BOOK REVIEW

SOME THOUGHTS ON TEACHING ORDINARY CONTRACT

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CASES AND MATERIALS ON CONTRACTS AS BASIC
COMMERCIAL LAW. BY CURTIS R. REITZ. St. Paul, Minn.:
West Publishing Co., 1975. Pp. xxxi, 763. \$16.00.

I

Those of us who make a living by parading the troubles caused by promises before first-year law students cannot have ignored the unrest in recent years respecting the course in contracts.¹ For at least a decade we have been told first by one and then by another of our company that the dear friend we know as traditional contract law has fallen on hard times. The gist of the various claims is that the world has passed us by. It is said that what goes on in the law schools is no longer relevant to current problems of law and life, and that our generalized theory of contract has lost the bulk of its terrain—and thus its vitality—to the forces of legislation and other specialized, self-contained bodies of law. In short, we are asked to believe that the fundamental concepts of traditional contract law are obsolete and therefore unworthy of systematic study.²

In authoring a new casebook entitled *Contracts as Basic Commercial Law*, Professor Curtis Reitz declares himself with those who call for reform in the teaching of contract law.³ Yet any

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¹ Of course the principal target of criticism has been legal education in general. For one of the more radical bills of indictment, see Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444 (1970).

² For the flavor of the criticism, see L. FRIEDMAN, *CONTRACT LAW IN AMERICA* vii-ix, 10, 25, 211-15 (1965); Black, *Some Notes on Law Schools in the Present Day*, 79 YALE L.J. 505, 507-09 (1970); Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805; Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589 (1974).

³ C. REITZ, *CASES AND MATERIALS ON CONTRACTS AS BASIC COMMERCIAL LAW* xi-xii (1975).

association of Reitz with other currently active reformers—notably the empiricists and the behaviorists⁴—is at most coincidental. Apart from a shared belief in the disutility of doctrinal contract, Reitz appears to have few ties with any movement aimed at salvaging contract through the amassing of data from the field. His selection and use of teaching materials, particularly his heavy reliance on the ordinary appellate opinion, reveals a general lack of interest in turning to the social sciences in search of an empirical basis for the contracts course. Instead, Reitz responds to the problem of relevance by attempting to relate contract to fundamental, no-nonsense commercial law. He invites a return to the genuinely “commercial” transaction as the proper subject of study.⁵ This explains both the book’s double title and its underlying premise, namely, that what has gone wrong with contract teaching is traceable to the separation of contract law from commercial law. Professor Reitz would reform the contracts course by moving from the general to the specific, using the law of sales to provide the dominant thread of organizational content.

Ultimately the question posed by the Reitz materials comes to this: What is the justification for adding yet another casebook to a highly competitive field already crowded with strong books, many of which are more nearly alike than they are different?⁶ Unless there is virtue in fungibility, the answer must be that there is need for another choice. The alternative Reitz offers is shaped by his overriding conviction that the content of bargains—not the mysteries of the enforceable promise—should provide the focus of the contracts course. The trouble with the present state of taught law, he tells us, is that structuring study along the lines of the life history of a contract—formation through offer and acceptance, enforceability by virtue of consid-

⁴ E.g., Friedman & Macaulay, *supra* note 2, at 809-10, 812-21; Macneil, *Whither Contracts?*, 21 J. LEGAL ED. 403 (1969); Whitford, Book Review, 57 CORNELL L. REV. 855 (1972). For contrasting views, see Fuller, *Some Observations on the Course in Contracts*, 20 J. LEGAL ED. 482 (1968); Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022 (1975); Speidel, *Contract Law: Some Reflections upon Commercial Context and the Judicial Process*, 1967 WIS. L. REV. 822.

⁵ C. REITZ, *supra* note 3, at xi, xxiv-xxv.

⁶ J. DAWSON & W. HARVEY, *CASES ON CONTRACTS AND CONTRACT REMEDIES* (2d ed. 1969); E. FARNSWORTH, W. YOUNG & H. JONES, *CASES AND MATERIALS ON CONTRACTS* (2d ed. 1972); L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* (3d ed. 1972); J. JACKSON, *CONTRACT LAW IN MODERN SOCIETY* (1973); F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* (2d ed. 1970); I. MACNEIL, *CASES AND MATERIALS ON CONTRACTS* (1971); A. MUELLER & A. ROSETT, *CONTRACT LAW AND ITS APPLICATION* (1971); E. MURPHY & R. SPEIDEL, *STUDIES IN CONTRACT LAW* (1970); J. MURRAY, *CASES AND MATERIALS ON CONTRACTS* (1969).

eration or a substitute, performance and nonperformance in accordance with the law of conditions, breach, and remedies—"puts doctrine ahead of context."⁷ As a result, the "real" problems in contract—problems of the meaning of agreements, and of defining the scope of obligation in applying a contract—are preempted by excursions into borderline areas that contain a low yield of currently significant issues.

