

## An Agnostic's Bible

CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE, 3d EDITION. By Robert S. Summers<sup>†</sup> and Robert A. Hillman.<sup>‡</sup> St. Paul, Minnesota: West Publishing Company 1996. Pp. xlix, 1070.

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Manufacturing and marketing the modern contracts casebook is a formidable enterprise. Contemporary authors must envy the nineteenth-century pioneers who had only to mine and collate enough unedited case reports to permit a student to deduce the pure Idea of Contract in Langdellian fashion.<sup>1</sup> The gradual establishment of a canon of cases permitted later authors to free-ride somewhat on their predecessors' research,<sup>2</sup> but it correspondingly increased the costs of product development and marketing. Offering largely the same collection of cases, new market entrants had to develop innovations such as note cases, "comments," "problems," and "materials" in order to achieve product differentiation.<sup>3</sup> Those novelties having themselves become standardized, today's author must define an even more specialized marketing niche by identifying some still unmet pedagogical need or slighted theoretical perspective that will be supplied by the new publication.<sup>4</sup> Yet a steady stream of excellent contracts casebooks

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1. See generally E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406 (1987).

2. Farnsworth notes that many of the cases selected by the earliest casebook writers were "reused in anthology after anthology" and were revered as "leading cases" that became part of the "taught tradition of American contract law." *Id.* at 1437. He also notes that the anthologists "often took cases from each other." *Id.* at 1438.

3. Farnsworth dates such developments from the 1940s. *Id.* at 1407.

4. A self-conscious example is the opening sentence of the Preface to the first edition of ROBERT E. SCOTT & DOUGLAS L. LESLIE, *CONTRACT LAW & THEORY* (2d Ed. 1993): "The best place to begin is with the toughest question any prospective reader is likely to ask: Why do

continues to roll off the academic assembly lines.<sup>5</sup> One such work, less well known<sup>6</sup> than some of its competitors, is *Contract and Related Obligation (CRO)*<sup>7</sup> by Robert Summers and Robert Hillman. On the occasion of the publication of its third edition, this casebook deserves to be reintroduced<sup>8</sup> to the contracts teaching community.

A casebook's warranties appear in its preface.<sup>9</sup> In their Preface to the First Edition, the authors of *CRO* undertook to do the following: (1) acquaint the student with the lawyer's role in contractual relations; (2) stress the "private-made" character of much of what we call law; (3) expose students to many different theories about contract; (4) renew the waning practice of "dialectical" teaching by using largely unedited principal cases, and by eschewing summaries and textual notes; (5) reveal the many extra-legal sources of law, including moral, political, and economic reasoning; and (6) offer more general insights as to the nature of law and lawyering.<sup>10</sup> While I believe *CRO* largely succeeds in these aims, I will focus on its treatment of lawyering, and its presentation of theory and the nature of contract law.<sup>11</sup>

we need *another* casebook on contracts?" *Id.* at ix.

5. Two notable recent additions are STEWART MACAULAY, ET AL., *CONTRACTS: LAW IN ACTION* (1995) and RANDY BARNETT, *CONTRACTS, CASES AND DOCTRINES* (1995).

6. As of June 1996, *CRO* was in use at only twenty law schools. Telephone Interview with West Publishing (Jan. 23, 1997).

7. ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* (1996).

8. *CRO* was first published in 1987. So far as I am aware, it has never been reviewed.

9. The reader has more than usual reason to apply the sales warranty metaphor to *CRO*: Professor Summers is co-author of the definitive treatise on the Uniform Commercial Code: JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* (4th ed. 1995), while Professor Hillman is co-author of the leading work on the relationship between the Uniform Commercial Code and the common law: ROBERT A. HILLMAN, ET AL., *COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE* (1985).

10. SUMMERS & HILLMAN, *supra* note 7, at x-xi.

11. I will briefly address the three omitted goals:

(1) Private sources of law and legal administration. Aside from references in some introductory materials and the review of *White v. Benkowski*, 155 N.W.2d 74 (Wisc. 1967), discussed in the text, *CRO* does not particularly emphasize the "privateness" of contract law, but its authors must assume that such emphasis would be superfluous. The problems posed to the students demonstrate that an attorney will have many decisions to make concerning both the creation and administration of transactional legal relationships. Implicit in these exercises is the role of private parties in lawmaking and changing. A particularly interesting chapter concerns the "non-judicial administration of contract law," as it follows a landlord-tenant dispute, memorialized in a series of letters between the contending parties. SUMMERS & HILLMAN, *supra* note 7, at 510-16. I supplement the course with RICHARD DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW* (1978), which demonstrates the ways in which many "non-legal" factors affect legal outcomes.

Despite its focus on private sources of law, *CRO* gives little attention to the limitations on the power of contract parties to modify statutory and common-law duties. The potential for "contractualization" of tort law, corporate law, and the law of domestic relations has created issues

## I. CRO'S LAWYER-CENTERED PEDAGOGICAL APPROACH

### A. *Emphasis on Lawyering*

A major benefit to those of us who give a central place in the first year curriculum to legal professionalism is CRO's continuous emphasis on the "lawyer's role" in the contract process. This emphasis begins in CRO's opening description of the genesis of an appellate opinion. Using a well known case on punitive damages, *White v. Benkowski*,<sup>12</sup> CRO gives a narrative account of the parties' initial transaction, a copy of the written contract, a narrative of the events culminating in the breakdown of the relationship, copies of the initial pleadings and motions, a summary of some of the trial testimony, the special verdict form, the judge's ruling on a post-trial motion, the judgment, and

of growing political importance. A comprehensive introduction to contract law should address the appropriate limitations on individual capacity to alter public regulations by agreement. Moreover, these questions raise some of the most interesting problems, including the issue of commodification and inalienability, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987), the limits of private lawmaking in redefining the family, see Kellye Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219 (1995), and the contractual regulation of information in which the public has an interest.

(2) Dialectical teaching. This was the only pedagogical goal about which I had reservations. Happily, it seems not to have prevented the authors either from editing the principal cases where warranted, or from providing squibs or even one-line quotations from minor ones. CRO is replete with explanatory introductions and snippets of academic commentary, well-chosen for apt and concise expressions of theoretical positions. By way of comparison, however, CRO provides less note material than such works as CHARLES L. KNAPP & NATHAN M. CRYSTAL, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* (2d ed. 1987), and fewer summarized cases than JOHN P. DAWSON, ET AL., *CASES AND COMMENT ON CONTRACTS* (6th ed. 1993). CRO also omits several first year contract classics such as *Allegheny College v. National Chautaugua County Bank of Jamestown*, 159 N.E. 173 (N.Y. 1927), *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (C.A. 1892), *Decicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917), *Frigalimont Importing Co. v. B.N.S. Intern. Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960), *Lumley v. Guy*, 118 Eng. Rep. 749 (1853), and *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445 (D.C. App. 1965).

(3) Extra-Legal Sources of Law. Lon Fuller insisted that "law" arose from numerous "forms of social order, such as legislation, adjudication, mediation, markets, contracts, elections, and managerial direction." Robert S. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 444 (1978) [hereinafter Summers, *Professor Fuller's Jurisprudence*]. Each of these forms has its own competencies and limitations. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). This insight anticipated much modern thinking on such issues as whether problems of product safety are best resolved by markets, legislatures, or courts. Following Fuller's lead, the authors of CRO emphasize the multiple sources of legal reasoning at several points. See, e.g., SUMMERS & HILLMAN, *supra* note 7 at app. a (*Judicial Reasons*); *id.* at app. b (*Historical Background of Consideration and Related Doctrines*). The very nature of the casebook format, however, prevents any actual display of such forces at work in determining law except insofar as they can be translated into either judicial or academic reasoning.

