

Intention In Tension

CONTRACTS, CASES AND DOCTRINE. By Randy E. Barnett.[†] Boston, Massachusetts: Little, Brown and Company, 1995. Pp. xxxix, 1309.

Reviewed by Kellye Y. Testy*

First having read the book of myths,
and loaded the camera,
and checked the edge of the knife-blade,
I put on
the body-armor of black rubber
the absurd flippers
the grave and awkward mask.
I am having to do this
not like Cousteau with his
assiduous team
aboard the sun-flooded schooner
but here alone.

— from *Diving Into The Wreck*, by Adrienne Rich¹

I. INTRODUCTION

Just over four years ago, while I prepared to begin my first year of law teaching, one of many moments of panic struck. As I sat on the floor of my judge's chambers, surrounded by stacks of complimentary review copies of contracts casebooks, I was confounded: How was I to decide what casebook to use for my year-long contracts course? The casebook publishers had, of course, tried to make this seemingly overwhelming decision easier by identifying the distinguished law schools at which their books were being used. When I compared each publisher's list, however, I found more differences than overlaps.

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1. ADRIENNE RICH, *Diving Into the Wreck*, in *DIVING INTO THE WRECK* 22, 22 (1973).

Admittedly, the lack of uniformity at these distinguished schools came as no surprise. Fresh out of law school, I expected those brilliant, unpredictable, and fiercely independent professors to make their own decisions after all. At my home institution, I was likewise awakened to the fact that different professors used different books. Thus, the idea of institutional solidarity provided no refuge either. To my dismay, I realized that I was going to have to decide on my own what book to use, with only the vaguest notion of the relevant criteria to employ.

To make a long—and what to me was a gut-wrenching—story short, I settled on what most would perceive to be a safe course. I selected a casebook that is probably the most widely used in the country, whose author also writes one of the most influential horn-books, and which, more importantly, was currently being used by two other contracts professors at my home institution: *Farnsworth's Cases and Materials on Contracts*.² After three fairly pleasant and productive years with Farnsworth, however, I abandoned his book (with little fanfare and no gut-wrenching—but that's a story for another day)³ for one of the newest entrants in the Contracts casebook market: Randy Barnett's, *Contracts, Cases and Doctrine*.⁴ What could draw one from such a sure and safe course? What tantalizing material lies beneath the scarlet covers of Barnett's casebook? And, are there regrets and dissatisfaction that haunt this flight from a safe, well-trodden path to the new, crisp folds of a relative newcomer to the rough-and-tumble world of contracts casebooks? In the discussion that follows (names have not been changed; we are not innocents), I take on these questions and, in so doing, explore some of the strengths of Barnett's first edition, and suggest some improvements for the second.

2. E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CONTRACTS, CASES AND MATERIALS* (4th ed. 1988).

3. See Geoffrey R. Watson, *A Casebook for All Seasons?*, 20 SEATTLE U. L. REV. 277 (1997) (reviewing FARNSWORTH, *supra* note 2).

4. RANDY E. BARNETT, *CONTRACTS, CASES AND DOCTRINE* (1995).

II. A NOTE ON EVALUATIVE STANDPOINT

There are at least two obvious standpoints that come to mind when one sets out to evaluate a casebook, standpoints that to some degree mirror one of the oldest debates in contract law: objective versus subjective.⁵ One could attempt to adopt an "objective" stance, looking to what the author says he intends to do (in the preface, introduction, and teacher's manual), and evaluating whether he has accomplished those goals. On this score, Barnett looks good, perhaps because he wisely refrains from making too many claims as to what the book accomplishes. The claims he does make—that he includes fewer, but more lightly edited, cases than is the norm;⁶ that he favors "a mix of classic and very recent cases involving provocative controversies, memorable fact patterns, and public figures";⁷ that he jettisons "vexatious note material" in favor of study guide questions and hornbook references;⁸ and that he adheres to a "comprehensible and intuitive five part structure reflecting the cause of action for breach of contract"⁹—seem to be largely borne out by the text. That being said, however, I am tempted to ask what may be one of the most annoying questions a first year student hears: So what?

Although a purportedly objective stance may make sense in a standard book review, it rings particularly hollow when applied to a casebook. A casebook is written for a specific instrumental purpose: for professors to use when teaching courses by that, or a related, name. To divorce the book from its use fails to capture this dynamic process. Rather, it seems more useful to ask whether one can use the book to effectively achieve the pedagogical goals one seeks to accomplish. Granted, this more subjective evaluative standpoint somewhat decenters the book from its position of power and redistributes it to the professor and her teaching priorities and abilities, but in my view it more accurately captures the questions worth asking.

This is not to say that the author's claims as to what he seeks to accomplish are irrelevant. The author's claims may have been a driving force in making the professor believe that the casebook is one she can use as an effective tool in accomplishing her pedagogical goals.

5. See generally Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (revealing the objective versus subjective tension in contract law).

6. BARNETT, *supra* note 4, at xxx.

7. *Id.*

8. *Id.*

9. *Id.* at xxxi. The five part structure reflecting the cause of action for breach of contract is enforcement, mutual assent, enforceability, performance and breach, and defenses. *Id.*

In that respect the claims may have a vital, originating role in creating the relationships that form the classroom community.¹⁰ Rather, the author's claims are hollow in isolation. Not to put too fine a point on it too early, but if, just for instance, Barnett were to write a casebook to "prove" that a consent theory of contract "works," I may, nonetheless, use that very book as my primary tool in problematizing the concept of consent. Thus, the author's goal in writing his casebook may be accomplished by him in his classroom, or by another in her classroom, but my class is unlikely to walk away believing in a unified theory of consent in contract law.¹¹

That being said, I press on.

III. DIVING INTO THE WRECK¹²

*There is a ladder.
The ladder is always there
hanging innocently
close to the side of the schooner.
We know what it is for,
we who have used it.
Otherwise
it's a piece of maritime floss
some sundry equipment.*¹³

In discussing my choice of Barnett's casebook, I focus on two of my central pedagogical goals, and describe how Barnett's casebook has either helped or hindered my ability to accomplish those goals. Those goals are to actively assist students in (1) learning basic (accepted) contract doctrines and methods of analyzing contract issues; and (2) developing a critical stance toward law in general, and contract law in particular.

While the first goal is neither surprising nor complex, the second requires a bit more explanation. By "critical stance," I refer to my specific goal of assisting students in recognizing, understanding, and challenging the ways in which a person's class, race, sexuality, and

10. By relationships, I refer to the relationship of the professor to the text, the students to the text, the students to the professor, and the students to each other. The synergy created by the mix of all of these is what I call the classroom community.

