Reflections on Barnett’s *Contracts, Cases and Doctrine*


Reviewed by Michael B. Kelly

On my shelf, I count nineteen different casebooks covering contracts, not counting older editions or multiple versions of a book. The doctrines they introduce, primarily to first-year students, differ very little. The Uniform Commercial Code does not differ from text to text, though the extent the authors advert to it varies. The common law doctrines do not differ significantly, though the cases chosen to illustrate them vary, as does the extent of reliance on the Restatement (Second) of Contracts as a summary of those doctrines. Consideration and reliance, material breach and repudiation, duress and fraud, expectation, and reliance and restitution interests all emerge from every text. The subjects appear in different orders. The cases differ (sometimes). But on the whole, every book treats the same basic components of the law—components that have not changed much in the last ten years, no matter what the publishers of new editions may want us to think.

The wealth of available materials drives authors to distinguish their casebooks from the rest of the pack. Some books choose new formats, such as McKinnon’s looseleaf approach1 or the newly arrived electronic casebooks.2 Some explore a particular theoretical approach to contract law, such as Scott & Leslie’s focus on law and economics.3

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2. The electronic version of Barnett’s casebook arrived the day I submitted this review. I do not have enough experience with it to venture comments at this time.

and MacNeil's focus on a relational theory of contract law. Some seek to organize the material differently, such as Dawson, Harvey & Henderson's innovation putting remedies at the beginning of the book, an approach others now follow.

In the quest for novelty, I fear that one vital component has received less emphasis than it deserves: pedagogy. I do not mean to imply that authors pay no attention to pedagogy. On the contrary, I suspect every author has some pedagogical purpose that motivates, at least in part, the creation of new materials. But often those pedagogical purposes misfire in execution. Among other problems, lack of training in education may undermine good intentions, pedagogical idiosyncrasies may emerge, other purposes may interfere with pedagogical goals, or collaborations (contemporaneous or posthumous) may produce mixed pedagogical messages. These difficulties do not destroy the substance of the contract law presented in the texts. But the materials chosen often do not facilitate teaching first-year students.

Randy Barnett's Contracts, Cases and Doctrine surmounts these difficulties. It presents a relatively straightforward set of teaching materials, aptly chosen for modern teaching techniques. Careful exposition of fundamentals permits professors to use class time more productively. The concentration on fundamentals also frees the professor to choose the specific elaborations she finds most valuable for the class or the material.

I. DESCRIPTION

Barnett's casebook is longer than many: 1292 pages, excluding tables and indices, but including a short (eight page) introduction. The length results, at least in part, from the inclusion of material other texts sometimes omit. Some of the material is optional. Agency and tortious interference with contract are not essential to understanding contract law, but they can be important additions if other courses no longer cover these topics. In other sections, Barnett offers an opportunity to explore a doctrine in more depth than other casebooks typically do. The choices of topics naturally reflect Barnett's interests:

8. The material teaches more quickly than the page count might suggest. I covered 1,150 of those pages—400 more than I had ever covered with the text I used before Barnett. Both texts were used in a six credit, two semester course.
using injunctions to enforce personal service contracts (five cases, two case excerpts, forty-three pages total) and using intention to be legally bound to decide which contracts to enforce (Chapter Ten, seventy-five pages, in addition to references in three other chapters covering consideration and reliance). The topics themselves may not require coverage this extensive. But extensive materials draw students beneath the surface of these topics. In this way, the casebook helps professors reveal some of the complexity underlying judicial opinions. Barnett injects the same opportunities in other, less-extensively covered topics by giving students more of the opinion, an opinion following remand, excerpts from articles on the context of the dispute, or one more case than is common in other texts. Barnett uses the additional pages to good purpose.

