

TOURO LAW JOURNAL OF RACE, GENDER, & ETHNICITY**A HUMBLE TRIBUTE TO PROFESSOR DEBORAH WAIRE POST UPON HER RETIREMENT****DEBORAH ZALESNE***

It is my pleasure and honor to write a personal tribute to Professor Deborah Waire Post, my two-time co-author, my mentor, and my friend. Her contributions to my own scholarship, teaching, and perspective on the law are immeasurable. Her contributions generally to contracts scholarship, contracts pedagogy, and the development of contract law itself, are even more so.

When I started teaching, just over twenty years ago, I was fortunate that one of my contracts colleagues at City University of New York Law School (“CUNY”), Sharon Hom, was a co-author of a progressive, social justice-oriented contracts casebook, *CONTRACTING LAW*.¹ When I discovered that the casebook was authored by three women, I was immediately in awe. But it was when I learned that all three authors came to the book with an outsider perspective, based not only on gender, but also on race, ethnicity, and sexual orientation that I realized how revolutionary the book really was.

I adopted the book as soon as I started teaching Contracts at CUNY. But I was a bit wary about this brand of teaching. I wasn’t sure, at the time, that I wanted to teach from an “outsider” or “critical” perspective. Can one teach Contracts from a public interest, social justice perspective without sacrificing the canon? Would students accept this “alternative approach?” I knew I wanted to teach from this cutting edge, critical race feminist casebook, but I was young and uncertain as to how it would be received.

I had my answer soon enough. The casebook includes many of the same chestnut cases included in more traditional books. The book teaches the same contracts doctrine. It includes the same focus on the UCC and the Restatement. But it presents the law in its historical-cultural context, adding a human dimension to the cases and thus to the law. It includes short pieces of poetry and fiction that make the stories in the cases relatable, a pedagogic innovation that is now becoming standard, but that almost never finds its way into casebooks. It includes an article related to breeding horses for a restitution case about a horse breeder, an extensive note on agriculture and the family farm after a promissory estoppel case about dairy farmers trying to get a loan, a detailed note providing the backstory to the U.S. Steel Youngstown, Mahoning Valley plant closings, after a United Steelworkers contract formation case, a long note about the history of the employment at will doctrine and job security relevant to consideration and the employment cases, and an article with statistics about children as consumers for the minority cases, among many other important background notes and articles. The result is that students learn to see all the angles and they learn to be critical of the bare bones facts as so often appear in judicial opinions.

After using *CONTRACTING LAW* in my contracts class my first year at CUNY I realized that I was not actually teaching from an alternative perspective and my students did not perceive the

* Professor of Law, City University of New York School of Law. B.A., Williams College; J.D., University of Denver College of Law; LL.M., Temple University School of Law.

¹ AMY KASTELY, DEBORAH WAIRE POST, NANCY OTA & DEBORAH ZALESNE, *CONTRACTING LAW* (5th ed, 2016).

class as such. Rather, with CONTRACTING LAW as the course book, students learned the law in a deep and lasting way and were able to develop nuanced and meaningful analyses of cases and fact patterns, boosting performance on their exams and better preparing them for the bar exam and for practice.

After using the book for almost twenty years I had the great fortune of being asked to join on as an author for the recently published fifth edition. Working with Deborah (and Nancy Ota, and Amy Kastely) has honestly been the pinnacle of my career so far.

Deborah not only took part in writing a ground-breaking, progressive contracts casebook, but she has also broken ground in the way she delivers the material to her students. Justice Holmes once stated that “[t]he main part of intellectual education is not the acquisition of facts but learning how to make facts live.”² Deborah is a master at bringing cases to life. She knows every fact of every case in CONTRACTING LAW, and appears to have a Ph.D. in every subject that comes up in every case. She uses her deep knowledge to animate not only the facts, but also the legal principles for which the cases stand. By emphasizing the context and historical and cultural background of each case, she assures that the standard contracts principles she teaches will be meaningfully applied to the narrative-infused facts of each case; and she challenges courts and cases when the application of traditional principles fit a staid formalism rather than the concrete situation at hand.

