

5-2015

## Under the Sun: Casebooks and the Future of Contracts Teaching

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### Recommended Citation

Thomas W. Joo, *Under the Sun: Casebooks and the Future of Contracts Teaching*, 66 HASTINGS L.J. 899 (2015).

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# Under the Sun: Casebooks and the Future of Contracts Teaching

THOMAS W. JOO\*

*What is the future of the casebook in legal education? It is tempting and fashionable to blame the current woes of law schools on their supposedly “outdated” educational practices, such as casebooks. As this Article shows, however, most of the current criticisms of casebooks and the case method are perennial ones. This does not render the critiques invalid, but it does undermine the notion that they reveal a contemporary crisis in legal education. Indeed, they are not even specific to legal education. Rather, they reflect fundamental tensions in the learning of any field: theory versus practice, general understanding versus specific technical knowledge. By saying that there is nothing truly new in these criticisms, I do not mean to say that proposals for reform are futile or ill-advised. It is simply that there is nothing new under the sun, in legal education or anywhere else. Legal education has gone back and forth on these matters, and will continue to do so, and that is probably as it should be.*

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\* Professor, UC Davis School of Law. This Article was prepared for a Hastings College of the Law Symposium in honor of Charles Knapp’s fiftieth year of law teaching. I would like to thank Hastings, the organizers and attendees of the conference, and of course Chuck Knapp, a leading scholar, teacher, and mentor in the field of contracts. I would also like to thank the UC Davis School of Law for its financial support of this research.

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## INTRODUCTION

The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun.  
—*Ecclesiastes* 1:9 (King James).

I am optimistic about the prospect of teaching contracts through casebooks. In light of the current mania for “disruptive innovation,” it is tempting and fashionable to blame the current woes of law schools on their supposedly “outdated” educational practices, such as casebooks. But the slack demand for legal education in recent years is unlikely to be a sign of a crisis in the quality or relevance of legal education. More likely, it is driven by the lack of demand for lawyers. Law firms were hiring huge numbers of graduates at princely salaries less than a decade ago; it seems implausible that legal education has undergone a wholesale decline in quality or relevance since then. A quick look at the history of legal education shows that most of the current criticisms of the case method have appeared before. Formal legal education generally, and the case method in particular, arose in direct response to the perception that legal training was too tied to routine law practice. For over a century, the case method has been both praised for its practical value and ridiculed for lacking such value (the most common criticism of legal education today). Like anything, casebooks and case-based teaching could be improved. But I believe they are far more useful and less hidebound than many of their critics would have you believe.

Indeed, other countries continue to look to U.S. legal education as the model for reforming their own institutions.<sup>1</sup> In many countries, U.S. legal education has literally become part of legal education. Afghanistan, for example, has recognized that educating lawyers in the United States and other countries is a faster route to rebuilding the profession than remaking domestic legal education.<sup>2</sup> Foreign law graduates have long

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1. See, e.g., Carole Silver, Book Review, 61 J. LEGAL EDUC. 691, 691 (2012) (reviewing *LEGAL EDUCATION IN ASIA: GLOBALIZATION, CHANGE AND CONTEXTS* (Stacey Steele & Kathryn Taylor eds., 2011)).

2. *Id.* at 694 (citing Veronica Taylor, *Legal Education as Development*, in *LEGAL EDUCATION IN ASIA: GLOBALIZATION, CHANGE AND CONTEXTS*, *supra* note 1, at 216, 223).

sought advanced degrees in the United States, and in recent years, many Chinese nationals have chosen to pursue law degrees in the United States and return to China to practice as “foreign-qualified lawyers.”<sup>3</sup> Many foreign nationals see a U.S. legal degree as training that qualifies them to compete on the global level, and they see U.S. training as more practice oriented. In UC Davis’s International Commercial Law LL.M. program, I have taught many experienced practitioners with law degrees from many different countries. I teach U.S. corporations law using the same casebook I use for my J.D. classes. The students—or more to the point, lawyers—often comment that the U.S. teaching style is more grounded in practical application than that in their home countries.