For Reitz, then, the beginnings of a different path lie in the removal of exercises in doctrinal frolic and detour. His decision to part company with much of the common law learning cannot be explained as a grudging concession to requirements of space or time or the like. Rather, *Contracts as Basic Commercial Law* is born out of a fundamental breach with the traditional content and structure of contract study.⁸

In fairness to Professor Reitz, I must make a brief disclosure. This reviewer has grown weary of much of the talk about the deficiencies of contract law and teaching, especially that which proceeds on the assumption that the thing we presently palm off in the classroom is some spruced-up, rearranged version—in content and in spirit—of what occupied the minds of Langdell and Williston. As long as the baseline for attack is a model constructed out of late nineteenth-century orthodoxy, contract can always be made to appear out of fashion. The Willistonian conception of contract—the so-called unitary or "classical" theory that infects the first *Restatement*⁹ and about which Grant Gilmore has written so splendidly in recent times¹⁰—is indeed dead. But in fact it never lived save as an illusion, and then only in scattered quarters and surely not in the cases.

My point is mainly that the classical theory is too simple a target (witness the fact that the mailbox rule is usually the first thing wheeled out to document assertions of contract irrelevance).¹¹ Perhaps the greatest hazard in taking the idea of a unitary theory of contract seriously is that one comes eventually

⁷ C. REITZ, *supra* note 3, at xxiii.

⁸ *Id.* xxiii-xxviii.

⁹ RESTATEMENT OF CONTRACTS (1932).

¹⁰ The essential features of the classical theory were a limited range of liability under consideration theory, a notion of strict liability within those limits, and a restrictive approach toward damage awards. See G. GILMORE, *THE DEATH OF CONTRACT* 3-53 (1974); Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975).

¹¹ E.g., Friedman & Macaulay, *supra* note 2, at 812. At least one scholar has found intellectual rewards in studying contracts formed through correspondence. Sharp, *Reflections on Contract*, 33 U. CHI. L. REV. 211, 212-15 (1966).

to conclude that a body of law organized around doctrinally oriented subject matter cannot possibly provide a theoretical basis for the present day. If by the term "doctrine" we mean a principle of law established through past decisions, then doctrine is at home in contract. But doctrine, like most other things, is a matter of more or less, of emphasis—as has always been clear from a reading of the stories in the contract reports. It is one thing to reject doctrinal orthodoxy, and to work at releasing the grip of black letter formulation on organization and theoretical structure. It is something else to cut off the underpinnings of structure by driving doctrinal concepts from classroom discussions of contract disputes. Judging from the advance sheets and the casebook marketplace, there is as yet scant evidence that salvation for the contracts course lies in some form of antidoctrine.¹² The disclosure, then, is that I enter upon this task believing that measured quantities of the older learning are essential to the basic course in contract. Moreover, the arrival of each new set of teaching materials confirms my suspicion that it is considerably easier to talk about reform in contract study than it is to carry it out.

II

Rather than unpack the Reitz book in detail, or quarrel about preferences in areas where the play of discretion is inevitable, I wish to focus on organizational principles and general themes.¹³ The first distinguishing feature of the book is a structure resting on a different view of the direction of march through the subject matter of contract. The author reverses the usual birth-to-death order of presentation of concepts, substituting a format designed to emphasize the extent of performance before breach and litigation. A second feature surely to be noticed is the omission of transactions located at the margins of

¹² Gilmore, *Friedrich Kessler*, 84 YALE L. J. 672, 681 (1975). See generally Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43 (1975).

¹³ On another occasion Professor Reitz has expressed the view that "[a] book review is not the medium for declaring what a different book the reviewer would have written." Reitz, *Book Review*, 123 U. PA. L. REV. 697, 699 (1975). I must respectfully dissent, especially when the book in question is a set of teaching materials that purports to depart from established patterns with an innovative approach. In light of his broadside attack on the study of traditional contract, it seems appropriate that Professor Reitz assume the burden of demonstrating that he has found a better way. My reading of the academic marketplace tells me that that burden is a heavy one. Thus, a reviewer of any new entrant is obliged to confront the ultimate question of what the basic contracts course should be about.

commerce, a reform carrying with it the elimination of many problems at the core of orthodox contract.