12. 155 N.W.2d 74 (Wisc. 1967).

finally, the appellate opinion.<sup>13</sup> This introduction highlights the involvement of lawyers throughout the contract process by describing and evaluating the services performed by the parties' counsel at each step in the dispute.<sup>14</sup>

Most other casebooks seem oblivious to the importance of a law student's early development of a self-image as a professional.<sup>15</sup> Instead, they seem to encourage the student to develop a self-image as, well, a student, i.e., an innocent inquirer, an earnest compiler and summarizer, an intellectual answerer of abstract questions, and a detached critic of practices and theories. By contrast, *CRO's* questions and problems repeatedly situate the first year law student in the role of an attorney whose client has a vital interest in the issue in question.

I believe that this shift in perspective is critical to the professional development of law students, and leads them to ask themselves a lawyer's questions: Would I advise my client to sue in these circumstances?<sup>16</sup> How would I draft a contract so as to achieve or avoid this result?<sup>17</sup> What course of action would I counsel my client to follow in light of this precedent?<sup>18</sup> How can I prove that element of the claim?<sup>19</sup> Is this settlement offer reasonable?<sup>20</sup> What additional information do I need to advise my client?<sup>21</sup> Is what I am thinking about doing ethical?<sup>22</sup>

Ironically, I suspect that those inclined to dismiss this as a trade school approach are the ones most likely to overlook the critical

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13. SUMMERS & HILLMAN, *supra* note 7, at 5-26.

14. These include the attorney's role in planning, negotiating, and drafting contracts; interviewing and advising clients to such transactions; advising clients during the performance phase; negotiation of disputes; and conducting the litigation of lawsuits arising from breach. I usually suggest to students that the attorneys may not have served their clients well in several respects, not the least of which is that the parties managed to litigate the case through the Wisconsin Supreme Court for an award of 25 cents.

15. There are exceptions to this generalization, including ARTHUR ROSETT, *CONTRACT LAW AND ITS APPLICATION* (5th ed. 1994); DAVID H. VERNON, *CONTRACTS: THEORY AND PRACTICE* (1991); and KNAPP & CRYSTAL, *supra* note 11.

16. See, e.g., SUMMERS & HILLMAN, *supra* note 7, at 723 (Problem 6-5).

17. See, e.g., SUMMERS & HILLMAN, *supra* note 7, at 371 (Problem 4-1); *id.* at 373 (Problem 4-2); *id.* at 379 (Problem 4-3); *id.* at 426 (Problem 4-10).

18. See, e.g., SUMMERS & HILLMAN, *supra* note 7, at 364 (excerpt from MacNeil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627, 641 n.31 (1975)); see also SUMMERS & HILLMAN, *supra* note 7, at 371 (Problem 4-1).

19. See, e.g., SUMMERS & HILLMAN, *supra* note 7, at 723 (Problem 6-5).

20. See, e.g., *id.* at 334 (Problem 3-15).

21. See, e.g., *id.* at 371 (Problem 4-1).

22. See, e.g., SUMMERS & HILLMAN, *supra* note 7, at 398 (excerpt from Opinion No. 79 Legal Ethics Committee Opinion 169, Committee on Legal Ethics, District of Columbia Bar (1980)).

importance of such inquiries to the validity of more global or objective conclusions such as "What is the best rule for this situation?" or "How can contract law reach just results?" When a student is led to think like a lawyer whose clients want to achieve private ends rather than the public good, she is apt to make more sophisticated predictions of the likely consequences of well intended regulation or precedent. To wit, if all the seller must do to avoid a finding of unconscionability is to enlarge the font from six point type to fourteen point type and have the buyer initial the oppressive provision, the unconscionability precedent will have little effect on the collective well-being of improvident buyers.<sup>23</sup> An accurate understanding of legal practices is as essential to legal theory as vice is to versa.

### B. Sequence of Topics

The fundamental unit of analysis used by CRO is the "general theory of obligation," which the authors define as "a recognized basis for imposing legal duties."<sup>24</sup> Before beginning its survey of theories of obligation, CRO briefly introduces the idea of remedies with the well-known case of *Sullivan v. O'Connor*.<sup>25</sup> *Sullivan* is followed by a quotation from a 1938 letter from Lon Fuller to Karl Llewellyn, concerning the influence of Fuller's seminal work, *The Reliance Interest in Contract Damages*.<sup>26</sup>

To me it seems clear that no analysis of contract law can be realistic or adequate which does not recognize that there exists a hierarchy of contract interests, which may be sloganized by saying that they extend from restitution through the reliance interest to the expectation interest, with a number of little midstations, disturbing to *elegantia juris*, along the way. . . . I consider the contribution made

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23. Six point seems to be the font of preference for overreaching business merchants. See, e.g., *Henningson v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); *C&J Fertilizer, Inc., v. Allied Mutual Ins. Co.*, 227 N.W.2d 169 (Iowa 1975), reprinted in SUMMERS & HILLMAN, *supra* note 7, at 618 (both courts noting that the unconscionable provisions appeared in six point type). In treating standardized agreements and unconscionability, CRO often asks students how they might re-draft the agreement, citing Llewellyn's observation that commercial drafters will "recur to the attack" when courts invalidate their contractual terms. See Karl N. Llewellyn, O. Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700, 702-03 (1939) (book review), excerpted in SUMMERS & HILLMAN, *supra* note 7, at 616-17. Awareness of this predictable response is the beginning of enlightenment in thinking about the regulation of unfair contract practices. Thinking like a lawyer with a regulated client thus improves one's ability to think like a judge or legislator aiming to regulate that client.

24. See SUMMERS & HILLMAN, *supra* note 7, at 2, 33.

25. 296 N.E.2d 183 (Mass. 1973), reprinted in SUMMERS & HILLMAN, *supra* note 7, at 35.

26. Lon. L. Fuller and William Perdue, Jr., *The Reliance Interest in Contract Damages* (pt.1), 46 YALE L.J. 52 (1936).

in my article on the reliance interest to lie, not in calling attention to the reliance interest itself, but in an analysis which breaks down the contract-no contract dichotomy, and substitutes an ascending scale of enforceability.<sup>27</sup>

The "ascending scale of enforceability" is illustrated by the ensuing comparative survey of seven theories of obligation (bargain contract with consideration,<sup>28</sup> promissory estoppel, unjust enrichment, promissory restitution,<sup>29</sup> tort liability arising from contractual relations, obligation arising solely from legal form (such as the seal), and obligation arising from statutory (Article 2) warranties).<sup>30</sup> The effect of this survey is to de-center bargain contract from its usually privileged position in a contracts course and to induce students to think of civil obligation as a general domain whose provinces include contract, tort, and property.

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27. SUMMERS & HILLMAN, *supra* note 7, at 41.