11. My standpoint is admittedly subjective. I am fully aware of the problematic notion of the subject in these post-modern times. See generally FEMINISM/POSTMODERNISM (Linda J. Nicholson ed., 1990).

12. I have borrowed this heading from the title of Adrienne Rich's poem and book of the same name. See RICH, *supra* note 1.

13. RICH, *supra* note 1, at 22.

gender affect (and are affected by) the law, as well as my more general goal of assisting students in learning to identify and to resist assertions of power, claims of naturalness, and the seduction of simplicity. I have found Barnett's casebook an excellent tool in accomplishing both of my pedagogical goals, in particular the goal of critical thinking, although perhaps not in the way Barnett might expect or like to hear.

A. *Student-Centered and Learning Friendly*

I want my students to learn basic contract doctrines and policies, legal reasoning, and argumentative skills. One could argue persuasively that this goal could be accomplished with any of the major casebooks on the market. While I agree that that is largely true, there are many overt features about Barnett's casebook's structure and content that are particularly student and learning friendly. And while the book does not have an explicit focus on lawyering skills, much of its structure and content create excellent springboards for encouraging students to think like lawyers rather than like students, which significantly enriches their understanding of basic contract doctrine.

Consistent with his claims,¹⁴ Barnett manages to include many cases that involve provocative controversies, public figures, and memorable fact patterns. Such cases are fun to teach and certainly pique student interest. Many students, most of whom come from liberal arts backgrounds, often tell me that they expected to hate contracts because they anticipated reading about boring business situations. Starting the course with *Baby M*,¹⁵ for instance, quickly dispels that notion. Immediately, students are swept into a case with which they may be somewhat familiar (increasing their confidence level), about which they have strong feelings (generating easy discussion so that students get practice speaking in class), and which is usually well outside of the sphere most would define as the ordinary business deal (encouraging students to ponder the appropriate scope of private agreement making in society). Once the pattern of interest, excitement, and care about contract law begins, it is infectious. And because Barnett intersperses the alluring cases with more factually routine, albeit doctrinally important ones, the enthusiasm for the subject can be carried throughout the course—even after slogging through such swamp lands as the lost volume seller doctrine or the parol evidence rule.

14. See BARNETT, *supra* note 4, at xxx.

15. *In re Baby "M,"* 525 A.2d 1128 (N.Y. 1987), reprinted in BARNETT, *supra* note 4, at 1120.

While this enthusiasm toward the subject of contracts, which Barnett's case selections spurs, is a salutary one for student learning, it is not without its downsides. The worry here is that students will be left with a misshapen impression of contract law, having studied a disproportionate number of fascinating, but unusual, cases. Without a doubt, any practicing lawyer will tell you that it is far more important to be able to handle the run of the mill construction dispute than it is to be able to appreciate all the subtleties of the *Baby M* case. True enough. Still, casebooks cannot be all things for all people.¹⁶ Barnett's book is certainly less overtly focused on skills training than some,¹⁷ a criticism that is unlikely to surprise him. In fact, Barnett omits conditions from his coverage,¹⁸ even though using contractual conditions in drafting agreements to control risk is an essential lawyering skill.¹⁹ That Barnett's casebook is not more overtly skills focused does not concern me because there are many aspects of the book that lend themselves well to an increased emphasis on contract law in practice. Two key aspects, discussed below, are the casebook's organizational structure and its inclusion of significant background information on major cases and the judges who decided them.

Throughout his casebook, Barnett incorporates interesting background material on a number of major cases which enables a professor to discuss contract law in practice. For instance, Barnett includes excerpts from Richard Danzig's excellent book on the

16. One of the reasons that I chose his book despite its lack of a skills focus is that I am not particularly suited to teaching a course that prioritizes practice skills. Having done far more teaching than practicing, skill development must be largely left for another teacher. That need is met at Seattle University School of Law where we enjoy an excellent clinical program (including live-client clinics and integrative clinics) which bridges the gap between students' substantive courses and practice. In addition, many colleagues, including myself, often collaborate in the first year courses on a problem that gives the students a chance to combine two or more courses in analyzing the problem and to acquire some exposure to lawyering skills. For two years I worked with a colleague on a joint contracts/civil procedure case; this year I am working with a local attorney to give my class a practice problem that corresponds to each of the five major components of my course.

17. See, e.g., ROBERT E. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION* (1987); CHARLES L. KNAPP & NATHAN M. CRYSTAL, *PROBLEMS IN CONTRACT LAW, CASES AND MATERIALS* (2d ed. 1987).

18. Barnett does, however, include cases such as *Petterson v. Pattberg*, 161 N.E. 428 (N.Y. 1928), reprinted in BARNETT, *supra* note 4, at 395. Although *Petterson v. Pattberg* is included in the materials on acceptance, it does contain a discussion of conditions precedent that could be used to spark a discussion of conditions.

19. For work that engages the use of conditions as an important risk allocation device, see e.g., SCOTT J. BURNHAM, *DRAFTING CONTRACTS* § 10.1-.8 (2d ed. 1993).

capability problem in contract law²⁰ as well as excerpts from law review articles which examine the history of particular cases,²¹ or address a broader topic that relates to the treatment of particular cases.²² Barnett also includes biographical notes on the judges who decided each of the casebook's principal cases. There are several uses one can make out of Barnett's inclusion of this type of material, and I find it one of the most distinguishing aspects of his book. Indeed, the casebook's lack of explicit treatment of lawyering skills is ameliorated by the background materials, which provide a sturdy springboard for excursions into studying the lawyering process.

Barnett's inclusion of background material is a useful teaching tool for three reasons. First, the background material enables the professor to impress upon students that the appellate opinions that form the bulk of their first-year diet are just the tip of the iceberg. That is, the story that forms the basis of the litigation at issue is represented in a very narrow form in the final appellate opinion in the case—which is usually the one studied in law school. The background material helps students to see the immense channeling of narrative that occurs in litigation. Once this channeling is appreciated, students are well positioned to critique the process that sweeps some facts away as the case makes its way upstream. And when the kinds of facts that are swept aside, and the kinds of facts that are maintained, begin to form channels of their own from repetition, the potential for a more sophisticated critique of law is presented.²³ Likewise, Barnett's inclusion of biographical information on the judges can be used to suggest that *who* the judge is matters—a point that lawyers are keenly aware of in practice. Barnett thus provides another bridge to practice, in addition to forming the basis for a critical perspective of the law.