Reitz tells us that one of the great failings of traditional contract is that "it deemphasizes the necessary fact that a court always sees a contract controversy by looking backward from the phase of disagreement."¹⁴ From this, he concludes that the legal system fails to take sufficient account of the "performance phase" of the transaction in litigation.¹⁵ The rascal is, of course, the unitary theory. Given the inclination of that theory to seek out the enforceable promise, Reitz would have us believe that courts are too often drawn off into doctrinal debates about contract formation and fail to see the significance of performances already rendered by the parties.¹⁶ Furthermore, the quality of judicial performance suffers because traditional doctrines focus on the words used in a transaction when, in fact, it is the examination of the context of the transaction that is "the most important dimension to understanding the parties' agreement."¹⁷ Having perceived the problem as basically one of a doctrinal structure unsuited to the task of determining what contracts mean in application, the author aims ultimately to achieve a greater understanding of what courts do in fact with disputed bargains.

His plan is to highlight transactional context by emphasizing the performance stage of contract. What results is more in the nature of a structural overhaul of the classic casebook than it is a blueprint of a new world. Because disputes over the meaning of contracts are litigated today with great frequency, Reitz purports to make up the bulk of the contracts course with cases exposing judicial techniques for defining the obligation created by a contract.¹⁸ The book opens with various aspects of the process of interpreting and applying contracts¹⁹—subjects appearing near the mid-point of most contracts courses. Reitz follows this innovation with an order of presentation based on the extent to which performance has taken place prior to disruption of the

¹⁴ C. REITZ, *supra* note 3, at xxiii.

¹⁵ *Id.* xxiv.

¹⁶ I believe that the case law does not support Professor Reitz's claim that "[v]irtually none of the traditional law of contracts takes cognizance of the performance phase at the point of litigation." *Id.*

¹⁷ *Id.*

¹⁸ *Id.* xii.

¹⁹ *Id.* 1-154. Others have noted that questions of interpretation arise in a very large number of contracts decisions. *E.g.*, Shepherd, *Contracts in a Prosperity Year*, 6 STAN. L. REV. 208, 223, 226 (1954).

relationship. Lawsuits arising out of wholly executed bargains are collected in Part II,²⁰ disputes occurring at some point short of plaintiff's full performance are the subject of Part III,²¹ and Part IV, with a noticeable lack of enthusiasm, looks at claims arising under a wholly executory bargain and claims based on the bargaining process.²² Thus the materials on mutual assent and consideration are relegated to the end of the book and treated only in bare outline. Presumably the objective in displacing the standard front end of the contracts course is to deemphasize doctrine, thereby advancing the author's concern to focus attention on the content and context of bargains.

In addition to trimming assent and consideration materials and positioning the survivors late in the book, Reitz seeks to accomplish still further doctrinal deemphasis by omitting entirely the familiar cases based on noncommercial promises—for example, *Kirksey v. Kirksey*²³ and *Hamer v. Sidway*.²⁴ No doubt it will come as a surprise to many to learn that such promises are not “central to the idea of contract as a mechanism for exchange.”²⁵ Nevertheless, this kind of change reflects the author's general approach to the enforceable promise. He believes that classic theory lost touch with reality not only because of its unitary quality, but also because the theory itself was “shaped by noncommercial transactions, or more accurately by noncommercial attitudes toward all transactions.”²⁶ In sum, Reitz's argument with traditional contract is that its preoccupation with problems arising at the periphery of exchange means that the business of marking off the enforceable promise consumes far too much attention at the expense of more important and active issues. His solution is to remove from view materials that litigate the question of existence of liability, and to replace them with materials that litigate the nature and extent of liability.²⁷

²⁰ C. REITZ, *supra* note 3, at 155-308.

²¹ *Id.* 309-560. If there is a casebook area in need of skillful editing and presentation, it is the subject matter of performance and nonperformance. Reitz attacks the problem with an arrangement based on the causes of bargain disruption, relying on a reduction in principal cases and an expansion of text to bring about a simpler, more orderly exposition.

²² *Id.* 561-665.

²³ 8 Ala. 131 (1845).

²⁴ 124 N.Y. 538, 27 N.E. 256 (1891).

²⁵ C. REITZ, *supra* note 3, at xxv.

²⁶ Reitz, *supra* note 13, at 699.

²⁷ Instead of devoting great attention to the question: was there a contract, we will deal with the question: what did the contract require or permit the parties

III

The declared purpose of the book is "to provide a teaching tool for a first-year law course."²⁸ It may well do that, and do it effectively. My concern, however, is whether the book can serve as a vehicle for a meaningful course in contracts—that fundamental sub-division of the law which has come to occupy a critical position in the early stages of law study. Although the book is an original product of a first-rate mind, I have difficulty with both its message and its manner of delivery.