The organization is well considered, though not entirely conventional. The basic structure begins with remedies, then proceeds through assent, enforceability (consideration), performance and breach, and concludes with contract defenses. Barnett makes several interesting judgments in placing subjects within this framework. Public policy limits on the enforceability of promises appear in the introductory chapter, not the section on defenses. Interpretation appears in the section on assent, drawing parallels between the existence of an agreement and the meaning of the agreed terms. Multiparty contracts (third party beneficiaries, assignment, delegation, and agency) also appear in this section, rather than being tacked on at the end of the book. Barnett devotes extensive coverage (four chapters) to consideration, beginning with a chapter on the theoretical underpinnings, followed by more traditional chapters on consideration and reliance surrounding a chapter entitled "The Intention To Be Legally Bound." The chapters on performance and breach cover the traditional topics: good faith, warranties, prospective nonperformance, material breach and substantial performance. The chapters on defenses are divided into capacity, improper means (fraud, duress, undue influence, and unconscionability), and failure of basic assumptions (mistake, impracticability, and frustration).

Each unit (with a few exceptions) proceeds in a standard format. Barnett introduces each case or article with study questions, things for students to consider as they read the selection. The cases themselves

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are presented with only occasional notes or comments at the end. After two or three readings (often including an article providing contextual material), Barnett quotes pertinent sections of the Uniform Commercial Code or the Restatement (Second) of Contracts, sometimes with comments or illustrations. The frequent inclusion of the Uniform Commercial Code makes it easy to incorporate that material into the basic course on contracts. References to three major hornbooks conclude each section.\(^\text{10}\)

The case selection emphasizes the classics, though modern developments are thoroughly represented. Barnett reveals the origins of most doctrines, sometimes with excerpts from scholarly works, but often with the leading cases. The historical flow of the law emerges clearly from the materials. The cases are uniformly well edited and well chosen.

Barnett also prepared a thorough teaching manual for use with the casebook. It contains complete lesson plans for every unit in the text and for many portions of the companion volume, *Perspectives on Contract Law.*\(^\text{11}\) The lesson plans are in outline form, usually beginning with a question and exploring the expected answers. The teaching manual is available on disk for those who want to import these outlines to their word processing program and edit them for use in class.

II. PEDAGOGICAL VALUE

Barnett's materials offer a number of pedagogical advantages over other materials. The structure of the materials facilitates the productive use of class time. The absence of clutter empowers professors to direct their course along avenues they find most valuable. In discussing these two qualities, I find a third point emerges. The depth of materials makes it harder for students to treat the law at a superficial level. While not discussed separately, this aspect of the book deserves note.

By including excerpts from the UCC and the Restatement in almost every section, Barnett frees class time to explore the use of or the rationale for the existing rules. The book does not ask students to

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11. Randy E. Barnett, *Perspectives on Contract Law* (1995) [hereinafter Barnett, *Perspectives*]. This work provides extensive excerpts from law review articles, designed to explore the rationales for the doctrines covered in the casebook—any contracts casebook, not just Barnett's.
try to discern the prevailing rule from a sequence of judicial opinions. Rather, it lays rules out and illustrates their application with cases. Students come to class with a better grasp of the fundamentals. This frees the professor to explore the nuances of the material. Class time can be devoted to honing more important skills: the ability to apply the rule to different situations, the ability to evaluate normative justifications for the rule, and the ability to frame arguments that might produce better rules or exceptions in subsequent litigation.

Some professors may not see this as an advantage. The presence of the UCC or Restatement will not aid professors who want to focus their course on common-law induction—deriving rules from an array of cases. (Barnett's decision to put these excerpts at the end of each unit will not keep students from reading the rule before the professor can tease it out in class.) But then, very few casebooks today are well suited for this technique. Some casebooks reduce student exposure to excerpts from the UCC or the Restatement (or even cases that quote them). But they rarely contain enough different cases (even counting note cases) to give students sufficient data points from which to induce the law.

12. Dawson's casebook strikes me as a perfect example of this pedagogical approach. Dawson et al., supra note 5. Its extensive use of note cases packed with variations or even contradictions of principal cases offers a wealth of opportunities for distinguishing cases and explaining which facts caused the variations. My limited knowledge of Kessler, Gilmore & Kronman suggests it belongs to the same genre. Friedrich Kessler et al., Contracts: Cases and Materials (3d ed. 1986).

