

REMEMBERING RICHARD L. BARNES

*Michael H. Hoffheimer**

The drift of red silt across the desert.
Return your bones to its soft blanket.
Say this: all the trouble we've been to,
to take back our same places.

*Emileigh Barnes*¹

Richard L. Barnes (1954-2013) taught at the University of Mississippi School of Law from 1988 to the end of 2012. My friend lost his life in a car accident while driving back to Oxford at the start of the spring 2013 semester. The first holder of the Leonard B. Melvin Lectureship, Professor Barnes introduced a generation of future lawyers to contracts and commercial law. During the second half of his career, he shared his growing passion for—and frustrations with—federal Indian law with a devoted group of scholars.

Professor Barnes grew up in Arizona and always took professional pride in the outstanding education he received at the University of Arizona, where he earned a B.A. *cum laude* with a major in Political Science (1976) and a J.D. with distinction (1979).

After graduating from law school he served as law clerk for Judge Lawrence Howard, Arizona Court of Appeals (1979-80) and then practiced law as an associate with DeConcini, McDonald, Brammer, Yetwin and Lacy in Tucson (1980-82). In law school he first developed a taste for legal academics as Articles Editor for the Arizona Law Review. To prepare himself for the law school job market, he obtained an LL.M. from Northwestern University (1983). His first academic appointment was at the University of

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¹ EMILEIGH BARNES, GIVEN 20 (2012) (poetry chapbook by the daughter of Richard Barnes).

South Dakota law school (1983), and he visited at Brigham Young law school before moving to Mississippi.²

Professor Barnes joined the law faculty at an important moment in the history of the University of Mississippi School of Law. From an institution with deep roots in the state and a proud regional reputation, the law school was aspiring to join the ranks of nationally prominent law schools. Moreover, American law schools as a whole were attempting to improve their academic quality with “excellence” being the pedagogical slogan of the day. During the 1980s the University of Mississippi School of Law had hired but failed to retain a number of promising young contracts and commercial law scholars. Professor John Robin Bradley, chair of the faculty hiring committee, deserves credit for pursuing the unusual strategy of searching for a lateral hire and for persuading Professor Barnes to move his young family to Oxford.

From the start of his career at the University of Mississippi, Professor Barnes exceeded expectations. Through his high standards of teaching, his productivity as a scholar, and his active participation in faculty governance, he played an important role in enhancing the law school’s quality and reputation. His support for excellence in programming was all the more effective in that he combined his commitment to professionalism with a soft-spoken demeanor and Westerner’s populist abhorrence of elitism.

Overcoming the challenge of reducing a crowd of conflicting ideas to simple summaries, Professor Barnes was an exceptionally effective classroom teacher. He could alternatively delight and embarrass students by interrupting an elaborate exposition of a railroad case by suddenly toot-tooting on a wooden train whistle. But it was his passion for his subject and his devotion to his students that led students to select him as outstanding law professor and outstanding faculty member (2006-07, 2007-08). Among former students who returned to Oxford for his funeral was Michael J. Gorman, who interrupted his practice in Dublin, Ireland, to catch a transatlantic flight in time to serve as pallbearer.

² He was Visiting Professor of Law at BYU in 1985-86 and also visited at the University of Mississippi in 1988-89 before accepting an offer to join the faculty permanently in 1989.

On rare occasions Professor Barnes could be persuaded to demonstrate his ability to “alphabetize.” This involved having members of the audience call out a word. For example, someone might say the word “and.” Then he would immediately list the word’s letters in alphabetical order: “a-d-n.” He would ask for harder words. None were too long or complicated. To “dyslexia” he would immediately respond, “a-d-e-i-l-s-x-y.” To me this talent was impressive enough by itself. But Professor Barnes was capable of alphabetizing while *simultaneously* (“a-e-i-l-m-n-o-s-u-y”) juggling three balls *and* rollerblading backwards.

Two pervasive intellectual themes emerged in his teaching and research on contracts and commercial law. First, Professor Barnes believed that common law contract principles embodied moral values. Second, he viewed the Uniform Commercial Code as one of the last century’s great legal achievements: a coherent, largely self-contained legal regime, complete with workable definitions and rules of interpretation. Although Professor Barnes was himself a social reformer, behind both of these themes was visible a deep conservative admiration for the texture of the law as it had evolved. This made him wary of unforeseen consequences brought about by short-sighted tinkering with legal rules.

