

WORKSHOP ON THE FUTURE OF THE LEGAL COURSE BOOK

This is an edited version of the transcript of a workshop discussion held on Saturday, September 27, 2008, at Seattle University School of Law.

The co-organizers of the workshop were: Edward Rubin, Dean, Vanderbilt Law School; Kellye Testy, Dean, Seattle University School of Law; Ronald Collins, First Amendment Center, Washington, D.C.; David Skover, Seattle University School of Law.

The participants at the workshop included: Daniel Albohn (Sony Electronics), Kraig Marini Baker (Davis, Wright Tremaine), Marilyn Berger (Seattle University School of Law), Matthew Bodie (St. Louis University School of Law), Heidi Boe (West Education Group), Sean Caldwell (Lexis-Nexis Law School Publishing), Susan Case (National Conference of Bar Examiners), John Chatelaine (Aspen Publishers), Maggie Chon (Seattle University School of Law), Peggy Davis (New York University School of Law), Steve Friedland (Elon University School of Law), Craig Gold (Concord Law School), Bill Harmon (Microsoft), Heidi Hellekson (West Academic Publishing), Tom Hill (Adobe Systems Inc.), Conrad Johnson (Columbia University), Faye Jones (Florida State University College of Law), Gene Koo (Harvard Law School), Leslie Levin (Lexis-Nexis Law School Publishing), Paula Lustbader (Seattle University School of Law), John Mayer (Center for Computer-Assisted Legal Instruction), Bill McCoy (Adobe Systems), John Mitchell (Seattle University School of Law), Richard Mixter (Aspen Publishers), Charles O'Kelley (Seattle University School of Law), John Palfrey (Harvard Law School), Dennis Patterson (Rutgers-Camden Law School), Michael Schwartz (Washburn University School of Law), Greg Silverman (Seattle University School of Law), Keith Sipe (Carolina Academic Press), Joel Thierstein (Rice University), David Vladeck (Georgetown Law School).

SESSION 1: GLIMPSES OF THE FUTURE: THE POSSIBLE, THE PROBABLE,
AND THE POTENTIAL OF INNOVATIVE REFORM

A. Introduction

KELLYE TESTY: I'm Kellye Testy, the Dean of Seattle University School of Law. Great thanks to you, David, for pushing this idea forward. I also want to acknowledge Ron Collins, with the First Amendment Center in D.C., and Ed Rubin, who is a wonderfully prolific legal scholar and now the dean of Vanderbilt's Law School. I want to acknowledge and thank all three of those gentlemen for working with me to bring this important workshop to Seattle. I also want to take just a moment to thank three different groups that have been very generous in their support of this conference and have enabled us to host the event at the law school. I want to recognize the Microsoft Corporation, Aspen Publishing, and also the school of law's Annual Fund for Excellence, which is supported by alumni and friends of the school.

As you know, most every law school right now is thinking about its curriculum. The Carnegie Report certainly was a big factor in spurring that, although curricular reform is something that law schools, of course, are always engaged in. It moves, in my view, at a glacial pace sometimes. One of the things that really struck us here at Seattle University, as everyone started to talk about Carnegie and started to talk about curricular reform, is that it was, frankly, a bit of old news to us. Seattle University School of Law has always prided itself on being at the forefront of legal education in many ways, and one of them is that we've always had an incredibly robust clinic, legal writing programs, and trial advocacy programs. The idea that we need to be more focused on the whole person, not only cognitive learning but the other dimensions of learning, was something that we've been working at for some time.

It certainly has struck me, during all those conversations, that one of the things missing was the question of what materials we were going to use to do this teaching. As we all recognize, what happens in the classroom is a chemical sort of reaction, where the mix is based on the students, on the professor, and the materials, including the format in which those materials are presented. To take these conversations to the next level, this is a topic that we really needed to address, and so it is most fitting, I think, that it is here.

I'm convinced that in thinking creatively about what it is we're teaching and how we're teaching it, all law schools will be helped in taking the important next steps in curricular reform.

The first session that we're beginning with this morning is called, "Glimpses of the Future: The Possible, the Probable, and the Potential of

Innovative Reform.” The idea, in beginning with this topic, is to get some of our creative juices flowing and to think about where it is we might be trying to go with this discussion, these initiatives, and these innovations.

There are questions we need to ask ourselves: What are some exciting experiments in nontraditional pedagogy? What kinds of visions do you have? What successes do you know of as we think about the world? Our students are entering an increasingly complex, interdisciplinary, global world. What kind of measures will make sure that our students receive the kinds of legal education that they need to succeed in that world? Whether you’ve had progress with innovations in print or in electronic formats, those are the kinds of things that we hope to hear about here in this session. We hope to start our day out with some vision of what might be possible.

B. Connecting With the Student: Innovative Teaching Methods

DAVID SKOVER: One of the reasons why you are the particular academics who are here is because of the remarkable innovations that you have undertaken in your own coursework. I will admit that I was slow to come to educational reform myself, not because I loved the print book experience or necessarily thought that what we call Socratism is particularly effective, but because I, like many of you, was a bit insecure about losing the control that the Socratic method always ensured me. As I became more confident as a teacher, I found myself weaning away from what I had known.

Paula Lustbader, my colleague who is steeped in pedagogical theory, helped me out by first encouraging me to move away from what we would know as the traditional method of teaching. She informed me about what she wasn’t hearing from my students about me and about others like me.

I’ve been teaching now for twenty-six years. Only in the last seven to ten years would I say that I have become more satisfied with my teaching experience because I broke away from what we all know so well as the traditional Socratic casebook method of teaching. Looking around and seeing the age of the participants here, I imagine that most of us had very similar experiences in law school.

I’ve broken the ice by a self-confession of early inadequacy, and I know there are so many of you who have moved into innovative techniques of pedagogy. So, please, do share with us what you have found so exciting about your current teaching experiences.

DAVID VLADECK: I don’t have a confessional, but it doesn’t seem to me as necessarily a battle of Socrates versus Bill Gates. I think

most law schools are very good at teaching doctrine using the Socratic method, and very good for inculcating doctrinal understanding; but, students have no idea what lawyers actually do doctrinally. The question is: How do you integrate some actual experiential learning in a civil procedure course or in a federal courts class so the students actually know how lawyers use that doctrine to represent their clients? I think that many people, at least in my law school, are gravitating towards more problem sets in the basic classes.

For every first-year student, we've moved to a one-week skills-based course. I think that we will start pushing much more skills-based learning into our curriculum by offering what we'll call experiential courses, courses that try to marry doctrine with practical experience. The current casebook-based teaching modes just do not lend themselves to those kinds of courses. They just don't work.

RONALD COLLINS: One word that I have heard time and time again, and read in Gene Koo's memorandum, is the word, "Collaboration." I believe it's central to this entire enterprise. If you think about the Langdell method, it's individualistic, it's top down, it's "Here, take it or leave it." No real choices, no collaboration. What's so exciting about what we're doing here is that we no longer have to see the world along those fault lines. There is room for the traditional Socratic, there is room for the narrative, there is room for the experiential, there is room for the economic perspective, there is room for the publisher, and there is room for the lawyer. As we begin to think about where we want education to go, we will readily discover how we can collaborate, how we can network. In other words, what more can be brought to the table? How can any variety of materials, how can any variety of perspectives, be woven into what it is we're doing? When we do that, when we proceed along those lines, we don't necessarily think outside the box, we explode the box, and that's the sort of synergy I would hope we can begin to unleash.

VLADECK: We all know the lawyer who ought to be hermetically sealed off in his office, but that's not the way lawyers practice law. They practice law collaboratively. In the parts of the legal profession I participate in, there are lots of collaborations that cut across law firm boundaries so that people who are interested in similar issues, or who have cases that raise the same questions, collaborate extensively. I think there are two things I would like to add to the discussion of collaboration. The first is that I think you need to force students to collaborate with people who are not their friends in exercises that pit them against one another, not so they learn that the adversarial system is Darwinian, but so they learn the opposite. They will learn that good lawyers learn to cooperate not just with people on their side, but with their adversaries as well be-

cause it's often better for their clients to simply reach an agreement and move on.

I teach a course essentially in public interest lawyering, and the last section is intensive negotiation, and I cheat. I weight the problem so that if the students do a good job, they'll settle the case, and 70 percent of the students do. The ones that don't settle learn a lot about their own views about being adversaries because it's their own commitment to getting the last penny for their client that generally subverts the deal. I think Kellye's right that we are used to grading students individually on their performance,¹ but I actually think as a teacher, I want to grade them on their ability to collaborate with their peers because if they can't do that, they are not going to succeed in the legal profession. We all know the lawyer that is hermetically sealed off in his or her office, and that typically is not the successful lawyer.

SKOVER: The one thing that does concern me is a conversation I had with a lawyer, a hiring partner of a law firm. Maybe he made this comment because he doesn't really trust that we do have skills training abilities, maybe that's what he was reflecting, but he said, "The one thing you all do very well is heavy weightlifting for the mind." He said, "You teach logic. You take college students with mushy thinking, and start putting structure into their minds." He said, "The one thing I'm concerned about is as you move to these other pedagogies, are you going to continue to reinforce traditional, rational, linear-sequential logic?" I said, "That is what you think we do? Is that what you think we do?" He said, "That's all I really got out of you and that's all I really valued."

Now, that was really interesting because he was making a pitch for an old way of teaching, and he was putting us on guard about a lot of innovation. My question is: How would you all, as you are thinking about these things, answer him? Is he out of touch or is he, in fact, identifying something that he thinks we actually do very well? As we're moving towards more innovative ways of teaching, are we going to continue to do that very well?

STEVE FRIEDLAND: What I'm hearing is a reframing, and the reframing is from "What are we teaching?" to "What are they learning?" and I don't think we often ask that question. It's really about students learning in the classroom. Another teacher I know told his students, "If you stop learning before I stop teaching, that would be unseemly." And, of course, that happens all the time. People are behind those computer screens talking to each other. They are multitasking, which as we all know is a chance to do lots of things poorly at the same time. What I'm

1. Kellye Testy had earlier commented on the individualistic nature of law school.

hearing is their learning relates to context. Their learning relates to collaboration. When they look at our books and we skip over material, they are not thinking that “Hey, this is fine.” They are saying, “We’re missing something.” They are looking at it from a totally different perspective. Getting it from the top down and from “Sages on the Stage” and instead of from us—as guides on the side—is not as helpful to their learning process. They are portable learners. They learn outside the classroom. They want these iPods. They learn that way. I’m a 20th-century dinosaur. I learned in law school the following sequence: teacher teaches, I learn, I go to the library, we come back, and do it again. We need to somehow get rebooted ourselves. We teach them for the most part to be law students. They are in there practicing being law students for three years, or at least the first two years, when their habits are formed. Then we throw them out and say, “Be a lawyer.” It’s like watching a marathon and saying, “Go run it!” It doesn’t work that way. With the bar exam, it’s a different kind of learning, “You have 1.8 minutes, and you have to do this multiple choice question.” Well, students can say, “I didn’t practice that for three years.” We might respond in traditional legal education, “That’s okay. Do it anyway.” These points all ask the pivotal question: What are they learning? What’s the purpose?

KRAIG MARINI BAKER: I am a practicing lawyer, and I also teach at the University of Washington. It’s so clear to me that a lot of what is exciting about the practice of law, what is exciting about the legal system generally, gets wrung out of the traditional method.

When you read the equal protection cases as an undergraduate, you go, “This is what the law is all about.” I think when you go to the case method and you do the “Hairy Hand” case, it immediately just sort of kills that excitement.

I teach in the school of communications. I realized I wasn’t teaching lawyers and that I needed to be able to impart the notion about why it is that I practice law. Why it is that I get up and am passionate about what I was doing every day? For my class, I got rid of the textbook. Now, it’s a digital media course. We have casebooks when we talk about law, but they aren’t casebooks for digital media courses. I like not having a textbook. I’m able to pick and choose what I want and relate things in class to what they are reading in the paper. I’m able to have them understand the way that the legal system impacts so much of everybody’s life from day in and day out and why people practice law with such passion. I think that whatever the solution here is, we have to be able to let the professors impart this passion and grow the passion among the students.

TESTY: Thank you. It's important to remember that our students do come to us very excited about law and about the prospect of using law for good and change in society. We have to find ways, especially in that first year, to make sure we don't take all the life out of why they're here in the first place.

MICHAEL SCHWARTZ: I think that's an interesting entree into thinking about what we know, for example, about novices in their field. If we can connect to their prior knowledge, we can engage them more and deepen their excitement. If we flip the order, and teach the Bill of Rights in Constitutional Law first, we might actually connect more with our students—especially if we start with the assumption that one of the skills in a constitutional law course is the ability to read these incredibly difficult opinions, with multiple dissents and concurrences, and make sense of them and synthesize them. Perhaps that's an entree to thinking about design on a nontechnical level.