28. The authors have chosen particularly apt cases for the consideration doctrine that lend themselves very well to the development of the skill of analogical reasoning. For the first three weeks, literally every new case can be usefully compared to all the preceding ones in classic fashion, permitting the students to draw ever-finer distinctions and comparisons. The sequence of principal includes *Hardesty v. Smith*, 3 Ind. 39 (Ind. 1851), *reprinted* in SUMMERS & HILLMAN, *supra* note 7, at 47; *Dougherty v. Salt*, 125 N.E. 94 (N.Y. 1919), *reprinted* in SUMMERS & HILLMAN, *supra* note 7, at 48; *Maugh's v. Porter*, 161 S.E. 242 (Va. 1931), *reprinted* in SUMMERS & HILLMAN *supra* note 7, at 55; *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891), *reprinted* in SUMMERS & HILLMAN, *supra* note 7, at 57; *Baehr E.I. v. Penn-O-Tex Oil Co.*, 104 N.W.2d 661 (Minn. 1960), *reprinted* in SUMMERS & HILLMAN, *supra* note 7, at 60; *Springstead v. Nees*, 109 N.Y.S. 148 (N.Y. 1908), *reprinted* in SUMMERS & HILLMAN *supra* note 7, at 63; *De Los Santos v. Great Western Sugar Co.*, 348 N.W.2d 842 (Neb. 1984), *reprinted* in SUMMERS & HILLMAN *supra* note 7, at 71; *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917), *reprinted* in SUMMERS & HILLMAN, *supra* note 7, at 73; *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441 (N.Y. 1982), *reprinted* in SUMMERS & HILLMAN, *supra* note 7, at 75; and *Mattei v. Hopper*, 330 P.2d 625 (Cal. 1958), *reprinted* in SUMMERS & HILLMAN, *supra* note 7, at 77.

29. "Promissory restitution" is the term I prefer. This source of liability is usually referred to as moral obligation or promises to pay for benefits received.

30. I confess to having exercised the typical professional prerogative by tinkering with CRO's organization. In the first eight weeks, for example, I violate the casebook sequence by inserting two lengthy, out-of-order "digressions." First, I teach third-party beneficiary, agency, assignment, and delegation immediately after the material on bargain contract, promissory estoppel, and restitution. I find that the third-party material clarifies several references in the early cases to assignment and agency and demonstrates the way in which performance and nonperformance can entail externalities that the law should consider. It also prepares students to consider third-party issues in the later theories of obligation, and prepares them for related topics in property law, such as assumption of mortgages.

Second, before dealing with warranty doctrine, I use the mistake and fraud materials to introduce information-based legal obligations and risk allocation. The doctrines of mistake, fraud, concealment, and warranty form a cluster of closely related ideas that are often found together in any case that appears at first to involve any one of them. I believe that both these digressions supplement the "compare and contrast" pedagogical strategy of the casebook's introductory chapter.

I find that this survey section of *CRO* "teaches" very well. The "compare and contrast" strategy of presenting several bases of civil obligation in succession encourages the student to identify the salient characteristics of each theory and to compare their underlying policies. This perspective is also eminently practical. Any experienced litigator knows that disputes arising from commercial transactions usually engender complaints with multiple counts, each casting the events into a differently-nuanced retelling, appealing to a different source of justice, seeking a remedy tailored to its own rationale. Students of *CRO* learn early on to look for alternative ways of analyzing transactions.

The comparison approach also yields another dividend, which can be expressed by the following metaphor. Imagine that the theories of obligation are arrayed along the vertical axis of a grid and the associated legal doctrines are arrayed along the horizontal axis. To determine whether a doctrine applied to a theory, one would trace a line across from a theory to its points of intersection with the doctrinal columns. Thus, the line representing the theory of bargain contract would intersect the columns representing the doctrine of the statute of frauds, the parol evidence rule and the foreseeability requirement in damages. *CRO*'s comparison approach leads students to ask whether these columns might also intersect lines representing other theories of obligation, such as promissory estoppel or tort arising from contract. Sometimes this method locates a possible doctrinal application that has not yet been identified in the caselaw.<sup>31</sup> Does the mitigation doctrine apply to Section 90 claims? Does the contracts foreseeability rule apply to claims based on torts that arise from contracts? Does the statute of frauds apply to promises to pay for benefits already received? Does the mistake doctrine apply to Section 90 promises? *CRO* recognizes and encourages such useful speculations.<sup>32</sup>

My major criticism of this survey is its incompleteness.<sup>33</sup> The most important omission is the theory of obligation that might be known as "representational obligation," as it is enforced by the tort

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31. I was led to the discovery of this phenomenon by several intriguing student questions about the application of doctrines to different theories. I realized that they were asking these questions, in part, because of the way the material had been presented.

32. See, e.g., SUMMERS & HILLMAN, *supra* note 7, at 122 (Relation of quasi-contract to statute of frauds); *id.* at 156-58, 162-64, 176 (Relation of tort to contract); *id.* at 206 (Problem 2-9) (Application of the statute of frauds to other theories of obligation).

33. An additional minor criticism must attend the confusing inclusion in this survey of a section on the statute of frauds, which is not a theory of obligation. The authors seek, however, to suggest the application of such formal requirements to noncontractual forms of obligation. See SUMMERS & HILLMAN *supra* note 7, at 206.

doctrines of fraud and misrepresentation. The legal obligation that arises when one makes a factual representation is quite similar to that which gives rise to promissory estoppel and often arises in similar circumstances.<sup>34</sup> Just as foreseeable reliance on gratuitous promises can lead to remedies under Section 90, justifiable reliance on gratuitous factual representations can lead to remedies in tort. The "beneficial reliance" rationale that supports enforcement of gratuitous promises applies with similar force to gratuitous factual representations.<sup>35</sup>

This omission is not, of course, unique to this casebook. No contracts casebook gives adequate attention to factual representation as a basis of legal obligation. Considering the frequency with which counts of fraud are joined to counts of promissory liability in the world of civil litigation, this anomaly can be explained only by a stubborn adherence to the traditional academic boundary between contract and tort.

Another set of omissions from the survey of theories of obligation results from *CRO*'s stress on the importance of private-made law, and its consequent de-emphasis on the public regulation of contractual exchange. The survey omits the large body of legal relations that are voluntarily entered, and are often the subject of contractual agreement, but whose content is defined by public norms that cannot be easily modified. Examples include the attorney-client relationship and the relationships arising from marriage, adoption, the formal trust, partnership, bailment, and agency. A general survey of the civil obligations that are "related" to contract should include such consent-based, regulated relationships.<sup>36</sup>

The "ascending scale" theme continues in the remedies section, which follows the survey of theories of obligation. *CRO* is one of the great family of casebooks, tracing their lineage to the patriarchal Lon Fuller, that discuss remedies before contract formation.<sup>37</sup> But by deferring its treatment of remedies until after it has presented the theories of obligation, *CRO* permits remedial doctrines to be evaluated

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34. Randy Barnett and Mary Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987).

35. For example, a representation of fact can induce beneficial reliance by a person who can thereby avoid the costs of ascertaining the true state of events, and thus increase social utility or wealth.

36. Professor Hillman has acknowledged the importance of this debate over state control of the contracting process in contemporary contract theory, but appears to contend that it could be resolved only by a unified theory of contract, which he rejects as unrealistic. Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 123 (1988) [hereinafter Hillman, *Crisis in Contract Theory*].