It will be observed that the book is entitled *Contracts as Basic Commercial Law*, not *Basic Contracts as Commercial Law*. This difference is reflected not only in the book's substantive content, but in its pedagogical method as well. There is no effort at the outset to introduce contract as an institution, or to suggest the scope or sources of contract law. Specially written text generally ignores the legal history of enforcement of promises and background developments leading up to the modern cases.²⁹ The author goes immediately to a pattern of principal cases—many of which are of recent vintage and not found in traditional books—followed by questions,³⁰ an occasional original problem, and numerous blocks of text material.³¹ It is clear that Reitz has in mind a study of the disposition of business disputes in court, not the conventional development of a generalized conception of

to do. We will be exploring the landscape of the territory of contractual agreements rather than charting the outer edges or boundary lines that mark the separation of the land of contract from the land of no-contract.

C. REITZ, *supra* note 3, at xxiii.

²⁸ *Id.* xi.

²⁹ See, e.g., *id.* 81-82, 177-78, 306-08, 310-11, 339-41, 582-85, 602-07.

³⁰ See, e.g., *id.* 367-68. Many of these questions are excess baggage; they are already implicit in the selection and arrangement of the cases. To the extent that post-case questions go beyond the cases, there is a risk that they will springboard the user of the book into lines of inquiry the profitability of which reasonable people may fairly debate. This is especially unsettling where, as in the Reitz book, subject matter limitations already lock student and teacher into a particularized view of contract. Rather than supporting discussion of the major problems and distinctions contained in the cases, Reitz's excessive use of questions and note commentary at times tends to channel attention to the whole of "the law" in a particular problem area. Moreover, many of the strengths of the book, such as its emphasis on the procedural posture of issues reaching the appellate level, are dissipated by these strings of questions.

³¹ See, e.g., *id.* 90-111, 155-97. Reitz's original text—especially that which introduces a new block of material—is successful at keeping matters currently under consideration within the larger perspective of his performance arrangement. See, e.g., *id.* 309, 328, 344, 375-76, 408-09, 430-32. As to case selection, many of the familiar favorites are omitted; absent a test in the classroom, it is difficult to determine whether the replacements are good teaching cases.

contract law and theory. The title is not misleading—this is not a book about basic contract.

Given Reitz's criticisms of the way the traditional contracts course is taught, one might reasonably have expected to see a different book. The author's case for change rests principally on antidoctrinal grounds, yet the book addresses many of the familiar doctrinal problems in an unexceptional manner. One need look no further than Part I—on interpretation, the parol evidence rule, and the statute of frauds—to see very conventional treatment of major doctrinal areas.³² Although Reitz takes great pains in Parts II and III to present problems grouped according to the extent of performance, his materials proceed in a fashion commonly found in the performance sections of conventional casebooks. Indeed, some blocks of material are merely reproductions of the standard fare.³³ Apart from the innovations represented by the opening and closing sections, it is not apparent that this book does the customary things any differently from others already in print.

The "different orientation"³⁴ Reitz offers is based on selection and arrangement of materials already in the casebook field. His thesis is that a better way of teaching and of handling contract problems can be achieved by more efficient presentation. So he culls out problems thought to be insignificant, and he declares an intention to move away from the abstractions of general contract theory to a study of the common types of commercial exchange.³⁵ Yet his principles and themes are not readily identified at work in the book. For example, his "strong thread of cases and problems deriving from contracts for the sale of goods"³⁶ never quite develops—at least as a "thread." The book does not provide in-depth coverage of sales law such as to render unnecessary an upper level offering in Article 2 of the Uniform Commercial Code. Nor does the book systematically use the Code—by analogy or otherwise—to illustrate statutory and common law relationships, or as a source of exercises in statutory methodology.³⁷ Code materials are treated mostly by way of informational text, and seldom in a problem format.³⁸ Despite the

³² See *id.* 90-154.

³³ *E.g.*, *id.* 227-48, 383-401.

³⁴ *Id.* xxiii.

³⁵ The book includes an index of contracts according to business context. *Id.* 751-52.

³⁶ *Id.* xxiv.

³⁷ See, *e.g.*, *id.* 146-54.