Deborah’s students appreciate the engaging exercises and simulations she does, such as asking them to make a movie about their favorite cases (thus assuring that students see the parties as real people), and having the moot court students help her 1Ls re-argue cases (thus pushing students to consider alternative perspectives). Deborah engages the students in a way that requires them to think deeply about the people in the cases. In this way, she is able to teach empathy through the facts and details, while simultaneously creating a stimulating moral and intellectual atmosphere.

In teaching Contracts, Deborah emphasizes to students that judicial opinions illustrating legal concepts are not essentially about naked legal persons, but rather daughters, mothers, sons, and fathers clothed in our shared humanity and various social situations. Deborah’s autobiographical piece, *The Square Deal Furniture Company*,³ included in CONTRACTING LAW, exemplifies this humanizing approach to teaching. In the article, Deborah juxtaposes the realities of the relationships between the working poor and furniture stores like Walker Thomas and the more fictional basis for the reasoning in *Williams v. Walker Thomas*. She details how her own observations and experiences “as a poor black person living among other working class white and black families on an integrated street in a small city” did not at all resemble the picture painted by both the lower and the appellate courts in *Walker Thomas*. She brings the facts of the case to life, describing the “personal relationship” that existed between her parents (whom she describes as “poor, not stupid,”) and the salesman from the furniture company (who she says was “given the privileged status of ‘friend’”). Writing that “Williams was a good credit risk because she had a personal relationship with Walker-Thomas,” she humanizes legal and economic categories in a

² Oliver Wendell Holmes, Oration before the Harvard Law School Association, at Cambridge on the 250th Anniversary of Harvard University, (Nov. 5 1896) in SPEECHES BY OLIVER WENDELL HOLMES, 1896, at 29.

³ Deborah Waire Post, *The Square Deal Furniture Company*, in CONTRACTING LAW, *supra* note 1, at 464–65.

way that cannot be done if the goal is simply to teach black letter law in preparation for the bar exam.

By explaining her father's personal loyalty to the furniture store, she successfully debunks the notion that such commercial relationships are always arm's length, and convinces the reader of a different perspective. As a matter of content, it provides students an easily memorable and vivid illustration of a reality at odds with the ideological assumptions of the court. However, in form ("transported back in time to my own childhood"), the vignette in the casebook is given from the point of view of a child uncorrupted by economic and legal categories, seeing only what is before her eyes, getting to the actual thing-in-itself: the concrete human relationship between the salesman and her father sitting at the kitchen table, the sense of its regularity, the way the furniture looked in the home – all from the point of view of an observing, aware child. While the law is an abstract tool, the parties to a lawsuit live concrete realities in a specific social context, playing a role in a particular historical process and with their own senses of the meaning of conduct and language as members of communities within communities.

This humanizing method of teaching law -- a method of considering human categories of trust, personal relationships, and the varied factors that go into human motivation -- is undoubtedly missing from most standard contract law casebooks.

Once students see Ms. Williams as a particular human being with a particular history in a particular social context, their legal analysis can incorporate appreciation of the violence committed by a betrayal of trust. In other words, relationships and context matter. Deborah insists that students develop the tools to approach every judicial opinion asking whether the court adequately considered the context surrounding whatever issue is presented.

To that end, Deborah and her co-authors advanced the theory that there are three discrete ways in which courts might consider the controversial "reasonable person." The key difference among the three tests is the type of evidence permitted: the "universal" reasonable person test considers language alone; the "positioned" reasonable person test considers language as well as the context surrounding the communication; and the "socially situated" reasonable person test considers the language and context surrounding the communication, as well as the social identity of the participants -- their histories, communities, and expectations, based on their race, ethnicity, gender, age, religion, etc. These three variations of the reasonable person test present a new and effective method of provoking critical thought in general, and critique of judicial reasoning in particular. In one sense, the subtle distinctions will tickle students' critical sensibilities in attempts to discern which test the court applies. But in another sense, students are compelled to think of what features of the context are relevant, including power relations, historical marginalization of populations, the particular historical context, and dominant ideologies. As students move to their second and third years, and are introduced to balancing tests in constitutional law, common law property principles, and modern corporate law, to name a few examples, the critical capacity stirred up in a first year contracts course will only become more refined.