37. Farnsworth, *supra* note 1, at 1436-37.



in light of the policies underlying the associated theories. The authors may have preferred this sequence for jurisprudential as well as pedagogical reasons. The remedies-first approach might have been thought to imply a form of legal positivism, criticized elsewhere by Professor Summers, that equates the concept of having a legal obligation with the concept of being subject to a legal sanction.<sup>38</sup>

Though Fuller would have rejected this form of positivism, he did contend that legal remedies have a constitutive role in shaping the ends that law seeks to achieve, and are not merely instruments designed to achieve a predetermined goal, such as economic efficiency.<sup>39</sup> Fuller argued that the means available to law actually determine the ends that law can and should rationally seek, and that laws themselves are "means-goal complexes."<sup>40</sup> While *CRO* does not explicitly adopt Fuller's deconstructive inversion of the traditional relation between ends and means, it does seek to tie remedies tightly to their underlying theories of obligation. Less obviously, the remedies section also reinforces the unstated premise that *CRO* is concerned solely with forms of legal obligation that are enforceable by private claims for damages or equitable relief, and not with promise-based obligation that would lead to enforcement by state agencies or criminal prosecution.<sup>41</sup>

The remedies section would benefit in places from more use of economic reasoning to justify different measures of damages. Whether one views a legal obligation as an expression of social morality or as method of social engineering in the instrumentalist mode, the question of the correct measure of damages for its breach cannot be answered solely by looking at its theoretical justification. The continuing quest for the appropriate measure of damages for a claim of promissory estoppel is but one example of this problem.<sup>42</sup>

The focus on remedial choice extends to one of the more impressive later chapters, concerning the appropriate allocation of losses and gains following the application of the doctrines of impossi-

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38. Robert S. Summers, *The New Analytical Jurists*, 41 N.Y.U. L. REV. 861, 879 (1966).

39. Summers, *Professor Fuller's Jurisprudence*, *supra* note 11, at 438. Law, or an economic system, does not simply serve to satisfy wants, but has a role in forming them. *Id.* at 439.

40. *Id.* at 438.

41. See *Rummel v. Estelle*, 445 U.S. 263 (1980) (affirming sentence of life imprisonment under habitual offender statute for obtaining money under false pretenses: defendant failed to repair an air conditioner after receiving payment of \$120.75 to do so).

42. Compare Daniel Farber & John Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903 (1985) (expectation damages is appropriate because promissory estoppel is a contract doctrine) with Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 378-79 (1969) (remedy depends on whether estoppel or contract is the theoretical basis for Section 90).

bility, impracticability, and frustration.<sup>43</sup> Again, economic theory might have served in areas in which natural law seems to offer little basis for allocation.

After the survey of theories of obligation and remedies, the major divisions of the casebook correspond to different processes in the typical chronology of contract behavior.<sup>44</sup> Each chapter begins with a brief essay on the lawyer's role in relation to that part of the contract process. After the cases are presented, problems pose lawyering issues arising from the doctrines and principles.

*CRO* tries to expose the student to several facets of a transactional lawyer's services.<sup>45</sup> This effort is a much-needed counterbalance to the dominant image of the lawyer-as-litigator that emerges from an exclusive diet of appellate case study. If one wishes, one can easily divide *CRO* into two halves roughly corresponding to different lawyer roles. The first half (including theories of obligation and remedies) tends to emphasize the lawyer as litigator. These materials lend themselves to discussions of such things as litigation strategies and judicial rhetoric. The second half emphasizes the lawyer as contract planner and drafter<sup>46</sup> and includes chapters on contract formation, interpretation, policing doctrines, and conditions. Discussion in the second semester naturally shifts to matters such as risk allocation and business planning.

*CRO*'s caselaw coverage in three of these areas—contract interpretation, the parol evidence rule, and the law of conditions—deserves special mention as being thorough and well thought out. None of these sections creates any illusion of doctrinal consistency and the cases are good springboards for discussions of both lawyering and policy issues. The commentary, especially in the conditions material, focuses on the lawyer's role in structuring legal relationships by using these legal doctrines. The authors emphasize not only the risk-allocating function of express conditions, but also the numerous ways that courts have developed to avoid the effects of

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43. See SUMMERS & HILLMAN, *supra* note 7, at 987-1013.

44. The agreement process (contract formation and policing doctrines); the performance process (parol evidence rule, interpretation, good faith, conditions); and the cessation process (impossibility, impracticability, frustration, and their consequences).

45. It gives little attention, however, to the skills of interviewing, negotiating, and developing proof of material facts.

46. SUMMERS & HILLMAN, *supra* note 7, at 364-84. This break is marked with material on contract planning and drafting.

nonoccurrence.<sup>47</sup> These cases are well-adapted to teaching performance counseling.

## II. CRO AND LEGAL THEORY: FIDELITY TO LON

As its authors acknowledge, if CRO can be said to have a theoretical orientation, it is the jurisprudence of Lon L. Fuller.<sup>48</sup> Fuller's thought anticipated many of the insights of legal process theory,<sup>49</sup> law and economics,<sup>50</sup> and relational contract theory.<sup>51</sup>

47. Thus, after presenting the orthodox doctrine that express conditions must be strictly satisfied in order for performance of the conditional promise to become due, *see, e.g., Brown-Marx Assoc., Ltd. v. Emigrant Savings Bank*, 703 F.2d 1361 (11th Cir. 1983), *reprinted in SUMMERS & HILLMAN, supra note 7*, at 769, the authors perforate the doctrine with illustrations of the following limitations or exceptions: Interpretation of contract language as a covenant rather than a condition, *see, e.g., Howard v. Federal Crop Ins. Corp.*, 540 F.2d 695 (4th Cir. 1976), *reprinted in SUMMERS & HILLMAN, supra note 7*, at 776; finding waiver of a nonmaterial express condition, *see, e.g., Connecticut Fire Ins. Co. v. Fox*, 361 F.2d 1 (10th Cir. 1966), *reprinted in SUMMERS & HILLMAN, supra note 7*, at 795; *Clark v. West*, 86 N.E. 1 (N.Y. 1908), *reprinted in SUMMERS & HILLMAN, supra note 7*, at 799; finding estoppel to assert a nonoccurrence caused or induced by the promisor, *see, e.g., Du Pont de Nemours Powder Co. v. Schlottman*, 218, 353 (2d Cir. 1914), *reprinted in SUMMERS & HILLMAN, supra note 7*, at 790, or resulting from the promisor's failure to exercise necessary diligence in bringing about the occurrence, *see, e.g., Luttinger v. Rosen*, 316 A.2d 757 (Conn. 1972), *reprinted in SUMMERS & HILLMAN, supra note 7*, at 788; overriding express conditions to avoid a forfeiture, either by reading the condition out of the contract, *see, e.g., Foundation Dev. Corp. v. Loehmann's, Inc.*, 788 P.2d 1189 (Ariz. 1990), *reprinted in SUMMERS & HILLMAN, supra note 7*, at 812, or by excusing trivial nonoccurrences either under equitable powers, *see, e.g., J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*, 366 N.E.2d 1313 (N.Y. 1977), *reprinted in SUMMERS & HILLMAN, supra note 7*, at 804, or pursuant to nonforfeiture statutes, *see, e.g., Holiday Inns of America, Inc. v. Knight*, 450 P.2d 42 (Cal. 1969), *reprinted in SUMMERS & HILLMAN, supra note 7*, at 816; subjecting nonoccurring conditions of personal satisfaction to an objective test where appropriate or limiting the judging party's discretion by a standard of good faith, *see, e.g., Forman v. Benson*, 446 N.E.2d 535 (Ill. 1983), *reprinted in SUMMERS & HILLMAN, supra note 7*, at 782, or fraud, *see, e.g., Rizzolo v. Poysher*, 99 A. 390 (N.J. 1916), *excerpted in SUMMERS & HILLMAN, supra note 7*, at 788; declaring a condition to be "manifestly unreasonable" or unconscionable, *see, e.g., Q. Vandenberg & Sons v. Siter*, 204 A.2d 494 (Pa. 1964), *excerpted in SUMMERS & HILLMAN, supra note 7*, at 804.