20. RICHARD A. DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW* 120-25 (1978), excerpted in BARNETT, *supra* note 4, at 1031.

21. See, e.g., A.W.B. Simpson, *Quachery and Contract Law: The Case of the Carbollic Smoke Ball*, 14 J. LEGAL STUD. 345, 348-369 (1985), excerpted in BARNETT, *supra* note 4, at 372 (discussing *Carlill v. Carbollic Smoke Ball*, 1 Q.B. 256 (C.A. 1892)); A.W.B. Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 293-394 (1989), excerpted in BARNETT, *supra* note 4, at 443 (discussing *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (1864)). The inclusion of this material also gives students insight into the role of several types of scholarship.

22. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992), excerpted in BARNETT, *supra* note 4, at 187; Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065, 1115-119 (1985), excerpted in BARNETT, *supra* note 4, at 140; Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WISC. L. REV. 1, 26-29, excerpted in BARNETT, *supra* note 4, at 839.

23. See *infra* Part IIB (discussing contract law's treatment of race, class, sexuality, gender).

Second, the presentation of the obscured facts of a particular litigation in the background materials allows students some initial insight into the lawyering process. In seeing how lawyers have emphasized some facts and de-emphasized others, students can start to contemplate their own roles as fact sorters and developers. Not only can the professor use this material to discuss the selection of facts as a strategic matter, but she can also emphasize the ethics of selecting certain facts over others. By this, I refer to the ethics of professional responsibility, as well as to ethics in the larger sense of choices with which one is personally comfortable. For instance, in a particular dispute (perhaps a surrogacy battle like *Baby M*) it may be in the client's best interest to bring into the light that the opposing party is a lesbian or a gay man, given that the law is still often a site of oppression for lesbians and gay men. To do so, however, may be a troubling normative choice for a lawyer who is gay or lesbian or who works to rid the legal system of this kind of oppression.²⁴

Finally, Barnett's use of background material draws attention to the human dimension of law which is often concealed in appellate opinions that, more often than not, focus on abstract rules. The story behind the case illuminates the people whose lives are touched by the decision, revealing the human elements—often tragedy, loss, and violence—that form the basis for so much of law's work.²⁵ I believe that this emphasis, once again, is an excellent springboard for projecting students from their student role into their lawyer role. The cases become part of the fabric of real persons' lives—not just convenient props for the students' study of law.²⁶ Accordingly, the background material assists students in contemplating the power they will hold as lawyers, as players in a social system that is often violative of persons even when it is arguably working "for" them. With hope, the "story" behind the cases will encourage students to reflect upon their moral and professional responsibility to use that power wisely.

24. On the relationship between narrative, critical theories, and legal ethics, see generally Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475 (1993) (part of a symposium on critical theories and legal ethics).

25. See generally ROBERT COVER, *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* (Martha Minow et al. eds., 1992) (exploring the violence of the law).

26. For instance, the inclusion of background material on *Hawkins v. McGee*, 146 A. 641 (N.H. 1929), reprinted in BARNETT, *supra* note 4, at 73 (the "hairy hand" case), reveals that even though George Hawkins "won" in the opinion in the book, he did not fare very well in life, at least in part because of the surgical operation that formed the basis for his complaint against Dr. McGee. Barnett includes the related litigation between McGee and his insurance company in this section as well, which provides students a window into an area of litigation where the real battles are often fought and shows the interrelatedness of cases. See BARNETT, *supra* note 4, at 73-82.

Just as Barnett's inclusion of background material assists students in understanding basic contract doctrine and gaining facility with lawyering skills, so too does the general organization and content of the casebook. As noted earlier, Barnett's casebook is fairly traditional in its doctrinal coverage, with all the basics (except conditions) present and accounted for.²⁷ In addition, Barnett includes a brief section on agency, which is a subsection of multiparty transactions (along with third-party beneficiary doctrine and assignment and delegation).²⁸ Nice touch, and arguably necessary given my experience teaching Payment Law, where students have little familiarity with agency concepts.²⁹

Having decided to treat the topic of agency, however, Barnett might profitably integrate it into sections where it has some cross-over effect. For instance, perhaps it would be better placed in the section on offer and acceptance, given that contract formation is done largely through agents (Barnett's stated reason for including the unit on agency in the first place),³⁰ or even placed in the section on foreseeability of damages, given its substantial entanglement with those doctrinal questions.³¹ Agency issues figure prominently not only in the classic *Hadley v. Baxendale*³² case, but also in the more modern context

27. See *supra* note 19 and accompanying text.

28. See BARNETT, *supra* note 4, at 589.

29. This may be attributable to the fact that agency is covered in some basic business organizations courses, but not in others, and to the fact that many students do not take a separate agency or agency and partnership class.

30. BARNETT, *supra* note 4, at 589.

31. Including agency materials within the foreseeability section would also serve to bolster a rather weak part of Barnett's treatment of remedies. The only foreseeability materials are *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854), reprinted in BARNETT, *supra* note 4, at 97, and *Morrow v. First National Bank of Hot Springs*, 550 S.W. 429 (Ark. 1977), reprinted in BARNETT, *supra* note 4, at 111. *Morrow* is an unusual case that concerns a breach of contract claim by Morrow, a coin collector, against the bank for the value of some coins that were stolen from his home. His theory was that the bank had promised to notify him as soon as some new safety deposit boxes were available, and that the bank's breach of that promise caused him loss. The safety deposit boxes apparently became available on August 30, the bank did not notify Morrow, and his house was burglarized on September 4. From a summary judgment in favor of the bank, Morrow appealed and lost before the Arkansas Supreme Court. The court adopted the tacit agreement test to hold the lower court on the ground that "the bank's bare promise to notify [Morrow] as soon as the boxes were available did not amount to a tacit agreement that the bank . . . would be liable for [Morrow's loss]." *Id.* at 113. While it is interesting to contrast the tacit agreement test with the *Hadley* rule, the unusual facts of *Morrow* do not provide a fertile ground for fully exploring the contours of the foreseeability requirement. This section could profit from an additional, and more modern, case discussing foreseeability. See, e.g., *Spang Industries v. Aetna Casualty & Surety Co.*, 512 F.2d 365 (2d Cir. 1975); *EVRA Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir. 1982).

32. 156 Eng. Rep. 145 (1854), reprinted in BARNETT, *supra* note 4, at 97.

where contracting parties are dealing with large corporations (or where both parties are corporations).