Viewing contracts as rooted in the basic fairness of holding parties accountable for the objective manifestation of their mutual assent, he perceived the need for doctrines like unconscionability and adhesion to police the bargain, to assure a genuine meeting of minds, and to avoid a manipulation of contract law by socially dominant parties.³ He regarded the growing formalism in contracts law as a threat to these traditional common law values. He was never persuaded by economic liberal or law-and-economics arguments, because he did not consider efficiency as a sufficient explanation for established contracts doctrines nor a desirable goal.⁴

He was especially critical of the Supreme Court decision in *Carnival Cruise Lines, Inc. v. Shute*.⁵ In that case the Court

³ See, e.g., Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123 (2005).

⁴ See Richard L. Barnes, *The Efficiency Justification for Secured Transactions: Foxes with Soxes and Other Fanciful Stuff*, 42 U. KAN. L. REV. 13 (1993).

⁵ 499 U.S. 585 (1991).

specifically enforced a mandatory forum-selection clause requiring plaintiffs from Washington state to litigate in the defendant's home state of Florida. The clause was embedded in small print attached to a ticket that was delivered after the plaintiff had paid for a trip. Most critics of the decision have focused on its policy implications and on Justice Blackmun's debatable assertion that such clauses benefit passengers by lowering ticket prices. Professor Barnes objected to the Court's disregard of first principles of contract formation and challenged its assertion that the clause was in good faith. Professor Barnes is very possibly the only scholar who actually read all the other terms in the ticket's microscopic print. He found that many of the other provisions were unenforceable and unconscionable under established legal principles. This supported his critique of the Court's analysis:

Even more damaging to the Supreme Court's position is the lack of support for its conclusion that the clause was offered in good faith. . . . [quotation from opinion omitted].

This conclusion of good faith by the Court is astonishing. Carnival had attempted to fully exculpate itself from liability in another paragraph on the same page of the ticket. This attempt at full exculpation was not even mentioned in the majority opinion. Federal law, specifically 46 U.S.C. § 183(c), prohibits the owner of a passenger vessel, transporting passengers between ports of the United States or between a United States port and a foreign port, to insert an exculpatory clause for bodily injury arising out of negligence or fault of the ship owner or its agents, servants, and employees. The law declares all such attempts to be null and void whether they are rules, regulations, or contractual provisions. The federal statute also prohibits liability limitations on other attempts to lessen or weaken the rights of claimants at trial. This latter, much less specific clause was the one at issue in *Carnival*.⁶

Professor Barnes leaves a respected corpus of scholarship in two dozen traditional law review articles.⁷ A few of these push the

⁶ Barnes, *supra* note 3, at 176-77 (footnotes omitted and minor editing errors corrected).

⁷ See appendix. None of the official lists of his publications, including that in Professor Barnes's personal resume, is complete.

limits of the genre. His probing critique of law and economics justifications for commercial law opens by contemplating whether a hammer is a good thing, takes the form of a fictional dialogue, and concludes with the image of a toilet flushing.⁸ His research topics reflected the range and evolution of his interest; he moved easily from the U.C.C.'s impact on agricultural practices, to contracts involving surrogate motherhood, to the limits of commercial speech. His last two articles were composed as a signal study of the Supreme Court's Indian law jurisprudence, addressing Justices' diverging approaches to issues of tribal sovereignty. He argued that a civil rights model with its attention to individual liberties—and its problematic dependence on judicial empathy—failed to provide a firm foundation for tribal sovereignty. His last article criticized Justice O'Connor, whom he respected in many ways. He concluded that the Justice's American Indian law opinions were deficient:

In this, as a native Westerner, she may have missed an opportunity to elaborate a system of sovereignty, one favoring the tribes as sovereigns by right of their historical role as outside the federal government. Having missed this opportunity, she missed the concomitant opportunity to bolster a reserve of power that offsets the federal power she was concerned about.⁹

Bringing to legal research a love of word play and an eye for the absurd, Professor Barnes crafted titles that referred to Dr. Seuss books and riffed on polysemantic case names. One article incorporated two case names into a truly groan-inducing pun: "*Prima Paint* Pushed Compulsory Arbitration Under the *Erie Train*."

For all his intellectual wit, and notwithstanding his forceful criticism of courts and fellow scholars, Professor Barnes never assumed a cynical attitude, nor did he distance himself from the people whose lives were affected by the law. While he remained optimistic about the law's capacity to curb excesses and to help

⁸ Barnes, *supra* note 4, at 13, 17, 73.

⁹ Richard L. Barnes, *A Woman of the West, But Not the Tribes: Justice Sandra Day O'Connor and the State-Tribe Relationship*, 58 *LOY. L. REV.* 39, 111 (2012).

members of society interact more fairly, he was at the same time sensitive to the dangers of overconfidence and hubris.

