treatises and *Restatements*, the scale of which is demanded by the complexity of the positive law across the various states. Another difference arises out of the American case method of teaching, which manifests itself in the

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<sup>299</sup> See Joerges (n 173, ‘History’) 181.

<sup>300</sup> *ibid* 164.

<sup>301</sup> F Kessler, ‘Some Thoughts on the Evolution of the German Law of Contracts—A Comparative Study: Part I’ (1975) 22 *UCLA Law Review* 1066.

<sup>302</sup> Goudkamp and Nolan (n 3) 33–34 (framed there as ‘the US and the rest’, ie, the US and the Commonwealth).

<sup>303</sup> Admittedly, Gilmore (n 116) 99–100 ascribes the formulation of so many issues as questions of law in the classical contract model to ‘distrust of the role and function of the civil jury’, but this claim is hard to square with the English experience.

<sup>304</sup> On this feature of the American legal landscape, see Twining, [chapter 15](#) of this volume, [p XXX](#).

<sup>305</sup> Although this tendency was more marked in the late twentieth century, it was also observable in the work of James Barr Ames, Langdell, and (to a lesser extent) Williston: see Lobban (n 45) 313.

plethora of student-oriented casebooks and the general absence of textbooks, or ‘hornbooks’. One result of these two differences is that while the American scholars considered in this collection are best known for multi-volume treatises and/or law review articles, the reputations of English contract scholars have generally rested on multiple editions of the single-volume treatises (or more latterly textbooks) that bear their names: *Leake, Pollock, Anson, Cheshire and Fifoot* and *Treitel*. As the twentieth century wore on, these differences became more marked, and, when coupled with the greater impact of realism in the US, tended to manifest themselves in a widening gap between an American emphasis on what we earlier termed ‘modernist’ contract scholarship and the survival in the Commonwealth of more ‘traditional’ contract scholarship, albeit with many counter-examples on either side of the divide.

When it comes to the interactions between English contract scholars and American contract scholars, the story is one of ebb and flow. In the early days, the links were strong, but somewhat one-sided. There were American editions of the works of Powell and Chitty,<sup>306</sup> for example, but limited attention paid in England to American scholarship. In the era of Langdell, Holmes, Pollock and Anson, the connections remained important. The vast majority of the cases in Langdell’s casebook were English,<sup>307</sup> for example, and the works of Pollock and Anson wielded ‘great influence in the United States’,<sup>308</sup> where (as we have seen) multiple American editions of those works were published.<sup>309</sup> As time passed, however, the relationship became more balanced, and dependence evolved into dialogue. The connections between Pollock and Holmes exemplify the transatlantic conversation that was taking place in the late nineteenth century on matters of contract law.<sup>310</sup> We have already seen that Pollock’s move away from the will theory towards a more objective approach was almost certainly attributable in part to the work of Holmes, but the stream of influence was not one-way. After all, it was Pollock’s definition of consideration that Holmes

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<sup>306</sup> See Simpson (n 29) 253fn.

<sup>307</sup> Farnsworth (n 104) 1439.

<sup>308</sup> *ibid* 1413.

<sup>309</sup> Text to n 125.

<sup>310</sup> For the details, see Kelley (n 10). For the wider transatlantic conversation on consideration, also involving Ames, Anson, Langdell and Williston, see Lobban (n 45) 380–82, 394–99. See too Lobban’s accounts of similar debates concerning offer and acceptance (*ibid* 346–48) and the performance of existing duties as consideration (380–82).

essentially adopted in *The Common Law*, and which eventually found its way into section 75 of the *Restatement of Contracts*.<sup>311</sup>

The dialogue continued to be a lively one well into the twentieth century, as is apparent from the publication in 1930 of an article by Corbin in the *Law Quarterly Review*, in which he argued that the English case law on trusts of a promise amounted to the equitable recognition of a third party beneficiary rule.<sup>312</sup> In the late twentieth century, however, the personal connections between contract scholars on the two sides of the Atlantic weakened, although both Trietel and Atiyah regularly taught in the US, and – unusually for an English private lawyer – Atiyah regularly published articles in American law reviews.<sup>313</sup> In any case, by now the tide of influence had decisively turned, as is shown by, for example, the impact of Corbin and Gilmore on the thinking of Atiyah,<sup>314</sup> and by the fact that in recent times English and Commonwealth scholars have tended to respond to American contract scholarship, rather than the other way round.<sup>315</sup>

### C. ‘Metropole’ and Colonies/Commonwealth

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<sup>311</sup> See Gordley (n 29) 172–73.