13. For example, in Chapter 4 (Policing the Bargain) of Farnsworth & Young, citations to the Restatement (Second) of Contracts are relatively rare, let alone quotations of the rules presented in the Restatement. See E. Allan Farnsworth & William F. Young, Contracts: Cases and Materials 324-482 (5th ed. 1995). References to the UCC are more common, but require students to find the text in a supplement in order to evaluate summaries of the rule or questions concerning how it would apply to particular cases. The chapter on contract defenses in Mckinnon, supra note 1, is similarly sparing in citation to the Restatement. Students can surmount these difficulties, if professors demand that students read all pertinent provisions of the UCC and the Restatement before class. By making the provisions part of the text, Barnett makes it more likely that students will meet this demand.

14. Induction requires more than one or two bits of data. Students can appreciate the importance of variations on the facts only if cases (or at least hypotheticals) present a sufficient array of situations in which the new facts take on importance. Fewer cases would suffice for a doctrine where courts produced uniform results across an array of factual situations. Factual nuances would not produce different results, so there would be no purpose in studying the facts that might lead a court to vary the outcome. Such bright-line rules are relatively rare today, at least in common-law decisions. Where they exist, they offer little reason for extended study, particularly if a professor's objective is to teach the techniques of common-law induction. Students are unlikely to learn sensitivity to subtle variations of facts in a context where courts attach no weight to these differences.
The dearth of casebooks suited to common-law induction reflects a decline in the importance of this skill relative to other legal skills. I do not attribute the demise of the Socratic Method to diminished student tolerance for teaching techniques that hide the ball.\textsuperscript{15} The common law itself is in decline. Codification has eroded the number of fields where primary lawmaking results from common-law methods. More and more, students must learn to take an authoritative text (usually a statute or administrative regulation) and apply it to a problem.\textsuperscript{16} Divining the rule from cases remains useful, but not central, to the practice most students will face. Anthony Kronman’s mourning for The Lost Lawyer\textsuperscript{17} may reflect the passing of common-law induction. Exposure to more cases might help students develop the “good judgment” and “practical wisdom” Kronman misses.\textsuperscript{18} To prepare students for practice today, however, teaching materials should emphasize, not merely include, skills of statutory construction and application.

Arguably, contract law is not the appropriate course in which to introduce statutory application. The UCC has codified sales of goods, but that subject frequently is covered in a specialized upper-class course. The common law remains significant for most contracts in the vast majority of states. Thus, focusing the class on common-law techniques is a plausible choice.

In a traditional first-year curriculum, however, contracts affords an excellent opportunity to introduce statutory techniques.\textsuperscript{19} Contracts should not become exclusively devoted to statutory application in the manner of, say, tax. But the UCC provides ample opportunities to apply a statutory text. Even the Restatement, while not a statute, provides rules that can be explored in the same way we explore statutes. Neither torts nor property, other staples of the first year, seems as well suited to the task. Until the curriculum adapts to

\textsuperscript{15} I do not mean to assert that asking students to think through problems for themselves hides anything. But students may perceive it as such, particularly in this context, where the American Law Institute has performed much of the induction in creating restatements of the law.

\textsuperscript{16} I am familiar with the contention that no text can ever be authoritative. But courts often treat texts as authoritative. Students who will practice law, rather than teach it, must study the techniques for using statutes to support their clients’ positions, including, perhaps, the techniques for deconstructing the text when their clients’ fates so require.


\textsuperscript{18} KRONMAN, supra note 17, at 12.

\textsuperscript{19} Other courses, particularly Criminal Law, also can introduce statutory techniques. Civil Procedure, once it gets past jurisdiction, is a likely candidate. On balance, however, first-year courses are dominated by the common law. Introducing statutory techniques in a substantive, private-law, civil-law course helps restore equilibrium to the curriculum.
changes in modern practice, contracts professors should consider helping students prepare for practice in a world of codes.