³⁸ See, *e.g.*, *id.* 198-204, 354-58, 375-77, 400-01, 412-13, 582-85.

claim to relate the Code to the subject matter of contract, there does not seem to be any greater Code integration than is found in other books that include the usual core of contract law.³⁹

The presentation of sale of goods materials is representative of the treatment accorded the various transactions found in the book. Reitz ranks exposure to diverse business contexts high in importance.⁴⁰ But the transactional mix is not translated into recurring themes about the legal implications of general theories and differing settings. In view of his emphasis on context and his asserted preference for sale of goods cases, one would expect to see a contextual approach organized around transaction types. This is of course an accepted casebook technique for relieving the strain on general theory occasioned by the business needs of specialized areas of activity.⁴¹ Yet there is no sustained effort to isolate factual settings for comparison purposes, no organizing principle that tracks the passage of doctrinal concepts from transaction to transaction.

The beginnings of an explanation of this seeming disparity between goal and achievement lie in the narrow range of materials contained in the book. Although Reitz condemns judicially administered concepts for obscuring contract in context, his efforts to fix attention on the content of bargains are based almost exclusively on the use of the ordinary appellate opinion.⁴² Rarely does he flesh out his presentation with non-case materials—original text or extracts from secondary sources—pointing to the business background of a case or the social and economic significance of the underlying transaction. This failure to broaden and enrich discussion of the cases is perplexing in light of his recurring claim that doctrinal contract operates to conceal the importance of underlying transactions.

Many of the points Reitz wishes to make about the content and context of promise-making are not easily made within the confines of the appellate opinion.⁴³ We are indeed aware that parsing an appellate opinion involves an awkward search backward through a trial record which itself conceals business facts

³⁹ In fact the book adheres closely to a common law orientation, as is made clear in the author's suggestions to students for contract study. *Id.* xxviii-xxx.

⁴⁰ *Id.* xxiv. Surprisingly, the book does not provide distinct treatment of consumer contracts.

⁴¹ See, e.g., A. MUELLER & A. ROSETT, *supra* note 6.

⁴² There is reason to believe that Reitz's argument with traditional contract has less to do with legal structure than with the limitations of the appellate opinion as a vehicle for presenting business facts.

⁴³ Nor are they easily made within the covers of a single book purporting to supply a basic course in contract. See generally Whitford, *supra* note 4.

and situation-sense. Still, a contract is "a promise . . . for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."⁴⁴ In determining those rights and duties, the courts apply a developing body of doctrines derived from precedents, rules, statutes, and restatements. The ordinary contract opinion today is a story about what is happening to those doctrines. To teach through cases is to teach that story in a setting marked by incomplete knowledge of specific facts and general business background. Thus, the case method seems ill-suited to Reitz's preference for context over doctrine.

IV

The most troubling aspect of the book is its downgrading of materials critical to the development of insight into basic theory and decisional processes, and to the accomplishment of the customary goals of a first-year course. I speak of concepts commonly associated with the enforceable promise.

That each beginning law course carries a designated title confirms the existence of an established body of learning, organized and subdivided into fields. In presenting one of these fields to students we are space-bound by received classifications; there is a language to be learned and a culture to be passed on. And because our task is to prepare lawyers who will advise and represent clients and persuade decisionmakers, there is an intellectual discipline that is central to the common enterprise. A casebook must operate within the familiar limitations of subject matter and the problem or case method of instruction. The analytic goals we value so highly cannot be achieved if the classroom process of analyzing and distinguishing cases is conducted as a freestanding exercise in its own right, for its own sake. To be meaningful, analysis must have a substantive base in materials that contain lines of development, groupings of connected problems arranged in a sequence. In short, we are after the skill of synthesis. Unless the student is obliged to reassemble the components taken from a series of related problems he is not really forced to think about the unsolved problem.

I find the book thin on materials for developing the reinforcing skills of analysis and synthesis.⁴⁵ In part, this is because

⁴⁴ RESTATEMENT (SECOND) OF CONTRACTS § 1 (Tent. Drafts Nos. 1-7, 1973).

⁴⁵ Some subjects are presented with little more than a descriptive sketch. *See, e.g.*, C. REITZ, *supra* note 3, at 339-43 (condition and promise); 430-53 (disruption caused by change of circumstances); 602-07 (consideration).

the book is shorter than most, with fewer principal cases and therefore only an occasional line of cases that deals at length with any substantive area.⁴⁶ The usual tension between coverage and depth is balanced to favor coverage, which is achieved by incorporating numerous informational notes. What emerges is a book giving the appearance of covering a little about a variety of contractual transactions. The opening sections of the book—on the elusive subjects of interpretation, unconscionability, and obligations of good faith—reflect what in my judgment is its shortcoming throughout: In an effort to modernize contract through illustrative glimpses of relatively recent developments, the editor has removed the staples for conveying important themes about the nature of contract.