48. SUMMERS & HILLMAN, *supra note 7*, at x. Professor Summers' assessment of the thought of Lon Fuller appears to have undergone a significant evolution. Identifying himself with the analytic or positivist school of jurisprudence associated with H.L.A. Hart, Summers sided with Hart in his long-running debate with Fuller over the nature of law. Robert S. Summers, *Professor Fuller on Morality and Law*, 18 J. LEGAL EDUC. 1 (1965) (book review). Fuller naturally took issue with Summers' criticism of his views. See LON L. FULLER, *THE MORALITY OF LAW* 190-1, 196-97 (Rev. ed. 1969) [hereinafter FULLER, *MORALITY OF LAW*]. After Fuller's death, Summers published a book on Fuller's jurisprudence described by its author as "a sympathetic general introduction to Fuller's work." See ROBERT S. SUMMERS, LON L. FULLER 1 (1984).

49. See William N. Eskridge, Jr. and Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2040 (1994); Anthony J. Sebok, *Reading The Legal Process*, 94 MICH. L. REV. 1571, 1575 (1996) (reviewing HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994) (William N. Eskridge, Jr. and Philip P. Frickey, eds. 1994) (*The Legal Process* "adopts and defends Lon

Although his opposition to legal positivism<sup>52</sup> led many to identify Fuller with the school of natural law, his legal philosophy was original and difficult to classify. Fuller espoused a procedural rather than substantive natural law, whereby a legal order exhibits an "inner morality" insofar as it achieves the formal characteristics essential to its efficacious operation.<sup>53</sup> He implied that a legal order's procedural morality would in some way assure its substantive morality.<sup>54</sup> Disputing legal positivism's focus on the "top-down" nature of state coercion, Fuller argued that our legal order is built from "bottom-to-top" in its customary, contractual, and other consensual forms.<sup>55</sup> In its emphasis on private lawmaking, *CRO* bears the imprint of Fuller's influence.

### A. *The Multidimensional Theory of Obligation*

In the preface to *CRO*, Summers and Hillman promised to deliver a "multidimensional, general theory of obligation."<sup>56</sup> This warranty should have been disclaimed, however, or at least qualified. Anyone hoping for a unified field theory of civil obligation must seek it elsewhere. As with most contracts casebooks, *CRO*'s emphasis on the

Fuller's conception of adjudication."))

50. Fuller and Perdue's *Reliance Interest in Contract Damages*, *supra* note 26, is commonly cited in law-and-economics analysis of contract remedies. See, e.g., Charles J. Goetz and Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1291 (1980).

51. Fuller emphasized the role of the parties themselves in creating and administering legal order. See Lon L. Fuller, *Professional Responsibility*, 44 A.B.A. J. 1159, 1161-62 (1959), reprinted in SUMMERS & HILLMAN, *supra* note 7, at 4; LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 93-5 (1940), cited in SUMMERS & HILLMAN, *supra* note 7, at 754.

52. Fuller's most famous attack on legal positivism occurred in the well-known "Hart-Fuller" debate. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) [hereinafter Fuller, *Fidelity to Law*]. Fuller's views on the relationship between law and morality were also the subject of a lengthy exchange with philosopher Ernest Nagel on the relationship between fact and value. See Lon L. Fuller, *Human Purpose and Natural Law*, 3 NAT. L. FORUM 68 (1958); Ernest Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NAT. L. FORUM 76 (1958); Lon L. Fuller, *A Rejoinder to Professor Nagel*, 3 NAT. L. FORUM 83 (1958); Ernest Nagel, *Fact, Value and Human Purpose*, 4 NAT. L. FORUM 27 (1959). These articles are anthologized in MAURICE R. COHEN, COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 596-640 (Philip Suchman Ed., 2d ed. 1979).

53. See FULLER, *MORALITY OF LAW*, *supra* note 48.

54. Fuller argued that a legal system that observed the inner morality of law would have difficulty implementing irrational laws, such as those enforcing racial apartheid. *Id.* at 159-62. This was not one of his most compelling arguments.

55. Summers, *Professor Fuller's Jurisprudence*, *supra* note 11, at 445-47.

56. SUMMERS & HILLMAN, *supra* note 7, at xi.

multiple policies underlying civil obligation coincides with a refusal to adopt any single, reductive ur-theory, such as economic efficiency, with which to rationalize them all.<sup>57</sup> And as with most contracts casebooks, this refusal is both a strength and a weakness. While this approach more easily accommodates the separate historical strands and different social purposes of each theory of obligation, it offers no hope of rationalizing these different principles with each other or establishing authoritative ways of deciding cases when the principles come into conflict.

A few contemporary theorists have attempted to resolve the bloom and buzz of doctrine by comprehensive theories of contract obligation. Randy Barnett's recently published *Contracts, Cases and Doctrine*<sup>58</sup> attempts to reconcile all contract obligation according to the principle of consent. Some law and economics advocates would also make such a claim for the principle of economic efficiency.<sup>59</sup> Acknowledging somewhat more multiplicity, Steven Burton pursues the Langdellian dream by organizing his casebook around five general principles: The Autonomy Principle, The Justification Principle, The Justice Principle, The Compensation Principle, and The Security Principle.<sup>60</sup>

CRO eschews this unifying urge for a pluralistic survey of doctrine as it finds it. Its message is that there is no overarching theory, only several social policies and principles that are realized in the various rules of law. As Professor Hillman expressed it elsewhere:

The institution of contract includes irreconcilable ideas and discordant phenomena. Fragmented by special rules applying to distinct kinds of contracts, and subject to various exceptions within the main body of doctrine and to competing, distinct theories of obligation, contract law does not fit neatly into any one slot. A highly abstract core theory simply cannot exercise dominion over the entire field. Theorizing that denies the need for reconciliation of conflicting ideas and ideals is thus itself an assault on contract law.<sup>61</sup>

In other hands, such observations might launch a critical theory of contract law. The conflict among contract principles was openly celebrated in the contracts casebook that inspired the Critical Legal

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57. This rejection appears more fully in Hillman, *Crisis in Contract Theory*, *supra* note 36, at 118. "Our complex society is replete with conflicting and evolving ideas, policies, goals, and methods. It is not surprising that our law reflects these conflicts." *Id.* at 109.

58. RANDY E. BARNETT, *CONTRACTS, CASES AND DOCTRINE* (1995).

59. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

60. STEVEN J. BURTON, *PRINCIPLES OF CONTRACT LAW* v-vii (1995).

61. Hillman, *Crisis in Contract Theory*, *supra* note 36, at 123.

Studies movement, Kessler and Sharp's (and later Gilmore's and later Kronman's) *Contracts: Cases and Materials*.<sup>62</sup> It begins famously with a section subtitled "Rule and Counterrule," a sequence of paired cases designed to impress upon the first-year law student that the principles of contract law are hopelessly contradictory.<sup>63</sup> The anti-authoritarian students of the 60s were liberated by an exposé of society's irresolvable moral tensions; the post-everything students of the 90s are more apt to be demoralized by the insight. While Summers and Hillman reject grand, totalizing theories like economic efficiency as inaccurate or incomplete,<sup>64</sup> they do not share Kessler, Sharp, and Gilmore's irreverent glee in exposing the conflict and incommensurability among the bases of the several theories of obligation, and more deeply, among the animating principles of contract law. As a result, *CRO* seems at times to be a sort of Agnostic's Bible, bearing witness to the frequent conflicts among contract principles, urging students to search for principled resolutions, yet suspending judgment as a matter of principle.