Laurel Oates, a professor here at Seattle University, found in a study that most students learn more from cases when they read them with a problem in mind and when they read them with context. In the casebook series I've designed for Carolina, every subject is introduced with a problem the students are going to be able to solve at the end of their study of that particular subject area. Just as lawyers get an overview of a subject matter before they read the cases, the problem in the casebook is followed by an overview of the subject area before they read the cases.

PAULA LUSTBADER: I would like to add another layer, which is, "Why are you thinking this?" I'm trying to get students to think about their own protocol and their own learning and their own way of putting things together. That will help them be able to transfer those skills into another setting if they're reflective. I ask them, "If you just figured that out, what did you do to figure that out so you can then repeat that step?" The second thing I wanted to have us be thinking about is I love the concept of "Go see the video, see how it actually works in real life." I think we need a combination of textbook materials and real-life experiences. I would like to add a layer where we actually interview clients or people who have been involved so we get a richness of their cultural backgrounds and how it impacted them emotionally. Of course, we can't do this all the time. Then it loses its effectiveness. You can't say, "Here is another video." We have to be really thoughtful about how we bring those stories in to help make it rich. I think for ten years I taught, "Okay. Here is how you read and brief a case," and then "Here is how we outline," and then, "Here is how we answer a question," and finally it dawned on me, "How do lawyers use cases? What are we really trying to do here?" So, I shifted my whole approach to the problems-oriented

concept. The materials aid us in revealing to students why the lawyer is asking this or that question—I go to Article 7 after I look at this section of Article 3. If we can be transparent about the protocols, it helps students grasp on to that schemata of problem solving.

Finally, I have my students do art. John Mitchell and Marilyn Berger, as well as a couple of our other colleagues, are just finishing an article on the pedagogy of play. One of the things that we find really exciting is getting our students to play with the material and to think out of the box. Thinking about things in different ways encourages the imagination and the creativity instead of what traditionally happens. I would like us to think about ways that we could get the materials to encourage that level of play.

GENE KOO: I want to go back to David Skover's first comment about the sense that he was using the Socratic method largely as a way to maintain control, and it strikes me that a lot of what I'm hearing is about changing from a very linear "I'm going to lead you through the following way of thinking" mode to creating more of a field of play where students are able to make choices within boundaries that you're setting, and that requires not just new resources but also a completely new way of teaching and approaching your classroom. In addition to resources, one of my questions would be, "What do we need to do to enable professors to have those skills to be able to teach in this way?" It is scary for people who have been teaching using this linear Socratic Method to then suddenly switch.

TESTY: I've talked to so many people who didn't, until after tenure, feel like they could actually teach the way they thought they should teach. Before tenure they were trying to teach the way they were taught. It really may be that the material is the first question because most people will not move away from what they know unless they have something to use.

DENNIS PATTERSON: I've taught commercial law for about twenty years. I wrote a casebook with a colleague of mine, Richard Hyland, largely because we were completely dissatisfied with the books on offer. We didn't want to do the traditional commercial law course that looks principally at just sales transactions. We have an overview which cuts against the grain of what most people do in commercial law. Very few people, if any, teach an overview course. Our view was that every law student should be able to graduate from law school knowing something about how their checkbook works, including sales transactions and secured transactions, so we developed this book. Now, the most innovative thing that we did in the book was we have edited cases, but we developed this technique, which we call the intervention, and in the course

of an opinion, we intervene in the text in a different typeface, asking questions of the students as the case unfolds, doing a number of things, but principally reminding them about things that they read in contrast. We ask questions about the logic of the opinion as it unfolds, and try to bring together different aspects of commercial law. About four or five years ago, we thought about taking the whole project online and explored it and found that we really didn't have the technical means to do this.

JOHN MITCHELL: There are several important themes here, the least of which, to my mind, is the fancy technology. However, a fundamental change in perspective would be huge: I'm talking about shifting the ground so that the appellate cases and statutes become the library, and the client and his or her case becomes the context within which we're teaching. That would be a huge deal. The course, then, isn't about the cases. The course is about the client's case, and the statutes and the cases are the library. Using that kind of methodology, you can still cover everything you would with a more traditional approach, but it's from this client-centered context. That's dramatically different. The issue of technology then becomes secondary: What are the tools we could use to create these kinds of materials? And how do we use them? This idea of shifting the context of client narratives is a huge step and has nothing to do with even having electricity. That's what's exciting.

LUSTBADER: Little things we can do are great, but there is so much going on at the undergraduate level that we really should be learning from. I went to a technology and learning conference about two years ago, and they were demoing this U.S. History course that was a game about the Second World War. The students were in teams—they were different leaders of state, and the like—and they had to make decisions about how to honor the treaties and the contracts and so forth. They weren't role-playing. They were actually making different decisions from history and then looking at the implications of what happened. It was amazing. These guys are learning in so many different ways than what we've ever thought about.

SKOVER: We are already convinced of the importance of what we are doing: moving away from traditional pedagogy. In some sense, when we academics are talking to each other, we are preaching to the choir. But when we are talking to publishers, I don't think that's the case. Hopefully, they are listening.

BERGER: I think that you also have to consider another dynamic: Coverage. You can't do everything. They don't have to study doctrine and statutes and do an analysis over and over again; but you do have to choose your innovations so that they serve your teaching goals. I think that is very, very important. I don't think we want to go into a classroom

and just see people entertaining students by selecting fascinating things. Then we turn into a very gimmicky profession. For example, when you do collaborative learning in groups, you should have a goal. “What’s the pedagogy behind this?” I am concerned that we use PowerPoints, for example, to just enliven a class. What’s the point in that? If instead a PowerPoint is accompanied by an outline to present doctrine, then that serves a purpose; but I’m not going to rant and rave about PowerPoints.

C. Skills-Based Learning in First-Year Curriculum

TESTY: Often we say that we need to have more skills, more training, more of what lawyers really do. Sometimes we still have a very narrow, litigation-centered image of what lawyers do. Yesterday, I spent a day in Olympia, our state capital, and heard a lot about how lawyers have too little training in advocacy, the legislative branch, or even drafting. Lawmakers say that they get so many resumes from lawyers, especially where they just don’t see the skill set that law schools provide for their students in a particular area, that are still so litigation heavy.

EDWARD RUBIN: I went to Vanderbilt because the faculty wanted us to rethink the whole process of legal education. Just speaking about the first year for a moment, one thing we’ve done is try to think about the first year courses more foundationally; that is to say, how do they provide a broad background for upper-class courses? We now teach a course on the regulatory state with developing a transactional contracts class. We’re thinking of moving from property to a broader introduction to business concepts that would not only involve property, but would also involve money, debt and equity, bankruptcy, and the like. For every one of these courses, save one, we need new materials, and neither anyone on the Vanderbilt faculty nor anyone at any other school is going to adopt these courses unless they have materials. Even the people who conceive the courses need time away from teaching to develop them, or they themselves do it.

I think this is just part of a movement that’s happening all over legal education, which means this is really a crucial time in terms of rethinking materials because there’s going to be a whole new generation of books that represent this effort to achieve relevance and to think more realistically about the educational process and how the first year functions. The only exception is constitutional law, because there are so many constitutional law books and there is so much material. When students come in full of enthusiasm, it is a pity to hit them with the dormant commerce clause and tell them they’ll study the Bill of Rights sometime later in their education if they choose to take it because, after all, it is not as important as the dormant Commerce Clause.

VLADECK: Why do you start with the dormant Commerce Clause?

RUBIN: That's what I inherited and what schools typically do. More schools teach structure and defer the other stuff until later. That's one of the proposals we have to change, but I think that's still probably the modal approach to constitutional law. All I'm saying is that for that one subject area to change, we don't need new materials. For every other, we're going to need new materials. My second point is a pedagogical one, which is that I think there's a different notion of skills now than there used to be. It used to be that skills are something separate and secondary. I think certainly educational theory has come to the realization that skills are not only central to the process but it's how you understand theoretical material. If you haven't done something, if you haven't tried to, let's say, draft a statute yourself, reading a statute and even theorizing about the nature of statutes is much harder to do. You don't have that sort of on-the-ground understanding. What this suggests is that we not only need a new generation of materials, but those materials have to be interactive. We have to figure out ways, despite our mass education, to teach those kinds of skills that can only be achieved in some kind of more open format.

We tell our students, "Look to the left of you, look to the right of you. One of you will be a transactional lawyer," because statistically, that's the case with law school graduates. That means for all practical purposes, they will never read a case and never walk into a courtroom, and that's a third of our graduates. What we are doing is *deals*. We are negotiating, drafting, interpreting—this is something that students have no exposure to, so it astonishes non-lawyers. Although we all know, that every law school teaches a course called "contracts" in the first semester, in most of those courses the students never see a contract. It's not regarded as a relevant text. Yet, the skill of simply reading a contract is as important as the skill of reading a case. We don't teach it. I remember—I was a transactional lawyer—and my first day on the job, I went in, and the partner hands me a sixty-page contract and says, "There is a dispute about this. Would you go to your office, read it, and tell me what it is—what our client's position should be?" I had never seen anything like it in my life. I felt like I wanted to cry, and so I looked through this thing in this sort of disconsolate way. I got to the end, and there were no signatures. Now, I had read a case about signing a contract, so I went back into the partner's office with a sense of triumph, and I said, "This contract isn't valid. It isn't signed." He looked up to me and said, "We don't sign in this industry. Please go back to your office and read the contract." That's transactional law. It's doing deals. It's negotiating.

It's working. I think the important point is that it's not just about creating different materials and it's not just about getting away from relying on cases—it's a different way of thinking about law. We have to communicate, that as a transactional attorney, you are essentially representing one person or a partnership who have agreed to work together, not people who are having a dispute. If a dispute does arise, it's in the context of working together and they're going to have to keep working together because they are part of a supply chain, for example.

TESTY: One year I had the particular pleasure of teaching two sections of contracts in the same year. One of the classes got a little bit ahead of the other, so when I got to the point where I was teaching consideration—and that's a topic that I think all of us who teach contracts sort of struggle with—I had one of my classes draft a contract where they had to put the deal points together and make sure there was a bargain and there was consideration. The other class didn't do that because of the time. On the final exam, the performance was remarkably different in terms of the students' understanding of the subject area, just from that one little thing that changed. The students who had done that drafting, they understood the theory of contracts so much more fully. This makes two points: One is that some of you have mentioned that these interventions don't necessarily have to be huge. Some small interventions can make a big difference. And second, it's not just about the students learning extra things; are they even learning the core things you're trying to teach through the traditional methods?

HARMON: This year there's a Supreme Court case in transactions about how parties set up their contracts and how it affects outcomes. We actually had the students do a contract negotiation of a real contract where the terms were ambiguous on certain points. They had to work something out. I was amazed at the final exam of how they laid out, after having done this, what the law was on both sides and the logical conclusion, the key facts, and what they needed to know from their client. They did materially better on that portion of the test than they did on other topics because they actually had really worked with it, so it really does make a difference.

PEGGY DAVIS: I run a program that provides a full year of really intensive experiential learning for first-year students. We are all about the idea that people learn law by trying to use it, so we put our students in simulations throughout the year and ask them to use the law. We try to make them understand, and try to help ourselves to understand, that working collaboratively to solve a problem, particularly when there is an expert collaborator, is the way we learn. To structure a course in that way is valuable. It's not everything, but it's valuable. It seems to me

that what we have to do, and I love this terminology, is to “structure a field of play” for our students. As you might imagine, our course has been struggling to do that, to structure fields of play for students. This makes me very curious to know whether there’s some parallel thing going on within law firms or within practice groups of any kind such that younger lawyers are collaboratively solving problems using media that I never heard of when I went to law school. How can we replicate those uses in the classroom and how valuable can they be in creating the fields of play that experiential learning needs?

D. Helping Students Contextualize the Law

CONRAD JOHNSON: I am from Columbia Law School and I’ve been teaching clinics for twenty years. The clinic we are in now is lawyering in the digital age. It is about being in that section of law practice and the profession. It seems to me that one of the places to give birth to something in digital format would be in the area of context. Our students don’t have context. They read these cases where the facts have already been delivered to them because the trial has already occurred, because the interviewing and the scrimmage over discovery has already occurred, so they don’t see the law from the ground up, and they don’t get the chance of connecting to the passion of it. A way to think about bringing resources into the world in a digital format would be to, instead of delivering stuff to them, have some stuff in the can, so to speak. You could ask your students, “Here is the problem. What do you want to know?” They could begin building things from the bottom up, applying the habits of mind that we ignore from the Socratic method, which I agree has a place, but has dominated too much. I feel that its overuse, in fact, has stunted growth in the ability to develop facts and to understand how to apply them to the law to achieve a client’s objectives. There are a lot of steps there, and I’d argue that that’s not something you can do through the study of appellate cases. There must be better foundational material than that.

VLADECK: I want to follow up on Conrad’s point about context. That’s the most radical idea we’ve heard yet. If you look at conventional casebooks, the facts are always sacrificed on the altar of doctrine. We do whatever we can, in teaching pure doctrinal courses, at least historically, to make them as acontextual as we can, because what we want the students to do is to learn to play with the doctrine not with the facts. Now, as someone who is a practicing lawyer, that always struck me as completely backwards. I want students who are able to make distinctions on a fact basis, not on a doctrinal basis, because that’s the way the law generally works. I think that’s an important insight that really should not get

lost in all of this. That's really a point that forces people to reassess whether the silo-based teaching that we do now bears any resemblance to the way lawyers practice law.