<sup>312</sup> AL Corbin, ‘Contracts for the Benefit of Third Persons’ (1930) 46 *LQR* 12. See further, Treitel (n 248) 51–53.

<sup>313</sup> See Goudkamp, chapter 14 of this volume, p XXX, who emphasises Atiyah’s particular interest in and admiration for American law and scholarship. Atiyah even co-authored with an American scholar a substantial comparative work on Anglo-American legal reasoning, theory and institutions: Atiyah and Summers (n 202).<sup>313</sup>

<sup>314</sup> See nn 203, 209.

<sup>315</sup> This is particularly true in the case of the relational contract scholars Macneil and Macaulay: see, eg, the essays by Campbell and Vincent-Jones in Macneil (n 183); and D Campbell et al (eds), *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Oxford, Hart Publishing, 2003). But see also J Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge, Cambridge University Press, 2013), drawing on the work of the new formalists in the US.

We also touched in the introduction to *STL* on the relationship between England as metropole and her colonies and dominions (and later with the rest of the Commonwealth).<sup>316</sup> As in the case of tort, the British Empire and its aftermath pervades the story of the common law of contract and its scholarship. The tone was set by Addison, who described the law of contract as ‘a universal law adapted to all times and races, and all places and circumstances’.<sup>317</sup> That that ‘universal law’ was *English* law was not really in any doubt. Some years after Addison’s treatise was published, for example, a judge in a New Zealand contract case said that ‘it would be a presumptuous thing in a colonial judge to over-rule the settled practice as laid down in the text books of England’.<sup>318</sup> It can readily be presumed that in the nineteenth century those ‘text books’ had even greater influence in the British Empire than they did in the United States, even if the law itself was not as uniform as might be supposed.<sup>319</sup>

The idea of a ‘universal law’ of contract underlay Colebrooke’s enterprise in writing a guide to it for colonial administrators in British India. When it came to contract law – unlike, say, family law and succession – few allowances were made for local custom and tradition, and Colebrooke simply assumed that the principles he derived from mostly civilian sources would provide a suitable framework for resolving commercial disputes between Indians. As McCunn points out, despite having an excellent knowledge of Hindu law, he cited few Indian sources, although he did seek to address practical issues that might arise in the Indian context, such as the existence of domestic slaves.<sup>320</sup> A similar approach was taken by William Macpherson when he wrote his *Outlines of the Law of Contracts as Administered in the Courts of British India*,<sup>321</sup> though

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<sup>316</sup> Goudkamp and Nolan (n 3) 34–35. See also J Goudkamp and J Murphy, ‘Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories’ in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Oxford, Hart Publishing, 2015).

<sup>317</sup> Addison (n 284) v.

<sup>318</sup> Gresson J in *Re Maclean and MacAndrew* (Otago Daily Times, 27 May 1862) (quoted by W Swain, ‘“The Great Britain of the South”: The Law of Contract in Early Colonial New Zealand’ (2020) 60 *American Journal of Legal History* 30, 41).