For example, in a squibbed case, *Elvin Associates v. Franklin*,<sup>65</sup> Aretha Franklin was sued for failure to honor a singing engagement to which she had made an oral commitment. Even though the parties had exchanged documents stating that neither party would be bound until execution of a formal contract, the court found Franklin liable under the theory of promissory estoppel because plaintiff had relied on her repeated oral assurances that she would perform. Lacking any more general theory, such as economic efficiency or consent, the basic theories of obligation made this case undecidable: A denial of recovery would satisfy the theory of bargain contract (by respecting the promisor's power to withhold consent to be legally bound) while the actual outcome satisfies the theory of promissory estoppel (by protecting the promisee's foreseeable reliance).<sup>66</sup> While the grab-bag

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62. FRIEDRICH KESSLER & MALCOLM PITMAN SHARP, *CONTRACTS: CASES AND MATERIALS* (1953). The current edition is FRIEDRICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* (3d ed. 1986).

63. KESSLER & SHARP, *supra* note 62, at 55. Those who doubt that casebook authors can influence theory might note that Duncan Kennedy's early writings on legal indeterminacy can be seen as an extended elaboration on this casebook's organization. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1686-87, 1700 (1976). See also Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (using Kessler & Gilmore's cases to illustrate law's irreconcilable tensions).

64. See Hillman, *Crisis in Contract Theory*, *supra* note 36, at 122.

65. 735 F. Supp. 1177 (S.D.N.Y. 1990), reprinted in SUMMERS & HILLMAN, *supra* note 7, at 104.

66. See Hillman, *Crisis in Contract Theory*, *supra* note 36, at 116-17 (acknowledging the conflict). It should be noted in passing, however, that Barnett's consent theory fares no better in

theory gives the student a variety of potential legal analyses from which to choose, it leaves her without any way of resolving conflicts among them. Agnosticism thus serves a practitioner better than it does a judge.

CRO's lack of a general theory of contract also hampers analysis of the conflicts among such subsidiary doctrines of contract formation as the parol evidence rule. For example, the authors reprint *Harrison v. Fred S. James, P.A., Inc.*,<sup>67</sup> in which plaintiff claimed he was wrongfully discharged from an oral agreement of two years employment. Shortly after being hired, he executed a written agreement providing that he could be terminated upon fifteen days written notice. Finding this document to be an integrated contract, the court held that the parol evidence rule barred it from considering plaintiff's argument that the written agreement modified a prior oral contract and was unenforceable because it was not supported by fresh consideration. Once again, isolated doctrines and principles made the case undecidable: The pre-existing duty rule would make the written contract modification of a prior oral agreement unenforceable while the parol evidence rule permits the prior oral agreement to be discharged by the writing and prohibits inquiry into the new contract's own lack of fresh consideration. It is apparent that, as a practical matter, either of these rules would gobble up the other if given unqualified priority in such conflicts.<sup>68</sup>

CRO next presents *Kinn v. Coast Catamaran Corp.*,<sup>69</sup> which holds that the parol evidence rule bars any consideration of prior oral communications that might establish a promissory estoppel claim arising before execution of the integration. While in this case, the parol evidence rule permits bargain contract to displace promissory estoppel, nothing inherent in either theory of obligation requires this

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resolving this case unless it can first adjudicate the legal meaning of the defendant's inconsistent expressions of consent to be bound. *Id.* See generally Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990) (extensive supplementation of libertarian consent theory of contract by communal norms of contract formation and interpretation robs "consent" of its normative power).

67. 558 F. Supp. 438 (E.D. Pa. 1983), reprinted in SUMMERS & HILLMAN, *supra* note 7, at 690.

68. If the pre-existing duty rule could be overcome by the mere execution of a writing memorializing the new deal, it would pose no barrier to endless revisions. If the parol evidence rule fell whenever the proponent of the pre-integration evidence alleged that the integration modified a prior, inconsistent deal, it would pose no barrier to the parol evidence offered in most cases.

69. 582 F. Supp. 682 (E.D. Wis. 1984), reprinted in SUMMERS & HILLMAN, *supra* note 7, at 694.

outcome. CRO draws attention to this conflict in a note<sup>70</sup> that suggests several ways in which the two doctrines might interact.

To resolve such conflicts, a judge or law student needs more than mere knowledge of the respective policies of each rule. Despite the authors' claims to propound a "general theory" of civil obligation, CRO neither provides nor suggests a *tertium quid* to resolve such conflicts. CRO's readers must be content to observe the occasional, spectacular collisions among contract principles much as if they were nuclear physicists observing events in a particle accelerator, with much the same hope that the result will reveal some contingent secret about the inner structure of the atom, or the common law.

CRO dramatizes the conflict among three classic, traditional theoretical stances in a fictional appellate opinion, *Pratt Furniture Co. v. McBee*.<sup>71</sup> Written in the tradition of Fuller's celebrated *Case of the Speluncean Explorers*,<sup>72</sup> *Pratt* is a remedies case in which three appellate judges articulate the positions of conceptualism, economic efficiency, and what might be called law-and-morality. The latter judge seems to echo Fuller's approach, and is given the most space (albeit in dissent).

The *Pratt* opinion also exemplifies the chilly reception that CRO gives to economic analysis of law. While such familiar notions as efficient breach and the economics of nondisclosure are presented,<sup>73</sup> more interesting economic criticism of regulation is not.<sup>74</sup> Often the quoted economic analysis is followed immediately by opinion

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70. SUMMERS & HILLMAN, *supra* note 7, at 694.

71. *Id.* at 351-57.

72. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

73. SUMMERS & HILLMAN, *supra* note 8, at 240-41 (excerpt from RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 89-90 (2d ed. 1977) (efficient breach of contract described)); SUMMERS & HILLMAN, *supra* note 7, at 558 (excerpt from Anthony T. Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 13, 18 (1978)). See also SUMMERS & HILLMAN, *supra* note 7, at 254 (excerpt from Ian Ayers and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 101-02 (1989)); SUMMERS & HILLMAN, *supra* note 7, at 236 (excerpt from Von Mehren, *Contracts in General*, 7 INT'L ENCY. COMP. L. ch. 1 at 89 (1982) (economic efficiency of the expectation measure of damages for breach of contract)); SUMMERS & HILLMAN, *supra* note 7, at 213-14 (excerpt from David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 392-95 (1990) (describing, *inter alia*, a promise-breaker's guilt as a "sacrifice of psychic and social goods"))).

74. For example, given the extensive limitations on freedom of contract in the name of regulation, it would seem that the first year is not too soon to introduce students to the possibility of counterproductivity in instrumentalist law-making. See, e.g., Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990).



disagreeing with it or criticizing it on moral grounds.<sup>75</sup> While I think economics has much to say to contract theory, I personally find this skepticism healthy. One suspects that the authors' resistance to "positive"<sup>76</sup> economic analysis of law may resemble Fuller's antipathy for legal positivism: "There is indeed no frustration greater than to be confronted by a theory which purports merely to describe, when it not only plainly prescribes but owes its special prescriptive powers precisely to the fact that it disclaims prescriptive intentions."<sup>77</sup>

### B. Missing Critical Theory

CRO contains a wealth of well-chosen and well-edited selections from theoretical analyses that illuminate the issues raised by the cases. Conflicting viewpoints are often juxtaposed and the authors are content to raise questions rather than to resolve them. This theoretical content is deficient in only one respect: it omits virtually all progressive, feminist, and critical race theories. The only post-war theories appearing in CRO's pages are relational contract theory and law-and-economics analysis, neither of which calls existing contract law seriously into question. The absence of more critical perspectives leaves the reader unaware that the traditionalist optimism about the fundamental rationality and decency of law, and the associated complacency about its role in facilitating market exchange, may not be unanimous. These exclusions are even more significant in light of the authors' concession that contract law consists of irreconcilable ideas and discordant phenomena,<sup>78</sup> and of Fuller's account of law as a "bottom-up" construction, inextricably entwined in social and moral reasoning.<sup>79</sup> A body of law that emerges as a witches' brew of ideology, tradition, reason, commerce, popular culture, religion, racism, sexism, and faction would seem to stand in special need of critical

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75. Thus Posner's articulation of the theory of efficient breach, *see supra* note 69, is followed by what appears to be a critical comment by Lon Fuller, *see* FULLER, *MORALITY OF LAW* *supra* note 48, at 2, *reprinted in* SUMMERS & HILLMAN, *supra* note 7, at 241, while Kronman's economic analysis of the rules of nondisclosure, *see supra* note 73, is followed by a critical comment from CHARLES FRIED, *CONTRACT AS PROMISE* 79, 83 (1981), *reprinted in* SUMMERS & HILLMAN, *supra* note 7, at 558.