Sadly, many casebooks are caught in a pedagogical middle ground, not well adapted either to common-law induction or to statutory application. They fail to lay out the existing doctrine with sufficient clarity to allow students to use that as a starting point for further discussion. Nor do they contain enough case materials to permit a meaningful development of inductive reasoning as practiced in the common law. Rather than permitting a professor to use the materials in either manner, these sources undermine each approach. The lack of clarity forces a professor to devote some time to identifying the rule before effort to apply it can begin. But the sparse materials preclude a meaningful exercise in inductive reasoning. Thus, for all their substantive merit, these materials suffer severe pedagogical disadvantages.

Paradoxically, Barnett's casebook may facilitate common-law induction better than many others. Barnett occasionally provides several cases on the same doctrine. These units offer an opportunity to practice the skills of common-law induction. One example has already been mentioned: the extended material on the use of injunctions to enforce personal service contracts. Interestingly, Barnett does not include Section 367 of the Restatement in this section, leaving ample room for deriving the rules from the cases. Another opportunity—my favorite for introducing this skill—arises when comparing Mills v. Wyman to Webb v. McGowin. Here the Restatement, though clear, may miss important distinctions between the cases. Thus, Barnett's materials may offer sufficient opportunities to explore common-law induction, though it may not satisfy a professor intent on devoting the entire course to this skill.

Barnett's materials shine, however, when used as a springboard for problems or for an exploration of the policies underlying the rules. Barnett lets the professor choose which avenue to pursue. He does not provide a series of problems in each section, nor (with some excep-

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20. In an age of hornbooks and commercial outlines, omitting the rule entirely may merely slow efforts to discover black letter rules, not prevent them. But impelling students toward hornbooks does not teach useful legal research skills. The time students spend searching for and reading rules omitted from the text would be more productively spent thinking about legal problems to which the rule might be applied and how the problems should be resolved.

21. 3 Pick. 207 (Mass. 1825), reprinted in BARNETT, supra note 7, at 688.

tions) does he offer extensive policy analysis in the text. I miss problems or hypotheticals that would allow students to explore variations before coming to class. But I find that gap easy to fill from old exams. Note problems after each case would improve the text, but perhaps not enough to justify added length. Given a choice between note problems and sacrificing the depth of material presented in order to make room for them, Barnett’s choice is sound. I do not miss notes exploring the policies underlying the rules. The Perspectives supplement provides ample opportunity to explore these topics. Moreover, I find it useful to ask students to reason their way through these issues. (While common-law induction is in decline, reasoned policy analysis remains vital to arguing many appellate cases.) The text provides the basic framework, facilitating elaboration in either or both directions.

Do not misunderstand my praise of the casebook’s fundamentals: it is not devoid of theory or of problems. One entire chapter (entitled “Principles of Enforceability”) explores the theoretical basis for enforcing promises, succinctly expounding decades of academic efforts to rationalize the law’s decisions about which promises to enforce. The next three chapters follow up on these theories with cases that exemplify their operation and allow students to see how each plays a role in contract case law. Article excerpts at strategic points, while primarily focused on placing cases in context, often inject theoretical concerns into the reading. The cases themselves frequently discuss the policy concerns in explaining the preference for one rule or result over another. But compared to many other recent casebooks, Barnett devotes more of the reading to cases, statutes, and sections of the Restatement. He lays the foundation upon which classroom discussion may build. The professor retains the freedom to design whatever structure she desires upon this foundation.

23. BARNETT, PERSPECTIVES, supra note 11.

24. One of my colleagues prefers a text that includes policy analysis. He finds students resist these topics unless the text introduces them. Endorsement by the author reduces the tendency for students to dismiss the discussion as professorial digression. Between the supplement and the sections in which Barnett plunges into policy concerns, the book establishes from the outset that the study of law is not limited to memorizing rules. In particular, beginning the book with a chapter covering public policy limits on freedom of contract should set a tone in which conflicting policies play a prominent role in appellate decisionmaking.