<sup>319</sup> For a discussion of local variations in contract law observable in nineteenth-century New Zealand, see Swain *ibid.*

<sup>320</sup> McCunn, [chapter three](#) of this volume, [p XXXff.](#)

<sup>321</sup> Macpherson (n 50).

he relied more on English texts than had Colebrooke, and incorporated into his analysis a selection of decisions of the Indian courts.<sup>322</sup> Macpherson went on to act as the secretary to the commission whose work culminated in the Indian Contract Act of 1872, legislation that was subsequently replicated in several former British colonies.<sup>323</sup> As the 1872 Act illustrates, ‘the relationship between the West and its periphery was sometimes one of interaction, mutual influence, or independent (but parallel) development’, and ‘[p]eripheries ... were often places of experimentation and innovation, including legal innovation’.<sup>324</sup> The phenomenon of reflection back from ‘periphery’ to ‘metropole’ is shown by the use which Pollock made of the 1872 Act when writing his treatise, in the preface to which he said that he had relied on it as ‘an instructive example of what can be done to consolidate and simplify English case-law’.<sup>325</sup>

After the nations of the Empire gained their independence the symbiotic scholarly relationship between England and what was now the Commonwealth continued. Hence, for example, Atiyah first established himself as a contract scholar while working in the late 1950s at the University of Khartoum,<sup>326</sup> and he later worked for four years at the Australian National University, where his inaugural lecture concerned the doctrine of consideration.<sup>327</sup> Similarly, Macneil taught contract law at the University of East Africa in Dar es Salaam for two years – indeed his first book on contract was written to support his teaching there.<sup>328</sup> It is possible that Macneil’s East African experience played a role in the development of his relational theory of contract, although, as Twining – who himself worked in both Khartoum (alongside Atiyah) and

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<sup>322</sup> On Macpherson, see MacMillan (n 61) 108–12.

<sup>323</sup> See J Minattur, ‘The Indian Contract Act: Its Wanderlust and Warmer Climes’ [1972] *Journal of the Indian Law Institute* 107.

<sup>324</sup> A Likhovski, ‘The Intellectual History of Law’ in MK Dubber and C Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford, Oxford University Press, 2018) 154.

<sup>325</sup> Pollock (n 74) vii (quoted by Lobban (n 45) 307). So impressed was Pollock by the legislation that he included its key provisions in an appendix.

<sup>326</sup> See further on Atiyah’s time in Africa, Goudkamp, [chapter 14](#) of this volume, [p XXX](#).

<sup>327</sup> PS Atiyah, *Consideration in Contracts: A Fundamental Restatement* (Canberra, Australian National University Press, 1971).

<sup>328</sup> IR Macneil, *Contracts: Instruments for Social Co-operation—East Africa* (South Hackensack, Fred B Rothman, 1968).

Dar es Salaam (before Macneil)<sup>329</sup> – points out,<sup>330</sup> he made little reference to it in his later work. Meanwhile, other Commonwealth countries such as Australia and New Zealand were slow to develop their own textbook tradition,<sup>331</sup> and there (and later in Singapore/Malaysia) the gap was filled in contract law by local editions of *Cheshire and Fifoot*.<sup>332</sup> Swain makes the point<sup>333</sup> that over time the authors of these homegrown editions became more assertive, so much so in the case of the New Zealand edition that it developed into a wholly independent work which is now the leading contract treatise in that country.<sup>334</sup> More recently, Coote had a significant influence on English contract law from his base in Auckland, while at the same time spearheading legislative developments in his home jurisdiction that were later emulated in England and elsewhere.<sup>335</sup> As a result he ‘helped to put New Zealand contract law and scholarship on the world map perhaps like no other New Zealand-based legal scholar in the twentieth century’.<sup>336</sup>

## D. Audience

The intended audiences of the contract works of the scholars considered in this collection varied widely. They of course included legal practitioners, law students and legal academics, but they

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<sup>329</sup> See W Twining, *Jurist in Context: A Memoir* (Cambridge, Cambridge University Press, 2019) chs 5–6.

<sup>330</sup> Twining, chapter 15 of this volume, p XXX.

<sup>331</sup> On the likely reasons for this in the Australian context, see Bartie (n 4) 28–29, who references the idea of a ‘universal’ common law, and the small numbers both of the law professors who would have written such books and of the law students who would have been the market for them. As for Canada, in an overview of contract and commercial law scholarship in common law Canada published in the 1980s, Leon Trakman described it as a ‘young discipline’: LE Trakman, ‘Contract and Commercial Law Scholarship in Common Law Canada’ (1985) 23 *Osgoode Hall Law Journal* 663.