As we shall see, many of the contemporary criticisms of American legal education, and the case method in particular, have been made periodically since the earliest days of the modern law school. This does not mean the critiques are invalid, but they are not specific to any contemporary crisis, the “digital age,” or the “new economy.” Indeed, they are not even specific to legal education. Rather, they reflect fundamental tensions in the learning of any field: theory versus practice, general understanding versus specific technical knowledge. Some degree of each is necessary. Moreover, there is no ideal point of balance among these competing and complementary priorities. The feeling of imbalance is justifiable, and intractable. By saying that there is nothing truly new in these criticisms, I do not mean to say that proposals for reform are futile or ill-advised. It is simply that there is nothing new under the sun, in legal education or anywhere else. Legal education has gone back and forth on these matters, and will continue to do so, and that is probably as it should be.

### I. THEORY VERSUS PRACTICE

Critics of contemporary legal education<sup>4</sup> often cite the 2007 Carnegie Report, which argued that law schools focus too heavily on doctrinal analysis and not enough on lawyering skills or ethics.<sup>5</sup> Casebooks, of course, are far better suited to teaching the former than the latter. The tension between theory and practice in legal education is a constant—as is the anxiety about this tension among legal educators, students, and the bar. Indeed, the 2007 Carnegie Report is only the most recent in a century of reports (primarily from the Carnegie Foundation) grappling with this issue. The current concern about a lack of practical training also appeared, for example, in the American Bar Association’s (“ABA”)

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3. *Id.* (citing Taylor, *supra* note 2, at 226).

4. *See, e.g.*, Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 CATH. U. L. REV. 643 (2013).

5. WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 5–6 (2007).

MacCrate Report in 1992,<sup>6</sup> and in an earlier report by the Carnegie Foundation, the 1921 Reed Report.<sup>7</sup>

Prior to modern academic legal education, lawyers trained through apprenticeships in law offices before admission to the bar. William Blackstone criticized this approach, arguing unless an apprentice is educated “in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him.”<sup>8</sup> When academic law professorships were first introduced in U.S. colleges in the late 1700s, they were designed to provide the theoretical foundation for apprenticeships that Blackstone had recommended.<sup>9</sup>

The Langdellian case method, and the casebook, arose as part of a movement to emphasize the academic character of law schools. Prior to the Langdellian case method, professors in law, as in other disciplines, educated students through lectures or textbooks.<sup>10</sup> Dean Christopher Columbus Langdell introduced the case method at Harvard Law School in 1870, but it did not begin to spread to other schools until around 1890.<sup>11</sup> By 1914, a majority of American law schools had adopted some version of the case method.<sup>12</sup> That year, the Carnegie Foundation commissioned a report on the case method. Because of continuing disagreement among U.S. academics over the case method, the Carnegie Foundation asked Josef Redlich, a professor at the University of Vienna, to conduct the study.<sup>13</sup>

Redlich’s report praised the case method for teaching practical lawyering skills. Some U.S. lawyers then, as now, criticized the case method as “too academic, too ‘transcendental.’”<sup>14</sup> Redlich, however, thought it was practical and useful, and more “scientific” than traditional methods because of its empirical grounding in actual decisions.<sup>15</sup> He

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6. AM. BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report.athcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.athcheckdam.pdf).

7. ALFRED Z. REED, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES, WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA (1921).

8. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1963 (2012) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*32).

9. *Id.* at 1964–65.

10. Bruce A. Kimball, *The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell’s Emblematic “Abomination,” 1890–1915*, 46 HIST. OF EDUC. Q. 192, 194–95 (2006).

11. *Id.* at 202–03.

12. JOSEF REDLICH, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS vii (1914).

13. *Id.* at vi. Redlich spent a total of two months visiting ten U.S. law schools.

14. *Id.* at vii.

15. *Id.*

thought case-method students were better prepared for practice than those from European law schools or those from other U.S. law schools.<sup>16</sup>

In Redlich's view, the case method,

really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It . . . mak[es] the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded not as dry abstractions but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating social and economic life of man.<sup>17</sup>

In fact, early critics of the case method argued *both* that the case method was excessively theoretical and that it was too practical.<sup>18</sup> The latter criticism was apparently based on the belief that lawyers would engage in the “mindless collection of precedents in an attempt to win judgments for their clients based only on the assumed weight of the collected cases, rather than appeal to the principles of the common law.”<sup>19</sup> In other words, the study of cases provides fuel for advocacy, but not understanding of the law.

