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Book Review of Contracts: Cases and Commentaries

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BOOK REVIEWS

Contracts: Cases and Commentaries, 5th ed., Christine Boyle and David Percy, eds. (Carswell, 1994, 896 pp., \$110)

Law school casebooks are located at the intersection of two markets: the products market and the ideas market. The dilemma for editors of casebooks is that these two markets may be somewhat incompatible. What is potentially attractive in the products market might be unattractive in the ideas market, and *vice versa*. This dilemma may be particularly acute in the marketplace for contracts casebooks, an area of law that is often perceived as the heartland of traditional law school pedagogy and legal ideology. Unlike, for example, constitutional law or even criminal law, contract law is constructed as paradigmatic, stable and relatively uncontroversial. Consequently, casebooks are expected to be equally conventional: classical in their organizational structure and heavily loaded in favour of doctrine. Real law for real budding lawyers is what the publishers demand. On the other hand, a growing number of Canadian legal academics are recognizing the highly controversial nature of contract law, that it is a fertile terrain for the contestation of ideas, ideals and ideologies,¹ and that good and responsible pedagogy entails a commitment to addressing such issues.² Publishers, ensnared by their own perceptions of what the practicing lawyer needs, tend to shy away from such intellectual proclivities. Hence editors may find themselves in a bit of a bind: to produce a set of materials that is both saleable and academically responsible.

The new, and fifth, edition of Boyle and Percy, *Contracts: Cases and Commentaries* manifests this tension between the ideas market and the products market. When one contrasts this edition

¹ See, for example, J. Cassels, "Good Faith in Contract Bargaining: General Principles and Recent Developments" (1993), 15 Adv. Q. 56; M. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Massachusetts, Harvard, 1993); W. Weigers, "Economic Analysis of Law and 'Private Ordering': A Feminist Critique" (1992), 42 U.T.L.J. 170.

² See, for example, R. Devlin, "Normative and Somewhere to Go?" (1995), 33 Alta. L.R. 923.

to the first there is a significant, though by no means fundamental, shift in emphasis. The ideas dimension has taken on a larger role, but mostly in the form of a grafting onto the conventional structure rather than through conceptual reorientation. The following brief comments attempt to assess the benefits and costs of this incrementalist strategy in the spirit of what bell hooks and Cornel West have described as "critical affirmation".³

There is much that is praiseworthy in this new edition. Many new and important cases (for example, *Empress Towers Ltd. v. Bank of Nova Scotia*, *Wiebe v. Bobsien*, *London Drugs v. Kuehne & Nagel*, *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, and, obviously, *Hunter Engineering v. Syncrude*) have been added and no significant omissions are apparent. Thankfully, there has been an effort to balance these additions with a deletion of several other cases (though, for some inexplicable reason, *Jen-Den Investments* has survived). However, there is some unevenness in that several new cases have been added to the issues of promissory estoppel and waiver without much attempt to tighten up the section. Chapter Nine, The Interpretation of Contracts: Standard Form Agreements and Exclusion Clauses, has been significantly and helpfully restructured, though one might quibble with the categorization and location of *Spurling v. Bradshaw*. Unfortunately, the chapter on contingent agreements remains awkward, mostly because the crucial case in this area, *Turney v. Zhilka*, which is frequently referred to, is not introduced until late in the chapter.

More generally, this edition continues the tradition of making fruitful but not excessive use of law reform commission proposals. On the comparative side, there are also helpful cross-references to American and even Australian developments. Of particular significance are the commendable efforts of a couple of the contributors to identify how the new Québec Civil Code attempts to resolve common contractual problems. But the editors are careful not to stray too far afield, and the overall sense one gets from the book is that there is an increasing Canadianization of contract law with a corresponding contraction (and marginalization) of English sources, mostly by relegating them to the notes. This makes me happy.

³ b. hooks and Cornel West, "Black Women and Men in Partnership in the 1990s" in b. hooks, *Yearning: Race Gender and Cultural Politics* (Boston, South End Press, 1990), pp. 203, 208.