This is why the book's initial sections are a risky experiment in entry into contract study, and why, ultimately, the general scheme of organization may prove not to have the virtues claimed. Because the course does not open with typical doctrinal themes, the student is ill-equipped to handle the unusually complex doctrinal problems that arise in Parts I and II. For example, only the most courageous among us would take up the concept of mutual assent with the classic "chicken" case on the first day of class.⁴⁷ While it is customary to introduce the Uniform Commercial Code with a section 2-207 exercise in "the battle of the forms," to be meaningful the exercise requires at least a first acquaintance with common law notions of the deviant acceptance; and if there is to be an exercise at all, the student should have access to more than the single opinion in *Doughboy Industries*.⁴⁸ Relief for mistake is confusing enough in its own right. To introduce it with cases involving avoidance of personal injury releases⁴⁹ forces the student to confront adhesion settings with little idea of the law's customary supervision of the bargaining process. The course moves quickly to the duty of good faith as found in standardized contract and unconscionability

⁴⁶ The book contains about 90 principal cases, less than half the number found in other contracts casebooks. *E.g.*, L. FULLER & M. EISENBERG, *supra* note 6. I suspect that the book is designed for a four-unit course to be offered in a single semester, and that it is intended to serve as a direct lead-in to upper class offerings in the commercial field.

⁴⁷ *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (Friendly, J.).

⁴⁸ *Application of Doughboy Industries, Inc.*, 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962).

⁴⁹ *Cady v. Mitchell*, 208 Pa. Super. 16, 220 A.2d 373 (1966); *Boccarossa v. Watkins*, 112 R.I. 551, 313 A.2d 135 (1973); C. REITZ, *supra* note 3, at 55-64.

settings,⁵⁰ addressing the problem of unfair pressure without exposing the student to its doctrinal antecedents, not the least of which is the requirement of consideration. Surely the invalidating doctrines traditionally used to police the bargain—fraud, duress, mistake, and so forth—need to be worked through before examining recent intrusions into the substance of the bargain.

Reitz's purpose in positioning these subjects is to illustrate techniques of interpretation, not to teach substance. Still, it is hard to see how understanding of the multi-layered concept of "meaning" in contract is advanced without some working notion of how an agreement gets to be a contract at all, and what different things can happen to the parties when we "enforce" a contract. We need to know what it is we are filling and shaping—and the legal consequences of what we do—before we can profit from observing how it is done.⁵¹ To take an example from Reitz's second section,⁵² the emerging duty of good faith has ancestral roots in the long-standing confusion between terms implied in fact and terms imposed in law. If we are to talk intelligently about current obligations derived from good faith doctrines, the idea of tacit agreement—indeed, the entire institution of implied contract—must be brought along with some care and molded into the structure of contract in general.

Synthesis inevitably includes an historical dimension. In law, as in life, we only really understand where we are by taking account of how we arrived here. No doubt there exists fresh contract material which, viewed pedagogically, does not require the support of the past. But as an organizational scheme for contract teaching, movement from the older materials to current formulations and emerging trends seems so obviously sensible as not to require serious discussion. Competing legal solutions, case

⁵⁰ *Id.* 66-85.

⁵¹ The problem of difference in meaning is pervasive in our law. It arises in determining whether there is a contract and in defining rights and duties under a contract. The Reitz book purports to exclude disputes over the existence of a contract, concentrating on disputes about terms. Even assuming these two areas of interpretation can be neatly separated, his approach is surely not the way to introduce doctrines for determining whose meaning prevails in cases of divergent understanding. The lines along which tests of reasonable use of language have developed in law need to be tracked in a more orderly sequence. The problem of interpretation is too central to all of contract and dependent on too many distinct compartments of the law to be inserted at the beginning of a contracts course, before operative meaning is introduced in the formation stage.