76. Oft invoked is MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3 (1953). *See also* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 15-17 (4th ed. 1992).

77. Fuller, *Fidelity to Law*, *supra* note 52, at 632.

78. *See supra* note 57 and accompanying text.

79. Summers, *Professor Fuller's Jurisprudence*, *supra* note 11, at 445-47.

analysis.<sup>80</sup> Despite their hostility to the forms that critical theory has taken,<sup>81</sup> more in the way of theory on race, class, and gender should be included in the next edition of *CRO*.

Somewhat disturbingly, Summers and Hillman seem to have made a special effort to eliminate any reference to race or gender from materials that would otherwise raise such issues on their own. The third case in *CRO*'s survey of the consideration doctrine is *Maughs v. Porter*,<sup>82</sup> in which plaintiff sought enforcement of an auctioneer's promise to give persons attending the auction a chance to win a new car.<sup>83</sup> The auctioneer's promise was made in an advertisement, which is quoted in the opinion. *CRO*'s text of *Maughs* omits the single word "white" from the advertisement, which had limited the offer to white persons.<sup>84</sup> I can only assume that the authors wanted to avoid the

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80. I do not mean to imply that *CRO* should receive critical theory uncritically. Quite the contrary. For example, the most frequently cited article on feminist theory of contract may be Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985), and its criticism of DAWSON ET AL., *supra* note 11. Frug attacked Dawson's casebook for its failure to proffer a feminist interpretation of *Parker v. Twentieth-Century Fox*, 474 P.2d 689 (Cal. 1970), and thus leading students to infer that Parker was a stereotypically grasping, indolent female for refusing to accept a substitute movie role when her original contract role was canceled. Frug argues that Parker rejected the demeaning, sexist role in the substitute film because it was inferior to the progressive, feminist role she was to have played in the original movie. *Id.* at 1116.

In my opinion, however, this celebrated analysis is the least convincing part of Frug's essay. How can a casebook editor be faulted for failure to mention an argument that was ignored by the majority of the California Supreme Court, which was obviously straining to find some element of inferiority in the proffered contract? The most plausible inference is that the court did not mention it because Parker's attorneys did not argue it, that they did not argue it because she did not instruct them to, and that she did not instruct them to because she did not refuse the substitute role for feminist reasons. Whether or not Frug's "re-reading" is wishfully conjectural, and I believe it is, any such speculation in Dawson's casebook would be presumptuous. Dawson's editors continue to decline the opportunity in the sixth edition.

Ironically, Frug missed a much better opportunity to make the same point about stereotyping in Dawson's treatment of *Sharon v. Sharon*, 8 P. 614 (1885), reprinted in DAWSON ET AL., *supra* note 11, at 211 (5th ed.). *Sharon* holds that a woman gave adequate consideration for a promissory note by promising not to "annoy or disturb plaintiff in his rooms." Imagine, a woman having to be paid not to irritate a man! The squib omits that the parties had previously cohabited illegally and that the note in all likelihood represented a form of quasi-alimony. This squib is omitted in the sixth edition of Dawson's casebook, so perhaps Frug's critique struck home after all.

81. See Hillman, *Crisis in Modern Contract Theory*, *supra* note 36, at 106-13 (critical legal studies overstates the indeterminacy of law).

82. 161 S.E. 242 (Va. 1931), reprinted in SUMMERS & HILLMAN, *supra* note 7, at 55.

83. Plaintiff was adjudged to be the winner of the drawing, but the auctioneer refused to deliver the prize. The court denied recovery, however, because, although the auctioneer's promise was supported by consideration (the plaintiff's attendance at the auction), the contract was held to be unenforceable on grounds that it created an illegal lottery under Virginia law. *Id.*

84. SUMMERS & HILLMAN, *supra* note 7, at 55. The reference was included in *CRO*'s first edition and omitted without any textual sign of deletion from the second edition. The omission

"distraction" the offending word had introduced into classroom discussions of the consideration doctrine.

But by eliding evidence of racism in the Virginia residential housing market of the 1930s, the authors lose a golden opportunity to make a critical point in connection with their central theme that contract law is a form of private lawmaking.<sup>85</sup> The advertisement can be the springboard for a discussion of racially restrictive covenants, demonstrating that private lawmakers can sometimes achieve evils beyond the constitutional power of public lawmakers.<sup>86</sup>

CRO also omits *Williams v. Walker-Thomas Furniture Co.*,<sup>87</sup> but gives students the following problem on the standard form contract:

Problem 5-6. Sally Williams comes to your law office and tells you that during the last five years she purchased over \$1,800 worth of household items from Thomas Appliances for which payments were to be made in installments. Williams' balance at Thomas Appliance was now only \$164, but she was in default, and could not pay. Thomas Appliances has just told Williams that it is going to take back all the items she has purchased from the store, not just the most recently purchased one which cost more than \$164. The terms of each purchase were contained in a printed form contract. Each form contained the following clause:

[T]he amount of each periodical installment payment to be made by purchaser to the Company under this present agreement shall be inclusive of and not in addition to the amount of each installment payment to be made by purchaser under such prior agreements or accounts; and all payments now and hereafter made by purchaser shall be credited pro rata on all outstanding agreements and accounts due to the Company by purchaser at the time each such payment is made.

Ms. Williams was not well-educated; she had completed only the eighth grade. Before checking your state's consumer protection legislation, are there any common law approaches to Ms. Williams' problem? Do you understand the above provision?<sup>88</sup>

Now this is an interesting approach to the issues presented in *Williams*, and I am not at all sure that it merits criticism. It may

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is marked by an ellipsis in the third edition. *Id.*

85. This theme is emphasized at the very beginning of the casebook. See, e.g., SUMMERS & HILLMAN, *supra* note 7, at 4-5, 7-8.

86. Judicial enforcement of racially restrictive covenants ended only with *Shelly v. Kraemer*, 334 U.S. 1 (1948).

87. 350 F.2d 445 (D.C. Cir. 1965).

88. SUMMERS & HILLMAN, *supra* note 7, at 626.

indeed merit praise. The problem forces students to interpret the obscure provision that bound Ms. Williams.<sup>89</sup> This exercise could tend to foreclose any tendency to attribute her lack of understanding (if indeed she failed to understand the clause)<sup>90</sup> to her lack of intelligence or education.

The interesting thing about Problem 5-6 is not what it includes, however, but what it leaves out: all references to race and economic class, and certain aspects of gender that were so important in *Williams*. The authors might argue that omission of any reference to Ms. Williams's race is intentional and laudable. While most readers of *Williams* assume that the plaintiff was African-American and on welfare,<sup>91</sup> this assumption is harmful stereotyping.<sup>92</sup> CRO might then be more enlightened to eliminate all clues that would support such a racial stereotype.<sup>93</sup>

Few contracts opinions mention race at all, since it does not figure as a formal element in any contract doctrine. This has led some to complain that African-Americans are "invisible" in accounts of

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89. Summers and Hillman anticipated the exercise recently described in Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L.R. 89, 97 (1994).