In 1921, another Carnegie Foundation report, this one by Alfred Reed, criticized the lack of real-life practical training in U.S. law schools. As noted above, most law schools followed the case method by this time, but not all lawyers went to law school; many received their training through the traditional apprenticeship method.<sup>20</sup> Most states permitted law school as a substitute for apprenticeship, but few states required formal legal education for bar admission.<sup>21</sup> The Reed Report recognized the emergence of three kinds of law schools: scholarly schools, schools focused on local practice, and part-time night schools:

The scholarly law school dean properly seeks to build up a ‘nursery for judges’ that will make American law what American law ought to be. The practitioner bar examiner . . . properly seeks to prepare students for the immediate practice of the law as it is. The night school authorities, finally, see most clearly that the interests not only of the individual but of the community demand that participation in the making and administration of the law shall be kept accessible to Lincoln's plain people. All these are worthy ideals. . . . But no single institution, pursuing its special aim, can attain both the others as well.<sup>22</sup>

In this passage, Reed advocated for law schools with a range of different *goals*. The ABA, however, seems to have misunderstood Reed

16. *Id.* at viii.

17. *Id.*

18. Kimball, *supra* note 10, at 225–26.

19. *Id.* at 226 (quoting WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION, 133 (1994)).

20. *Id.* at 197–98 (“Although many law professors considered the question resolved in their favor by 1895, the issue remained disputed . . .”).

21. Spencer, *supra* note 8, at 1995.

22. REED, *supra* note 7, at 418.

as advocating for law schools with different—that is, lower—educational standards.<sup>23</sup> Thus, the ABA commissioned its own report, intended to protect the “scholarly” law schools from this perceived challenge.<sup>24</sup> The ABA called for a uniform standard of a three-year law degree following at least two years of college.<sup>25</sup> It also recommended that each school have a “sufficient number” of full-time instructors (as distinct from legal practitioners) and its own dedicated law library.<sup>26</sup> According to one observer, “[t]hese requirements all meant to homogenize law schools around standards that tilted in favor of the national, full-time law schools.”<sup>27</sup> Ironically, given the contemporary bar’s criticisms of the scholarly law school approach, the ABA played a key role in that model’s dominance.

This convergence on the scholarly model obviously contributed to the academic nature of modern lawyer training, including the use of casebooks. When the case method began to spread from Harvard to other law schools around 1890, it was bound up with a series of “academic, meritocratic reforms” that Harvard had also adopted, including:

extending the degree course to three years; requiring a bachelor’s degree for admission and then selecting among qualified applicants; conducting written examinations for promotion and graduation; grading and sequencing the curriculum among first-, second-, and third-year courses; transforming the library from a textbook repository into a scholarly resource; and hiring full-time instructors who regarded the professorate as their career. Case method entailed these meritocratic reforms because teaching with original sources required both stronger academic preparation and a much greater time commitment on the part of both students and faculty.<sup>28</sup>

The case method became “emblematic” of “the view that academic merit defined professional merit,” and the prestige and influence of law schools continues to derive primarily from the academic qualifications of their professors and students.<sup>29</sup>

The reintegration of hands-on training into law teaching is usually traced to the late 1960s, when the Ford Foundation began supporting clinical legal training and the Council on Legal Education for Professional Responsibility began advocating for clinical education.<sup>30</sup> Around the same time, however, yet another Carnegie report warned against exclusive reliance on clinical teaching. The report echoed Blackstone’s

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23. See Spencer, *supra* note 8, at 1997.

24. *Id.* at 1995–97.

25. *Id.*

26. *Id.* at 1997.

27. *Id.*

28. Kimball, *supra* note 10, at 195.

29. *Id.* at 198.

30. Judith Welch Wegner, *The Carnegie Foundation’s Educating Lawyers: Four Questions for Bar Examiners*, B. EXAMINER, June 2011, at 11, 16.

criticism of apprenticeships and, moreover, reflected the continuing search for balance: “We are also concerned that an anti-intellectual tendency of clinical education will offer an allure to students and to some faculty members who seek ‘relevance’ at any price.”<sup>31</sup> The report recommended moderation: “experimentation with many modest ideas, one of which is clinical education.”<sup>32</sup> The basic concept of classroom education followed by clinical experience is reminiscent of the original idea of academic legal education as the intellectual foundation for apprenticeships.