I hear echoes of his voice in a stanza by his daughter:

It seems to me
the problem has been:
we think our power to predict
gives us the power to control.¹⁰

Midway through his career Professor Barnes turned his attention to his family's Cherokee ancestry. For him this was complicated by the fact that his grandparents had not been enrolled as members of the tribe; he worried that friend and foe alike would question the motives behind his growing fascination with his Indian heritage. As a colleague I viewed his searching interest in his family's cultural identity as closely connected to his continuing engagement with legal controversies. In the deeper roots of his own family's values he found the sources of his abiding skepticism about the pro-development bias of Anglo-American law.

Perhaps his American Indian roots and his Arizona childhood also help explain his passion for nature, which found expression both in his photography and in his ardor for extreme sports. A remarkably perceptive and gifted photographer, Professor Barnes made an easy transition from film to digital technology. In the new medium he found more ways to capture the open vistas, the contrasting hues, and the play of light and shadow that characterize his images of beloved Western locations. Prints of several of his photographs are on permanent display on the second floor of the law school.¹¹ For years he talked about a book—*Sacred Spaces*—that would document in photographs the physical places affected by leading Indian law decisions.

Off campus, Professor Barnes pushed himself to extraordinarily high levels of performance in mountain biking,

¹⁰ EMILEIGH BARNES, CONSTANT 20 (2013) (poem in the form of commentary on quotation from ALFRED NORTH WHITEHEAD AND BERTRAND RUSSELL, PRINCIPIA MATHEMATICA (1910-27) (in poetry chapbook dedicated "to Richard").

¹¹ He also created a photographic record of the L.Q.C. Lamar House prior to its renovation. For a reproduction of one of his images, see Michael H. Hoffheimer, *L.Q.C. Lamar 1825-1893*, 63 MISS. L. J. 5, 18 (1993) (photograph by Richard L. Barnes).

skiing and snowboarding. For the most part he pursued these as solo activities, not in competition. He did not brag. Only through cross-examination did I learn that he had achieved the highest possible rating as a down-hill skier. And during his last few years he qualified as a ski instructor and was working at ski resorts during vacations.

He put his carpentry skills and creative imagination to good use, constructing a multi-story tree house for his children behind their family house in Oxford and making annual additions and improvements to a family cabin in the woods in California.

The law school, too, benefited from his expert understanding of construction and from his organizational skills. During the final phase of the construction of the Khayat law building, he provided some helpful suggestions, including one that led to the early completion of part of the third floor that is most in use. He helped supervise the often frustrating process of the physical move of faculty offices.

His children remember their father's lack of pretense and how beloved he was by everyone he met in all walks of life. A creature of habit, he could be found every day at lunch with a paperback novel, often at the same seat at the same restaurant. He was a regular at Denver's restaurant and remained in touch with the Mote family years after they closed it and moved to Florida. Later the manager at Moe's restaurant named a chair for him and attached a plaque with his name. His reading choices cycled back and to his favorite genres—cerebral science fiction and murder mysteries—and to his favorite author, Tony Hillerman,

Professor Barnes spoke little about his family—unless asked. He was rightly awed by his wife Kathy, a revered high school math teacher. He had unbounded confidence in his children. His son Clay earned a B.A. in linguistics and a B.S. in computer science at the University of Arizona and he received an M.S. in human-computer interaction from Rensselaer Polytechnic. He has found gainful employment in that genius-crowded field. Professor Barnes's daughter Emileigh obtained a degree in journalism at the University of Iowa and an M.F.A. at the University of Mississippi. She is putting her education to good use for the United States government. In his youngest daughter, Molly, now

in middle school, the sunniest and most sociable moments of Professor Barnes's personality endure.

The University of Mississippi School of Law has erected appropriate memorials honoring Professor Barnes. In addition to the display of his photographs, the school has named the courtyard for him and planted a tree in his honor. But, perhaps, he is best remembered by the continuing legacy of his public service. Soon after moving to Oxford Professor Barnes became active in local development issues. Alarmed by the explosion of uncontrolled growth that he had seen damage communities in the West, he mounted a campaign to ban billboards and large commercial signs in the city limits. His concern with the need for active oversight of large residential developments led to his appointment two times to the Oxford Planning Commission, which he briefly chaired.

To Professor Barnes we owe thanks for the enactment of the Oxford sign ordinance. This controversial step put an end to burgeoning sign wars, preserved the historic character of the town, and even reduced operating costs for small businesses. The ordinance halted the construction of new billboards and imposed a schedule for the removal of existing billboards. In the year of his death, the last remaining billboards came down.