<sup>332</sup> See text to nn 222–25 above.

<sup>333</sup> Swain, chapter nine of this volume, p XXX.

<sup>334</sup> See J Finn et al, *Burrows, Finn and Todd on the Law of Contract in New Zealand*, 7th edn (Wellington, LexisNexis, 2022).

<sup>335</sup> There is an interesting parallel between Coote and Sir John Salmond, who had a huge impact on the English law of tort from his base in New Zealand in the early twentieth century. On Salmond, see M Lunney, ‘Professor Sir John Salmond (1862–1924): An Englishman Abroad’ in *STL* (n 1).

<sup>336</sup> Rick Bigwood in Coote (n 111) vi.

also extended in some instances to colonial administrators, businesspeople and even the educated public. In the case of some of the early English contract scholars, such as Addison and Chitty, there is no doubt that their primary audience was legal practitioners.<sup>337</sup> Colebrooke's intended readership is also clear, if unusual:<sup>338</sup> he wrote his treatise to provide a set of principles of contract law which could be used in the adjudication of disputes by judges in the courts of the East India Company. Gilbert's unpublished treatise is a more difficult case, as it is not obvious at whom it was directed (assuming that it was originally intended for publication). According to Michael Macnair, however, 'the analytic form and the character of the work as connected text' and the 'incompleteness of the coverage of the authorities' suggest that 'Gilbert was writing for a lay or student audience, rather than for a professional audience or himself'.<sup>339</sup>

The late nineteenth-century English writers show the importance of a scholar's intended audience for the nature and style of their work. Anson clearly wrote for the (relatively new) student market, and as we have seen, this explains key features of his textbook, including its clear structure, its brevity and lack of references, and the lucid and simple way in which the law was set out. The first edition of the book was even published in a smaller format than other legal works, presumably so as to mark it out as a different kind of law book, intended for a different readership.<sup>340</sup> As AV Dicey later commented, '[t]he special virtue of the book lies in its precisely meeting the wants of a student who begins reading the law of contract'.<sup>341</sup> By contrast, as Anson himself observed, neither Leake nor Pollock 'wrote for beginners'.<sup>342</sup> Quite who they did write for is another matter. Lord Wright later said that 'Leake's book was for practitioners, while Pollock's book was for students of principles and legal thinkers'.<sup>343</sup> That may have been an over-simplification in the case of Leake, since his intended readership is not clear, and may have changed over time. Commenting

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<sup>337</sup> See Lobban (n 45) 302.

<sup>338</sup> See McCunn, [chapter three](#) of this volume, [p XXX](#).

<sup>339</sup> Macnair (n 38) 259.

<sup>340</sup> Waddams (n 17) 143.

<sup>341</sup> AV Dicey, 'Law-teaching, Oral and Written' in HH Henson (ed), *A Memoir of the Right Honourable Sir William Anson* (Oxford, Clarendon Press, 1920) 93 (quoted by MacMillan (n 61) 170).

<sup>342</sup> WR Anson, *Principles of the English Law of Contract*, 6th edn (Oxford, Clarendon Press, 1891) v.

<sup>343</sup> Wright (n 77) 154.

on the much enlarged second edition of Leake's treatise, Pollock said that 'one cannot help fearing that the gain to practitioners is a loss to students',<sup>344</sup> an observation that suggests that Leake's work was not originally perceived as a practitioner text,<sup>345</sup> even if later editions were presented in that way.<sup>346</sup> Furthermore, like Addison,<sup>347</sup> it is possible that Leake intended his treatise to be read not only by lawyers, but also by merchants and educated members of the public,<sup>348</sup> an ambition which we can safely assume was not realised. As for Pollock's own text, the ambiguity of Lord Wright's remark about it nicely captures the ambiguity of its intended audience, which seems to have been both students and practitioners. That required a difficult balancing act, and while Pollock managed to pull it off during his lifetime, after his death his work came to be 'outflanked on the one side by Chitty (for practitioners) and on the other by Anson (for students)'.<sup>349</sup>