Other than the addition of agency and the omission of conditions, Barnett's coverage of doctrinal issues in contract law is reasonably standard fare.³³ Nonetheless, there are a couple of high points for my pedagogical purposes that require mention. More than most casebook authors, Barnett includes several jumping off points for treating the intersection of issues such as race, gender, sexuality, and class with law.³⁴ In addition, Barnett's doctrinal coverage and emphasis does a particularly good job of presenting contract law largely as a set of default rules that apply when parties do not otherwise bargain for a specific term.³⁵ By explicitly addressing the default character of many contract rules, Barnett encourages students to peep into the lawyer's role as a planner and drafter.³⁶ The lawyer's ability to "contract around" contract law (to a large degree) is second nature to one who has thought about or worked with contracts extensively, but often completely lost on first-year students who are so heavily invested in learning rules that they miss the fact that the rule might be avoided. This feature of Barnett's coverage helps ameliorate the nonpractice focus of the book in that it gives students a feel for the lawyer's use of contract as a risk allocation tool and a set of off-the-rack provisions for use when the parties do not bargain terms out for themselves. Barnett's coverage also presents the opportunity to again revisit the question of the limits of private ordering as students consider whether there are constraints on a party's ability to contract around contract law.

While Barnett's coverage is fairly standard, his ordering of the materials is less so.³⁷ As noted above, Barnett portrays his casebook

33. But see *infra* Part IIB (discussing materials that provide springboard for discussion of race, gender, sexuality, and class).

34. This feature is discussed more fully *infra* Part IIB.

35. Barnett has written extensively about default rules. See, e.g., Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL'Y 783 (1992).

36. See, e.g., BARNETT, *supra* note 4, at 157 (contracting around the default rules of damages); see also *id.* at 407 (filling gaps in assent).

37. There are many small ordering choices that I find particularly useful in assisting students learning of basic contract doctrine. Barnett includes his discussion of the pre-existing duty rule in the section on consideration, which makes sense doctrinally to me. Some texts, such as FARNSWORTH, *supra* note 2, include it in the "policing the bargain" section, instead. Because the pre-existing duty rule is, in my view, largely used to police the modification context, the latter organization makes sense from a policy perspective. From a doctrinal perspective, however, the placement in consideration makes learning easier. And once the rule is understood from a doctrinal perspective, the jump to its policy basis is a fairly easy one. Barnett might profitably

organization as "a comprehensible and intuitive five-part structure reflecting the cause of action for breach of contract: Enforcement,³⁸ Mutual Assent, Enforceability, Performance and Breach, and Defenses."³⁹ While there is much to be said for studying remedies before studying theories of obligation and mutual assent,⁴⁰ whether Barnett's approach is intuitive is perhaps questionable.⁴¹ At a minimum, the remedies-first approach is certainly not linear,⁴² which makes it not only difficult and controversial, but also the least student-friendly part of Barnett's organization. Admittedly, it is probably the least student-friendly part of my approach to teaching contracts, but I willingly make the trade-off for the long-term pedagogical benefits I perceive it

include his material on illusory promises within the consideration materials as well, given that the illusory promise is one of the few situations where consideration will be found lacking. Barnett includes illusory promises within a chapter on interpretation, which is frankly not a bad choice given that seemingly illusory promises are often found to contain more than meets the eye once a court concludes an interpretative move or two (such as implying best or reasonable efforts or implying a duty of good faith).

38. Enforcement is comprised of three chapters: Chapter One includes helpful introductory material on studying contract law (more student-friendliness), a brief section on the nature and history of contract, and a section on freedom of contract and public policy. Chapter Two includes material on conventional money damages and their limits, and a section on liquidated damages, punitive damages, and arbitration clauses (even more attention to alternative dispute resolution and contract law would be beneficial). Chapter Three, entitled "Other Remedies and Causes of Action," includes specific performance (containing extensive and interesting materials on contracts for personal services), restitution, and tortious interference with contract. Chapter Three could be significantly improved by including a discussion of other causes of action that blur the contract/tort line such as fraud and misrepresentation. I defer the materials on restitution and tortious interference until I have covered the basic theories of contractual obligation (and would presumably defer other contract-related theories of obligation until that time as well were Barnett to include more of them). Another suggestion would be to add to this section on "other causes of action," but to move it to Part III on enforceability so that the students might more fully grasp these as choices in their lawyer's arsenal of civil obligation weapons. If this were done, I would suggest moving the material on implied and express warranties from the performance chapter to the section on theories of obligation as well. This move would then provide a perhaps more realistic view of the way lawyers think about litigating a case and provide a place to explicitly problematize the idea that there are, or have to be, distinct boxes called "contracts," "torts," and "property."

39. BARNETT, *supra* note 4, at xxxi.

40. Once again, it is an orientation that allows focus on the lawyering process. When a client comes in to discuss her case, she is often focused on the end she desires, the remedy. So, too, does a lawyer keep that end in sight as she makes her way through the maze of litigation, deciding what cause of action to assert, and whether its elements are satisfied. One may wander endlessly in that maze without first having an idea of the end goal being sought.

41. Intuition, of course, is quite subjective. The remedies-first approach seems intuitive to me in much the same way that a child who wants a ball and is learning to walk sees the ball and then, in going after it, figures out how to get there, always with the ball in sight.

42. A linear approach would arguably place the issues of contract formation, enforceability, and performance and breach prior to remedial issues.

to hold.⁴³ Apparently Barnett and I are simpatico on this cost-benefit analysis, so I find no fault with this ordering decision. Barnett includes a textual discussion of the reasons for adopting this approach to ameliorate its potential disorienting effect.⁴⁴ This candor with students is a welcome reprieve from other texts which, through their silence on the issue, can leave students with the impression that this ordering is the only "right" one, or make students wonder if they are the only one who finds the approach somewhat befuddling. In general, Barnett's short textual introductions to each section are helpful road maps for students to follow as they try to mesh one section with the next.⁴⁵

Another interesting organizational choice is Barnett's placement of materials on freedom of contract and public policy at the beginning of the book.⁴⁶ This choice breaks Barnett's goal of holding to a five-part structure reflecting the cause of action for breach of contract. The rest of his materials on defenses to contractual enforcement appear at the end of the book.⁴⁷ If this move is any measure, then Barnett should resist structure more often. There are many pedagogical benefits to taking an early look at public policy limits on contracting, an approach I employed prior to using Barnett's book.⁴⁸ First, the materials raise what ought to be a theme running throughout a course on contracts: Are there limits to the concept of private ordering, and if so, what are they? It is easy to lose sight of this basic, but central,

43. The merits of the remedies-first approach have been discussed elsewhere. See, e.g., E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1436-37 (1987). I will not repeat those arguments here, but shall only note that on balance I have found the arguments in favor of this approach more compelling than those against it. In addition, emphasizing the law's felt consequences on person's lives is an important goal for my teaching. Thus, an early look at what contractual enforcement means serves this goal of revealing law's violence. See Robert Cover, *Violence and the Word*, in COVER, *supra* note 25, at 203.

