

**BARNETT**

**CONTRACTS**

**Cases  
and  
Doctrine**



**Lewis, Brown  
and Company**

---

# CONTRACTS

## *Cases and Doctrine*

**Randy E. Barnett**

*Professor of Law*

*Boston University Law School*



**Little, Brown and Company**

***Boston***

***New York***

***Toronto***

***London***

**Copyright © 1995 by Randy E. Barnett**

All rights reserved. No part of this book may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems without permission in writing from the publisher, except by a reviewer who may quote brief passages in a review.

**Library of Congress Catalog Card  
No. 94-79726**

**ISBN 0-316-08076-4**

RRD

**Published simultaneously in Canada  
by Little, Brown and Company (Canada) Limited  
Printed in the United States of America**

---



# CONTRACTS

---

## **EDITORIAL ADVISORY BOARD**

**Little, Brown and Company**  
**Law Book Division**

**Richard A. Epstein**

James Parker Hall Distinguished Service Professor of Law  
University of Chicago

**E. Allan Farnsworth**

Alfred McCormack Professor of Law  
Columbia University

**Ronald J. Gilson**

Charles J. Meyers Professor of Law and Business  
Stanford University  
Marc and Eva Stern Professor of Law and Business  
Columbia University

**Geoffrey C. Hazard, Jr.**

Sterling Professor of Law  
Yale University

**James E. Krier**

Earl Warren DeLano Professor of Law  
University of Michigan

**Elizabeth Warren**

William A. Schnader Professor of Commercial Law  
University of Pennsylvania

**Bernard Wolfman**

Fessenden Professor of Law  
Harvard University

***To my wife, Beth, for making this book possible,  
and my children, Laura and Gary,  
for making it necessary.***

---

# PREFACE

In the beginning there was the textbook. It consisted of explanatory text. Students studied contracts largely on their own using treatises such as those by Blackstone and Kent, or summaries of these treatises written by learned practitioners. Next came the casebook. It consisted of cases. Casebooks were developed for teaching contracts in the university classroom setting using the “case method.” Then came the multivolume modern specialized treatises, the Restatements, the Realist Revolution, the Uniform Commercial Code, and, most recently, an explosion of legal scholarship with an increasing emphasis on legal theory.

As contracts casebook authors struggled to cope with each of these developments, contracts casebooks were transformed into an amalgam of highly edited cases and “squibs,” fragments of law review articles, excerpts from the Uniform Commercial Code and the Restatement — and, of course, the ubiquitous “note material.” The idea was to integrate the diverse sources of contract law in a single tightly edited volume. However, this evolution from casebook to integrated snippets of material has resulted in several undesirable consequences.

First, contracts teaching materials are now predigested. Practicing lawyers and legal scholars must scan whole cases, whole articles, and whole statutes to glean the information relevant to their problem. Unfortunately, to get everything into a single volume, cases, articles, and other materials are so heavily edited that students are not required to sift through the materials themselves. The scanning has already been done for them by the casebook author. Rather than gleaning the message of a case or article, the challenge posed to students and professors by today’s casebooks is to decipher the casebook *author’s* message hidden in the structure of the materials.

Further, because highly edited casebooks inevitably take on a heavy dose of their authors’ views of contracts, novice professors are forced either to learn and accept the authors’ viewpoint or to swim heroically against the tide. Experienced professors with independent minds are less likely to engage in fighting the casebook and are more likely to supplement it with their own materials, perhaps eventually abandoning the casebook altogether. While it is inevitable that the au-

thor's views will be reflected in any casebook, the more heavily edited and integrated a casebook is, the more difficult it becomes for teachers to project to students their own views of contract.

Finally, to make room for more cases about complex commercial transactions, contracts casebooks have increasingly abandoned the classic cases that contracts professors still debate to this day. Complicated commercial fact patterns make contracts seem remote from the life experience of average first-year law students, who are required to take the course, but who may or may not be interested in pursuing careers practicing commercial law. As a result, contracts professors are at a competitive disadvantage with their colleagues who teach seemingly more engaging first-year subjects such as criminal law or torts.