The intended readerships of the works of twentieth-century contract scholars considered in this collection are generally obvious enough. The multi-volume treatises of Williston and Corbin were predominantly practitioner works,<sup>350</sup> though their erudition meant that they were drawn upon heavily by other scholars in the US and far beyond. The casebooks written by Corbin, Kessler and Macneil were equally clearly student works. The same was true of *Cheshire and Fifoot*, though, in a way typical of the leading English textbooks of its era,<sup>351</sup> it also came to be relied upon by practitioners and judges as a relatively concise and discursive treatment of the subject when compared with works such as *Chitty. Treitel* was also intended originally as a student text, although as we have seen it expanded considerably over time, and eventually settled in a rather ambivalent space somewhere between a student work and a practitioner work. Finally, the articles and

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<sup>344</sup> F Pollock, *Principles of Contract at Law and in Equity*, 3rd edn (London, Stevens & Sons, 1881) x (quoted by Waddams (n 17) 142).

<sup>345</sup> See also MacMillan (n 54), commenting (at 21) that while the style of Leake's work was 'initially thought more suitable to the student than the practitioner ... it soon became clear that the work was of greater value to practitioners'.

<sup>346</sup> *ibid* 23.

<sup>347</sup> See MacMillan, [chapter four](#) of this volume, [p XXX](#).

<sup>348</sup> On Leake's ambitions in this regard, see MacMillan (n 54) 11.

<sup>349</sup> Waddams (n 17) 142.

<sup>350</sup> On Williston's intended audience, see Movsesian (n 135) 267–68.

<sup>351</sup> See Goudkamp and Nolan (n 3) 36–37.

monographs of scholars like Kessler, Macneil, Atiyah, Treitel and Coote were presumably intended primarily for an audience of fellow academics, although they found their way onto many student reading lists and, in the case of Treitel and Coote (and the more doctrinal work of Atiyah), they can also be understood as forms of what Burrows terms ‘practical legal scholarship’,<sup>352</sup> targeted in part at judges and other legal practitioners throughout the Commonwealth.

## E. Contract and Contracts

Our final theme is the recurrent tension in common law contract scholarship between a law of *contract* and a law of *contracts*, or in other words between a conception of the relevant law as a unified body of generally applicable principles and a countervailing tendency to fragmentation along fault lines such as subject-matter and party identity.

Most of the early contract scholars, likely operating under civilian influence, structured their work either in whole or in part around types of contract, such as sale, lease and partnership – in England this was true of, for example, Chitty and Addison, and in the United States of Story and Parsons.<sup>353</sup> An exception is Colebrooke, whose published treatise was organised around general principles, though McCunn thinks it likely that his unpublished (and untraceable) second volume dealt with different types of contract – a compromise position latterly adopted by the editors of *Chitty*.<sup>354</sup> By contrast, the classical contract lawyers of the late nineteenth century sought to develop a general body of contract principles which were applicable across the board. In the words of Atiyah:

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<sup>352</sup> Burrows, [chapter 11](#) of this volume.

<sup>353</sup> See Horwitz (n 152) 12–13 (a typical mid-nineteenth-century American contract treatise ‘contained separate chapters on the law of sales, insurance, negotiable instruments, agents, railroads, and so forth’).

<sup>354</sup> See, eg, *Chitty on Contracts* (n 13), which has one volume on general principles and another on specific contracts.