E. The Bar Exam and its Effects of Pedagogical Reform

SKOVER: Now, Susan Case has expertise that the rest of us do not, and she was invited here primarily because we all realized that much of what we're talking about in terms of curricular reform is going to be affected by the last stage before full practice, the bar exam. I would like to turn our discussion to the impact that bar exams have on all of our pedagogical reform choices. I am going to ask you, Susan, to begin this discussion first, but then of course I want to open it up to all of you to examine whether the bar exam, and concerns about bar exam passage, should really influence what reforms we choose.

SUSAN CASE: The primary criticism of the bar exam is usually directed at the multiple-choice component (the MBE). To help save time all around, it is important for everybody to realize that in our lifetimes, there will always be a multiple-choice component to the bar exam. There are several reasons for using a multiple-choice exam. First, nothing samples content as broadly as a multiple-choice exam. Students cannot criticize the exam by saying, "You asked the only 200 things I didn't know." The content sampling for a multiple-choice exam is far more expansive than for an essay or performance test. Second, multiple choice is the only format of exam where you can equate scores; equating is critically important. Because of equating, it is irrelevant whether an examinee took this July's exam or February's exam or last July's exam. They are equivalent in terms of content sampling and are equivalent in terms of the meaning of the examinee's scaled score. The equating adjusts for exam difficulty, and for the proficiency of the students taking the exam. Third, the grading is accurate. None of you believe that professors who grade dozens of papers can grade absolutely consistently from the first paper to the last. In addition to that challenge, the additional issue for bar examiners is maintaining consistency from February to July, or from one July to the next. Maintaining consistency over time is not possible. Essays and performance test scores on the bar exams are "equated" through the multiple-choice scores, but cannot be equated directly. Finally, the multiple-choice format was developed for anonymity. The Scantron sheets don't care if the examinee is black, white, male, female, fat, short, or speaks with an accent or not. Each examinee has anonymity, and is graded fairly and consistently. We have a responsibility, if we are going to have a multiple-choice component on the bar exam, to make these questions as good as possible. The content has to be accurate and

the items have to pass the “who cares” test. Each of our test development committees includes a mixture of law professors, practitioners, and judges, and we challenge them to consider, “What does the new lawyer need to know? Is the topic being tested really critically important?” There are several quality control steps where questions are reviewed periodically by external reviewers who review the questions in terms of the accuracy and relevancy of the questions. We are always trying to improve the exams. For example, I personally would like to broaden the scope of the MBE and add a dozen more topics on the bar exam. I would like the bar exam to be a general reflection of what new lawyers need to know. Some topics would only warrant one or two questions; the exam would not be equally divided among topics as it is now. My last comment relates to the role of bar prep courses. It seems inconsistent that students need to take bar prep courses prior to taking the bar exam and yet faculty argue that the bar exam is forcing them to cover particular topics in the doctrinal courses.

SCHWARTZ: To let the multistate portion bar exam or any other bar exam drive our curricular choices or our teaching choices seems fairly irrational because there are ways to make sure our students pass. There are lots of different methods of what schools are doing to increase their bar passage rate. Unfortunately, by and large, two months after exams, the students have forgotten a majority of what they learned

FRIEDLAND: For professors who teach at new schools, bar passage rates are very relevant; however, being at a new school also allows the professors to teach more creatively, especially regarding formative feedback. Because we now have an opportunity to really focus on different kinds of learning, it is a false dichotomy when schools either teach to the bar or teach people to think like lawyers. The curriculum equals not only substantive law, but also the processes of problem solving, skills, and values. Answering bar-type questions is just one kind of process. For instance, a professor at Georgetown, Randy Bass, studies how students proceed to answer problems. This process, “Visible Learning,” evaluates how students are thinking while answering multiple choice questions. It is an interesting way of analyzing whether people are learning and whether people are learning effectively. The researchers have the students think out loud, and then videotape the students as they are thinking through the problem. The research shows that students who do not do well are all over the place when they are thinking through the problem, and that the people who do better think in a certain fashion or are using particular protocols. In practice, the bar exam can help us focus on using multiple choice questions for formative feedback purposes. When a student who sits in the back of my room is thinking, “I got this

stuff” has to do one multiple choice and misses it by a mile, we now know they need to go back to work, and it is a great way of giving feedback during the process.

BODIE: The problem with multiple choice questions is that students expect there to be the “right” answer. As professors, we need to help them understand that they are all kind of right to some extent, but this is the best answer. Here is a metaphor as an example: Lawyers are like meteorologists. We are, in a way, trying to predict what the weather will be like, but we don’t know, and you don’t really know until you are there that day and you know whether it’s raining or not. In law, for example, you might end up with a court that disagrees. The judge might take the view that one percent of the people looking at this problem would take, but that is what the court has taken. The whole notion that there is a right answer on these questions is what upsets law professors.

DAVIS: Most law schools have to worry about whether their students will pass the bar. However, the crucial question here is: What can digital techniques bring to our efforts to make our students bar ready?

F. Using Technology Effectively

BAKER: It’s not only law professors that are noticing the need to enter the digital world to communicate with their students. We are seeing an evolution in the practice of law as well, where law firms are actually embracing these things. For example, we have a closed Twitter feed that we use within our group where people will pose questions they have. Why tweets get a response and email won’t, I don’t know. We also use AOL Instant Messenger when we’re doing joint negotiations, so you can have offline discussions while you’re doing online negotiations. That’s been a great teaching tool, if we have multiple lawyers on it, in addition to our client.

JOHN MAYER: As you were talking, I kept thinking of tools that are instantly available to me right now. I am not blogging this. I know a few people are blogging this, but I’m writing in my Wiki about this, and I’m thinking if you want to gather materials quickly, there’s any number of places where you create a Wiki and you start dumping materials. I’ve seen twenty years of faculty who think that they have to produce all these materials. They use the materials once, and then next year they don’t teach that same class, or they move on and it becomes a one-off that sort of dies. What we need instead is for the material to be structured in a way that it can be found by others and reused by others. I thought, “Why not let the students do all this work?” You could basically outline what you want to produce, and you say to the students, “I’ll give you extra credit” or “It’s part of an assignment” or “It’s a group assignment to pro-

duce the materials for the course.” For example, if you would like to draw something on the board but don’t like the way you draw, you could say to a student, “Can somebody please go grab a copy of MindMaster or SketchUp or Photoshop or any number of tools and do a better version of this?” The students would probably be doing it for themselves anyway. You just encourage them to share with the rest of the course.

JOHN PALFREY: The thing that is most exciting about this gathering, and why I am so excited that David pulled this group together, is really just the reconceptualization of the legal casing materials: they begin in digital format. Materials are born digital right now. If you think about even the Wall Street Journal, for instance, every morning that’s created digitally, and the printed edition is just an artifact. It’s printed out in one format and is also made accessible online in a searchable way. If we create things in this format for starters and then re-provision it in different ways that meet specific needs, that will get at some of the issues that we may be facing. Again, I think there’s a separate bucket of concerns associated with things that already are in analog format and about how you transition them into any new system. But if you are creating new materials, I think just seeing a digital perspective makes many new things possible. I think the second key point is to recognize that the students too are born in a digital era and that they are accessing information very, very differently than even those of us born a little earlier. I think that John Mayer is leaning in, too, and saying students do interact with these materials in ways that can help be part of teaching materials. The kinds of legal research that I see among some students at Harvard Law School is just simply to type in a search term and find that one point out there. This isn’t legal research like we used to teach. To make this shift to born digital items is to recognize that kids born in the digital age come with good stuff and bad stuff, and that’s a really different teaching endeavor.

BILL HARMON: One of the things I noticed about the students is that they already are very proficient at obtaining information. The case-books are great because they give them a guide, a start, and pieces of information. But they are already good at getting information. I think the next step in technology is to let them collaborate. I believe in letting them figure out what facts are important. The law is really about people, so you figure out, “What do these people need as a remedy? What is their business objective?” Then what do I have to find out from them to use these rules and cases to help them get the objective they want in a good way, so there are always some missing backs and it looks a lot like the beginning as opposed to the end. I think technology can help us get there because they can unleash the diversity of each other’s perspectives by

talking to each other, not only through the Socratic method. With the Socratic method, your teacher is asking you questions and you're answering them, but you don't realize the person sitting next to you comes from a whole different background and sees it from a whole different perspective which is just as meaningful. I think technology might help us bridge those gaps.

PATTERSON: I agree. I just finished teaching a section of the course on bills of lading. We have a case that involves six containers of scallops that go from Tokyo to Port Elizabeth, New Jersey. They are misdelivered by virtue of a fraud and then a bank levees on the fraudster because, of course, they're bankrupt. So the question is: Who gets the scallops for dinner? Imagine a unit that goes something like this: You click a button and you have a video on how the shipping process works and it features the folks who actually are involved, using fax machines, telephones, e-mail, talking to one another, and then a bill of lading, how it works in the process. You just sort watch the mechanics of this on a video. It would be great to figure out "Oh, this is how it works."

Second would be a visual schematic of the transaction, from the shipper to the common carrier, to the customs broker, the warehouse, and then ultimately the buyer picking up the goods. Then the doctrine: How do Article 2, Article 7, warehouse receipts, bills of lading, and Article 9 all impact this transaction? How can you visually put together the underlying physical movement of the goods with doctrine, how they each latch onto the goods as they move from customs to the warehouse to the buyer? This leads to the most difficult question of all: How can we take a new interactive digital approach to legal education and develop the one thing that separates average lawyers from great lawyers? Imagination! The ability to look at something and say, "This is what will solve it and here is the doctrine and here is the thing we need to do, here is the document we need to craft;" that's the kind of intelligence that I think is the most important thing for us to develop and inject in our students.

G. Publishers

KEITH SIPE: I'm from Academic Press. I guess the part publishers would like to know is where you see any of us fitting into any of this.

HEIDI HELLEKSON: As professors, we have to feel comfortable with these materials. We all follow your lead. We are not going to want to come running out there with things that aren't going to make sense or are going to be too scary to use. But I love the idea of "intruding" on the text of the case. We recently had a group of professors together at a brainstorming session, and somebody asked, "Why do we have all these notes at the end of the cases? By the time students get there, do they care

about the notes? Are they even reading the notes?” We were able to respond, “This is an incredible idea. Let’s pull these notes out and put them in call-out boxes, and where the information is relevant enough to interrupt the case, let’s place a call-out box there.” Not only that, but we should also put it on the web. We can create web links to a wide variety of related materials, so students can take this learning outside of the classroom and go further on their own. This kind of innovation is not necessarily based on technology; rather, it is the change in the layout of the book itself. Students are saying, “This resonates with me.” This is more like what they’re used to.

SKOVER: There was one person, who will go unmentioned, who did not come to this workshop. He said, “Well, one of the biggest problems with this workshop, as far as I’m concerned, is that you are putting the cart before the horse because, you see, publishers will follow us as long as we know what we want to do.” I replied, “Well, I think you’ve mislabeled the horse and the cart, because I think publishers have been leading us down the road for a very, very long time, and only the fringe of the academy, one percent, two percent perhaps, have moved away from the traditional model of teaching because they are willing to put their time and attention to creative pedagogy.” The vast majority of what we would call “traditional colleagues” are such because they haven’t the creativity, they haven’t the time, they haven’t the interest or whatever to move away from the traditional materials that print publishers give them and, of course, print publishers are selling to the bulk of the academy.

MARILYN BERGER: I also want to talk about the publisher’s responsibility. John Mitchell and I have been publishing with Aspen. Our ideas at the time appeared to be radical. But they were in response to the publisher who said to us, “Make a wish list. What would you like us to help you with?” I put in everything we possibly could envision at proposal time. Then we got to the printed textbook. I sent them copies of a medical textbook that I thought was just dynamite—it had illustration boxes and arrows, and so forth. With the publisher we developed a similar graphic structure that assisted in presenting the substantive material in our books. It was an interesting process because the design of the book included different paper, a different cover, the whole thing, and every single thing worked the way it was supposed to work because we kept pushing and pushing as a team. Then there was a feeling of, “Okay, this will be experimental. We’ll do it. We’ll do it.” And we did it.

We also wanted a really vibrant website. A website that looked like “The Wire” combined with “The Sopranos.” We wanted students to relate to our educational site in the way that they were used to for their “fun-entertainment sites.” The publisher said, “We can’t do that. We

can't put movies up. We can't have things running around the screen. We can't put animations up." I asked, "What is the point of doing something experimental if you refuse to enter the 21st century?" The question must have gotten through to them, because they hired somebody to do the website.