This book charts a different course. It contains far fewer cases that are more lightly edited than has become the norm. In addition to commercial transactions, I have favored a mix of classic and very recent cases involving provocative controversies,<sup>1</sup> memorable fact patterns,<sup>2</sup> and public figures.<sup>3</sup> These are cases that lend themselves to discussing both basic contract doctrine and the broad philosophical, economic, and political implications of adhering to these legal rules and principles.

In place of vexatious note material, students will find "Study Guides" before most cases and, after each topic, "Reference" citations to the most popular and respected contracts treatises.<sup>4</sup> In this way, students receive useful questions and suggestions *before* they read a case and ready access to more comprehensive and authoritative explanations of the material than is possible in a casebook. Each section also includes relevant provisions of the Uniform Commercial Code and the Restatement (Second) of Contracts.

Although this appears to be a standard-length casebook, the appearance is deceptive. Substantial space is devoted to liberal excerpts from the fascinating scholarship that has been written about the historical development of contract law and the facts behind many of the most famous contracts cases. These and other "background read-

1. For example, surrogacy agreements, failed vasectomies, involuntary servitude, palimony claims, sexual harassment, reporters' promises of confidentiality, and children's rights.

2. For example, Chevy Corvettes, Carbolite Smokeballs, custom stereos, oil embargoes, cancelled coronations, football players, opera singers, college catalogues, employment manuals, computer software, and pregnant cows.

3. For example, Shirley Maclaine, Robert Reed, Brooke Shields, Jack Dempsey, Lee Marvin, Lillian Russell, and Elvis.

4. References are provided to E. Allan Farnsworth, *Contracts* (2d ed. 1990), John D. Calamari & Joseph M. Perillo, *Contracts* (3d ed. 1987); John E. Murray, *Murray on Contracts* (3d ed. 1990).



ings” — such as those concerning the ethical behavior of the lawyers in the case — can be assigned to enrich the student’s understanding of the cases and to stimulate a deeper classroom discussion than cases and statutes alone. They also illustrate that opinions of appellate courts are often surprisingly incomplete and that one’s sympathies for the parties may shift upon learning more about the facts.

Nonetheless, because the background material included here is easier for students to read and takes far less class time to cover than a comparable volume of cases, this book can more readily be adapted to shorter courses or, in longer courses, supplemented by other materials. For example, those who wish to teach contract theory by means of excerpts from legal scholarship may also assign the anthology *Perspectives on Contract Law*.<sup>5</sup> While presenting a greater diversity of longer excerpts than is possible in a casebook, its coverage and structure are designed to meld harmoniously with that of this book.

In contrast to the complex and idiosyncratic organization of some other casebooks, a great effort was made to adhere to a comprehensible and intuitive five-part structure reflecting the cause of action for breach of contract: Enforcement, Mutual Assent, Enforceability, Performance and Breach, and Defenses. While I explain in the introduction to Chapter 2 why I decided to begin the book with enforcement or remedies, the open structure permits professors to easily reorder these topics however they prefer. And those who wish to assign fewer pages to their students will find it relatively easy to tailor the text to their needs and interests. Both parts and chapters tend to begin with introductory material and end with refinements to the basics. Simply omitting these pages and all background material reduces the length of the text to approximately 620 pages — without omitting *any* of the basic doctrine.<sup>6</sup> One would then be left with a pure old-fashioned casebook, albeit with Study Guides, References, and relevant U.C.C. and Restatement sections.

*Randy E. Barnett*

January 1995

5. Randy E. Barnett, *Perspectives on Contract Law* (1995).

6. This figure assumes the omission of Chapters 1, 2C, 3C, 7, 8, 9A, 10, 11D, 12B, 13A, 14, and 16C and all background material. (But what a pity that would be!)