The central idea that characterised [the works of the classical lawyers] was the *generality* of contract law, the fact that it could be stated at a high level of abstraction, and that the law applied indifferently to all kinds of contracts irrespective of the subject-matter.<sup>355</sup>

With the exceptions of Colebrooke and Macpherson – whose works were intended for a British Indian audience – Leake was the first English writer strictly to apply this idea, and to banish all discussion of particular contract types. He wrote in the preface to his treatise that it was concerned only with ‘the law of contracts in its general and abstract form apart from its specific practical applications’.<sup>356</sup> The same approach was later taken by Pollock, Anson and the American Langdell. Note, however, that Leake still wrote of a ‘law of *contracts*’. By contrast, Pollock took the ideal of an abstract general set of rules to its logical conclusion, and for the first time published a treatise on ‘the law of *contract*’.<sup>357</sup> As Waddams has pointed out, this change of terminology was significant. The use of the singular lent ‘itself more readily to a deductive approach’ and suggested ‘a high degree of conceptual unity’, whereby ‘one unified and coherent body of principles governs all contracts, whatever their nature’.<sup>358</sup> (Interestingly, however, while this usage – like its equivalent ‘the law of tort’ – became commonplace in England, and also Australia, Canada and New Zealand, it did not catch on in the US.)

The classical ideal of contract law as an abstract set of principles ‘blind to details of subject matter and person’<sup>359</sup> was the subject of sustained attack in the twentieth century. First, it came to be perceived as part and parcel of an ideology of *laissez-faire* – according to Atiyah, when you eliminated the distinction between different types of contracts and contract parties you made it ‘much harder to justify paternalist intervention which protects some parties against others’.<sup>360</sup> Second, the realists attacked it for divorcing the law from the complex reality of exchange

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<sup>355</sup> Atiyah (n 73) 400.

<sup>356</sup> Leake (n 55) v.

<sup>357</sup> There is an obvious link in this respect with Pollock’s tort scholarship, and especially his belief that there was a general principle of liability underlying the various individual torts: see Goudkamp and Nolan (n 3) 7–8.

<sup>358</sup> Waddams (n 17) 141.

<sup>359</sup> LM Friedman, *Contract Law in America* (Madison, University of Wisconsin Press, 1965) 21.

<sup>360</sup> Atiyah (n 113) 170.

transactions, which, they argued, could only properly be understood if full account were taken of the nature of the transaction and the parties to it. (This was what Llewellyn called ‘narrow issue’ thinking.<sup>361</sup>) And finally, increasing paternalism subjected the classical model to huge centrifugal pressures, as the interventions usually came in the form of legislation – or sometimes judicial implication of terms – that applied to particular contract types (housing, employment, credit, etc) or parties (such as consumers or employees). The result was that ‘the law of contract shattered like a broken mirror, and splintered into subfields’.<sup>362</sup>

This fragmentation posed a challenge to contract law scholars of all persuasions, though their response to it generally depended on where they sat on the traditional/modernist (or classical/realist) spectrum. The traditionalists, such as Cheshire and Fifoot and Treitel, stayed true to the classical model of exposition established by Pollock and Anson by devoting all the chapters in their works to general principles. By contrast, the modernists tended to compromise by maintaining a primary focus on general matters (howsoever framed) but adding some discussion of particular contract types, as in Kessler’s casebook.<sup>363</sup> One American scholar, Harold Havighurst, went further, and organised his casebook entirely around transaction types, but this proved too much for his intended readership to stomach, and the experiment ended in failure.<sup>364</sup> That failed experiment serves as a useful reminder that there is an important link between the contract/contracts question and the question of audience. A combination of general discussion with analysis of specific types of contract is likely to be of most use to a practising lawyer,<sup>365</sup> while a work organised entirely (or almost entirely) around general concepts is likely to be better suited to the classroom environment.

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<sup>361</sup> See Twining (n 114) 137.

<sup>362</sup> Friedman (n 164) 384.

<sup>363</sup> For a qualified defence by a leading modernist of a generalised ‘law of contracts’, see IR Macneil, ‘Whither Contracts?’ (1969) 21 *Journal of Legal Education* 403.

<sup>364</sup> See Farnsworth (n 104) 1434. Havighurst acknowledged his debt to Leon Green, who had organised his casebook on torts according to the context in which the claim had arisen, rather than the usual conceptual categories. On Green, see J Steele, ‘Professor Leon Green (1888–1979): Word Magic and the Regenerative Power of Law’ in *STL* (n 1).