We don't know if this is going to sell because it's so forward-looking and thinking, but I feel that we were addressing students' concerns regarding how they learn. As another example from this experiment with technology, we produced a two-and-a-quarter-hour movie. The purpose of the movie is to reach students by presenting education in a format they are used to seeing. The movie, through a fictitious trial, teaches certain basic trial skills, so students don't have to guess at how to do things like jury selection. They have a model right in front of them. The publisher was responsive to what we said students needed, and in fact the publisher also seemed to want to do something other than a print-type book. We've already seen this sort of approach carried over into other books. One recent book, for example, could have been very static, but it's accompanied by a DVD that shows students how to do mediations. Our experience is an example of a publisher trying to be responsive to advances in technology, and harnessing technology for student learning. This project wasn't just a gimmick. We were looking at what students wanted and what they do. Of course, law schools also have a responsibility. First, if we are going to use technology for student projects, like creating a video to be posted on YouTube, law schools need to provide video cameras. Why on earth should everybody have to buy their own equipment? Seattle University Law School does an excellent job with technology generally, but we don't have cameras that students and professors can borrow. The lack of equipment makes it difficult to develop student projects because one has to rely on a student owning a camera and knowing how to use it. I think the law schools have a responsibility to provide technology. Part of the problem lies with tenure and promotion. Why does somebody have to wait eight years to be creative? That's a lot of students passing through that don't get the benefit of untenured professors doing creative things. Why is that? When one creates a website and then keeps it up with substantive content—I am not talking about creating something that's just pretty, but something really useful—that creative act has pedagogical objectives. There must be rewards for that kind of effort, and I'm not just talking about money. I'm talking about the very essence of recognition—recognition that such an effort counts for something. If one creates a website of a high enough caliber, it should count as scholarship. It should count also as part of teaching. People deserve recognition for these kinds of things. Finally,

while students will be receptive to whatever new and exciting things we do, innovative materials and ideas have to be reflected in their examination process. You can't do this kind of thing and then all of a sudden expect students to take a regular law school exam. Everything has to fit together as a package.

I have one last point I'd like to make regarding law reviews and the need for their evolution as well. Law reviews are not cited by anybody except SSRN. They are not used in the way that they used to be. A study published in the *New York Times* reported that law reviews are irrelevant to most judges—they do not rely on law reviews. Another article in the *New York Times* pointed out that the world does not look at what the Supreme Court does anymore. The global community looks now to the world court and other international courts—that should tell us something. All of our law reviews have to be reflective of the excitement and imagination that is in this room. They have to be open and receptive to graphics. John and I tried to publish something with graphics, and it was a huge battle to get the graphics in. Most journals in the medical community are online. You buy a license, and you can see all these beautiful graphics.

SESSION 2: THE PRINTED CASEBOOK & ITS PRINT/ELECTRONIC
ALTERNATIVES: ADVANTAGES & DISADVANTAGES IN CONTENT &
DELIVERY SYSTEMS

SKOVER: When we were first organizing this workshop and considering this session, I was quite concerned that the participants would all say, "Well, why are we discussing this? The debate of print versus electronics is over." Certainly there were Memoranda of Preliminary Thoughts that suggested as much. Then there were others of our colleagues who seemed to echo the same message. Matthew Bodie, from St. Louis University Law School wrote, at the beginning of his preliminary memorandum, "There is no question that within a relatively short period of time, legal course materials will be in electronic form. The way of tradition is too weak to hold back the substantial advantages of the electronic format much longer." Conrad Johnson of Columbia University made it clear that he was on board with that view as well: "We need to use methods of producing, sharing, and commenting upon student work in formats," and then he wrote in bold, "other than text. Students live in an online world overflowing with video, audio, graphics, and animation, much of which is increasingly easy to create and share." I have to say I was relieved to receive some dissenting voices, for fear that there would be nothing in this session to say. Thus, Faye Jones of Florida State University tickled me when she wrote, "Is print really the problem? In the

context of the library, print can present problems—lost, stolen, misfiled or mis-shelved titles—but it isn't the problem. In some ways, print is superior. It's easy to read, mark up, transport, and share. Print can be used when there is no electricity or network connection." I was happy to hear Craig Gold from Concord Law School state, "While Concord Law School strives to be on the forefront of legal education, it continues to use traditional casebooks for course-reading content with only a few exceptions. Reading and analyzing appellate cases is still the best way to learn how primary law is applied and molded to different fact patterns." A similar voice came from Michael Schwartz of Washburn, who wrote: "The problem with law school text is not the print mechanism used to bring the instruction to the students, but rather the predominant anti-intellectual approach law professors use in designing their textbooks." Well, in all of this contention, perhaps the real spirit for this session was best described by the CEO of Carolina Academic Press, Keith Sipe, who wrote, "Nobody has put it better than Yogi Berra when he said, 'The future is especially hard to predict.' This Berra-ism is right up there with his other oft cited piece of advice, 'When you hit a fork in the road, take it.' As a publisher, I'm standing, looking at Yogi's fork in the road feeling only confusion and enervation." Let's hope that today's session will dispel some confusion and inspire us beyond the point of enervation.

SKOVER: I am going to open up the conversation for a little while to an all-group discussion of this notion of print versus electronic modalities to determine whether there is really a consensus among you or if there is division along those lines.

COLLINS: This whole print versus electronic conflict is a battle that need not now be fought. I think they can coexist, but let me just start off by asking, if I may, without trying to be a deconstructionist here, "What is print?" If by "print" you mean a book with its contents on paper, that's one conception. But if by "print" you mean, for example, a website, commercial or otherwise, where one goes to download an entire e-book or parts of it and click until one has made all his or her selections, and then print that out by means of some inexpensive Kinko's-like process, well, that's an entirely different kind of "book." True, it's a "printed" book, but it's of an entirely different order.

DAVIS: This may be more a question for faculty than for students, but I saw in the papers we got in advance of this meeting some reference to the physical difference between reading text on paper and reading text on screens. It seems that we don't yet have a full understanding of what the differences are, much less what the eventual effects of those differences might be.

SKOVER: I believe the question is: Is there something different about print rationality and electronic thinking? If all we're talking about, in moving to electronics, is having more text in electronic form then, frankly, I don't believe that the discussion between print and electronics is really one worth having. But, if what we're talking about is adding that which could not be represented by print, and engaging intelligences that could not be tapped into by print, then that discussion is worth having. We all heard earlier, in session one, about pedagogical techniques that had very little to do with text. Yet all you've talked about so far in the "print versus electronic" debate is how you want your text. But an electronic curriculum may be able to tap into different forms of intelligence than linear, sequential, rational reasoning.

SILVERMAN: First, I was very happy to hear Dennis talk in the morning session about how he embedded text within a case as an intervention. I've been attempting to develop similar kinds of interventions using a digital format. For example, I've taken a judicial opinion in a PDF format and—rather than inserting some commentary after a key part of that case in a different font and color—I've embedded an audio file containing spoken comments in the PDF's margin so that when the student gets to that paragraph in the case, he or she can click on that audio clip in order to hear my brief commentary or guidance in dealing with that paragraph. Thus, if I know from past experience that a particular paragraph typically gives students trouble, I can include an oral explanation in the case itself, and avoid having to spend class time addressing the difficulty. They hear it from me when they're doing their reading the night before. Similarly, I've developed and embedded Flash movies in PDFs of judicial opinions. In this fashion, I provide the students with a short interactive quiz which students can use to assess their understanding of a particular part of an opinion after reading it. By successfully answering these interactive questions, students can be confident that they have extracted and understood what they need to know to continue. Thus, in a manner not possible with a paper casebook, I have embedded two different kinds of media, Flash movies and audio clips, as a digital elaboration of Dennis's concept of an intervention. Additionally, when we provide course content to students in a digital format, we provide it to them over a digital network. In a digital network environment—where students and teachers are working together online—it becomes possible to think of a student's engagement with the course content, the professor, and other students in the class in terms of information flows or digital streams. These digital streams, representing the students' engagement with the course, can be captured, monitored, supervised, responded to, and assessed. Thus, by providing the students with course content in a

digital format, we open the door for the first time to capturing information about the students working with that content. This information permits us to monitor and evaluate the understanding and progress of individual students in a class—even a very large first-year class. Through using data-mining technologies on this information representing the students' engagement with course materials, we can quickly identify students who need additional help and can take the necessary steps to assist them in achieving the objectives of the course. Print casebooks simply do not permit this kind of targeted pedagogical intervention.

Pushing a bit further this concept of capturing a student's engagement with the course, it is interesting to note that technology to digitally capture in-class student activity now exists, and is becoming more powerful and user-friendly with each passing year. Here I am thinking not just of audio and video capture systems with some form of search functionality, but audience response systems that would allow the capture in real time of each individual student's reaction to, and understanding of, questions and issues being discussed in class. This semester I'm experimenting for the first time with a browser-based audience response system—a clicker system without a physical clicker. (A browser-based system is much less expensive to implement, since it does not require the purchase of special hardware devices.) In class, this system provides real time feedback which allows the professor to decide whether additional time on a particular point is warranted. Outside of class, the professor can identify and contact those students who still need additional assistance to achieve the goal of that day's class.

My overall point is that while rethinking legal education for a digital age must start with transforming the print casebook into more flexible digital media, it should not stop there. We should also be thinking about how to harness the promise and power of evolving digital tools and technologies to enhance student learning to wherever it takes place, inside the classroom or out, and this will require digitizing not just course content but different forms of course interaction as well.

VLADDECK: I wanted to return to your first question about whether we're just talking about a means of conveying text, or whether we want more. I use non-textual material in my teaching. I make my students go to Oyez.org and listen to oral arguments, and I make them go to other websites and look at TV ads for cigarettes when we do First Amendment projects. But, I don't know whether I would insist that such technological aids be integrated into whatever system is adopted. I mean, yes, in an ideal world, they would be, but it's not all that inconvenient if they aren't. In a textual note to your students you can say, "Go to this website and watch these ads and think about whether the government could prop-

erly constrain them under the First Amendment” or “Listen to the argument in Virginia Pharmacy Board and tell me what you think.” I want the students to do this. It may be that it would be preferable to integrate those kinds of links and those kinds of instructions in whatever platform we end up in, but I don’t know whether that’s crucial.

COLLINS: In my view, electronic format represents all sorts of exciting and innovative possibilities, which are quite different from a print format. For example, with a print format, you have one book for contracts, for example, and one or more books for supplements and study aids. However, with e-books, that does not need to be the case. The materials now outside a print casebook might readily be electronically incorporated into an e-book. For example, a contracts e-book would have a link at the end of the consideration section. This link, or equivalent device, would allow the reader to download a section of a study aid on that very subject and incorporate it right into the relevant place in this contracts e-book. Perhaps there would also be white space that the students could incorporate their own outline right along with some input from a *Gilbert’s* outline or a *Nutshell*. This becomes very interesting if you think in terms of data and overlapping it or integrating it.

KOO: One of the themes that has been recurring here has been the theme of flexibility—both flexibility in the production of the materials and in the delivery of the materials. There is a kind of separation between these two concepts. There are some amazing experiments being done by everybody here, and it seems to me that rather than concluding, “Well, these are the best experiments,” we should be looking for platforms that allow that kind of experimentation, whether it’s on the production side or the delivery side. If we were to have digitally networked e-texts, what would be interesting is not the digital network, but that the platforms could allow students to do things that we right now in this room cannot imagine. I think part of what we want to have moving forward is a platform that’s open to experimentation both from all of us as producers of the content, and for the students who, as users of the platform, will do things that we just couldn’t imagine.

MITCHELL: The professor from Kansas State whom I’ve previously mentioned was talking about these ideas, and he said the kids use YouTube and Facebook, but nobody understands at this point the academic potential of these media—nobody is a native. No one understands how to use them to learn how to think. Kids know how to use it for diversion. They know how to use it for fun. I guess what I’m saying is that I think it’s okay to start at ground zero and figure it out. I don’t have any idea how it will all turn out, but I’m allowed to think first generation about how this can really be used in my teaching. I think it is right to set

these tools up and think about how to use them. I'd like to return for a moment to a question that was raised but never answered—does anybody here know about any research or theories on whether the human mind functions differently if it's looking at a screen rather than reading a book? Is there something different that happens and, if so, what is it? Does that difference matter at all to us?

BILL McCOY: There's been a lot of research on reading digitally, including a paper by a colleague of mine, Bill Hill. The bottom line is that immersive digital reading is possible for most people, although many people have a twenty to thirty percent measured degradation in efficacy when reading digitally. However, more recent studies are starting to show that decrease in efficacy dropping to zero in some cases. It is an active area of research, and the general trend seems to be that digital reading is roughly the same cognitive process as paper reading if you can induce immersive reading flow in the person who is consuming the text.