---

# ACKNOWLEDGMENTS

This book would not have been possible without the assistance of a great many persons. First are the wonderful people at Little, Brown. Their commitment to excellence by means of repeated peer reviews of the original proposal and successive drafts immeasurably improved the final product. Special thanks are due to Carol McGeehan, who originally conceived of this project, Betsy Kenny, who ably assisted her in shepherding it from conception to completion, and Tony Perriello, who deftly edited the manuscript. I owe a great debt as well to the professors who gave selflessly of themselves as anonymous reviewers of the manuscript: Lisa Bernstein, Lissa Broome, Scott Burnham, George Cohen, Richard Craswell, David Dow, Steve Knippenberg, Andrew Kull, Warner Lawson, Gregory Maggs, Dennis Patterson, Laura Stein, and Elizabeth Warren. Although I do not know who of them suggested which improvements to the text, I do know that, as a group, they functioned for me as a coauthor — looking over my shoulder to ensure that the book responded to the diverse needs and preferences of other contracts teachers. In addition, I received helpful suggestions from Ian Ayres, Sheldon Halpern, and Anthony Jon Waters. Many improvements to previous drafts of this book were stimulated by class discussion with my contracts students at Northwestern University, Harvard Law School, and Boston University School of Law. Finally, I wish also to thank my extraordinary research assistants: Dan Brown at Chicago-Kent College of Law (Class of 1994) and, at Boston University, Saba Khairi (Class of 1995), Kristin Taylor, Andrew White, and Kathleen Eagan (Class of 1996). Kristin, Andrew, and Kathleen spent countless hours proofreading the manuscript and comparing it with the original materials. And Kristin is solely responsible for researching and writing most of the wonderful judicial biographies that give us a sense of the men and women who struggled both to decide the cases before them and to justify their decisions. The idea to include judicial biographies in a casebook was innovated by Professor Curtis R. Reitz and a few of his biographies are included here as well. The cases and materials on legal ethics in Chapters 6, 7, and 15 were suggested by the W. M. Keck Foundation's project on legal ethics, which is administered by Geoffrey

Hazard, Jr. and Susan Koniak. Finally, I wish to express my gratitude for the research support I received as a Norman & Edna Freehling Scholar at the Chicago-Kent College of Law and from the Boston University School of Law.

I also wish to thank the following authors and publishers for permitting me to include excerpts from these works:

- American Bar Association, excerpts from Model Rules of Professional Conduct. Copyright © 1993 by the American Bar Association. Reprinted with permission. Copies of this publication are available from Member Services, American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611.
- American Law Institute, Restatement (Second) of Contracts. Copyright © by the American Law Institute. Reprinted with permission.
- American Law Institute, Uniform Commercial Code. Copyright © by the American Law Institute. Reprinted with permission.
- Anderson, Eric G., A New Look at Material Breach in the Law of Contracts, 21 U.C. Davis L. Rev. 1073 (1989). Copyright © 1988 by The Regents of the University of California. Reprinted with permission.
- Barnett, Randy E., A Consent Theory of Contract, 86 Colum. L. Rev. 269 (1986). Copyright © 1986 by Columbia Law Review. Reprinted with permission.
- Barnett, Randy E., and Becker, Mary E., Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations, 15 Hofstra L. Rev. 443 (1987). Copyright © 1987 by Hofstra Law Review. Reprinted with permission.
- Bennett, James, G.M. Settles Suit Over Plant Closing, New York Times, April 15, 1994. Copyright © 1994 by The New York Times Company. Reprinted with permission.
- Bernstein, Lisa, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992). Reprinted with permission.
- Blinkoff, Samuel, Note, Contracts: Acceptance of an Offer for a Unilateral Contract: Effect of Tender, 14 Cornell L.Q. 81 (1928). Copyright © 1928 by Cornell University. All rights reserved.
- Calamari, John D., and Perillo, Joseph M., Contracts (3d ed. 1987). Copyright © 1987 by West Publishing Company. Reprinted with permission.
- Corbin, Arthur L., Corbin on Contracts (1963 ed.). Copyright © 1963, 1993 by West Publishing Company. Reprinted with permission.
- Danzig, Richard, *Hadley v. Baxendale*: A Study in the Industrialization of the Law, 4 J. Legal Studies 249 (1975). Copyright © 1975 by Journal of Legal Studies, University of Chicago Law School. Reprinted with permission.

