The Best Law School Subject

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As far as we are concerned, there is no mystery to the title of this essay. For lots of reasons, contract law is by far the best law school subject to teach and to learn. What other subject contains such a wealth of theory, doctrine, and substantive reasoning?[1] What other subject focuses so clearly on essential components of economic and other organization in our society, namely private agreements and exchange transactions? What subject better exemplifies the power of general theory, the functions and limits of the common law, the rise of statutory law, the interaction of right and remedy, and the role of various legal actors in our system (including transactors, lawyers in their various roles, judges, and lawmakers)? Okay, maybe you can think of other nominations for best subject. But the best kept secret about contract law may be how much fun it is to teach. Perhaps this is because students come to the subject with low expectations. Invariably they are more than pleasantly surprised to see how interesting and exciting it is to learn about what promises society legally enforces and why.

Not only have we been blessed with the assignment of teaching contracts, we have been fortunate enough to produce, use, and distribute our own materials for teaching the subject: *Contract and Related Obligation* (CRO).[2] In our casebook, we have sought to capitalize on all those characteristics that make contract law so interesting and important. Among other things, we highlight the rules and principles of contract and related law, explore the dimensions of general theories of obligation, focus on lawyerskills such as planning, drafting, interpreting, counseling, litigating, and negotiating, and analyze contract as a major social institution.

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1. By the latter, we mean, for example, moral, economic, and political reasoning. *See* ROBERT S. SUMMERS AND ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION A-2 (3d ed. 1997).

2. *Id.*

Professor Sidney W. DeLong has paid us the compliment not only of using our materials, but of taking the time to review the book.[3] We have found relatively little to quarrel with in Professor DeLong's review. In fact, Professor DeLong often explains our goals better than we did or could. For example, although we believe in the importance of teaching lawyer skills as an end in itself, Professor DeLong's discussion of our use of practical material and our focus on lawyers' roles captures another of our purposes:

> 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. . . . An accurate understanding of legal practices is as essential to legal theory as vice is to versa.[4]

Further, Professor DeLong nicely explains in one sentence a principal reason for our early presentation of theories of obligation: "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."[5] In another sentence, Professor DeLong aptly describes our rationale for placing remedies after theories of obligation: "[B]y deferring its treatment of remedies until after it has presented the theories of obligation, *CRO* permits remedial doctrines to be evaluated in light of the policies underlying the associated theories."[6]

Professor DeLong's review also includes valuable suggestions that we undoubtedly will take up in the next edition of *CRO*. For example, we will include more material on voluntary relations heavily affected by public norms and nonvariable state law, such as marriages, trusts, and agencies.[7] In addition, we will supplement our selections from the secondary literature with a few more examples of analysis that question contract law's role in society.[8] We will also include some economic analysis of regulation.[9] In short, the next edition is sure to be better because of Professor DeLong's time and effort.

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3. Sidney W. DeLong, *An Agnostic's Bible*, 20 SEATTLE U. L. REV. 295 (1997).

4. *Id.* at 299. Professor DeLong also sees our efforts in this regard as a "much-needed counterbalance to the dominant image of the lawyer-as-litigator that emerges from an exclusive diet of appellate case study." *Id.* at 304.

5. *Id.* at 300.

6. *Id.* at 302-03.

7. *Id.* at 302.

8. *Id.* at 311.

9. *Id.* at 310.

But then there is the matter of the title of Professor DeLong's review of *CRO*: "An Agnostic's Bible."[10] We understand Professor DeLong to be commenting on what he believes are two characteristics of *CRO*. First, he believes that we "eschew" any effort to find a unifying theme among the various theories and doctrine, and that we fail to "celebrate" or emphasize conflicts between theories and to reach a judgment about what they mean.[11] Students must therefore try to make sense of the conflicts themselves. Second, Professor DeLong thinks that we are not only deficient in "critical" theory but that we have consciously sought to eradicate from the book issues such as race and gender.[12] We will comment briefly on each of these issues in turn.