PALFREY: I have just co-authored a book called *Born Digital*, in which we try to answer the question that you raised about young people who have known nothing other than this digital environment. The research that we looked at by neuroscientists and cognitive psychologists and so forth suggests that the effects of such an environment are not entirely clear. I think what Bill described is correct in terms of what studies have shown, but the digital environment is so in flux right now, in terms of how young people are using it, that I think it comes back to the theme of flexibility. Right now, we really don't know where this is all going. We have to get in the game and participate and think about it because the digital world is so dominant in terms of how students are learning but, at the same time, we must be careful not to preclude outcomes that might be, in fact, the best ones just because we don't know enough yet. There's an amazing series of six books just recently published by the MacArthur Foundation and MIT Press called *Digital Media Learning*, which explores an entire field being built to answer precisely this question and related ones. Howard Gardner has done great work in this area, among others. Just to respond to Gene briefly, I would add "interoperability" as a watchword along with "generativity." I would just urge, at this moment where we don't know exactly what the pedagogy ought to be going forward, that we work toward open standards and interoperable systems that permit different kinds of experimentation to succeed over time. The punch line is: interoperability and open standards in addition to generativity.

JOHNSON: One thing we do in the beginning of each semester is give folks a learning style assessment, which reveals that there are many,

many ways of learning in the classroom, even this self-selected small classroom. Clearly, to only offer people a learning experience through the lecture and a text is a very limited repertoire, and we could be doing better.

What we see in the learning management system we're using now, which is an open one, is not only what people do with their assignment, but also how long it took them to do it, when they did it, what they relied on to do it, what they're getting wrong, and what I need to focus more on. That seems to me a useful thing for us to be working with.

SKOVER: There certainly have been schools of thought, particularly in communication studies, that media impact our minds differently. It's very clear that when audio-video became dominant for the taping of criminal confessions, it had a huge impact on the way cases came out and the way law was being made; no textual account of a confession would ever have the same impact as an A/V account, assuming that it wasn't staged or manipulated, assuming it was a true account of what actually happened. We know at a visceral level that this must be true, that we must somehow be thinking differently or reacting differently or experiencing the reality of the law differently when we move from black and white text to an electronic reproduction of reality. Now, whether that actually changes our mental processes in addition to simply getting more information is, I think, a different and larger question.

LUSTBADER: I want to take us in a little bit of a different direction because all this has made me start to think about what we are preparing our students to do. First, in the short term, I would argue that we need both text and digital and multimedia materials, but I wonder whether, down the road, we are going to change the whole practice of law to such an extent that everything will be recorded, and we won't even be reading opinions. I don't know if we're preparing our students for the future of the law practice.

Second, as we move toward more digital and multimedia forms, I want to echo Marilyn's concern that in our excitement we may just add bells and whistles for the sake of the bells and whistles. There has to be a pedagogical objective. I think these ideas are really cool, but we can't lose the table of contents. We cannot lose the ability to bring our students back to the bigger schema, and whatever form our materials take must facilitate that.

SESSION 3: COMPETING ONLINE ARCHITECTURAL FORMATS: ADVANTAGES & DISADVANTAGES

BODIE: The next hurdle for professors using technology for education is to consider what will happen once the technology is in place. Un-

fortunately, it is not as simple as, “if you build it, they will come.” Even if you build the perfect system, they might not come. The challenge is in making this something that is cool, something that professors want to use, something that students want to use. Additionally, there is the problem of monetization. On the one hand, information should be free and it makes sense for information to be free but, on the other hand, if information were completely free, none of us here might have jobs. Moreover, we must consider what value we add in this process of legal education, and how do we think we should be compensated for that. Lastly, I want us all to address something that John Palfrey brought up earlier: What role does intellectual property play in all of this? Whether we monetize and how we monetize is something that we all do differently, but we all are proud creators of intellectual property. How does that change, or does that change, when our work becomes digital?

SKOVER: Before receptacles, like e-readers, become useful to us, professors must decide what kind of platform that we would want to create for containing these digital packages that we call legal information. There were assumptions made in the last session for an open-source platform, but we all know that’s not the only alternative out there. I think we really have to address meaningfully this distinction and the publishers’ interests that are engaged in that kind of distinction. If we are to move to an open-source platform, are we going to be restrained in terms of content, et cetera? There are so many questions involving the platform before we even get to what receptacle we are going to use to read content. I really want to hear you all debate this because I believe there’s not necessarily a consensus.

JOEL THIERSTEIN: One step further than David did, before the receptacle and before the platform, I think is the discussion of the intellectual property. Three weeks ago, I asked a group of doctors at the National Academy of Sciences, very similar to this, and I said, “You have all taken the Hippocratic oath, and because of that, aren’t you obligated then to open up all of your content,” and that met with a lot of looking at the shoes and “Who is this lawyer guy? Get him out of here quickly.” I will pose that same question to you. Aren’t we under the same obligation as doctors to open up our content? Don’t we have that ethical responsibility to open up our content, and by “open,” I mean make it freely available to anyone, anytime, anywhere.

BODIE: When you say “content,” what are you thinking of specifically because obviously cases are—

THIERSTEIN: Cases are open, our analysis of the cases, our journal articles, our books.

VLADECK: Can I ask a question of the publishers? How often do law professors publish casebooks on the theory they're actually going to make any money? I know there are some Evergreen casebooks that obviously have been financially remunerative for their authors, but I can't imagine that people go into writing a casebook thinking, "Aha, this is how I'll put my kids through college." Is that right or wrong?

LEVIN: I think that's right. I think that money is not the motivating force.

VLADECK: The motivating force is getting recognized by peers.

LEVIN: I think even just wanting to put your information out there, wanting to put your book out there. I get questions about royalties and predicting royalties, and that seems to be an important aspect, but mostly no, it's not really a factor that drives most of the authors.

RICHARD MIXTER: I always tell my authors that they should expect a really good vacation every year out of a successful book and if their aspirations are for more, principally or exclusively, sometimes that's a bad sign. You don't want to discourage the expectation of some financial reward, but that is not sufficient.

PALFREY: I just want to make one suggestion by way of a structure that might move us a bit forward. It seems like, at least the way we've been talking about it, that there is one bucket that's the content, the objects, whether it's digital text file or audio. Then the second bucket is the platform, the place where it resides, the place where it's accessed, the place where it's sorted, and where other information is added to it. And finally, the last bucket is the receptacle, to use David's word. It might be the Kindle or Reader edition, it might be a web page, or it could even be a book. It seems to me that we should design a system to be at least dual licensing compatible with the notion that a purely open access series of works could be run through the system and then rendered in a way useful to students and recombined and remixed as part of the pedagogy that we're undertaking.

Likewise, as we design the system to enable a fairly standard mode of copyright transfer, knowing that copyright is probably not going to be reformed entirely in the next few years, we should think like transactional lawyers. Some objects may be an open-access article or an open-access case, but then may get remixed in the platform by wonderful publishers or experts who establish a copyright in the combined work and then render it sometimes in the Reader and sometimes in the Kindle and so forth. I guess I would come back to the plea for interoperability of technology, and also interoperability of intellectual property systems, in part because of the unsettled nature of IP issues and business models on the web today.

COLLINS: Again, what I love about talking to John Palfrey and other like-minded souls is that we get ourselves out of this either/or situation. In that regard, I have a few ideas or models of how we might consider things. First of all, there's the model that John just mentioned. You have a platform, and you have open access to information for free. Or you have a proprietary site with paid-for information. Or you might have both free and proprietary information on the same platform, with the possibility of mixing content with royalties going to authors. On that score, as an author, let me just speak for me, but perhaps not for my co-authors. I like whatever profits I can get from my book. I like that I'm copyright protected, that somebody is not going to steal my work and put their name on it. That's important to me. It's also important to me that there's a lot of published information available for free. In the last two days alone, conversations with people I've spoken to reveal an incredible amount of information that's out there and that can readily be tapped. If all that free data can all be put on a platform, and that platform also allows proprietary entities to post their data on that platform, then that would be quite remarkable. On such a platform, proprietary entities might opt to have their books sold in whole packages or in parts, and have those parts somehow incorporated electronically into public access information. Those are all options. Or consider this: A commercial publisher might deem it desirable to share its materials (e.g., 200 edited contracts cases) in return for links in those materials to commercial study aids. When a student clicks on that link, that student might purchase, for a small fee, a section of some study aid. Another option would be for private commercial publishers to have their own e-books on their own proprietary platforms. That way, a professor might say of a given work: "Great book, but I just don't like the last third. I want to move the end to the beginning." If the publishers allow their authors and their audience to do that, and we're concerned about pedagogical reform, does it make any difference if it comes from their platform or this other open access platform? If what you want is pedagogical reform, it seems to me there's a number of alternatives and options. There need not be a war between those who want to give it all away, even though something needs to be said for charity, and those who see that sometimes the creative process is linked to remuneration. We can have our cake and eat it too. I hope in the next panel we can explore, in some detail, how we can make some of those things happen in the next year or two.

KOO: I think a big issue that seems to be percolating when you talk to people about this is the question of making sure that the credit and reputation is still part of the publishing process. It seems that one of the major currencies, besides the dollar currency, is the reputational curren-

cy. I would imagine any system, in order to succeed, is going to have to really pay close attention to that.

BAKER: I do licensing for academics and also for lots of people who are in it just to make money. I think this is the baseline question: What are the incentives for the people who are creating, distributing, and investing in the content? There are two things that are interesting about the academic environment: (A) there isn't a huge amount of royalties being generated to the original creators; and (B) there are reputational benefits that accrue to the creators. These creators are part of a "publish or perish" tradition. In addition, other kinds of incentives that are structured within the context put academics in a different place than, for instance, the photographer in the room today. The photographer is trying to make a living based on the copyrights in his photography, particularly if he's an art photographer, and has to police and manage those copyrights and be very aggressive about that. All of our publishers are essentially in the business of making money on a closed system and developing all these kinds of things. The publishers have a completely different incentive structure than the academics. However the dialogue is structured, and however you move in that direction, you have to really think about what the incentives are. It would be great if all the information was free and if everybody had all the time in the world to create all the information that they wanted, but that doesn't exist. The copyright law was structured, in part, to create some incentives. I think we have to make sure that we understand everybody's incentives.

MAYER: www.eLangdell.org is the website that CALI is working on for a production system for authors to do everything that we've been talking about today. It's intended to be the production system, or set of tools, that lets you assemble pieces from the 700,000 cases that publicresource.org recently made available, and from any number of other vocations, including CALI lessons, and everything else we can get our hands on. The distribution system, on the other hand, which John Mayer mentioned, is going to be a separate thing. This is a beta system right now, so it is not available yet. You press a button, and it will output a variety of formats: PDF, RTF, and eventually Amazon or Sony—whatever format makes sense for us to support. We fully expect and would hope to work with commercial or copyrighted materials as well, to use it as the production system for a group of authors that don't want to give their copyrights away. In other words, if you are in eLangdell and you produce a book, and you now want to give the book away, one of the options will be to put the book in the commons. It then becomes available to anybody to do whatever they want. That's always going to be an option for faculty. We've run into the situation where sometimes faculty

don't want to give the material away; they want to limit it to their class, or limit it to a situation where they can sell it. The second point is that CALI owns the lessons that it publishes right now because CALI used to pay a royalty. We used to pay an author a nickel every time somebody clicked on it on our website. When we had 100 lessons and 100,000 usages, the nickels added up and people did okay, earning \$2,000 or \$3,000 a year. Now we have 700 lessons with a million usages. At that point, we were writing some \$2 checks to authors for certain lessons. It got ridiculous because we had a fixed pool of money to distribute in terms of royalties. We weren't charging students a nickel each time they clicked though. We went to a model where we bought the lesson upfront, and we currently pay \$1,250 for somebody to write a lesson. That means you get a certain amount of money, whether you write an unpopular lesson in environmental law or a popular lesson in civil procedure or evidence. I'm hearing that a lot of authors are not making much money selling books. Well, then, we could, as an academy, create a pool of money in which we pay people to write the book, and we then turn around and give it away.

THIERSTEIN: For those who don't know, I'm the executive director of the Connexions project at Rice, which is effectively what John Mayer and Gene Koo are doing with eLangdell and the projects that are associated in that arena. We are a platform and content management system, if you will, sitting on top of a learning object repository. We have about a million hits a month, over ten million hits a year, and we expect to add another zero by the end of next year. Somebody brought up earlier the fact that nobody is looking at the U.S. law journals anymore. Is it possible that's occurred because we've locked them down and you can't see them if you're outside the U.S.? Whereas, if you're authoring in XML, it's more searchable. In XML, you come up in the first page of Google every time if you're looking for content. It's a way to game the system, if you will, if you're a Google person.

MAYER: I wanted Joel Thierstein to mention how you went and found one of the top ten selling statistics textbooks, and then got a grant to buy it from the author so that you could then turn around and give the book away.

THIERSTEIN: The foundation bought it and then gave it to us. It's all the things that you want. The professors who are teaching this class are remaking the book. They are adding in their own stuff. They are doing everything that you could want in a book. We have included multimedia features, and we have publishers who are interested in taking the book, adding their own value sets, and then publishing it on their own.

We don't have the noncommercial license, so publishers can take the book as well and sell it.

MAYER: That raises the idea of sponsorship. Law firms, wealthy lawyers, or alumni could purchase or sponsor a book, like they sponsor a chair at a school. The book then becomes the intellectual center of the universe for how to teach torts, and that becomes a reputation point for this publishing empire.