- Danzig, Richard, *The Capability Problem in Contract Law* (1978 ed.). Copyright © 1978 by Foundation Press. Reprinted with permission.
- Dobbs, Dan B., *Introduction to Equity and Equitable Remedies*. Reprinted from *Handbook on the Law of Remedies*, copyright © 1993 by West Publishing Company. Reprinted with permission.
- Epstein, Richard, *Pleadings and Presumptions*, 40 U. Chi. L. Rev. 556 (1973). Copyright © 1973 by University of Chicago Law Review. Reprinted with permission.
- Etherington-Smith, Meredith and Pilcher, Jeremy, *The "It" Girls: Lucy, Lady Duff-Gordon, The Couturiere "Lucille," and Eleanor Glynn, Romantic Novelist XIII-XIV 174-178*. Copyright © 1986 by Harcourt Brace Jovanovich. Reprinted with permission.
- Farber, Daniel A. and Matheson, John H., *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. Chi. L. Rev. 904 (1985). Copyright © 1985 by University of Chicago Law Review. Reprinted with permission.
- Farnsworth, E. Allan, *Contracts* (2d ed. 1990). Copyright © 1990 by Little, Brown and Company. Reprinted with permission.
- Farnsworth, E. Allan, *Developments in Contract Law During the 1980's: The Top Ten*, 41 Case W. Res. L. Rev. 203 (1990). Copyright © 1990 by Case Western Reserve Law Review. Reprinted with permission.
- Farnsworth, E. Allan and Young, William F., *Contracts* (4th ed. 1988). Copyright © 1988 by Foundation Press. Reprinted with permission.
- Frug, Mary Joe, Shirley MacLaine and the Mitigation of Damages Rule: Re-Uniting Language and Experience in Legal Doctrine. Reprinted from *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U.L. Rev. 1065 (1985). Copyright © 1985 by American University Law Review. Reprinted with permission.
- Fuller, Lon L., *Basic Contract Law* (1947 ed.). Copyright © 1947 by West Publishing Company. Reprinted with permission.
- Fuller, Lon L. and Eisenberg, Melvin Aron, *Basic Contract Law* (5th ed. 1990). Copyright © 1990 by West Publishing Company. Reprinted with permission.
- Furmston, M. P., ed., *Cheshire, Fifoot & Furmston's Law of Contract* (12th ed. 1991). Copyright © 1991 by Butterworth & Co., Ltd. Reprinted with permission.
- Gilmore, Grant, *The Death of Contract*. Copyright © 1974 by the Ohio State University Press. All rights reserved. Reprinted with permission.
- Gordon, James D., *Consideration and the Commercial-Gift Dichotomy*, 44 Vand. L. Rev. 283 (1991). Copyright © 1991 by Vanderbilt Law Review. Reprinted with permission.
- Ibbetson, David, *Obligations of Future Conduct*. Reprinted from *Property to Contract: The Transformation of Sale in the Middle Ages*,