44. BARNETT, *supra* note 4, at 71.

45. In addition to the pointed, helpful textual discussions throughout the casebook, in Chapter One, Barnett provides a helpful textual discussion for students regarding the structure of the book, the various dimensions of law (theory, doctrine, facts), and a suggested approach to briefing cases. See BARNETT, *supra* note 4, at 3-9. I appreciate this material because it reduces the number of items I feel compelled to address the first day of class and allows me to move on to the substantive material more quickly.

46. See BARNETT, *supra* note 4, at 22-69.

47. See BARNETT, *supra* note 4, at 1061-1292 (chapters on capacity, misrepresentation, duress, undue influence, unconscionability, mistake, impossibility and impracticability).

48. The casebook is accorded presumptive authoritative status by students. Students are often skeptical of supplementary materials, and often do not treat them as seriously. This is particularly true if the supplemental materials raise issues that can be characterized as nontraditional. In addition, I gain credibility from having these materials in the text rather than in a supplement. See *infra* text accompanying note 87.

question as the course meanders its way through a host of doctrinal quagmires.⁴⁹

To begin with an examination of this question creates a touchstone for its frequent re-examination throughout the course. And because Barnett has the other policing doctrines at the end of the course, it allows one to come full circle. To look back at the initial examination of this question as the course concludes provides students with an opportunity to reflect on how much they now know and, perhaps more importantly, how much remains to be understood. It also provides a rather neat bit of closure (as well as evidence that one might profitably begin learning contract law at any point on a circle and be able to make his way 'round'), which is likely important for first-year law students who may be reeling slightly from classroom discussions aimed at revealing the law's internal inconsistencies and timeless conflicts.

While for me this tidiness is but a small branch I am willing to hold out in a churning sea, I sense that it means more to Barnett. Here, our intentions regarding the casebook may diverge most.⁵⁰ I suspect that Barnett, a well-known proponent of a consent theory of contract,⁵¹ finds this last section on policing doctrines further evidence that his consent theory of contract works. The policing doctrines he covers can be explained as necessary doctrines that ensure that the consent given in a contractual exchange is the type of consent that the law wants to enforce (invalidating, for instance, consent given under duress, or as the product of misrepresentation or mistake). The section on defenses can also be explained as evidence that the consent theory that Barnett propounds will not have unduly harsh effects.⁵² Just look, after all, at all the doctrines we have that ensure that we enforce only the right kinds of consent. How (too) safe, how (too) tidy, how

49. Most casebooks pay insufficient attention to the fact that private ordering is often subject to public regulation. Contracts casebooks, by and large, present contract law as a wholly private affair. This is troubling on many levels; I will mention two. First, many contractual arrangements are subject to a host of public regulation, so it is deceptive. Consider corporations, partnerships, attorney-client relationships, marriage, domestic partnerships and adoptions. Second, this emphasis on the private is primitive in a time when the public/private dichotomy has been seriously called into question.

50. There is, of course, a vast amount of literature that engages the question of authorial intention and the degree of primacy it ought to be accorded. See, e.g., UMBERTO ECO, *THE ROLE OF THE READER* (1979).

51. See generally Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) [hereinafter Barnett, *A Consent Theory*]. See also BARNETT, *supra* note 4, at 652 n.45 (listing a bibliography of his writing on consent).

52. For evidence of this explanation, see Barnett, *A Consent Theory*, *supra* note 51, at 282 nn. 48-49.

(too) grand! Needless to say, I think the ideology of consent needs much more examination. While I find much that is appealing about Barnett's consent theory,⁵³ I am immensely skeptical of the notion that one has discovered, or can discover, any one theory that fully explains or should fully explain contract law. At this juncture, I believe that a unified theory of contract law is unrealistic, and perhaps harmful.⁵⁴ Having an avowed consent theorist as the author of one's casebook,⁵⁵ however, makes it significantly easier to problematize the concept of consent and the ideology of freedom of contract. With the consent theme everywhere in the casebook, and reified into its basic structure, one does not have to stretch far to engage it.⁵⁶

This is the place.

*And I am here, the mermaid whose dark hair
streams black, the merman in his armored body*

We circle silently

about the wreck

we dive into the hold.

I am she: I am he⁵⁷

Our philosophical differences aside, I believe that Barnett and I share at least one key value—deep concern for student learning. Like the helpful background material that Barnett provides, other features

53. For instance, as one who works in the area of law and sexuality, the idea of consent has been a core concept in defining a line of demarcation against state interference. Furthermore, in contract law specifically, the ideologies of consent and freedom of contract provide potentially useful constructs for persons (such as gays and lesbians) who seek to insulate their lives from the effects of laws that render those lives invisible or problematic. For instance, gays and lesbians often use contracts to attempt to alter inheritance laws and other laws that do not respect their familial status, or use relationship contracts as a substitute or alternative to marriage laws. See generally Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511 (1990).

54. This statement, of course, calls out for substantial explanation that is beyond the scope of this review. For now, see Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219 (1995); and look for Kellye Y. Testy, *Two or Three Things I Don't Understand* (forthcoming 1997) (manuscript on file with the author).

55. Barnett does make several disclaimers in the text about the appropriateness of that forum for advocating a particular theory, see, e.g., BARNETT, *supra* note 4, at 652 ("A casebook is probably not the place to advocate a particular and controversial solution . . ."). And while Barnett is an accomplished scholar, his materials also evidence one who is a dedicated teacher. In addition to the student-centered orientation of the entire casebook, Barnett's teacher manual reveals one who puts an enormous amount of thought and energy into teaching. I confess that I have yet to be able to cover all that his teaching notes indicate he covers (although, of course, I cover some issues he does not).

56. I am not the first, of course, to "teach against" a text. See, e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, 32 J. LEGAL EDUC. 591 (1982); James Boyle, *Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003 (1985).