What about our lack of a unifying, comprehensive theory of the whole and our response to the absence of a meta-theory? Professor DeLong seems to believe that we promised such a theory in our preface.[13] But we stated only that we intended to "introduce the concept of a multi-dimensional general theory of obligation in Chapter One, explore and compare *a variety of such theories* in Chapter Two, and regularly return to *these theories* in later chapters."[14] In short, each of the theories presented for enforcing promises is itself "multidimensional," but we never intended to claim that we were going to resolve the conflicts among the theories in one grand revelation. Indeed, no one has yet formulated a satisfactory "unified field theory of civil obligation"[15] and we doubt that anyone ever will or could.

This issue aside,[16] does *CRO* fail to equip students with a method for resolving the conflicts between theories and among principles? To some extent, the answer is yes, but that is because students should learn to accept some conflict and disorder in contract law. However, students also learn that judicial discretion is not unrestrained. *CRO* portrays more than just conflicts in theories and doctrine. By systematically building each theory of obligation from the ground up, *CRO* also shows the importance of doctrine in a multitude

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10. DeLong, *supra* note 3, at 295.

11. *Id.* at 307-08.

12. *Id.* at 311-16.

13. "In the preface to CRO, Summers and Hillman promised to deliver a 'multidimensional, general theory of obligation.'" *Id.* at 306.

14. SUMMERS & HILLMAN, *supra* note 1, at xi (emphasis added).

15. DeLong, *supra* note 3, at 306.

16. Elsewhere in the review Professor DeLong appears to agree with the futility of seeking one grand theory. Moreover, Professor DeLong correctly states that our intention was to set forth a "pluralistic survey of doctrine" that shows "that there is no overarching theory, only several social policies and principles that are realized in the various rules of law." *Id.* at 307.

of cases and settings, not only in deciding cases but in achieving just results even in difficult cases. Perhaps Walter Oberer made the latter point best in an excerpt we set forth in *CRO*:

> [L]egal doctrines do not decide the cases that belong in court; they do, however, establish the 'toolery' for seeking justice in the particular case. They represent, that is, relevant concerns, time-tested approaches for determining what facts are relevant, why they are relevant, the degree of strength of the relevance. In short, they provide time-tested *issues* for structuring a case—guides for lawyers to present the case and for judges to decide it. The doctrines thus provide the tools for winnowing through the totality of facts, for evaluating the relevance, for determining a just result, and finally, for the judge to rationalize that result in an opinion that brings the law determined to be relevant to bear upon the facts determined to be relevant.[17]

Although we do not deny the existence of conflicts between and within theories, we also believe that the extent of conflict can be overstated. Although we do not proffer formulae, *CRO* seeks to elicit and deploy the objective force and power of human reason so that students can see that, in light of careful analysis, the weight of reason is often discernibly on one side of an issue. This faith in reason is not the conviction of agnostics!

The second component of *CRO*'s "agnosticism," according to Professor DeLong, involves a deficiency in the book of theory that "calls existing contract law seriously into question"[18] and our apparent "special effort to eliminate any reference to race or gender" from the materials.[19] As to the general absence of materials critical of contract law, we hope that Professor DeLong has not overlooked material in *CRO* on problems of unequal bargaining power, of sorting out free bargaining from duress and extortion, of overreaching through standard form contracts, and of procedural and substantive unconscionability, among others.[20] Nevertheless, we will include some material of more recent vintage on these and related problems in the next edition. Of course, as Professor DeLong correctly points out, we should not and will not "receive critical theory uncritically."[21]

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17. Walter Oberer, *On Law, Lawyering and Law Professing: The Golden Sand*, 39 J. LEGAL EDUC. 203, 205 (1989), quoted in SUMMERS & HILLMAN, *supra* note 1, at 152.

18. DeLong, *supra* note 3, at 311.

19. *Id.* at 312.

20. We concede that most of these excerpts presently appear in one chapter (Chapter 5 on policing). *See* SUMMERS & HILLMAN, *supra* note 1, at 535-655.