Responding to critics who consider the "socially situated" reasonable person test nothing more than a disguised abandoned subjective test, Deborah provides two possible responses that all first year law students should take seriously: 1) the question is how mindful judges are to differing

perspectives, especially in a pluralistic society and complex economy; and 2) each approach (even the most formalistic) requires the interpreter to create an account, to tell a story with characters -- the question is simply the degree to which factual context informs such an account.

In addition to being a beloved, student-centered teacher, Deborah has also been a tremendously prolific scholar. Dating back to 1987, she has authored countless important books, book chapters, and articles, on provocative and thought-provoking topics such as *CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING*,⁴ *Contract and Dispossession*,⁵ *Reflections on Identity, Diversity, and Morality*,⁶ *Race, Riots and the Rule of Law*,⁷ *Profit, Progress and Moral Imperatives*,⁸ *Critical Thoughts About Race, Exclusion, Oppression and Tenure*,⁹ and *Power and Morality of Grading: A Case Study and a Few Critical Thoughts on Grade Normalization*.¹⁰ These writings consistently challenge both the Contracts bar and the academy to consider generally ways in which power and status affect contracting, and the ways in which “contract law has become an instrument of oppression and dispossession rather than liberation.”¹¹

Several years ago Deborah and I co-wrote an article, *Vulnerability in Contracting: Teaching First Year Law Students about Inequality and its Consequences*.¹² Deborah immediately insisted that the article, which focuses on teaching about socio-economic class in a first year contracts class, be “devoted not to the issue of vulnerable *people* but rather to vulnerable *populations* – groups that exist on the margins of society because they lack significant political and/or economic power.” The aim, she explained, is to get students to think structurally (also a form of paradigmatic scientific reasoning) by looking not only at individual parties but to the groups of which they are members, the particular histories of those groups, and the meanings and interpretations attendant to group affiliation.

In this article, we wrote about methods of encouraging students to be aware of the culturally-specific assumptions that intrude on student and judicial legal analysis. One method is “teaching interdisciplinary” (the title of another of Post’s many thoughtful articles on pedagogy)¹³. Deborah brought her rich background in anthropology to bear, demanding that psychology, economics, sociology, moral theory, history, and anthropology be part and parcel of any complete

⁴ LOUISE HARMON & DEBORAH W. POST, *CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING* (1996).

⁵ Deborah Waire Post, *Contract and Dispossession*, 1 COLUM. J. RACE & L. 418 (2012).

⁶ Deborah Waire Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN’S L.J. 136 (1990-1991).

⁷ Deborah Waire Post, *Race, Riots and the Rule of Law*, 70 DENVER L. REV. 237 (1993).

⁸ Deborah Waire Post, *Profit, Progress and Moral Imperatives*, 9 TOURO L. REV. 487 (1993) (reviewing MEIR TAMARI, *IN THE MARKETPLACE: JEWISH BUSINESS ETHICS* (1991)).

⁹ Deborah W. Post, *Critical Thoughts About Race, Exclusion, Oppression, and Tenure*, 15 PACE L. REV. 69 (1994).

¹⁰ Deborah Waire Post, *Power and the Morality of Grading: A Case Study and a Few Critical Thoughts on Grade Normalization*, 65 UMKC L. REV. 777 (1997).

¹¹ *Contract and Dispossession*, *supra* note 5 at 418.

¹² Deborah Waire Post & Deborah Zalesne, *Vulnerability in Contracting: Teaching First Year Law Students about Inequality and its Consequences* in *VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER* (2011).

¹³ Deborah Waire Post, *Teaching Interdisciplinarily: Law and Literature as Cultural Critique*, 44 ST. LOUIS U. L.J. 1247 (2000).

legal analysis. To ask students to think about culturally-specific assumptions held by the judge is to invite them to consider what they have learned, and what they do learn from their classmates, about each of these broad disciplines.