CRAIG GOLD: Mine is more of a comment than anything else—an expression, I think, of frustration that we're even having to have this conversation. It's frustration with the publishers, in general, because the technology to accomplish what we want to do is out there. The technology is available to publish things commercially with full digital rights management. The technology is available to publish things openly, with no rights whatsoever, and the technology is also there to self-publish. The digital rights management that the commercial publishers own could be used for our own self-publishing as well. With that in mind, it seems depressing that we have to reinvent the wheel. Given that the technology is out there, but the publishers and the appliance manufacturers, Kindle in particular, are so interested in being the only platform, they're tying our hands.

McCOY: I will make an analogy with the DVD market because, frankly, that is a hugely successful market that has migrated to a digital representation from analog and physical media, and it was about the fastest market to take off. DVD has a standard technology; the format allows people to author and create DVDs no matter what platform they are on, regardless of what device they are going to go through. You don't make a Panasonic DVD or a Samsung DVD; you make a DVD, and it works everywhere. By putting in a basic DRM or copy protection mechanism, it lets one protect the content they are going to distribute so that it cannot be trivially and easily copied by legitimate software. The DRM should be one that is simple enough that it does not raise Orwellian fears among the community. It shouldn't infringe on our ability to access content down the road or abuse any fair-use rights we have. Adobe is trying to promote the formats and DRM technology that will let that happen in digital publishing, unlike a closed iPod, iTunes, or Amazon. There would be only one store and the materials would only work on one device, but publishers can distribute too many channels in very many different business models. Publishers could distribute that content to consumers reading on multiple different kinds of devices.

HELLEKSON: I guess I'll respond on behalf of the publishers, at least West. I don't think it's that we're not interested. We've been looking at DRM capabilities for years now. Everything we have, we have it

digitally, but it's not as easy as going and clicking on a button. We have authors that are invested in this content; we have contracts and royalty agreements with the authors that provided the materials to us. Those materials contain law review articles. Those law reviews do not release to us the permission to put these materials up in an electronic format. Almost hands down, you rarely get law reviews giving you that kind of permission. In our catalog of 900 titles, there's a rare book where there are no third party copyright permissions within the materials. We have been working on this. This is not something that we're just turning away from. Also, my authors want to know that it's absolutely lock-down secure before they see something go up there. Adobe is getting there. We are working with people that we need to work with, but we are not satisfied that it's there yet. Honestly, at least from the standpoint of our company, we are very interested, and we've been very engaged with the various players out here in the digital world for years now.

BODIE: Let me just jump in. Part of the problem is that we're talking about packets, and maybe the packets aren't as obvious as we make them out to be. For a traditional casebook, you have a chapter, a little bit of text before the case, maybe a discussion, a background, a case excerpt, and you have notes. You may have problems in determining how to packetize that.

HELLEKSON: We engaged in custom publishing for many years. You could come in and say, "I want to take a slice of this casebook and a slice of this casebook," and we would spit it out and put a binding on it. In that format, it just wasn't really that desirable. There weren't that many people that came and said, "I have the time to take pages thirty through forty-three of this casebook." We have experimented with that, so definitely, I wouldn't quickly jump to an assumption that we are closed off to this, and that we have not been experimenting. One response I received to our memo is: "Gosh, I didn't know you guys were doing this stuff." Unfortunately, if it doesn't seem to be happening in your field, you might not get a copy of it. But I encourage you to come to our booth every year at AALS and see what we're doing, because every year, there's new stuff happening. I think that is the case for all the publishers.

LEVIN: I guess one reason I didn't respond initially to Craig Gold's statement is because I'm not sure what you are saying. Are you saying that publishers are an impediment?

GOLD: You might think you are not stopping an independent author from self-publishing, but you are. The availability of the copyrighted commercial publications out there in an electronic form is hampered. I certainly understand where your hands are tied with copyright

restrictions, but it seems to me a fairly simple matter of pulling those materials out of the books.

JOHN CHATELAINE: It's more than that though, Craig. You have to go to the authors. The authors have to agree to that. Then you go to Heidi Hellekson's issue. Every excerpt that's copyrighted that they have print permissions for, you have to get electronic permissions for. If you want this to happen, I say go to the academy and tell the authors to release the electronic rights to the publishers.

GOLD: Then perhaps the publishers change from this point forward. Perhaps the publishers should say to the authors upfront, "We are going to want to publish this in a digital format, and we need to have all these rights." I know that in the past, the West contracts left this up to the authors, and that has come back to bite all the publishers.

LEVIN: Our contracts make specific mention of using the material for electronic purposes and possibly dividing the material and using it in modular format, but you still have the problem of third-party copyright issues. We've been trying to include third-party copyright grants in our standard grant of permission for years, and invariably, the copyright holders cross off that part and give permission for only one time use for one edition, in print only.

HELLEKSON: Our contract has addressed that for over ten years now because we have seen this coming.

GOLD: How difficult does it become then to state in the contract that third-party material can't be used in this book?

HELLEKSON: With our interactive casebook series, we've had to say, "If you want to publish in this, you have to get around third-party permissions by not using these materials or summarizing it yourself, or you have to get that third-party permission," and that's the only way we can go forward with it. We are at that point with one of our series. There may come a point where we have to look at existing books that we have and start redoing them, but authors will not be terribly excited about doing that. What would be great is if, somehow, the decision would go up to the Supreme Court, and the Supreme Court would say, "Paper, digital, all the same."

COLLINS: Don't count on that.

BODIE: I was surprised to hear about the law reviews. Since professors make nothing off their law review articles, it's surprising to hear that the law reviewers are saying, "No, we are not going to give you permission."

HELLEKSON: And they are charging us more and more money to get even rights for the print to use it. The law reviewers charge us more

and more money to get the copyright permissions to reprint excerpts that go beyond fair use.

MAGGIE CHON: This brings to mind a collective licensing solution. We have a collective action problem. All of these copyright permissions are needed from lots of different sources in order to remix the content: first, second, and third-party sources. In the music industry, ASCAP and BMI exist to distribute royalties to musicians for their compositions, for their musical works in the jargon of copyright law, and perhaps a similar system could be set up for academic authors.

COLLINS: Now that Heidi Hellekson has made a point, I just realized there's another reason why I hate law reviews. I already have plenty. Maybe this is something we can work on with Craig and others, because I'm wondering, every time somebody writes a law review article, is there some designation they could give to make sure that its content is open, with full credit, of course?

PALFREY: I think it's a reference to the open-access mandate. First, let's just distinguish open-source from open-access. In simple form, open source generally refers to computer code; open-source is a means of giving that code away, but usually with some restrictions. That's the complicated part. Open-access generally refers to content, including the articles that we write. At Harvard Law School last May, we adopted a mandatory scheme for faculty. When faculty publish a scholarly journal article, they can make it accessible according to an open-access system that we set up. There is an opt-out option, so an individual faculty member may choose not to go open-access with an individual work. This opt-out applies particularly to the junior scholars who fear the extent to which publishing in this format will disallow them from getting tenure. We set up an open-access repository which then renders these files in a stable format. The repository is attractive to Google Scholar and other similar services, and would ideally interface with systems like Connexions at Rice and many other extraordinary repositories of similar sorts. I think it exemplifies this philosophical notion that we should render our work as publicly accessible as we possibly can. It's much more controversial in the sciences, where economics makes this trickier. NIH has a mandate of this sort, which is now law. My fond hope is that other law schools will do a similar thing, and we will make a whole series of connections between our repositories of open access articles.

SKOVER: I have two points to different constituencies. In a way, it's surprising to me that so many of you have given away your copyrights to law reviews. I have never written a piece where I have not retained my copyright. I've never had any law reviewer refuse to publish

me after I said, “I keep the copyright.” Maybe it’s just my forceful personality that lets me get away with this, but I can’t imagine that you all are such wilting flowers that you could have not insisted upon it yourselves. Going back to the publishers, and taking off Matt’s point, the traditional casebook is really made up of discrete packages. The publisher could permit those packages, with no copyright restrictions, to be placed on a platform where people could select units in an iTunes-like way. And if the author chooses not to give electronic rights for a component of the book, the publishers might respond, “Fine. In future electronic books, your article is not going to be read.” My guess is the authors are going to cave. If I can get law reviews to accord me copyright, I can’t believe that you don’t have the market power to overcome law review resistance, if you choose to rip apart the binding of the book and sell components.

BODIE: I do think what packet it is makes a difference. For instance, we can compare a chapter on a statute of frauds to a song. When you buy a song, you can’t say, “You know, I like the song, but I need more cowbell, so I want something added.”

SKOVER: You can conceptualize it like this: the first song is *Marbury vs. Madison*, the second song is the notes and questions on *Marbury vs. Madison*, the third song has articles on *Marbury vs. Madison*. I mean, there’s absolutely no reason why one can’t divide up a chapter. A chapter doesn’t have to be one unit.

BODIE: Then you have a comment and a question with a law review excerpt in the middle of it, right? We need to determine what level of granularity to break things up at. I guess, for the notes and questions, you could have twelve different notes.

McCOY: Just one comment: First, I don’t want to diminish the real rights and clearances issues around the need to get authors onboard and comfortable with digital distribution, but you guys in the legal business don’t exist in a vacuum. Relative to what’s going on in publishing in the larger sense, academic journals are so over all this. That doesn’t mean it’s not hard, but they’re over it. Trade, scientific, technical, and medical books are fast getting over it. There are 110,000 books for sale on the Kindle’s store, and some books have had illustrations pulled out because the rights weren’t cleared. So the books are not exactly the same as the print version. Again, there’s some sweat and blood required, but you guys don’t have to reinvent the wheel. In my opinion anyway, speaking as an outsider who does see many fields of publishing, this does not have to be a unique solution. My advice would be to seek solutions that have been used in these other fields and put them to work.

SEAN CALDWELL: We've spent a lot of time discussing a product initially designed for the print medium; now, we're digitizing the medium or offering it in some electronic format. We're also wrestling with the idea that there's material excerpted that we might not have permission to offer in the digital format. I suggest we shift the focus of the discussion. The question is: If we're building a product, what would that product look like, and what could we do with it?

FAYE JONES: Law schools have to revolutionize what they believe to be success points. Success is not strictly measured by the citations for law review. Instead, success should encompass how many times a product is downloaded. This really encourages open access, as Harvard has demonstrated through its model. For law schools, this would be a great revolution in scholarly publishing. Some law reviews post PDFs of their articles, but it's still not open access in the same light of the Harvard model.

BAKER: On a going-forward basis, we must think about whether we want to be licensors or licensees. In some parts of the discussion, we've taken the licensor perspective. Joel, you said, "Gee, West and LexisNexis should be able to turn over a pre-cleared database so they don't have to spend a lot of money to do that." David, at some level, you said, "Wow, I would never give my copyright away to the law review articles. I keep my copyright. That's very valuable to me." Ron, you said, "It's very valuable to be an author." As copyright has exploded into the electronic arena, it seems like everyone is a copyright lawyer now. Every creator is extremely sensitive to what happens with his or her created material. If we want to create a pre-cleared, common database, we must go to the academy and have the academy then say to the authors, "The benefit of the licensee from the information is worth the cost to an author and creator from the licensor side." If authors want to be licensees of a large database that's either free or requires a small subscription price—and not have to bear the cost of copyright clearance—they can't increase such costs by insisting "I don't care about you clearing anybody else. You have to clear my snippet in the casebook and spend that money." Whatever approach we take is fine, but we can't have both a licensor and licensee approach.

SILVERMAN: We're compiling resources for a pedagogical purpose. Thus, the idea of creating packets and the level of granularity should be relative to the pedagogical goal we are trying to achieve. Returning to Michael's point about the need for instructional design in legal education, the best practice of instructional design should determine the level of granularity. As we repackage course content, we must ask questions such as: What are the learning objectives, and what is the pedagog-

ical function targeted? By breaking the issue down in a systematic way, it'll create a kind of topology. Then it'll become clear what learning objects you need and what contents are required. Thus, the question is not about legal topics or traditional legal text, note, or comment. Instead, we must look at the pedagogical function the object is intended to fulfill. Some more points: A very important receptacle is the learning management system—whether it's WebCT, Blackboard, or Angel. As educators, this is important because there are commercial receptacles such as the Kindle or the Sony Reader. Because people will design content that fits into learning management systems or commercial readers, development efforts must facilitate interoperability as John has championed here today. For this, we need an open industry standard. SCORM is an emerging standard. I don't know if it's going to be the industry standard, but it's certainly a prime example of an open industry standard that we need to use when authoring digital course content.

BODIE: Can you explain that?