In hindsight it is difficult to imagine how deeply some interests resented any effort to restrict uncontrolled growth. These very interests have been among the principal financial beneficiaries of preserving Oxford's historic character. Yet forces resisting the sign ordinance and opposing limits on the density of inner city development helped bring Professor Barnes's political career to an end. He was removed from the planning commission. He ran for a seat on the Board of Aldermen. Never the politician, he refused to ask friends to place campaign signs in yards, waiting instead to be asked. Always the environmentalist, he personally retrieved and recycled all the campaign signs the morning after losing the election by a narrow margin.

Professor Barnes would probably not care to be remembered for the courage and vision he displayed at the dawn of Oxford's prolonged growth spurt. But he might be pleased if we think of him on occasion when we look up and see, not a garish

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advertisement on an industrial billboard, but a leaf or a cloud or a star.

APPENDIX

A Woman of the West, but not of the Tribes: Justice Sandra Day O'Connor and the State-Tribe Relationship, 58 LOY. L. REV. 39-110 (2012).

From John Marshall to Thurgood Marshall: A Tale of Innovation and Evolution in Federal Indian Law Jurisdiction, 57 LOY. L. REV. 57 (2011).

Manipulating Court Doctrine for the Good of the Common Law and Compulsory Arbitration, 51 S. TEX. L. REV. 41-73 (2009).

Prima Paint Pushed Compulsory Arbitration Under the Erie Train, 2 BROOK. J. CORP., FIN. & COM. L. 1-40 (2007).

Buckeye, Bull's-Eye, or Moving Target: The FAA, Compulsory Arbitration, and Common-Law Contract, 31 VT. L. REV. 141-84 (2006).

Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability, 66 LA. L. REV. 123-88 (2005).

UCC Article Nine Revised: Priorities, Preferences, and Liens Effective Only in Bankruptcy, 82 NEB. L. REV. 607-70 (2004).

Quotas as Satin-Lined Traps, 29 NEW ENG. L. REV. 865-82 (1995).

Distinguishing Sales and Leases: A Primer on the Scope and Purpose of UCC Article 2A, 29 U. MEM. L. REV. 873-925 (1995).

Indian Gaming: Congress Sends the Tribes Into a Constitutional Fray, But Did It Intend To?, 69 MISS. L.J. 591-633 (1995).

The Efficiency Justification for Secured Transactions: Foxes with Soxes and Other Fanciful Stuff, 49 U. KAN. L. REV. 13-73 (1993).

The U.C.C.'s Insidious Preference for Agronomy Over Ecology in Farm Lending Decisions, 64 U. COLO. L. R. 457-512 (1993).

Agricultural Liens and the U.C.C.: A Report on Present Status and Proposals for Change, 44 OKLA. L. REV. 9-70 (1991)(with Drew L. Kershen, Martha L. Noble, Brooke Schumm and Steven C. Turner).

Tracing Commingled Proceeds: The Metamorphosis of Equity Principles into U.C.C. Doctrine, 51 U. PITT. L. REV. 281-344 (1990).

U.C.C. Section 9-315: The Fairness of "Share and Share Unalike" in Resolving Unanticipated Conflicts Among Secured Creditors, 9 J.L. & COM. 207-33 (1989).

An Advocate's View of the Surrogate Mother Problem: Suggested Litigation Strategies, 12 AM. J. TRIAL ADVOC. 393 (1989), reprinted in 12 TRIAL DIPL. J. 175-86 (1989).

Delusion by Analysis: The Surrogate Mother Problem, 34 S.D. L. REV. 1-19 (1989).

A Guide to Critical Legal Studies, 34 S.D. L. REV. 220-25 (1989).

Toward a Normative Framework for the Uniform Commercial Code, 62 TEMP. L. REV. 117-76 (1989).

Field Warehousing Cattle and Their Sale on Recognized Markets, 9 J. AGRIC. TAX'N & L. 337-52 (1988).

Reaffirming the Dominance of Notice in Article 9: A Proposed Modification of Priorities in Returned and Repossessed Goods, 48 U. PITT. L. REV. 353-425 (1987).

Regulations of Speech Intended to Affect Behavior, 63 DENV. U. L. REV. 37-83 (1985).

A Call for a Value-Based Test of Commercial Speech, 63 WASH. U. L.Q. 649-706 (1985).

Commercial Speech Concerning Unlawful Conduct: A Clear and Present Danger, 1984 BYU L. REV. 457-508 (1984).

Casenote, *The Constitutional Fault Test of Gertz v. Robert Welch, Inc. and the Continued Viability of the Common Law Privileges in Defamation*, 20 ARIZ. L. REV. 799-823 (1979).