## II. CRITICAL THINKING: THE PRACTICALITY OF THE ABSTRACT

The concern about balancing the practical and the theoretical is absolutely appropriate and absolutely intractable. Legal practice itself involves both abstract ideas and nuts-and-bolts practicalities. Moreover, the debate between the theoretical and practical in legal education echoes the fundamental philosophical debate between rule-based and pragmatic approaches to jurisprudence, legislation, and every kind of legal problem solving. Balancing the two is a continual and healthy process. It is not a sign of a new crisis, nor is it a tension that will ever be resolved.

But the distinction between theoretical study and practical skills may be overdrawn. As Redlich argued, the exercise of extracting principles from decisions is itself a practical skill for a lawyer.<sup>33</sup> More broadly, as early defenders of the case method argued, the purpose of legal education is not to teach students the rules of law, but “the power of legal reasoning.”<sup>34</sup>

Even more broadly, the case method is intended to develop analytical ability and critical thinking skills. According to one recent study, “[t]he defining feature . . . of the last 30 years has been a precipitous increase in the wage payoff to jobs requiring synthesis, critical thinking, and deductive and inductive reasoning.”<sup>35</sup> American colleges and universities, however, may be failing to train students in such “generic competencies.” Employers complain that few recent college graduates have excellent skills in critical thinking and problem solving.<sup>36</sup> Longitudinal studies of college students’ critical thinking skills

31. HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 46 (1972).

32. *Id.*

33. REDLICH, *supra* note 12, at viii.

34. Kimball, *supra* note 10, at 227 (quoting *Discussion of Kale’s Paper*, in REPORT OF THE THIRTIETH MEETING OF THE AMERICAN BAR ASSOCIATION 1025 (1907) (comments of James Bart Ames)).

35. RICHARD ARUM & JOSIPA ROKSA, *ASPIRING ADULTS ADRIFT: TENTATIVE TRANSITIONS OF COLLEGE GRADUATES* 19 (2014) (quoting Yujia Liu & David B. Grusky, *The Payoff Skill in the Third Industrial Revolution*, 118 AM. J. SOC. 1330, 1332 (2013)).

36. *Id.* at 19 (citing JILL CASNER-LOTTO & LINDA BARRINGTON, *ARE THEY REALLY READY TO WORK? EMPLOYERS’ PERSPECTIVES ON THE BASIC KNOWLEDGE AND APPLIED SKILLS OF NEW ENTRANTS TO THE 21ST CENTURY U.S. WORKFORCE* (2006)).



have found that those skills do not improve significantly during college.<sup>37</sup> One study found that “if the CLA [Collegiate Learning Assessment, a test of job-related critical thinking skills] were rescaled to a one-hundred-point scale, approximately one-third of students would not improve more than one point over four years of college.”<sup>38</sup>

A recent follow-up study examined students two years after graduation.<sup>39</sup> Those who had scored well on the critical thinking test at graduation were significantly less likely to be unemployed, less likely to have lost their jobs, and less likely to be employed in unskilled occupations.<sup>40</sup> They also reported greater job satisfaction.<sup>41</sup> Abstract critical reasoning skills, then, may have material value that presumably derives from their practical value in the workplace. Law school students, with their higher GPAs and LSAT scores, are likely to have better critical thinking skills than the average college graduate. But if critical thinking is truly underemphasized in college, even these elite students require (and will benefit from) further training.

### III. CONTEXT: FOREST VERSUS TREES

A common criticism of casebooks is that they present a set of discrete, and often disconnected, doctrinal points without the overview and context that a textbook or treatise might provide. This criticism is also an old one, dating back at least as far as Redlich’s 1914 Carnegie Report.<sup>42</sup> Redlich noted that under the case method, “the students never obtain a general picture of the law as a whole.”<sup>43</sup> Nor, he noted, did students get an explanation of basic legal concepts before encountering them in cases.<sup>44</sup> He argued that every area of law uses “certain common elementary ideas and fundamental legal concepts which the student ought to be made to understand before he is introduced into the difficult analysis of cases.”<sup>45</sup> According to Redlich, these basic concepts “should not, as usually occurs to-day, come to the students unsystematically and unscientifically, as scraps of knowledge more or less assimilated out of

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37. See generally RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* (2011) (reporting results using the Collegiate Learning Assessment); Ernest T. Pascarella et al., *How Robust are the Findings of Academically Adrift?*, *CHANGE*, May/June 2011 (reporting consistent results based on a different measure of critical thinking skills).