57. RICH, *supra* note 1, at 24.

of Barnett's book are student friendly, which greatly assists me in my goal of assuring that students learn the basic doctrinal and theoretical aspects of contract law. Indeed, there is enough that is interesting and difficult about contract law that I feel no need to place more obstacles in the way of my students learning the basic "black letter" doctrines. My desire is that a book be user-friendly enough that students can do the basic learning on their own, and then come to class to discuss the more challenging aspects of doctrine, the more interesting clashes of policy, and the more compelling critiques of accepted doctrinal tenants and policy objectives.⁵⁸ Barnett's format makes some strides in this regard. For instance, the casebook includes "study guide" questions before the principal cases that give students guidance in seeking to pinpoint the important aspects of those cases. This is particularly useful at the start of the first year when students are largely adrift in separating the legally relevant from the legally irrelevant.⁵⁹

Barnett provides study guide questions in lieu of the more traditional "notes and questions" that usually follow a principal case or end a section of a casebook. While most teachers know that many interesting and challenging questions can be raised in a notes and questions format, students often find that approach overwhelming and irritating. Indeed, most professors find the questions posed rather irritating given that they are often seemingly unanswerable even from the professor's viewpoint, and the teacher's guide rarely provides any guidance. While the study guide questions in Barnett's casebook could arguably benefit from some expansion (some border on cryptic),⁶⁰ the approach is a sound one. Students will often give much more thoughtful answers, thereby enriching class discussion, if they have had an opportunity to reflect on a question rather than having it sprung upon them in class.

A final user-friendly learning tool that Barnett's casebook includes is excerpted provisions from the Uniform Commercial Code and the Restatement (Second) of Contracts, which he reprints at the end of a section that engages those provisions. While it is certainly convenient to have the text of the UCC or Restatement in the textbook, for ease of reference, there are some drawbacks to this helpful gesture. First,

58. Barnett's convenient hornbook references at the end of each section also helps students' class preparation and digestion of basic doctrine.

59. One can certainly critique the law's sorting process in this regard. See *supra* text accompanying note 23.

60. See, e.g., BARNETT, *supra* note 4, at 334 ("Is there a difference between Judge Hand's and Justice Traynor's theories of promissory estoppel that accounts for the different outcomes of these two cases? Or do they differ about something else?")

and perhaps most serious, is that the code provisions are out of context. That is, one of the key features of the UCC is that it is a code—it was written as a integrated unit (at least each article arguably was, and each is integrated with the general provisions of Article 1). Rather than giving students much experience parsing through a code, however, Barnett's reprinting tends to leave students mystified about where the code provisions came from and how they relate to other provisions. This can, of course, be remedied by requiring students to purchase a supplement that contains a full version of the UCC (or at least a fuller version, perhaps most of Articles 1 and 2). In a cost-conscious student body, however, that is certainly not a popular move when many of the provisions that will be studied are printed in the text, albeit in a jumbled order.

My own pet peeves aside, I have found Barnett's casebook to be an even better tool than I expected for my goal of assisting students in learning contract doctrine. It is student friendly in a number of respects, which propels student learning outside of class with a resultant enrichment of class discussions, and it is also a sturdy vehicle for enriching those discussions by propelling students into the lawyer's role that they will soon occupy.

B. Critical Perspectives

*I go down.
Rung after rung and still
the oxygen immerses me
the blue light
the clear atoms
of our human air.
I go down.
My flippers cripple me,
I crawl like an insect down the ladder
and there is no one
to tell me when the ocean
will begin.⁶¹*

In addition to my basic goal of helping students learn the basic and accepted tenets of contract law, I also seek to develop and nurture a critical perspective toward law in general and toward contract law in particular. I confess that often times these goals seem to conflict, especially when my critical reflex surges forth before the class has

61. RICH, *supra* note 1, at 22.

absorbed the basic doctrine. This is, of course, part of the trauma of the first year—the attempt to learn the law while everyone about you is poking holes in it. For one like me, who occasionally does find these two goals in tension, a fairly traditional and comprehensible casebook is a comfort. And as discussed above, Barnett's book is on solid ground in this respect. Surprisingly, however, Barnett's casebook has also turned out to be quite a gem for my goal of developing students' critical perspectives. In this regard, however, Barnett's casebook sometimes serves more as a source of friction than as a source of comfort.

One of the components of my goal of engendering students' critical perspectives is to assist students in recognizing, understanding, and challenging the many ways in which law addresses (or fails to address) issues of class, race, sexuality, and gender. I privilege this goal because of my belief that law is, should be, and always will be, entangled in social and moral reasoning.

Barnett's materials include little in the way of critical theories of law. There is no explicit treatment of any of the many critical perspectives on traditional contract law except for a brief excerpt from Mary Joe Frug's feminist analysis of a contracts casebook.⁶² Really, the only theorist who gets to speak in his or her own voice in the casebook is Barnett himself.⁶³ Barnett notes in his preface that those professors who desire to emphasize more theoretical perspectives can assign his supplement, *Perspectives on Contract Law (Perspectives)*,⁶⁴ in addition to the text. While *Perspectives* does include several helpful law and economics pieces,⁶⁵ thus bolstering the casebook's lack of

62. Mary Joe Frug, *ReReading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065, 1115-19 (1985), excerpted in BARNETT, *supra* note 4, at 140. While I am pleased that Barnett includes some of Frug's work, this excerpt (devoted to the Shirley McClaine case) is so short as to be rather misleading about the scope of her article. It is also not the strongest part of the article, which may set up an easy critique of her work. Moreover, because Frug's article is widely cited, I worry that it may be too easy to include a short excerpt from it and "check off that box."

63. See BARNETT, *supra* note 4, at 631-54. Here Barnett provides a textual discussion of the six core principles of enforceability (will, reliance, restitution, efficiency, fairness, and bargain) and then "integrates" them with his consent theory. *Id.* at 651-54. To be fair, Barnett does note that his "organizational scheme is not the only way to divide up the world. Others have been presented by Moris Cohen and by John Calamari and Joseph Perillo." *Id.* at 632 (footnotes omitted).

64. RANDY E. BARNETT, *PERSPECTIVES ON CONTRACT LAW* (1995) [hereinafter BARNETT, *PERSPECTIVES*]. Interestingly, the supplement is dedicated to Lon Fuller. For Fuller's influence on another casebook, see Sidney DeLong, *An Agnostic's Bible*, 20 SEATTLE UNIV. L. REV. 295 (1997).