⁵² C. REITZ, *supra* note 3, at 66-85. A further example is the author's treating the law of warranty and products liability before the conceptual problems of promise, representation, and fraud. *Id.* 155-97.

or statutory, are to be found in the doctrinally different answers given to the same or similar questions over a span of time.⁵³

The shortcomings of the Reitz book derive from a failure to address—selectively, systematically, and very promptly—the assent and consideration concepts that make up the enforceable promise. The case for continuing to treat these concepts in measured classroom doses⁵⁴ rests initially on a recognition that ideas central to contract, and traveling under a variety of labels, are found in doctrinal problems clustered about the enforceable promise. Furthermore, portions of the received wisdom are ideally suited to exercises in synthesis. Such doctrines as “mutuality of obligation” and “pre-existing duty” are properly discredited and perhaps in some senses even dead, but the problems of the highly conditioned bargain and the pressured adjustment in mid-course are undeniably alive. We ignore reality if we assume that dispositions either in court or in the law office are unaffected by any thought of consideration teachings.⁵⁵

A principal justification for attending to the enforceable promise rests on the plain fact that dramatic shifts have occurred in our attitudes about the range of enforceable promises. To cite but one line of development, the general tendency toward moving the point of liability to an earlier stage of the transaction—even into the bargaining process—is merely a reflection of a series of lesser, interconnected doctrinal adjustments.⁵⁶ Identification of the enforceable promise is no

⁵³ Law study, of course, concerns the use of decided cases to work out sensible solutions for undecided cases. The most productive subjects for synthesis are those in which basic policy assumptions achieved legal status at an early point, after which attention shifted to problems of rationalization and articulation within the confines of judicial opinions in individual cases.

⁵⁴ Perhaps the most frustrating question today is how to abridge treatment of the conventional front-end of contract—that is, formation and consideration—and yet retain its essence in ways that respond to contemporary commercial activity. In my judgment it is done through definitive text, prudent case selection, and, in general, through consolidation and integration of doctrinal themes. For example, standard acceptance doctrines can be meshed with recent advances of the reliance principle in connection with offers, a setting that lends itself to consideration of the role of commercial usage and the techniques of interpretation and implication. See, e.g., *Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (W.D. Wis. 1974); *Savoca Masonry Co. v. Homes & Son Constr. Co.*, 542 P.2d 817 (Ariz. 1975); *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 190 N.W.2d 71 (1971).

⁵⁵ See, e.g., *Rosellini v. Banchero*, 83 Wash. 2d 268, 517 P.2d 955 (1974).

⁵⁶ See generally Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U.L. REV. 673 (1969); Summers, *“Good Faith” in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

longer an exercise limited to a matching up of offer and acceptance and the application of a strict test of bargain. This is not the place to elaborate the new concept of assent that is in the process of formulation, or to track the ever-increasing encroachment of reliance and enrichment ideas upon basic theories of liability.⁵⁷ What needs to be said is that many of the striking developments in contract are occurring in areas heavily burdened with history. To remove the underpinnings of these developments is to deprive the student of insight that comes with discovery. I am not talking about inquests for dead problems. The field of contract formation is relevant today because it is at the intersection of many of the movements that are responsible for the expansion of liability we are currently witnessing.

An obvious reason for including materials that facilitate historical synthesis is the importance of drawing attention to the element of change or creativity that marks our legal system. Much of the value of the first semester of legal education comes from seeing the courts feeling their way. That is why the story of promissory estoppel, which Reitz virtually ignores, is so well-suited to telling in a contracts class. An accurate picture of contract in action requires that fundamental distinctions and classifications be introduced early and returned to again and again.

Contract involves really two sets of working notions: One is a notion of harm, or a wrong; the other is a notion of remedy. I am at a loss to understand how the details of today's contract law can be put in manageable form without talking repeatedly about expectancy, reliance, and restitution as bases of liability and protectable interests. It is through these distinctions that controlling notions of contract policy are expressed. They are indispensable building blocks as well as ideal material for the "process" or "technique" emphasis that occurs early in any first-year course. The student needs to be made to see that quite different kinds of harm result from the making of contracts, and that the law has devised alternative avenues of approach to a single problem. This cannot be done successfully with fragmented collections of cases and an occasional descriptive note.⁵⁸ Teaching

⁵⁷ See generally Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598 (1969); Childres & Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 NW. U.L. REV. 433 (1969); Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115 (1971).

⁵⁸ E.g., C. REITZ, *supra* note 3, at 220-27, 602-07, 628-45.

materials need to be arranged so as to play on basic and recurrent themes.

In bypassing materials on this century's refinement of concepts of promise and bargain, Reitz sacrifices subject matter that has great utility in the study of contract remedies. Perhaps the single most compelling justification for continuing to study the enforceable promise is its close proximity to the field of contract remedies, the premier subject matter of a contracts course. A great many problems in contract—especially problems arising in the formation area—are looked at from the perspective of taking care of losses. Cases involving indefinite contracts and the endless forms of partial agreement⁵⁹ come quickly to mind as instances of the remedial orientation of offer and acceptance doctrines, wholly apart from the salvage function performed by the restitution idea. The prevailing "objective theory" of promissory liability serves to restore positions worsened by the inevitable risks of language and proof of harm.⁶⁰ The history of the unilateral contract, the firm offer principle, and the many anti-forfeiture doctrines (for example, estoppel, the implied term)—to say nothing of the interplay of tort and contract that characterizes the section 90⁶¹ explosion—are strong evidence of the enforceable promise's continuing significance for the fashioning of contract remedies.