38. ARUM & ROKSA, *supra* note 35, at 38.

39. *Id.* at 60–61.

40. *Id.* at 60–65 (testing performance did not correlate to higher income, however).

41. *Id.* at 76–77.

42. See generally REDLICH, *supra* note 12.

43. *Id.* at 41.

44. *Id.* at 42.

45. *Id.* (including “choses in action, person and property within the meaning of the law, complaint and plea, title and stipulation, liability and surety, good faith and fraud”).

law dictionaries and indiscriminate reading of text-books.”<sup>46</sup> Of course, that is precisely how most of us first learned them, and probably still how most students learn them today. Redlich argued that law schools should instead offer overview courses of fundamental legal institutions and principles.<sup>47</sup>

Langdell seems to have disagreed with Redlich on the value of offering explanation—explanatory material accounted for less than one percent of Langdell’s casebooks.<sup>48</sup> But other early casebook authors did appreciate the value of textual explanation: precisely what distinguished the traditional textbook from the casebook. James B. Thayer’s 1892 *Cases on Evidence* “attended to his readers by expanding the explanatory commentary in order to help the student understand the cases”—such commentary made up nearly twenty percent of Thayer’s casebook.<sup>49</sup>

While some law schools (including my own) offer introductory (though not, to my knowledge, final) overview courses like those Redlich suggested, these offerings do not seem to be comprehensive or well integrated into the curriculum. Curricular overhaul of that sort is unrealistic in the foreseeable future. In the meantime, casebooks (and classroom instructors) should recognize that students lack such background, while opinions are written for experienced lawyers who have it. Casebooks could borrow a page from student versions of Shakespeare or the Bible that have extensive annotations describing antiquated terms. In this respect, digital casebooks could be useful. For example, clickable pop-up annotations could reduce visual clutter.

Casebooks could take Redlich’s advice and offer more background and explanation of basic concepts.<sup>50</sup> While including background material in every introductory casebook might create some redundancy across multiple courses, that would not necessarily be a bad thing. It would illustrate and reinforce these fundamentals and underscore their importance. Repetition in learning is often underestimated in legal education, where we strain to maximize the breadth of coverage, often sacrificing retention.

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46. *Id.*

47. Redlich also argued for summary and overview at the *end* of law school: “lectures which shall furnish the American law student once more, before he steps out directly into practical legal life, a certain general summing up and survey of the law.” *Id.* at 45. He also argued that this summing up and survey should include a comparative perspective. In this respect, he sounded much like today’s advocates for comparative law in teaching: “[T]he comparative method would go far to make the features and characteristics of the native law still clearer to the students, and to deepen their understanding of their own law through their insight into that of other peoples.” *Id.*

48. Kimball, *supra* note 10, at 217–18.

49. *Id.*

50. They could, for example, explain the difference between deciding a motion to dismiss and rendering a judgment on the merits.

## IV. CASES AND BEYOND

Even casebooks with significant explanatory material consist primarily of “cases.” As Jerome Frank noted in the 1930s, however, the law school “case” method is not actually the study of “cases,” but of appellate opinions.<sup>51</sup> A “case” in a casebook is not a comprehensive case history, in the sense of the history of a concrete problem. Nor is it a problem for the student to solve. Rather, it is a court’s (usually an appellate court’s) disposition of narrow legal issues that constitute one aspect of a legal dispute. If the “case” more properly refers to the larger story of the litigants’ problem, an opinion is just one small part of the “case.”

This characteristic of law school “cases” does not make them inherently flawed, but it is indicative of the original purpose (and limits) of the Langdellian method: training in inductive reasoning.<sup>52</sup> The Langdellian notion was that students should not be simply told the supposed first principles of common law, but should try to induce general principles from examples.<sup>53</sup> Opinions are evidence from which the student can conclude what the law says; a textbook can only tell you what the author thinks the law says. The focus on common law induction has been criticized as outdated since the common law has become relatively unimportant in the age of statutes and administrative law.<sup>54</sup> But the modern era is not discontinuous with the common law one. The narrow, incremental nature of common law opinions is extremely influential (for better or for worse) on the judicial approach to the interpretation of statutes, and in turn on agency rulemaking and interpretation. A lawyer attempting to interpret a statute or rule must do so (again, for better or for worse) in reference to general principles induced from judicial (and agency) precedent as well as in reference to the text.