By and large, the balance within each chapter seems to work quite well: the introductions are pithy, the case and statute law appropriately emphasize the more problematic elements of contract law, and the notes and commentaries are informative and conducive to furthering classroom discussions. But there is something missing. Each chapter tends to focus on the micro details of its particular subject area with little effort to locate these issues within the larger context of the contemporary debates around contract law. For example, to my mind, the chapters on Certainty of Terms and Representations and Terms raise the important question of the ideological predispositions of different judges, most specifically, whether they tend to be more individualistic or more communitarian in their vision of the good society and the good market-place.⁴ Yet in both cases the introductions fail to identify this potential (and manifestly political) interpretive framework.

Another example of this decontextualizing (and depoliticizing) tendency can be found in the chapter on Frustration. This is a fairly conventional chapter with few changes from the last edition. However, it is given some theoretical bite by the inclusion of an extract from the law and economics guru/theorist/judge, Richard Posner. While this is commendable, it is extremely modest. The issue of frustration, or perhaps more starkly "impossibility", asks the question about what sorts of external extenuating circumstances allow for the non-performance of the parties' contractual obligations. Progressive Canadian scholars such as Bill Conklin (as opposed to neo-liberal apologists such as Posner) have suggested that in considering this issue we should factor in economic and class variables to focus on the question of what judges consider to be of sufficient pedigree to qualify as potentially frustrating. Conklin's star example relates to "demand notes" by means of which banks were able to foreclose on farmers who found it impossible to live up to the unforeseeably high interest rates of the early 1980s generated by a recession far beyond their control.⁵

⁴ See for example H. Collins, *The Law of Contract*, 2nd ed. (London, Butterworths, 1993); F. Kessler, G. Gilmore and A. Kronman, *Contracts: Cases and Materials*, 3rd ed. (Boston, Little Brown, 1986) and R.M. Unger, *The Critical Legal Studies Movement* (Cambridge, Massachusetts, Harvard, 1986), pp. 57-90.

⁵ W. Conklin, "A Contract" in R. Devlin, *Canadian Perspectives on Legal Theory* (Toronto, Emond Montgomery, 1990), p. 207.

By including Posner, but not Conklin, the editors have permitted economic theory to eclipse economic realities, thereby constraining the opportunity for students to critically analyze this area of contract law. If Conklin's critique had been introduced it may have created space for discussion of contemporary issues; for example, reports that banks in the Atlantic provinces are calling in the loans that inshore fishers had taken out for their boats, loans that they are no longer able to pay because of the collapse of the fisheries. In short, the issue of frustration can, with a little imagination, be conceived of as a fairly clear example of where economic power(lessness) and the ideologies of contract law come into sharp relief.

Relative to the variable of class, issues of race and gender do surface in this edition. For example, the question of whether one's racial identity affects one's opportunities to contract garners some attention in the "student introduction", a few notes and some passing textual references. But I do find it interesting that although McIntyre J.A. mentions that the plaintiff in the celebrated unconscionability case, *Harry v. Kreutziger*, is "an Indian",⁶ neither he nor the editors come back to it. Thus an excellent opportunity for a discussion of identity politics and law is glossed over.

However, it must be acknowledged that another category of identity politics does receive somewhat more pervasive treatment. Questions of gender (and sexual orientation) are explicitly addressed in the context of Intention to Create Legal Relations, prenuptial agreements, cohabitation agreements and pre-conception arrangements.⁷ Again, I think that this represents significant progress in the process of modernizing and contextualizing contract law. But even here there are limits. Most of the situations in which issues of gender are identified can be quite easily ghettoized by characterizing them as "women's issues" and therefore marginal to the mainstream ("malestream")⁸ of contract law. But perhaps the project of advancing the debate about the relationship between feminism and contracts could be rendered

⁶ At p. 701.

⁷ These are the precise examples that Mary Joe Frug identified as particularly suitable for inclusion in a contracts casebook in her groundbreaking, "Re-reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985), 34 Am. U.L. Rev. 1065.