The central idea of vindication of expectancies needs to be considered in many different forms before it truly becomes a part of the student's understanding. That is why remedial principles are best introduced at the beginning of a casebook, in connection with the search for the enforceable promise. The underlying purposes of contract law are revealed most clearly when reimbursement of reliance and prevention of unjust enrichment are made themes in competition with protection of the expectancy. Quite often this can be done with a simple transaction. When the hand has even less utility after the operation than before, the boy is worse off in a sense that is different from not being as well off as the physician's assurances had led him to expect.⁶²

My remarks to this point should have made clear my view that Reitz's total exclusion of the so-called noncommercial

⁵⁹ See Henderson, *supra* note 57, at 1141-45.

⁶⁰ See, e.g., Sharp, *Mr. Justice Holmes: Contracts*, 31 U. CHI. L. REV. 268, 270-77 (1964).

⁶¹ RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Drafts Nos. 1-7, 1973).

⁶² *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929). See also *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973).

contracts—the bargain within the family and the promise prompted by mixed motives of exchange and gift—is a costly mistake. Cases of this nature continue to overrun the reports, and the problems they raise serve a variety of purposes in a contracts course. Among the lessons to be taken from the non-commercial transaction is that contract is often called upon to resolve a broad spectrum of problems that are essentially non-contractual, and that place enormous stress upon our system of contract remedies. Contract is as much a social and economic concept as it is a set of rights and duties.⁶³ In order to understand the element of exchange which informs all of contract through the bargain theory of consideration, it is necessary to explore the various species of exchange found in social and business relations. It is the study of borderline areas, where motives differ from the usual commercial ones, that truly brings home to the student the significance of economic exchange in law and in the practical affairs of the community. Furthermore, development of the idea of freedom of contract begins with the set of policies underlying the law's treatment of promises on the periphery of commerce. It would be difficult to overstate the extent to which the family transaction and the informal gratuitous promise have shaped doctrines that infect the entire life cycle of a contract.

V

A contract casebook must aim at more than the acquisition of substantive knowledge and analytic skills. It must constitute a self-contained intellectual product which conveys some larger notion of contract as a device for social and economic ordering. If a message of this sort comes through at all, it is usually to be found, quietly and implicitly, in the selection and arrangement of the cases and supporting notes and problems. Looking to the entire group of contract casebooks, one might safely conclude that it is not easy to construct an identifiable theoretical structure from materials that depart widely from the common core of traditional contract.⁶⁴ There are reasons this should be so. We are, after all, talking about the basic course in contract; the bulletin can be consulted for listings of courses available next year and

⁶³ We are indebted to Professor Harry Jones for his recent reminder that we lose sight of the social role of contract when we remove the modest transactions of ordinary people from the casebooks. See Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1027-28 (1974).

⁶⁴ At least one book has made the break convincingly. I. MACNEIL, *supra* note 6.

the year following in specialized types of contracts. Given the vastness and essential untidiness of contract and the limited time within which we work, the message most likely to get across will be about basic theory. Judging from the talk in law school halls, the specialized message of the upper level offerings is already receiving a less than enthusiastic reception.

As a casebook moves away from traditional subject matter in pursuit of recent specialties, there is less opportunity to explore values much cherished in our society. I refer to the many spin-offs from the familiar theme of tension between freedom of contract and governmental regulation. If emerging trends are to be put in proper perspective (which is to say understood), students need to have some rough notion of how we came to embrace, and deal with in law, the interests reflected in such terms as "freedom of contract" and "the security of expectations." It is not necessary that a casebook incorporate decisions that illustrate step-by-step historical development; in fact, textual treatment is preferable in most instances. But there are areas that must be included in some form if we are to get a sense of how the ideas at the bottom of contract—the notion of the return of a thing or its equivalent, the notion of form, the notion of wrong or harm⁶⁵—came to be worked out in our law. For the most part, these are materials out of which emerged legal recognition of the enforceable promise.

Rightly or wrongly, most teachers of contract are committed to traditional books. To attract followers, a casebook must be anchored in basic theory while incorporating materials looking to a more specialized conception of contract. The failure to provide this anchor is, I believe, the crucial problem with Professor Reitz's book.

⁶⁵ See generally Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576 (1969).