Furthermore, the use of opinions in teaching need not be limited to the induction of common law principles. The opinion can be used to illustrate the application of a particular legal rule (or, more broadly, the practice of applying a rule to a set of facts). This use of cases as specific examples demonstrating general principles is the reverse of what Langdell intended by his “case method,” which focused on having the student induce the general legal principle from specific examples. But

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51. Jerome Frank, *Why Not A Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 910 (1933).

52. Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 634–35 (2007).

53. *See id.* at 632–33.

54. *See generally id.*

this approach is nearly as old as Langdell's, and was pioneered at UC Hastings College of the Law, the host of this Symposium.<sup>55</sup>

More problematic than their narrow focus is the fact that appellate opinions are not representative resolutions of legal problems. Most litigation issues are not decided on appeal; moreover, most legal problems do not (or should not) involve litigation at all, but are resolved by advice and planning, drafting, or negotiation.<sup>56</sup> But usefulness of cases is not limited to teaching the rules of decision in litigation. As an illustrated statement of a rule (whether common law or statutory), an opinion can be used for solving a problem whether it be a dispute to be litigated, a negotiation "in the shadow of the law,"<sup>57</sup> or a planning problem. The facts of an opinion can also be used to illustrate a type of problem, to which the instructor might suggest non-litigation solutions.<sup>58</sup>

For all the limitations of casebooks, perhaps their greatest virtue is that they require the student to engage with primary sources. Many entering law students have limited experience with primary sources; they are more familiar with predigested textbooks and lectures. Casebooks help students recognize that rules of law do not originate from the pronouncements of a professor or treatise author, but from primary sources written by people wielding political power and authority.<sup>59</sup> Those sources are diverse, dispersed, and sometimes unclear or inconsistent. The question "What is the rule?" often has no answer, and looking at the primary sources can illustrate that.

Unfortunately, casebooks expose students almost exclusively to one type of legal source—appellate opinions—but hardly at all to other legal sources. Frank thought it would be more useful to study "elaborate court records, including the briefs (and supplemented by reading of text-books as well as upper court opinions)."<sup>60</sup> Of course, time is limited, so it would be impossible to supplement every opinion with "elaborate court records."<sup>61</sup> But mere exposure to other legal documents can help reinforce the message that the law is more than opinions. Some concepts or doctrine could be taught with documents other than opinions. In my white collar crime course, for example, I have found that the elements of a crime can be

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55. At Hastings in the 1880s, John Pomeroy "assigned cases not inductively but illustratively—to demonstrate the points already made in his lectures and syllabi." Kimball, *supra* note 10, at 208. Many schools pursued this "illustrative case method" rather than the Langdellian inductive method. *Id.* at 221.

56. See Rubin, *supra* note 52, at 653 ("A revised curriculum would benefit students in their careers by signaling to them that litigation is not necessarily the favored form of legal action.").

57. See Robert H. Mnookin and Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

58. See *infra* pp. 912–13.

59. Of course, we leave it to our legal research and writing courses to teach them how to find these primary sources.

60. Frank, *supra* note 51, at 916.

61. *Id.*

efficiently illustrated using the statutory text and an indictment. An indictment must allege facts illustrating every element of the crime, while an appellate opinion will probably address only some elements. Similarly, the allegations of a complaint for breach of contract might be used to illustrate contract formation and elements of enforceability.<sup>62</sup>

Students also need exposure to non-litigation sources, such as, most obviously, contracts.<sup>63</sup> But I think a little goes a long way. Extensive work in reading and drafting contracts is not of great use to beginning students. An actual contract is usually so long, dense, and mystifying that a first-year student cannot learn much from it. Furthermore, it is difficult to appreciate the significance of contractual provisions without knowing both the law and the relevant business context.