25. See, e.g., BARNETT, supra note 7, at 858-66 (excerpts of articles by Barnett & Becker, Gilmore, and Farnsworth on the role of reliance in the enforcement of promises).

I find this absence of clutter a strong advantage of the casebook. The book empowers professors. It allows them to determine the direction the course will take. Many postmodern casebooks constrain professors by proselytizing for a particular slant on contract law. Others clutter the text with so many points of view (of uneven worth) that they hamper efforts to help the class form a coherent picture of contract law. Barnett's text will not preclude a professor from adopting either approach. Proponents of the one true way or of the value of every academic viewpoint can pursue those educational ideals from this casebook. But selecting the Barnett casebook does not dictate the choice. The value of these teaching materials remains available to all, not just those who share a specialized view on contract law.

The absence of clutter should not be confused with the absence of insight. As with many casebook authors, Barnett illuminates contract law via the organization of subjects and the choice of cases. I was particularly impressed by the decision to group assent and interpretation. The link between the questions "Did the parties agree?" and "To what did the parties agree?" emerged effortlessly here, elucidating both issues more effectively than usual. The author's insight emerges quite clearly in his careful and extraordinarily thorough exposition of the various bases for enforcing promises. The decision to begin with remedies, though not unique, helps reveal the central role played by the question "How should the law respond to this broken promise?" Too many authors allow students to overlook the inextricable link between contracts and restitution.

The flexibility of the materials permits professors to pursue alternative organizations. I differ to teach most contract defenses

27. "Absence" may be too strong a word. I could quibble with one or two of the excerpts Barnett chose. But they are easy to skip without diminishing the overall wealth of material to which students are exposed.

28. Barnett's is not the only casebook to juxtapose assent and interpretation. See, e.g., LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW (6th ed. 1996); DAWSON ET AL., supra note 5. Having not used either of these texts, my impression that Barnett makes the link clearer may reflect greater familiarity with Barnett rather than any substantive difference between the texts.

29. Even when the law decides a promise should not be enforceable (e.g., due to fraud), remedies such as restitution may be available. Deciding not to enforce a promise does not equate to denying a remedy, only to denying expectation-based recovery. If I may inject a word of advice to beginning contract teachers: Start the course with remedies. When I started teaching contracts, I did not follow this advice. I was absolutely certain that starting with remedies was a bad idea. That was a mistake. I have seen the light.
immediately after consideration.\(^{30}\) I prefer to teach excuses (impracticality and frustration) in connection with performance and breach (because these defenses do not affect the validity of the original transaction, but only the obligation to continue performing). And I prefer to teach assent after consideration, when options are easier for students to understand.

Barnett's materials worked perfectly in the order I selected. The units are sufficiently self-contained that they can be rearranged to suit idiosyncratic preferences such as mine. Each unit begins and progresses in a logical manner that does not dictate a particular organization. Barnett has not eliminated the fundamental dilemma of contract teaching: no matter where you start, students still need to know something else before they can understand that unit. But Barnett has not interwoven the units inextricably. Rather, they remain as distinct as the subject permits.

## III. CONCLUSION

Randy Barnett has prepared excellent pedagogical materials. The casebook facilitates the valuable use of class time. The book's clarity permits students to master much of the material before class, allowing professors to devote their time to honing and elaborating on the basic framework. The directions of elaboration are not dictated by any political slant in the text. Rather, the clean presentation of fundamentals leaves professors free to move classroom discussion in any direction they desire. The wealth of material exceeds that of shorter casebooks but remains surprisingly manageable within normal course constraints. Professor Barnett has not cured the common cold or made legal education an effortless task (for either students or professors). But he has eliminated any need to struggle against a casebook's viewpoint or its gaps. These materials permit professors and students to cooperate in their joint enterprise: education.

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\(^{30}\) Consideration rests on the inference that each party values what she will receive more than what she will give in exchange for it. The law's decision not to question the adequacy of consideration rests on the assumption that each person is capable of deciding for herself the value of the things exchanged. Contract defenses explore the situations where that assumption may not hold true. Juxtaposing them lends coherence to the study of consideration.