SILVERMAN: SCORM is an acronym for Sharable Content Object Reference Model, which originated as a Department of Defense standard. The government educates thousands of soldiers, government officials, and employees. The government recognizes the importance in different kinds of educational technologies, as well as the importance of the issue presented today: how do we get educational technologies to interoperate when they are produced by multiple vendors? If someone enters into a contract with the government to supply educational content, the government, under DOD contracts, will ensure that the content can interoperate even though the contents may come from multiple vendors. To facilitate the process, the government has formed a commission to develop standards that vendors must comply with. This is the same type of model we have seen in other industries. The sets of standards that have emerged from this effort are called SCORM. They facilitate the creation of content that can interoperate with different learning-management systems and other technologies. Leveraging this governmental effort, many commercial vendors that supply universities and corporations content have adopted the same standards. It's clear these are the dominant standards right now. Thus, publisher-distributed content or author-created content should be SCORM compliant. This is especially true if we want the content to be compatible with learning management systems, which more and more universities use. Moving on to the problem of IP rights, I agree that the IP issue is a red herring. I think we can say, as David said, "Listen, we are not going to move the legacy content into the electronic arena unless you provide the electronic rights at a reasonable price." In addition, Maggie suggested we develop a compulsory licensing system to

minimize the transactional costs. If we can't accomplish either, well, then I suppose we'll have to write a new content for the medium. In either case, we must establish a framework that accommodates free, open access because some learning modules can't be created due to their great expenses. In reality, producing educational content containing multimedia content requires significant investment and large production teams. If we compare the number of people required to make a movie in the 1930s with today, we should be impressed with the difference in scale. As we go digital, the investment and effort required to create educational content will similarly mushroom. The framework for legal education should accommodate this growth. As Ron said, it's unrealistic to think that we have a one-dimensional system which only works with free or open source content. That would be way too restrictive.

RUBIN: Two thoughts occur to me: First, most producers are concerned with, as we say in the entertainment industry, credit rather than money. For example, most people writing law review publications write for publicity and citation purposes and not for money. Second, following Maggie's point, in terms of licensing and other mechanisms, most consumers and law reviewers are part of the law school institution. As such, I wonder if there's a mechanism that can be done to the administrative apparatus of law schools. We have the capacity to charge fees to students, and most law reviews are subsidized institutions. But we don't want to increase the total cost for students. We know students pay a lot of money for books; can the same kind of money be collected through a similar fee structure? There must be a creative way where we can transfer compensation to disaggregate the notions of access from the notions of return.

BERGER: I know this is radical to say, but I don't think law reviews are particularly important to students. When students see citations, they don't necessarily concentrate on law review citations. In casebooks, the notes that follow cases often clue students into what they should be looking for or where the professor may be heading. Any supplemental material we assign may also achieve the same goal. We know judges pay very little attention to law reviews. In addressing whether law review articles should be free, we must determine the audience. Every law school can provide law review publications for free because they have a license to SSRN. So in the context of creating digital packages, I'm not sure if law reviews are a relevant topic. I say this because I don't generally write law reviews. Again, I don't think many people read them. In fact, there are few—very few—law review articles that live on. We all know the articles we read while in school. I dare us to come up with a handful that will live on. Frankly, isn't this an AALS problem? For in-

stance, AALS can say, “Just make the stuff available, period. Law reviews are intellectual property that should be available to every single law student, end of story.”

CALDWELL: Marilyn, you were the first person today to mention edited cases in casebooks. This is a unique point. In addition to the interstitial text, authors contribute value to the text in casebooks. The full text of a case is something we can access and put in a library. From there, professors can create their own notes, questions, and introductory texts. Thus, professors can edit their course packets to suit their pedagogical purposes. Let’s assume we have the ability to present material electronically. Would professors put their own spin in the editing stage, or would they generally have a similar approach?

MITCHELL: The spin might not even relate to editing. This is because we can’t have a book that weighs 240 pounds, but we can put full cases online. Professors might provide hyperlinks to students and say, “You know this topic, now read the case and find the appropriate part that applies to our topic.” This is part of the lawyer’s research skill—reading the case in full, in its context, or skipping parts that don’t apply.

CALDWELL: That’s the other challenge. Depending on the case, the bulk of the pages may not be relevant for purposes of the class. There’s a reason to edit cases and thus to limit the universe for students. We don’t want students to run down alleys; rather, we want to sort of steer them.

HELLEKSON: Also, professors are asked to cover more and more material in a shorter time span. Naturally, there is pressure for more concise material.

BODIE: Part of the editing process may be an encapsulation of what an author writes about.

CALDWELL: Sure.

LEVIN: I want to address something David said earlier. I have the impression that most of us have not thought about providing custom legal publishing, or putting things online and having people pick and choose the material they want. Of course, we’ve been discussing this for a very long time. We have an advisory board of nine law professors and deans from whom we receive feedback on a regular basis. This is a topic that we’ve been discussing. At the same time, it’s complicated. It’s not something that’s going to be easy to accomplish. However, I just want to let everyone know—everyone who has an impression that this is something new—that we’ve had ongoing discussions about this topic.

SCHWARTZ: A law review article is a poor means of engaging our students in theory. This may be harsh, but we primarily include law review articles in casebooks to lazily fill out the pages. These articles are

not designed to engage students in discovering theory and policy in a manner that sticks with them on a long-term basis. The theoretical points we hope to transmit simply end up as mere knowledge if we throw articles into casebooks. Again, this may come across as a bit edgier than I intended.

CHATELAINE: To follow up, 13 years ago there were 25 titles from West and Foundation in electronic format. In those books, references to law review articles were deleted. Our advisory board made the editorial call to primarily include edited cases, problems, and notes in the casebooks. This decision reflected the pedagogical value of the electronic book at that point in time.

MAYER: For about twenty years, publishers have thought about what path or approach to take. This is not surprising because to make money in the business, you need a stable platform. I've heard people say, "Tell us what you want and we'll give it to you." But, law professors can't even tell you what they want because they don't know. This is why this issue is such a game changer. We need a system that we can experiment with for a while until there is a new plateau that isn't restricted. That way, we can play around for a bit because we don't even know what the best system for teaching is yet. Perhaps it's not time for making a concrete decision; however, it is time for lots of experimentation.

LUSTBADER: Has anybody done a student assessment? Has anybody received student feedback? We are dealing with the digital generation, and I'm not sure how the students in this generation learn the best. But from my kids, I can see that people learn differently. In law schools, we have a more diverse population in the student body than ever before. Students learn differently, and I want to hear from them what works. With that, I bet students aren't reading law review articles; I bet they're not reading the notes after the cases, and I bet half the students aren't reading the cases in the casebook. I have a 12th grader who said to my younger son, "You know, Joseph, I just figured it out. If you actually read the book, it's so much easier to answer the questions instead of relying on the class discussion, hornbooks, and cliff notes." I may be slow to this, but I'm just thinking, "We need to hear from the students."

BODIE: This question may be for publishers. In terms of study aids, has there been a market change? It seems like the e-manuals, et cetera, are still in book form. Has there been a revolution in the provision of study aids that I'm not aware of?

MIXTER: Aspen has two digital content platforms. The one that addresses study aids is called "Aspen Law Study Desk." Under this platform, students can integrate the content they create with publisher-

created content, which includes downloadable copies of manual law outlines and examples and explanations. In the last 18 months, we've had enough students using the software so that we know what they want and what they don't want. Based on the feedback, we've refined the platform accordingly. The same cycle also holds true for our other platform, TeachingLaw.com. In this platform, we are essentially pitching the casebook and course book as a service to the instructor. The platform provides information through an integrated publisher-integrated content and professor-created and professor-found content on a single platform. We are also getting lots of responses from our adopters and refining the platform accordingly. The reason I mention this is that I want you to know we're trying something. Some of us at Aspen have gone out on a limb to get the investment necessary for these platforms. We're finding out there's an interest. It's cautious in some respects, but we feel like we're pushing on it. Students who download e-books and workflow software are receiving DRM protected documents. We're starting to distribute some content that is not DRM protected, so we'll see what happens. If we get pillaged, then we'll rethink our approach.

Finally, I especially am interested in what CALI has been doing, and I've expressed a willingness to provide Aspen content to work with CALI. I am especially interested in their eLangdell system, but so far we haven't found, essentially, a business model that lets us, as publishers, be responsible principally to our clients, our authors, and that accounts for the problem of third-party permissions that Heidi referred to.

FRIEDLAND: It sounds like we're talking about creating new dialogues, and maybe here are two possible suggestions. Oftentimes we don't know what the students respond to in a course. When we give them the student evaluations, we don't ask about any of this stuff. Maybe we should start in law schools asking about all of this and what resonates with them. The second thing is I think there are a lot of people in legal education who would really benefit from this, and maybe one possibility is to create a symposium in the journal of legal education or elsewhere, including a lot of the issues we just asked about, and ask them if we can do it interactively, post it online, and model a lot of things we discussed.

HARMON: Asking what the students want is important. I came to teaching last year, and I had six or seven people who work with or for me who are students here. I said, "What do you need in a school" because I know it's different than when I went because I know that their ability to find and consume information is so much greater. It seems to me what they really long for is the application of that, how to apply it. They'll take the content as kind of a given, and so it's really the materials we

make around our courses that are different. In fact, I do a set of hypotheticals, so it's not my core business, but I just give it to them and wait about half the term. I tell them the black letter law they should have learned so far. I give them some sample exam questions and tell them they can give them to me, and I will give them feedback. Again, I give them black letter law, and that's not a mystery. You can go to a hornbook and find that. They want to know how to think like practitioners or lawyers, and I think that using the digital materials will go a long way to help students.

LUSTBADER: Every semester I ask them about the course materials.

MIXTER: Do you get useful feedback?

LUSTBADER: I do, and then I've shaped the class exercises to make them more useful.

CHATELAINE: Have they asked for electronic course materials?

LUSTBADER: I haven't asked that question.

CHATELAINE: That's what I think is interesting.

HARMON: I went on to Westlaw's TWEN system, where we can post materials and discussions. All of a sudden they're engaged, not typing, not note taking. They are talking. In fact, I just started a dialogue with my students on something we were going to talk about in class, and they were chiming in while they were doing homework. When they talk to each other, they learn a lot.

JOHNSON: For thirteen years now I've been using almost exclusively electronic materials. I asked my class the threshold question: "Would you prefer electronic materials?" I get back, "I like some stuff about the book, but overall I would love the option of getting things electronically." They give many, many reasons, most of which go to their ability to affect the text and to own the information in the text. The second thing about surveys is there is a bit of a leap-frogging effect. If I ask my students what they want, they tell me the things they can imagine. If I ask about things that are different than what they imagined, I can get comments on this, but it doesn't necessarily give us the skill. There is a lot of experimentation that would be more helpful than a student survey.

LUSTBADER: We just want to keep them in the loop.

SESSION 4: WHERE DO WE GO FROM HERE?

COLLINS: Welcome to the final panel. As has been said, there was a marvelous plenary session at the American Association of Law Schools that Ed Rubin moderated and others participated in. There was an enormous amount of energy in that room. People demanded reform.

It is in that spirit that this workshop continues today and will continue with your help in the months to come, until we actually do bring about some significant reform of the course books used in law schools. I'm heartened that when I flew here from Washington, DC, I thought the future was a bit down the road. I thought it might take us three or five years, if we were lucky, to get there. After speaking and listening to people, I have come to believe that the future is across the street. It's much, much closer than I had imagined. I thought there was going to be more contention. I thought there were going to be more obstacles—many more obstacles. Instead I found cooperation—a certain willingness to work together to bring about, in our own respective ways, some important and significant change. I thus urge you to continue to imagine how we might bring about some of these major changes that we've been talking about. I am very excited about the commonality of interests and the exciting partnerships between those who are committed to making some significant changes in this area. They include those in the academy, the publishing profession, the bar, and others. I invite you to consider how we might bridge the gap between those who are familiar with, and conversant in, technology, and those who are concerned about, and familiar with, pedagogy. How can those groups be brought together to produce some real reforms? I think Paula Lustbader, Steve Freidland, Conrad Johnson, and others had asked, "How can we tap into student input?" After all, they are the consumers of this product. Is there some meaningful way we can tap into that input and do something with it? These are some starting points about initiatives that we might take and continue. I welcome your input. This is your opportunity to put on your activist hat and, who knows, we may be able to change our world.

VLADECK: Although there are many points of consensus, the question is how to take an idea like this and operationalize it. One thought I had was to pick one first-year subject that is common for most law schools. We could collaborate to create a model using civil procedure, contracts, or something similar. That would provide an opportunity for us to work out all of the kinks. For example, many intellectual property concerns were raised, and we need to figure out how we're going to overcome those issues. We also need to figure out what the platform would be and what types of content would be included. Rather than trying to cover the entire waterfront, we could collectively pick one subject. It doesn't matter all that much which one it is, as the purpose is to develop a prototype. If this is going to work, there is going to be a Tom Sawyer component to it. We are going to have to prove to our colleagues in the law schools that, not only is it doable, but it's fun to do. If

we don't make it practical and fun we are not going to get the kind of buy-in from the academy that we need to move this along.

COLLINS: David, when you say "we," can you elaborate on who the "we" are?

VLADECK: I don't know about that. I think that's something that everyone here would have to wrestle with on their own. The conference organizers may be able to help figure out who the players are and what roles they might play. The most important thing is bringing people together around one prototype and moving forward on one front rather than on multiple fronts at the same time.