#### V. INSTRUCTOR, HEAL THYSELF

Casebooks are typically missing some of the essential pieces of a complete course, but that is not necessarily grounds for complaint. Instructors supply most of those missing pieces—as well they should. As a teacher, I have never expected a casebook to be a complete package of course materials. Casebooks were certainly not presented to me that way when I was a student. I was explicitly expected to write case briefs and compose my own course outlines (and implicitly expected to consult treatises and even commercial outlines). Most professors made changes to the book's organization and distributed at least some supplementary materials, further conveying the (useful) notions that the casebook was merely one resource among many, with no special authority, and that there are many possible ways to structure a course or explain a concept.

Indeed, the primary methods of in-class instruction are Socratic questioning or free-ranging discussion, methods that few, if any, casebooks are expressly structured to facilitate. The discussion aspect is value added to the course by the instructor. By contrast, an undergraduate textbook might be structured with the expectation that the professor's lectures will primarily repeat the same content as the reading (and discussion sections, not led by the instructor, will consist of answering questions that appear in the textbook).

The fact that the casebook is not expressly geared to the format of the class session means much more work for us, but I think that is good for us as teachers and researchers of the law. Ideally every instructor would construct her own materials, but, of course, most of our employers expect us to spend more time on scholarship than on “mere” class preparation. We should construct at least part of them, however, and not

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62. I should disclose here that I have not tried this myself.

63. Private documents such as contracts may be difficult to obtain; however, some statutory supplements do an admirable job of locating them and making them available.

expect the book to be a just-add-water “instant” course. That adds to our understanding of the materials, which hopefully benefits our students. Furthermore, it means we are adding value to the classroom experience (or at least are attempting to), rather than simply regurgitating someone else’s book.

Despite the antiquity of the “case method,” casebooks can be used to teach useful contemporary lessons. Langdell was motivated by some antiquated notions, most notably the quaint idea that law is a “natural science,” to which scientific induction could be literally applied.<sup>64</sup> Thus, we should not credit him with foreseeing the needs of contemporary law students and teachers.<sup>65</sup> But neither should we reject the use of opinions for this reason. Casebooks need not be, and, as far as I know, generally are not, used for the purpose of teaching the “scientific” induction of fundamental truths about law. To the extent they teach inductive reasoning, it is what might be termed “induction-lite”—trying to find common themes among multiple decisions. Furthermore, as noted above, judicial opinions have been used at least since the 1880s for illustrative as well as inductive purposes—that is, simply to show a rule in action. Opinions are not limited to common law subjects—they can also be used to teach “modern” concepts like statutory and rule application and interpretation.

Teaching from casebooks has practical potential, which Redlich recognized. The problem is, as the 2007 Carnegie Report recognized, we as teachers do not always use opinions with a mind to *why* they are useful.<sup>66</sup> We should explain clearly to students (and remind ourselves as teachers) that we crunch cases not to memorize things for the exam, but *because it is something that lawyers do*. This kind of message—why we study what we study—probably gets across better when told to the students than when written in a casebook. In advocating or in formulating legal advice, a lawyer must manipulate cases, holdings, and doctrine, not memorize them.<sup>67</sup> It is also important to avoid the tendency to ponder how many angels can dance on the head of a pin. Students excel at posing fiendishly clever, but outlandish, hypotheticals. I refuse to spend time on such questions, however, on the grounds that their answers are of no practical use. Moreover, pondering them means forgetting that we study law to solve the real problems of real people.

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64. Rubin, *supra* note 52, at 615 (“Our failure to progress paints the Langdellian original with false colors of modernity, misleading us into thinking that the rationales for this curriculum correspond to our current understanding of law, society, and education.”).

65. *Id.*

66. SULLIVAN ET AL., *supra* note 5, at 188 (“One limitation [of legal education] is the casual attention that most law schools give to teaching students how to use legal thinking in the complexity of actual law practice.”).

67. Unfortunately, this is very different from what students have to do on the bar exam.

I emphasize to students that the answer to any legal question means nothing in the abstract: it only matters insofar as it helps solve (or avoid) an actual legal problem. Imagine, for example, a contracts exam question that turns on the enforceability of a written agreement to perform a major construction project. My exam questions typically ask for a memo analyzing a specific problem, such as whether your client can enforce the contract. Student A goes into great detail analyzing whether the construction cannot be performed within one year from the making of the agreement, such that it would fall within the state's statute of frauds. Student B points out that the contract is fully memorialized in a signed writing that satisfies the statute, so whether it is within the statute has no effect on its enforceability. I would give *no* credit to Student A. Both students show understanding of contract doctrine, as expressed in the opinions and statutes we read. But only Student B understands why we read the opinions and statutes. Student A is playing with doctrine to answer a question, while failing to recognize that the answer is of no consequence to the client. As a lawyer, you work for clients, and clients do not pay lawyers to indulge idle curiosity. In the words of the 2007 Carnegie Report, I want students to think more like lawyers and less like students; to disabuse them of “the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.”<sup>68</sup>