- 13 J. Legal History 1 (1984). Copyright © 1984 by Frank Cass and Co., Ltd. Published by Frank Cass and Company, 890/900 Eastern Avenue, Ilford, Essex, England. Reprinted with permission.
- Kull, Andrew, *Unilateral Mistake: The Baseball Card Case*, 70 Wash. U.L.Q. 57 (1992). Copyright © 1992 by Washington University Law Quarterly. Reprinted with permission.
- Liebmann-Smith, Joan, *I Had to Protect Baby M*, Redbook, October 1987. Copyright © 1987 by Redbook. Reprinted with permission.
- Llewellyn, Karl N., *Our Case-Law of Contract, Offer and Acceptance (Part 2)*, 48 Yale L.J. 779. Reprinted by permission of the Yale Law Journal Company and Fred B. Rothman & Company.
- Maine, Sir Henry, *Ancient Law* (1864 ed.). Copyright © 1963 by Sir Henry Maine. Reprinted with permission of Beacon Press.
- Maute, Judith L., *Peevyhouse v. Garland Coal Co. Revisited: The Ballad of Willie and Lucille*, 89 Nw. U. L. Rev. — (1995). Reprinted with permission of Judith L. Maute and Northwestern University Law Review.
- National Conference of Commissioners on Uniform State Laws, *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-fifth Annual Meeting*. Material here was reprinted with permission of the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, (312) 915-0195.
- Petzinger, Thomas, *The Texaco-Pennzoil Wars*. Copyright © 1987 by Thomas Petzinger. Reprinted with permission of The Putnam Publishing Group.
- Pomeroy, *A Treatise on Equity Jurisprudence* (2d ed. 1892). Copyright © 1892 by Bancroft-Whitney Company. Reprinted with permission of Bancroft-Whitney, a division of Thomson Legal Publishing, Inc.
- Reitz, Curtis R., *Cases and Materials on Contracts as Basic Commercial Law*. Reprinted with permission of West Publishing Company.
- Roberts, Jorie, *Hawkins Case: A Hair-Raising Experience*, Harvard Law Record, vol. 66, no. 6, March 11, 1978, p.1. Copyright © 1978 by Harvard Law Record. Reprinted with permission.
- Simpson, A.W.B., *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 Cardozo L. Rev. 287 (1990). Copyright © 1990 by Cardozo Law Review. Reprinted with permission.
- Simpson, A.W.B., *Quackery and Contract Law: The Case of the Carbolic Smokeball*, 14 J. Legal. Stud. 345 (1985). Copyright ©1985. Reprinted with permission.
- Simpson, A. W. B., *The Doctrine of Consideration — Introduction*. Reprinted from *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975 ed.). Out of Print. Reprinted with permission.

- Smith, Adam, *The Wealth of Nations* (5th ed. 1789). Reprinted with permission of Penguin Books Ltd.
- Sturley, Michael F., Forum Selection Clauses in Cruise Line Tickets: An Update on Congressional Action "Overruling" the Supreme Court, 24 J. Mar. L. & Com. 399 (1993). Reprinted with permission of Anderson Publishing Company and the Journal of Maritime Law and Commerce.
- VanderVelde, Lea S., The Gendered Origins of the *Lumley* Doctrine, 101 Yale L.J. 775 (1992). Reprinted with permission of The Yale Law Journal Company and Fred B. Rothman & Company.
- Vardin, Patricia and Brody, Ilene N., eds., *Children's Rights: Contemporary Perspectives* (1979). Copyright © 1979 by Teachers College, Columbia University. All rights reserved. Reprinted with permission of the publisher.
- von Mises, Ludwig, *Human Action* (revised ed. 1963). Copyright © 1963 by Contemporary Books. Reprinted with permission.
- Weintraub, Russell J., A Survey of Contract Practice and Policy, 1992 Wis. L. Rev. 1. Copyright © 1992 by the Board of Regents of the University of Wisconsin System. Reprinted with permission of the Wisconsin Law Review.
- Wladis, John D., Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law, 75 Geo. L.J. 1575 (1987). Copyright © 1987 by The Georgetown Law Journal & Georgetown University. Reprinted with permission of the publisher.

---

## **SPECIAL NOTE TO THE READER**

Original footnote numbers from case decisions, law review articles, and other quoted material have been changed and integrated into the footnote numbering scheme for each chapter. Footnotes by the author within quoted material are distinguished from original footnotes by the abbreviation “Ed.” and/or enclosure within brackets. Some original footnotes have been omitted without indication.

---



# CONTRACTS



# SUMMARY OF CONTENTS

<i>Contents</i>	<i>ix</i>
<i>Preface</i>	<i>xxix</i>
<i>Acknowledgments</i>	<i>xxxiii</i>
<i>Special Notice</i>	<i>xxxix</i>

I

<b>ENFORCING PRIVATE AGREEMENTS</b>	<b>1</b>
1. INTRODUCTION TO CONTRACT LAW	3
2. DAMAGES FOR BREACH OF CONTRACT	71
3. OTHER REMEDIES AND CAUSES OF ACTION	195

II

<b>MUTUAL ASSENT</b>	<b>299</b>
4. REACHING AN AGREEMENT	301
5. INTERPRETING ASSENT	407
6. WRITTEN MANIFESTATIONS OF ASSENT	471
7. MULTIPARTY TRANSACTIONS	545