90. The lower court opinion states that she testified to an understanding inconsistent with the legal meaning of the clause, viz. that her payments would be applied to each item until paid off. *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964). The Circuit Court opinion does not rest on such a finding.

91. The inference from the opinion alone is apparently based on plaintiff's residence in Washington, D.C. and her receipt of government "relief" benefits. See Spence, *supra* note 89, at 94-5. These elements are eliminated in Problem 5-6.

92. See Spence, *supra* note 89, at 95; Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L.R. 1 (1995). While Chase says that *Williams* is about African-American consumers he nevertheless faults one unnamed contracts casebook author for saying so. *Id.* at 38-39.

Stereotyping low income consumers is a concern because the authors of CRO, along with those of many other contracts casebooks, use Judge Wachtel's opinion in *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (N.Y. Sup. Ct., 1969), reprinted in SUMMERS & HILLMAN, *supra* note 7, at 601-04. Although it rules in favor of the plaintiffs, the opinion stereotypes welfare recipients as "uneducated" and "often illiterate." These descriptions apparently were not established by the evidence, yet were essential to the finding of unconscionability.

93. Chase, *supra* note 92, at 85. Chase argues that to include *Williams* in contracts casebooks reinforces negative stereotypes of African-Americans. *Id.* at 38-39.

For a different, though qualified view on the wisdom of including *Williams*, see Spence, *supra* note 89. Spence uses an exercise designed to teach students not to jump to conclusions about Ms. Williams's race or economic status from the facts of the opinion. She warns professors to be cautious about making any reference to her race. *Id.* at 95, n.32. Yet, she considers *Williams* to provide an opportunity to bring in "issues of race" so long as they involve "different perspectives" and not "stereotypes." *Id.* at 98. Since it is difficult for me to imagine how to prevent a discussion of "the African-American perspective" or "the outsider's perspective" from shading into "stereotypes" of African-Americans or outsiders, her warning would seem well-advised.

contemporary American contract law.<sup>94</sup> When race is mentioned, it is often implied to be a "disability" justifying judicial paternalism.<sup>95</sup> *CRO* thus might well justify "de-racializing" *Williams*. Yet, to eliminate references to race is to eliminate references to racism.

Race is not the only factor erased by the problem, however. What of Ms. Williams's economic class? That too seemed relevant to the opinion in *Williams*, but the hypothetical is about the use of standard form contracts with tricky language, and not about unconscionability arising from a lack of bargaining power. The original plaintiff's receipt of government benefits and the ratio of the purchase price to the amount of her monthly income thus must have been thought to be superfluous to the case.

The effort to eliminate the plaintiff's poverty also raises the question of how it is that Sally Williams has come to "your law office." What kind of practice do "you" have? Why is it feasible even to consider litigating such a small claim? The public interest features of *Williams* drop out in Problem 5-6, and with them the realistic rationale for actual litigation.

Problem 5-6 also minimizes some of the aspects of *Williams* relating to gender. Both Ms. Williams's status as a single mother and the number of her children are omitted from the problem. I have found that when these facts are encountered in classroom discussions of *Williams*, someone usually mentions her domestic heroism. Again, the authors might contend that these details are irrelevant to the standard form contract issue.

But sanitizing such cases by eliminating "extraneous factors" such as race, poverty, and gender may alter the fundamental meaning of the case as a source of law,<sup>96</sup> in part by making the seller's behavior less culpable. Instead of a racist, exploitative, ghetto merchant taking advantage of someone who was unable to shop elsewhere, who had little formal education, who was struggling to support her family on welfare, and whose modest home would be stripped bare by the

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94. Chase, *supra* note 92, at 39. Chase criticizes all contracts casebooks for omitting reference to African-Americans as parties, attorneys, and judges. *Id.*

95. Chase, *supra* note 92, criticizes Knapp and Crystal for including in their casebook *St. Landry Loan Co. v. Avie*, 147 So. 2d 725 (La. 1962), which is the only other case he has found in major contracts casebooks in which the opinion mentions that a party was black, on grounds that it too features a black person as illiterate and in need of judicial protection. *Id.* at 56.

96. See Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 30-31 (1981) (determining unconscionability in consumer transactions requires consideration of individual factors such as lack of education, lack of resources to conduct sufficient investigation, inability to obtain reasonable credit, and psychological needs).

coercive repossession, Problem 5-6 involves only an appliance store that snookered a middle class consumer with some tricky contract language.

And we are left with the question, why does *CRO* use the facts of *Williams* at all? (The names of the parties,<sup>97</sup> the amounts of the indebtedness, etc.) Since the authors omit *Williams*, the students will miss these allusions, which are for the sole benefit of the professors.<sup>98</sup> Only we insiders are supposed to realize that *Williams* could have been analyzed as a case solely about defective information in a standard form agreement.<sup>99</sup>

Apparently, the authors of *CRO* are uncomfortable with discussions of race, class, and gender in the contracts classroom. So am I. The casebook does nothing to ameliorate the problem. Given the paucity of references to these topics in case reports, it becomes even more important to include theory on the effects of race, economic status, and gender in the supplemental materials. It may be that the most a first year course can aspire to is to hint at the possibilities of critical reaction to law, possibilities that must await an upper level treatment that can supply sufficient theory to permit full exploration. I would like to see *CRO* provide such hints in its next revision.

### III. CONCLUSION

*CRO* provides an excellent beginning to a study of lawyering in the context of the law of civil obligation. The role of the lawyer in helping business people structure their legal environments is repeatedly described, and it is by and large an attractive description. The authors have achieved an admirable balance between the practical and theoretical sides of an attorney's world and they repeatedly draw attention to the ethical implications of attorney conduct. They

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97. In Problem 5-6, Summers and Hillman change Ms. Williams's first name from Ora Lee to Sally. In her handout, Professor Spence changes Ms. Williams' first name to Mary to illustrate stereotypical reactions to the case. I assume that both authors considered plaintiff's name to suggest her race.

98. The teacher's manual, but not the casebook, gives the information that Problem 5-6 is based on *Williams*.

99. If so, the unreadability of the clause would seem to be less problematic. It is not expected that consumers actually read and understand standard form agreements, only that their terms be reasonable and not contradict the dickered terms of the deal and the contract-taker's reasonable expectations. See *RESTATEMENT OF CONTRACTS (SECOND)* § 251 (1981). The standardized contract term thus need not be any more comprehensible to a consumer, or even a first-year law student, than a standardized mechanical component buried inside a mass-produced appliance. It is the substantive fairness of the term in light of Williams's reasonable expectations that counts.

communicate a genuine interest in the student's future life as a lawyer and I think that students appreciate this orientation and are improved by it.

In the interest of conveying this message, however, the authors of *CRO* have de-emphasized both the extent of public, regulatory control over private contracting and its inherently political nature. As a practical matter, this omission contributes to what has become the typical blind spot of first-year law students, who remain largely unaware of the overwhelming importance of statutory and regulatory law. Such omissions may be inevitable given the fragmented nature of the traditional law school curriculum. As a theoretical matter, however, without a critical perspective, the ideology of contract law will remain as invisible to the law student as it is to the practitioner. Perhaps the next edition will remedy this shortcoming in what is otherwise an excellent teaching vehicle.