⁸ The term comes from Mary O'Brien, "Dialectics of Reproduction" in J. King-Farlow & W. Shea, eds., *Contemporary Issues in Political Philosophy* (New York, Watson, 1976).

more pervasive. For example, the note following *Hunter v. Syncrude* directs students to two very conventional academic commentaries, but there is no mention of the recent controversial suggestion by Maureen Maloney that Wilson J.A.'s approach in *Hunter* manifests traits of a "feminist view of the corporate world" by proposing a "more caring, purposive approach to exclusion clauses . . .".⁹

To be fair, it must be acknowledged that the editors do address issues of competing theoretical perspectives, identity and ideology in the "student introduction" to the book. This is, I think, a very positive step. On several occasions over the last several years, in debates with my colleagues about when to introduce theories of contract into the course, many have argued that it should come fairly late in the year after students have covered "the basics". My own position is that it is "the basics" themselves that are problematic and contestable, and that we should therefore address issues of theory from day one. This edition makes it much easier to pursue such a teaching strategy. This too makes me happy.

But I would like to encourage the editors to go a little further. I have three suggestions. First, while it is pedagogically useful to paraphrase (and even caricature) some of the competing perspectives on contemporary contract law, it would be helpful to provide extracts from some advocates of these competing perspectives. In this sense I think that the recent competitor text by Waddams, Trebilcock and Waldron¹⁰ is somewhat stronger. Secondly, I would urge the editors to encourage their contributors to attempt to incorporate these larger debates explicitly into their chapters, or, at the very minimum, to address them in the brief introductions to each chapter. In this way the collection as a whole would have greater intellectual depth and stronger thematic coherence, thereby enabling teachers and students to escape the dull compulsion of the doctrinal.

A third possible way to raise some of these larger issues of cooperativism versus Darwinism or to highlight the variables of race, class and gender would be to introduce students to some of the sociolegal studies of the operation of contracts, whether they be in

⁹ M. Maloney, "Economic Actors in the Work of Madame Justice Wilson" (1991), 15 Dal. L.J. 197, at pp. 198, 200.

¹⁰ *Cases and Materials on Contracts* (Toronto, Emond Montgomery, 1994), pp. 1-22.

the commercial sphere or the consumer sphere. Again, the existence of this sort of research is identified in the student introduction. However, a passing acknowledgement in the very last paragraph seems to me to be an exercise in confession and avoidance, especially when the editors suggest that these omissions arise because the "contributors [prefer] to concentrate on the inculcation of skills associated with more traditional materials".¹¹ In my opinion, this is a curious surrender of editorial influence.

An obvious reply might be that it is not possible to cover everything in a collection such as this and that the function of a casebook is to provide a core set of materials which individual teachers can expand upon with their own supplements. This is the strategy that I have adopted for the last six years and it works moderately well. But there is a legitimacy and hierarchy problem. When one attempts to raise issues of, for example, gender, class, race or sexual orientation in a contracts course there are some students who resist on the basis that it is not real law and that they are only being forced to study these issues because of the subjective preferences of the individual teacher. This tendency is exacerbated if one's colleagues do not use the same supplement. My point is twofold: what constitutes the core of a contracts course is contestable and contingent upon certain material and ideological presumptions; if we want our supplements to problematize and endanger the conventional structure and practices of contracts pedagogy we need to be more inclusive.

Nor would the inclusion of a more diverse range of issues, methods and perspectives require an exponential and unmanageable growth in the size of the book. For example, in relation to the sociolegal studies that suggest that there is a great deal of cooperation in the commercial market-place¹², there could be an expansive note or extract inserted after *Sudbrook Trading Estate v. Eggleton*¹³ in which Lord Russell advances the seemingly ontological proposition that "vendors and purchasers are normally greedy".¹⁴ Instead, we are referred to an article on

¹¹ At p. vii.

¹² See, for example, H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 Br. J.L. & Soc. 45; S. Macaulay, "Elegant Models, Empirical Pictures and the Complexities of Contract" (1977), 11 Law & Soc. 507.

¹³ [1983] 1 A.C. 444.

¹⁴ At p. 129.

relational contracts by McNeil (providing no indication as to the substance of his argument) and an extract from (yet another) law and economics scholar.