Perhaps Deborah's most profound insight here is to point out that thinking "sociologically" is not to think unscientifically. She suggests that students and judges look to the causes, not only the consequences, of inequality. (For example, while Judge Skelly Wright, in *Walker Thomas*, emphasized the consequences of inequality as creating relationships between "sophisticated" and "unsophisticated" actors, he did not adequately, if at all, deal with the causes.) Judging the causes of phenomena is the paradigm of scientific thinking. Encouraging students to think structurally and holistically and to make inferences about context and motivations, all with an eye toward the causes of the situation at hand, is not incompatible with learning the contract law canon. Instead it enhances the project by giving students additional tools to make creative arguments and find routes to pursue just causes as public interest attorneys.

The second method, though of course related, is to present students with two cases with similar sets of facts but different outcomes, often one strictly formalistic and the other attentive to varying degrees of relevant context. For example, in *Acedo*,¹⁴ a young, poor, possibly immigrant woman "misunderstands" a contract, signs it anyway, and is held to the letter of its content even though the consequence was, from her point of view, the forced taking of her newborn baby. In another case, *Vokes*,¹⁵ the court explicitly points out that "certain classes of people" are particularly vulnerable to exploitation. There, a widow paid enormous sums of money to continue her dance lessons all while disingenuously being told by the dance company that her dancing was mightily improving. A class discussion led by students on the different legal reasoning presented in each case is bound to remind participants of the importance of thinking structurally. The structuralism of considering "certain classes of people" brings insight to students by situating them in such a way to connect the dots on their own by making inductive inferences based on social experience rather than deducing from some static legal principle.

Deborah's work can be understood as an important piece in the ongoing revolutionary legal movement known as legal realism. Karl Llewellyn's influence on Deborah Post is evident and their shared backgrounds in anthropology help to problematize the static principles of classical contract law. In *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*,¹⁶ she points to the ambiguity built into Article 2 of the UCC as intentional and informed by anthropological insights. Because culture mediates between homogeneity and chaos in linguistic and behavioral interpretation, flexibility in the law does not amount to anarchy.¹⁷

Llewellyn understood that culture is a dynamic process, not a static set of social facts. Prompting students to think about culture in this way will make them better law students and more effective lawyers. Llewellyn aimed to "put his knowledge of anthropology to work"¹⁸ and Deborah

¹⁴ *Acedo v. State of Arizona, Dep't of Public Welfare*, 513 P.2d 1350 (Ariz. App. 1973).

¹⁵ *Vokes v. Arthur Murray, Inc.*, 212 So.2d 906 (Fla. App. 1968).

¹⁶ Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 TOURO L. REV. 1205 (2000).

¹⁷ *Id.* at 1212.

¹⁸ *Id.* at 1209.

believes rightly that students can do the same. While first year students may hate, at least initially, to be told that a statutory provision is ambiguous, learning to deal with ambiguity in the law will serve them well in the long run.

In addition to insisting upon empathy and realism in the law, Deborah encourages and inspires her colleagues to excel in our writing and teaching, symbolic of her aggregate impact on hearts and minds.

Deborah –

You've been my mentor and my inspiration. When it comes to my own scholarship, you have been my greatest supporter, as well as greatest critic. You have constructively insisted on ways to be more rigorous in my work, to adequately clarify my terms and arguments, provoking re-thinking with your insightfully relevant considerations and questions. Because on the one hand we do not always agree and on the other I have enormous respect for your views, your criticism carries great weight.

I am deeply grateful for your friendship and guidance. Thank you for believing in me enough to invite me to join this unparalleled project and creating the opportunity for me to work on a book that unites my love of teaching and contract law, in a context of social justice lawyering that demands continuing education, rigorous and informed criticism, and meaningful engagement with the tapestry of perspectives in our multifaceted society. Your patience and support mean the world to me, and your honest critiques of my scholarship have changed my thinking for the better. Your overall influence on my career cannot be overstated.

Your (professional) legacy will be in the lives you've touched, including the many students you have taught over the years, the Touro faculty, members of the AALS section on Contracts, members of SALT, your co-authors, and generally those who have been lucky enough to interact with you at any point along the way. It will be from your intelligence, professional integrity, depth of knowledge, encyclopedic memory, command of the law, relentless energy and wonderful sense of humor. It will be in having taught your students how to make a difference, having influenced your colleagues, having helped shaped many careers, having enriched our community, and having inspired us to be better teachers, better lawyers, and better people.

Congratulations on your retirement. I wonder if you will not work just as hard.