<sup>365</sup> A point not lost on the editors of *Chitty*, or on Williston, who included in his treatise a volume on ‘Particular Classes of Contracts’: Williston (n 127) vol V.

## IV. Conclusion

In the introduction to *STL* we said that we thought it would be difficult after reading that book ‘to escape the conclusion that scholars of tort law have played a significant role in the development’ of that subject.<sup>366</sup> We have no doubt that readers of this volume will reach the same conclusion about scholars of contract law. In the case of tort, the existing literature on the influence of jurists on the law’s development was somewhat limited (albeit with some significant exceptions). The position as regards contract is otherwise, and in this chapter we have drawn extensively on the relevant scholarship. Catherine MacMillan has, for example, argued that the English law of contractual mistake was essentially the product of scholars such as Leake, Pollock and Anson.<sup>367</sup> In her words, ‘mistake as a legal doctrine was created by English theorists and not English judges’.<sup>368</sup> The influence of scholars on the development of contract law is also a pervasive theme of the work of David Ibbetson,<sup>369</sup> Michael Lobban<sup>370</sup> and Warren Swain<sup>371</sup> on the history of contract law in general, and of Stephen Waddams’ book *Principle and Policy in Contract Law*.<sup>372</sup>

A reviewer of *STL* remarked of that collection that ‘a central finding is the sheer range and diversity of forms’ that scholarly influence over legal development can take,<sup>373</sup> a conclusion we believe can also be drawn from the current volume. And as we ourselves pointed out in the introduction to *STL*, that influence is generally subtle and indirect, and frequently imperceptible.<sup>374</sup>

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<sup>366</sup> Goudkamp and Nolan (n 3) 39.

<sup>367</sup> MacMillan (n 61).

<sup>368</sup> *ibid* 215. See also Swain (n 15) 229.

<sup>369</sup> Ibbetson (n 23) chs 11–13.

<sup>370</sup> Lobban (n 45).

<sup>371</sup> Swain (n 15).

<sup>372</sup> Waddams (n 35).

<sup>373</sup> Arvind (n 2) 114.

<sup>374</sup> Goudkamp and Nolan (n 3) 39–40.

That is particularly true when it comes to arguably the most enduring channel for such influence, namely the mind of the law student.<sup>375</sup> As Atiyah has observed with regard to the English experience in particular:

By the 1920s there were a large number of barristers and even judges whose first acquaintance with the law of contract had been obtained through the pages of Anson and Pollock; and there is a tradition that ‘taught law is tough law’.<sup>376</sup>

We hope that the chapters that follow will serve as a reminder of the significance of legal scholarship in the development of the common law. In England, it was the jurists – and not the judges – who really ‘created’ the modern law of contract, and gave it its distinctive shape and structure. Similarly, in the US it was scholars such as Langdell, Holmes, Williston and Corbin who fashioned the American common law of contract.<sup>377</sup> And this phenomenon of scholarly influence on contract law was repeated throughout the common law world, from the imprint left by Coote in his native New Zealand to the role that jurists played in the drafting of the Indian Contract Act. Nor of course did this phenomenon grind to a halt when the scholars who feature in this collection laid down their pens. For even if today’s scholars of contract law have less scope than their predecessors to establish the basic parameters of the subject, their ability to shape the future development of contract law and to further understanding of contracts and contracting as legal, economic and social phenomena should not be in any doubt. But that is a story for another day.

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<sup>375</sup> See McDonald (n 2) 485 (‘[T]here can be no doubt of the indirect influence of academics and scholars on generations of students who go on to become lawyers, judges, parliamentarians and policymakers ...’).

<sup>376</sup> Atiyah (n 73) 685.

<sup>377</sup> Of course, as Twining reminds us (chapter 15 of this volume, p XXX), no such thing really exists, but, like many myths, the idea of an American common law of contract has such resonance that it has frequently shaped reality, in the form of the contract law of the individual states.