Similarly, critical empiricism can both enrich and destabilize our understanding of offer and acceptance. The infamous 1939 case of *Christie v. York Corporation*¹⁵ in which the Supreme Court of Canada legitimized racism on the basis of freedom of contract and blamed the victim for not acquiescing, is buried in a note on p. 20 of the casebook. As the contributor proceeds to point out in the note, human rights legislation has been passed to remedy the failures of the judiciary. And that is all we get. There is no reference to the effectiveness of such legislative interventions, thereby suggesting (at least indirectly) that problems of discrimination are no longer an issue for contract law. However, recent research from the United States suggests that economic discrimination on the basis of race and gender is still widely practiced, that it is “synergistic” and not just “additive”, and that contract law may still be a terrain of political, social, economic and ideological contestation.¹⁶ Again, a note with an extract reporting these findings could open up a whole series of discussions that are otherwise rendered “nonquestions”¹⁷ because of the obsession with “traditional skills”.¹⁸

There are a couple of minor points I would add. By and large the editing in this edition is very good, although I think that contributors should be encouraged to re-edit *Meyer v. Davies*, *Barnett v. Harrison*, *Hunter v. Syncrude* and, especially, Justice Iacobucci’s meanderings in *London Drugs v. Kuehne & Nagel*. The only significant editorial flaw that I have encountered occurs on p. 398

¹⁵ [1940]S.C.R. 139.

¹⁶ See, for example, R. Austin, “‘A Nation of Thieves’: Securing Black People’s Right to Shop and Sell in White America”, [1994] Utah L.R. 147; I. Ayres, “Fair Driving: Gender and Race Discrimination in Retail Car Negotiations” (1991), 104 Harv. L.R. 817; P. Swire, “The Persistent Problem of Lending Discrimination: A Law and Economics Perspective” (1995), 73 Texas L. Rev. 787; N. Williams, “Offer, Acceptance and Improper Considerations: A Common Law Model for the Prohibition of Racial Discrimination in the Contracting Process” (1994), 62 Geo. Wash. L. Rev. 183.

¹⁷ For a useful feminist discussion of academic disciplines rendering issues of gender “nonquestions”, see J. McCalla Vickers, “Memoirs of an Ontological Exile” in A. Miles and G. Finn, *Feminism in Canada: From Pressure to Politics* (Montréal, Black Rose Books, 1982), pp. 27, 28.

¹⁸ For greater clarity, my comments are not intended to trash “traditional skills” nor abandon “legal doctrine”. Rather, these are acknowledged to be crucial and necessary skills; but they are not sufficient.

where three quite crucial lines in a quotation from *Hedley Byrne v. Heller & Co.* seem to have got lost. But I do want to query why there are pandering institutional glorifications such as “Fuller of the Harvard Law School”¹⁹ but no equivalent homages to, for example, Waddams or Trebilcock of the University of Toronto, or Majury of the Carleton Department of Law? Good scholarship speaks for itself, eh?

Finally, some parting thoughts for the publishers. The quality of the print in this edition is extremely problematic. Throughout the text, from line to line, there are shifts in font size from larger to smaller and back again for no legitimate reason. My assumption, and it may be unfair, is that this is an attempt to keep this edition to less than 900 pages for marketing reasons. While this squeezing of the text may not cause a problem for all readers, it will have a disparate impact upon visually impaired students, who already have a difficult enough time dealing with the heavy reading associated with legal education. I also wonder, given the possibilities of modern publishing technologies, whether it is still appropriate to have a unitary contracts text. This edition is already 50 pages larger than the previous edition and I know of no contracts teacher who uses this book who covers it all. My suggestions, if adopted, would undoubtedly make it somewhat, though not dramatically, longer. Might it not be possible for the publishers to offer to teachers a “smorgasbord” of chapters from which they could order their own customized copies. While costs may increase due to the losses in economies of scale, there may be greater benefits: for example, smaller and therefore cheaper books for students and the capacity to update the materials incrementally on an annual basis without having to wait five years for a new edition. Other publishers, for example Emond Montgomery, are already moving in this direction.

In sum, I think that Professors Boyle and Percy have, with some effort, managed to respond to the competing demands of two not particularly compatible markets. As a consumer of their product I am faced with two choices: voice or exit. In this brief review I have chosen the former, but in part this is because of the lack of options. However, a critical and comparative analysis of the various contracts texts currently available is a project that goes beyond the confines of this review and can wait for another occasion.

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¹⁹ At p. 290.

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