21. DeLong, *supra* note 3, at 312.

Professor DeLong sets forth two examples of the banishment of race and gender from *CRO*. The first is in *Maughs v. Porter*.[22] Professor DeLong correctly notes that in the second and third editions we expunged the word "white" from a sentence of the opinion describing how the defendant set forth an advertisement with the hope of luring white people to an auction.[23] Here is how this came about: The year that we were revising *CRO* for the second edition, a few students, some minority, some not, came to one of us (Okay, it was Hillman) after a class on *Maughs* and said that the reference to white persons in the case was insulting and unnecessary to the contract issue. Professor Hillman told the students something very similar to a point Professor DeLong made in the review of CRO that "sanitizing . . . cases by eliminating 'extraneous factors' such as race, poverty, and gender may alter the fundamental meaning of the case as a source of law."[24] But, alas, at the very last moment, before we sent the manuscript off to the publisher, Professor Hillman, remembering the deep concern of the student delegation, excised the offending word from the text.[25] We now both think that was a mistake.

Professor DeLong's second example is a problem we wrote based on *Williams v. Walker-Thomas Furniture Co.*[26] The problem is set forth in Professor DeLong's review[27] and we will not repeat it here. Suffice it to say that the problem focuses on whether a cross-collateral clause in an installment sales contract is sufficiently intelligible to be enforceable. We changed the name of the purchaser to Sally Williams and omitted references to her residence in Washington, D.C., her receipt of welfare, and her single-mother status. Professor DeLong thinks that this was a conscious effort to eliminate "all references to race and economic class, and certain aspects of gender . . . ."[28] We confess some puzzlement here. The problem does state that Sally Williams was uneducated, had paid all but $164 of an $1800 installment debt on household items, and was now in default and could not pay more.[29] Moreover, as Professor DeLong acknowledges, the case

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22. 161 S.E. 242 (Va. 1931), *reprinted in* SUMMERS & HILLMAN, *supra* note 1, at 55.

23. The second edition omitted the term without any indication and the third included an ellipsis.

24. DeLong, *supra* note 3, at 315.

25. We have no recollection of whether we put in an ellipsis in the second edition or what happened to the ellipsis.

26. 350 F.2d 445 (D.C. Cir. 1965), *reprinted in* SUMMERS & HILLMAN, *supra* note 1, at 626.

27. DeLong, *supra* note 3, at 313.

28. DeLong, *supra* note 3, at 314.

29. DeLong, *supra* note 3, at 313.

report of *Williams* itself fails itself to invoke the issue of race.[30] At any rate, our reasons for writing a problem and not using the full case were twofold. Professor DeLong aptly sets forth the first reason: "The problem forces students to interpret the obscure provision that bound Ms. Williams. . . . [T]he hypothetical is about the use of standard form contracts with tricky language, and not about unconscionability arising from a lack of bargaining power."[31] The second reason was that we cover the bargaining power issue and related problems of poverty in *Jones v. Star Credit Corp.*[32]

Professor DeLong raises interesting questions about whether extensive editing of cases merits criticism or praise. Despite the conclusions Professor DeLong draws from two examples, we are actually much more comfortable with selecting cases that are rich in facts and background and with preserving the record. After all, we devote a full introductory chapter to tracing the relationship between two parties from the agreement stage, to breakdown of the relationship, to failure of settlement negotiations, to lawsuit, and to final decision on appeal, in order to show students the importance of context and history in understanding a case.[33] As a general matter, we also tried to edit the cases in *CRO* with the goal of preserving the pertinent record. In this regard, we are also not agnostics, but in the nature of true believers.

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30. *Id.*

31. *Id.* at 314-15.

32. 298 N.Y.S.2d 264 (Sup. Ct. 1969), *reprinted in* SUMMERS & HILLMAN, *supra* note 1, at 601. Neither *Jones* nor *Williams* specifically invoke issues of race.

33. SUMMERS & HILLMAN, *supra* note 1, at 2-43.