The prominence of appellate opinions in casebooks can create the misimpression that legal practice is—and should be—litigation focused. The instructor can do much to counteract this without having to change materials. In contracts, I encourage students to ask whether the case should even have been brought. In some opinions, the law and facts so obviously favor one side that the plaintiff should not have brought suit, or the defendant should have settled rather than wasting time and money trying to defend herself. In others, the plaintiff wins, but the law limits recovery such that suit is not worthwhile. I also encourage students to weigh the value of winning legal remedies against the cost of litigation—not just attorney fees, but also time and aggravation, as well as the damage to business relationships. The narratives in legal opinions can help illustrate these concerns.

Opinions can also be used to teach concrete transactional lessons. Chaim Saiman gives an excellent example of “reading cases like a transactional lawyer” in Contracts class.<sup>69</sup> He assigns the “traditional battery” of opinions regarding letters of intent, and identifies the core issues: whether a document is intended to be binding or nonbinding, the

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68. SULLIVAN ET AL., *supra* note 5, at 188.

69. Chaim Saiman, *Transactional Lawyering—A Conceptual Approach*, 12 TENN. J. BUS. L. 83, 89–90 (2011).

precise nature of the duty to negotiate in good faith, and uncertainty about the appropriate remedy for breach of that duty.<sup>70</sup> Then he gives students a very simple hypothetical transaction (the contemplated sale of a car) and asks students to draft a nonbinding letter of intent. He does not expect first-year students to draft “a perfect or even serviceable document,” but looks to see whether they understand the basic difficulties and whether they drafted language that attempts to “avoid the pitfalls reflected in the caselaw.”<sup>71</sup> That is, the opinions do not provide any “rules” per se, but the narratives illustrate problems that parties and courts encounter in this transactional context. Saiman shows his students that a good transactional lawyer must be familiar with the issues that have proven to be troublesome, and attempt to address them ex ante through planning and drafting.<sup>72</sup> This is a far cry from Langdell’s inductive case method.

An even simpler example of a transactional perspective on a judicial opinion is to ask whether the losing party in a case might have avoided—or, more precisely, reduced the probability of—an adverse decision via good drafting. Some simple examples: even though it is not necessarily determinative, it would be wise to add an integration clause if you want to limit a contract to the terms of a written agreement, and it would be foolish to label a stipulated damages provision a “penalty” clause. As in Saiman’s example, the point is not to craft the ideal language, but to demonstrate how business interests can be furthered, and the likelihood of disputes reduced, by careful planning informed by knowledge of legal issues (which does not necessarily consist of “rules”).

#### CONCLUSION

I am optimistic about the value of casebooks in legal education, but the reader should take my optimism with a grain of salt. The same factors that fueled resistance to the original case method are likely to contribute to its persistence: “Those [professors] who have . . . attained, *financially*, a professional position under the older methods, *may* hesitate in sanctioning the innovation which retires any method by which they acquired affluence.”<sup>73</sup> Although I am not a casebook author, I acquire my “affluence” (such as it is) from teaching out of casebooks. My practice experience is nearly two decades old. As noted above, the case method was closely related to the larger shift from part-time practitioner-teachers to full-time academics. Thus, when the case method was introduced, the practitioners who taught law part-time at for-profit schools stood to be

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70. *Id.* at 90.

71. *Id.*

72. *Id.* at 91.

73. S. Stanwood Menken, *Methods of Instruction at American Law Schools. II. Columbia College, in the City of New York*, COLUM. L. TIMES, Mar. 1893, at 168, quoted in Kimball, *supra* note 10, at 228.



replaced by full-time non-practicing academics at universities.<sup>74</sup> A new shift away from casebooks and back toward practice-oriented instructors would require at least a partial reversal of that process. All of this has happened before . . . and it may all happen again.

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74. *Id.*