65. See, e.g., BARNETT, *PERSPECTIVES*, *supra* note 64, at 38, 50 (excerpts from RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 117-120 (4th ed. 1992); *Id.* at 42 (excerpt from

material on that perspective, it adds only a short excerpt by Patricia Williams in the way of critical theory.⁶⁶

Although Barnett's casebook lacks materials on critical theory, it surpasses most casebooks with its fodder on issues of race, class, sexuality and gender. Although I long for the day when casebooks routinely treat these issues directly,⁶⁷ Barnett's book provides several springboards one can use to dive into these turbulent waters.⁶⁸ For instance, if one is so inclined, the public policy materials (*Baby M*⁶⁹ and *Johnson v. Calvert*⁷⁰) are excellent vehicles to discuss all of these issues. On the one hand, it is a blessing that these materials appear first in the casebook, because it gives the professor a chance early on to establish a pattern of discussing issues of race, gender, class and sexuality. On the other hand, the early placement makes it difficult to tackle all of these thorny issues because the students are still struggling with basic tasks like briefing cases, and have yet to gain confidence and trust in themselves, the professor, and each other. Students can also get suspicious that they are not learning "the law" and may yearn for more rules and doctrine, particularly if students in other sections have started out with a rule-bound subject like offer and acceptance. Those in class who are uncomfortable talking about gender, race, class, or sexuality may get hostile and peg the professor as a "liberal" who is not going to teach them what they really need to know about contract law. Barnett's organization helps ameliorate this concern somewhat because students are thrown into remedies immediately after a short look at public policy—which certainly feels like law to the students who were worried.

Daniel Friedman, *The Efficient Breach Fallacy*, 18 J. LEG. STUD. 1, 1-8 (1989)); *Id.* at 52 (excerpt from Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 275-279, 285-287, 296-298 (1979)); *Id.* at 289 (excerpt from Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293-306 (1973)); *Id.* at 332 (excerpt from Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEG. STUD. 1, 2-18, 32 (1978)).

66. See BARNETT, PERSPECTIVES, *supra* note 64, at 215-17 (excerpting Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L.L. REV. 401, 406-08 (1987)).

67. For a recent entrant to this market niche, see AMY KASTELY ET AL., *CONTRACTING LAW* (1996).

68. I acknowledge that discussing these issues can be difficult, even risky. Still, I believe it is necessary and desirable to do so. My confidence in this regard has been bolstered by many conversations with my students who prefer the explicit treatment of these issues over keeping them silenced.

69. 525 A.2d 1128 (N.J. 1987) reprinted in BARNETT, *supra* note 4, at 1120.

70. 851 P.2d 776 (Cal. 1993) reprinted in BARNETT, *supra* note 4, at 55.

Likewise, the extensive materials that Barnett presents on contracts for personal services, which include cases such as *Lumley v. Wagner*,⁷¹ *Duff v. Russell*,⁷² *Dallas Cowboys v. Harris*,⁷³ *The Case of Mary Clark, A Woman of Colour*,⁷⁴ *Bailey v. Alabama*,⁷⁵ and *Lochner v. New York*,⁷⁶ lend themselves well to a discussion of race, class and gender. With some exceptions,⁷⁷ women appear in many of the expected places in Barnett's casebook, making frequent appearances in the cases Barnett chooses for the materials on duress,⁷⁸ misrepresentation,⁷⁹ capacity,⁸⁰ unconscionability,⁸¹ and promissory estoppel.⁸² This is in addition to standby characters such as Shirley McClaine⁸³ and Lucy, Lady Duff Gordon,⁸⁴ whose portrayals of

71. 42 Eng. Rep. 687 (Chancery Div. 1852), *reprinted in* BARNETT, *supra* note 4, at 222.

72. 14 N.Y.S. 134 (N.Y. 1891), *reprinted in* BARNETT, *supra* note 4, at 229.

73. 348 S.W.2d 37 (Tex. 1961), *reprinted in* BARNETT, *supra* note 4, at 241.

74. 1 Blackf. 122 (Ind. 1821), *reprinted in* BARNETT, *supra* note 4, at 218. The concern with this case, however, is that it gives a misleading vision of the courts' treatment of race because the court discharges a woman of colour from her contract of indenture. Some students may be tempted to read this case as proof that the law was not and is now not racist. Still, I prefer to have the material there to work with, engaging that worry explicitly in class discussion, rather than having the material make issues such as racism appear to be nonexistent. The case contains many statements that provoke excellent discussion. *See, e.g., id.* at 219 ("We shall, therefore, discard all distinctions that might be drawn from the colour of the appellant.") These statements provide an excellent vehicle for discussing the question of whether issues such as race, class, gender and sexuality ought to "matter" in the law. *See also, Bailey v. State of Alabama*, 219 U.S. 219 (1911), *reprinted in* BARNETT, *supra* note 4, at 247, 249 ("We at once dismiss from consideration the fact that the plaintiff in error is a black man.").

75. 219 U.S. 219 (1911), *reprinted in* BARNETT, *supra* note 4, at 247.

76. 198 U.S. 45 (1905), *reprinted in* BARNETT, *supra* note 4, at 254.

77. *See e.g., Mistletoe Express Service v. Lucke*, 762 S.W.2d 637 (1988), *reprinted in* BARNETT, *supra* note 4, at 128 (a female plaintiff is the owner of a freight company); *Duff v. Russell*, 14 N.Y.S. 134 (1891), *reprinted in* BARNETT, *supra* note 4, at 229.

78. *See, e.g., Silsbee v. Webber*, 50 N.E. 555 (Mass. 1898), *reprinted in* BARNETT, *supra* note 4, at 1125.

79. *See, e.g., Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968), *reprinted in* BARNETT, *supra* note 4, at 1115; *In re Baby "M"*, 525 A.2d 1128 (N.J. 1987), *reprinted in* BARNETT, *supra* note 4, at 1120.

80. *See, e.g., Ortelere v. Teachers' Retirement Board of the City of New York*, 250 N.E.2d 460 (N.Y. 1964), *reprinted in* BARNETT, *supra* note 4, at 1070; *Brooke Shields v. Gross*, 448 N.E.2d 108 (N.Y. 1983), *reprinted in* BARNETT, *supra* note 4, at 1095.

81. *See, e.g., Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445 (D.C. Cir. 1965), *reprinted in* BARNETT, *supra* note 4, at 1156.

82. *See e.g., Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. 1959), *reprinted in* BARNETT, *supra* note 4, at 823; *Ricketts v. Scothorn*, 77 N.W. 368 (Neb. 1898), *reprinted in* BARNETT, *supra* note 4, at 806; *Alden v. Presley*, 637 S.W.2d 862 (Tenn. 1982), *reprinted in* BARNETT, *supra* note 4, at 892.

83. *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689 (Cal. 1970), *reprinted in* BARNETT, *supra* note 4, at 132.

84. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917), *reprinted in* BARNETT, *supra* note 4, at 429.

women have been noted elsewhere.⁸⁵ The only known homosexual to make an appearance in the book is Donald Odorizzi, who is arguing undue influence to attempt to rescind a contract of resignation he entered into with his employer (a school board) when he was arrested for homosexual activity.⁸⁶ I explicitly focus on these issues, encouraging students to confront this disproportional representation in particular classes of cases. Left undiscussed, however, I worry that the casebook could be used to foster, even subconsciously, stereotypical attitudes about women, persons of color, and gay men and lesbians.

As noted earlier, however, I prefer having the springboards Barnett provides (however unsettling they may be) to not having them at all. Having the raw material in the casebook, on which students center, provides me with some comfort, especially when the casebook is a standard one—one you can easily assign without raising eyebrows. Because so much primacy is given to the text used in a course, it is often safer to at least ground a critique in the text, even though that critique moves significantly past any critical issues the text raises. This is particularly true for a professor who may be (or perceive herself to be) at risk because of factors such as age, tenure status, gender, sexuality, race, disability, or even an unconventional teaching approach.

*First the air is blue and then
it is bluer and then green and then
black I am blacking out and yet
my mask is powerful
it pumps my blood with power
the sea is another story
the sea is not a question of power
I have to learn alone
to turn my body without force
in the deep element.
And now: it is easy to forget
what I came for
among so many who have always
lived here⁸⁷*

85. See Frug, *supra* note 62; see also MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 87-95, 102-04, 189-94, 65-66, 176-77 (1992).

86. The charges against Odorizzi were later dismissed. See *Odorizzi v. Bloomfield School District*, 54 Cal. Rptr. 533 (1966), reprinted in BARNETT, *supra* note 4, at 1146.

87. RICH, *supra* note 1, at 23.

A second component of my goal of engendering students' critical perspectives is the general desire to encourage students to resist power. This resistance entails questioning what goes unquestioned (the "natural") and fighting the common urge to mask complexity. Students begin law school with instincts for passivity,⁸⁸ often accepting what courts do without critical assessment, leaving pronouncements of professors unchallenged, and generally bowing to assertions of power.

I seek more resistance.

I do not want to churn out students who are complacent and overly trusting in the face of power. One common way to model this resistance is to encourage students to question the rationale of courts, an approach which usually takes hold fairly promptly and sticks if properly nurtured. This technique, however, still leaves many assertions of power uninterrogated.

The casebook itself can provide a useful site for interrogation. Because students accord so much primacy to the text, the power of inclusion and exclusion in the casebook demands reflection.⁸⁹ Barnett's casebook helps me reach this goal because of what it is not. Barnett's text does not explicitly confront the many unresolved (unresolvable, I would argue) tensions in contract law. Contract law's ambivalence is not confronted directly, perhaps because Barnett believes it can be resolved (with his consent theory). Surfacing the many tensions in contract law, without making an effort to necessarily "resolve" all of those tensions, provides an occasion for the professor to resist the power of a casebook which encourages a unified vision of contract law. This process also provides a tangible example of resisting the seduction of simplicity, for it would, of course, be easier if these tensions would only work their way into a neat and tidy theory. For me, however, one of the alluring features of contract law is its constant struggle to mediate frequently conflicting values. I seek to reveal these tensions, not to mask them.

88. The source of this passivity is an interesting question. One could, of course, look to the structure of society, and the structure of law school for possible hints, but the subject is too vast and disconcerting for treatment here.

89. Of course, a professor should also be critical of her own choices, for those are also significant assertions of power (and can be more significant when the professor gives the casebook author a secondary role in her course).

*I came to explore the wreck.
The words are purposes.
The words are maps.
I came to see the damage that was done
and the treasures that prevail.*⁹⁰

A further part of my efforts to encourage students to resist assertions of power is to encourage students to dispel the "naturalness" of a variety of contingent social forms. By that I mean the process by which we attribute a natural quality to a particular form, then experience our everyday lives through this constructed lens, which reinforces the original perception of naturalness. The "naturalness" of genetics as determinants of parenthood is an example of this process; so is the "naturalness" of heterosexuality; so is the "naturalness" of bargain and consent as determinants of contractual enforceability; and so is the "naturalness" of race, sex and gender as meaningful categorization concepts. Of course, there are others.

The ideology of "naturalness" is, indeed, a powerful one. To dispel the acceptance of the concept of naturalness, I use the cases as vehicles for exploring various visions of how the world is and how it ought to be. Barnett provides plenty of material for this purpose, particularly with his inclusion of the public policy materials,⁹¹ his extensive treatment of the various theories of obligation, and his inclusion of cases such as *Marvin v. Marvin*⁹² and *Posner v. Posner*⁹³ which concern promises between persons in intimate relationships. My use of these materials encourages students to see the potential of social transformation through law. My hope is that in connecting law and society in this way, students will care more about what they do because of a critical self-awareness that their actions (and inactions) have real consequences. Each argument they make (or fail to make), each case they litigate (or fail to litigate), each step they take (or fail to take) as lawyers either promotes or impedes that transformative process.

90. RICH, *supra* note 1, at 23.

91. See *supra* notes 46-49 and accompanying text.

92. 557 P.2d 106 (Cal. 1976), reprinted in BARNETT, *supra* note 4, at 655.

93. 257 So. 2d 530 (Fl. 1972), reprinted in BARNETT, *supra* note 4, at 664.

III. CONCLUSION

Barnett may well have intended a different purpose for his book than the purpose for which I use it. But that is a risk he accepted when he consented to have Little Brown publish his casebook. Overall, he has created an extraordinarily useful tool for teaching. I hope that in revealing my use of that tool, I have not made him regret his consent. Although there are indeed many things one might hope to find in a casebook, what I hoped to find was a springboard—a place from which to dive and explore the wreck. And when all is said and done, Barnett's casebook does just that. It provides a surface that is both sturdy enough and springy enough to dive into contract law and explore its damage and its treasures. As such, Barnett's casebook is a learning tool of the highest order. It allows me, and I believe my students, to visit, to explore and to marvel at the many sites within contract law that need to be investigated and interrogated.

*We are, I am, you are
by cowardice or courage
the one who find our way
back to this scene
carrying a knife, a camera
a book of myths
in which
our names do not appear.*⁹⁴

94. RICH, *supra* note 1, at 24.