COLLINS: If that "we" can be as all-inclusive as possible, we would be the better for it.

VLADECK: I would agree with that.

KOO: In the last session, there was a lot of conversation about the problem of law journals not offering up their copyright. My understanding is those law journals belong to the law schools. While it might not be an easy thing, it should also not be an impossible thing for the deans of the law schools to get together and begin saying, "We are not going to get ourselves into this situation. If we insist on payment for use of our copyrighted materials, we will pay a lot of money to ourselves and get tied up in a knot. Instead, we are going to open up these journals. They belong to us. It's silly that we are sitting here debating the problem when we have control over that problem."

MITCHELL: Going back to the issue of modernizing casebooks, there are things happening right now. They're not electronic versions. They are texts focused on transmitting information and helping your students understand what's going on. They make use of good graphics, good information boxes, examples, etc., all to teach doctrine and concepts inside the case materials. This would have been forbidden in the 1960s. There is already a revolution happening. If you wanted to move this revolution to the digital realm quickly, I would do what David Vladeck is talking about with picking one subject for prototyping. We should identify one or two top casebook authors who would like to make a contribution to legal education at this point in their careers. Then a consortium of really skilled people would digitize the text and try out some of these innovations. Then it's their book. They get the royalties. The publisher wouldn't pay for it except for the publish media and marketing. This very successful book could be both the traditional standard and the most visionary book at the same time. Existing professors would keep using it, and new professors would also want to pick it up. If it takes a bigger market share, which I think it would, it will start a process where other books follow this model in order to compete.

LUSTBADER: Two weeks ago we did a curriculum reform conference at the University of Washington. We've been talking about combining what we learned there and at this conference, and doing a follow up in the spring. We'd like to focus on supporting the pedagogy and on developing course materials that can be used to support curricular reform efforts. I have had this fantasy for a long time. We call it Extreme Course Makeover. We would get people who might not be the leading casebook authors, but are ready to do something different. We would convince them to have their deans give them a stipend to redo their course. They do their Extreme Course Makeover over the summer, and we would do a two or three-day kick-start in the spring. We would almost have people go station-to-station, like someone does the eyes and then they go to dermatology. We would bring together a makeover team, including tech people, maybe one or two publishers, and some pedagogy people, to help them get it kicked off. That's an idea where we could really pull a prototype together.

DAVIS: I have a resource that may be of use for people working to develop these materials, as we're already doing some of this innovation. Our curriculum begins with having students read about a set of concepts and vocabularies that relate to some lawyering function. Then they plan collaboratively, execute that function, and finally critique it. We are constantly in the process of writing and revising materials for each of these units. On a foundational level, it teaches the concepts and vocabularies they need for counseling, drafting an argument, or doing research for purposes of counseling. These materials we're developing are tied to case file materials that we use in our exercises, but they could be adapted to case materials that people would want to use in other courses. We have a rotating team of sixteen faculty who work on this book. I've been kicking around the idea of making our team available to people who need to talk about the skills that the students would be using in conducting the experiential work. We could contribute the materials and expertise to people who want to put an experiential component in their courses.

FRIEDLAND: I think one of the best things about this conference is the confluence of industry and academics, having different types of people here just to talk about open source versus open access and all the words that John Palfrey was using that I didn't understand. At the AALS annual meetings there is, of course, the presentation of academic papers, but why not also have a session on these technical and curriculum issues? These kinds of sessions could be really terrific and could keep the dialogue going.

TESTY: One of the most successful projects in the legal academy in terms of founding a movement was the law and economics movement.

One of the things that was absolutely vital for that movement was the summer institutes. Everyone would go and have several weeks together to learn about one particular area of law and economics. Then they would take that back to their teaching and their writing. Building on what Paula Lustbader had said, another thought is to have a writers' retreat type of summer program. People could come and work on new books or materials during the summer. It would be nice to have people around that were working on similar projects, even if they were in different areas of law.

BODIE: Another area I find interesting is the dialogue with publishers and folks like Adobe and Sony who are working on content providers' software. I don't know to what extent you can talk with each other without raising antitrust concerns. But I fear we'll end up with three or four different platforms. Each will be great in its own way, but the competing technologies will make it really hard to collaborate and use them. It will keep projects isolated. If I happen to be using an Aspen book, I'll learn the Aspen technology, but I might use a West book for another course and then I'm going to have to learn the West technology. I won't end up doing it in the same way. If there was a shared platform it would be a lot easier for me to be more creative. I would have fewer hurdles to creating what I wanted, and it would be more likely that I would adopt the new technology. We could end up with three or four different great systems, that all cost money for the individual publishers, but that might not be used to the same extent as if there was just one system.

McCOY: I agree, and want to add that traditionally, with the development of a new technology, there is first a pre-Cambrian explosion of diversity. After that, there is a convergence when people convert to one standard. Some of us are a little older and remember that before the world-wide web, HTTP, and HTML took off as standards, there were Gopher, WAIS [Wide Area Information Services], and various other competing standards for hypertext and document content sharing over the Internet. It's not that HTML is technologically superior, but it was good enough and it was widely adopted. Currently, for representing final-form paginated documents in the prepress and preproduction process and for electronic document distribution, there is no material competition for PDF. In the digital camera world, JPEG is an inferior format. There were better formats available long before it became the dominant standard and enabled digital cameras to become a mass market. However, even as people like Kodak were promoting superior formats, they fell by the wayside. I think it's probably too soon for me to say definitively that the closed Kindle platform is the Betamax, and they're not here to defend

themselves. However, we do want to create that open standard platform collaboratively with the industry to help ensure that a superior format is adopted. I would encourage publishers especially to consider joining the IDPF, the International Digital Publishing Forum. We are standardizing the ePub format because we think we'll be the XML reflow and dynamic equivalent of PDF for paginated final form documents. In other words, we're going to have standards. The only question is, how long will the fermentation go along until those standards converge? We think that for distributable documents, PDF and ePub are going to be the best choices. For things like DRM technology and interactivity, there are things like Flash. It would be nice if we had only one standard, but in this case there are more than one set of requirements to meet. There's more than one standard relevant to all this material, but we firmly believe that in order to get consumers to adopt, including students and professors, we have to give them reliable standards. The trade-off is you may give up the best in order to get a good enough adopted standard, just as JPEG is kind of crummy to an image scientist, and HTTP and HTML are crummy to anyone expert in network technologies and protocols. PDF is an example of something good enough that can get established and help catalyze the industry. Ultimately, it's the content and the experiences in the classroom that matter, not the plumbing. We just want to get some plumbing in place so you guys can deliver those experiences.

SKOVER: What Bill McCoy's comments indicate to me is that it's imperative, for many reasons, to have a single platform that enables information to be gathered from existing publishers. There are many writers who might want to have their material offered either free or for charge. If we have multiple databases, and on each database there is only electronic information which that particular company owns, we might have a pre-Cambrian stage or something even worse. I think that we should be at the stage of recognizing, just like the record industry did with iTunes that companies can be paid for their content without having their own record store. I encourage continued collaboration among publishers and creators of new electronic course material to develop a single platform. Everyone's information can be delivered free or for a fee, as the copyright owner wishes. A publisher would have many choices about how to break up and make their material available. They could opt to sell only the whole book entire, for one price. Or, they could allow the book to be stripped and components sold separately for individual prices. Or, newly created material could be made available for free—all on the same platform. I don't see why we have to go through the pre-Cambrian experience to evolve into whatever platform we wish to have today. Bill, as much as I understand your point, with all this talk about collaborative

learning, why can't we do it? Why can't we collaborate and create a single platform where people who need to be paid royalties get paid and those who don't, don't?

MAYER: Sure, we can collaborate. CALI is a nonprofit consortium of 200 law schools. We have been working on eLangdell for over a year. You can go play with it right now. It is a little thin on features because we are in a beta stage, but we expect to rapidly iterate on features. We would love feedback. I almost hate to say it, but we should do the same with Connexions because they are interested in people working with their platform. There are still two competing platforms, which will continue until it makes sense for us to converge, if it does. In the meantime, we have had conversations with the Connexions folks, and will continue to inform each other. The CALI project predated knowledge of the Connexions project. We have already preloaded it with more than 700,000 cases that we are pulling from publicresource.org. We don't have to wait for another popular platform developer. How long is it taking you to build Connexions? I mean, you're five years old at this point, right?

THIERSTEIN: Ten.

MAYER: We can't wait ten years.

THIERSTEIN: It is ongoing. We build it every day.

MAYER: It has taken us two years to get eLangdell where it is. We are building on a content-management system that already exists. There are a lot of techy people in the legal education world that know how to use that the existing system. Even while we are building our platform, we are considering making the code open source software. This could allow an explosion of platforms. People can do the same thing in their area and build from there.

McCOY: It is conceivable that a higher level database and service could emerge, allowing mix and match custom publishing. The legal casebook/coursebook industry is small enough that we can imagine there could be just one, where this is not possible in a larger industry like online photo editing. Or if we look at online music, 97 percent of the music on your iPod doesn't come from the iTunes store. Despite the smaller industry size, I'm not convinced that, in fact, there will be one source for legal materials in the digital world. I am convinced that we need standards at the file format level. It would be a good objective to try for standards at higher levels, relating to the services offered. It may be possible in this community, even if it's not possible in more fragmented industries like online music.

KOO: I would not expect the publishers to be able to respond at this very moment or make any commitments at this time. However, if the

imperfect analogy of iTunes plays out a little bit, what are the concerns that the publisher would need to have addressed in order for that model to be a viable option? iTunes does provide revenue to the publishers of the music. Obviously I have a vested interest in CALI, but also Sony has put forward another concept and certainly Amazon has their own. I think it would help us to know what the publishers would need in order to protect their self-interests if we move forward with common standards. Is it the DRM? Is it a business model that's more service-based rather than product-based? It would be good to hear from publishers when they're ready to address this.

RUBIN: I found this conversation interestingly educational. I don't quite understand all of the technology, but I'm thinking about how to encourage adoption of new technologies among law faculty. There are two functions to consider: a convincing function and a training function. The convincing function relates to getting them to upload their work or otherwise make it available. The training function, which I think is more important, will drive the convincing function. It relates to getting them to understand the capabilities of the new platforms and start to use them. The training could happen through a variety of mechanisms, such as the AALS or individual law schools at sponsored conferences. However, in order to do that, the technology has to be all lined up and in place. The publishers need a simple message, such as "one website, one button." If it's a matter of competing websites and confusing technology, you're going to lose a lot of the ability to convince the non-technologically-oriented people to adopt new technologies. Once the questions that have been discussed up until now are settled, then we can work on the next steps.

MAYER: I've been involved with legal education and law for twenty years, and I'm very familiar with the idea of the big red button. Give the faculty a big red button, and they'll bap it. The problem is that development of pedagogical materials is not a big red button. It's a hard, complex thing. If it's not as simple as going to a website and uploading some stuff, there will have to be a training and a convincing function. How do we talk to faculty? I give presentations, I create PowerPoints, I go to schools, and then I hear crickets. "You want me to do work? I'm out of here."

CHATELAINE: I will second that, John.

LUSTBADER: I think the next step is to get innovative faculty members to collaborate on a couple of casebooks. Or, even before tackling casebooks, let's try the course makeover. We could help people figure out what they could do differently, more innovatively. I also like Kellye Testy's idea of summer institutes, where people can exchange

ideas in a concentrated period. One thing to remember is that we don't have to organize this work around the substantive area of law. It doesn't have to be just civil procedure professors. We can help create a vehicle for them to be the most effective at getting their students to learn the substance of any area of law. We can take the time to develop the course materials that then can easily be moved into the next iteration of course books.

JONES: The most persuasive recommendation for adoption is for faculty to speak to faculty who teach the same subjects. If you have a great, successful example in your class, then I'm more likely to follow it.

TESTY: This is an area not much different from a traditional casebook, in that not every faculty member is willing to write one. Not every faculty member will be willing to do this. We need some good ones, and then many people will use the new materials. This discussion also reminds me a lot of being in rooms where we've talked about teaching international law and getting it across the curriculum, or teaching race and gender throughout the curriculum. It starts and eventually the march will be made.

SKOVER: If you remember, Ron Collins and I proposed "Conceptions Course Books" in our preliminary thoughts memorandum. One of the things that we stressed there, and I think has to be stressed again now, is that if you want to move education generally, a tent needs to be broad enough for both the traditionalists and the non-traditionalists. This observation may be anathema for people who want to move away from Langdell, but there are colleagues of mine who would never adopt dramatically reformed electronic course materials. I assume that that is true across the board, perhaps except at Vanderbilt. We have colleagues who otherwise would not be as experimental as we would like. One of the first steps in habituating them away from print casebooks is to get them out of the print modality. If it only means that they choose the e-book consisting of select cases that they want, they are still ahead of the present game. They would still be assigning a cheaper work than the print text of which they only use a fourth, so concerns about price might be addressed for them. They might then be encouraged eventually to move a little bit further and try out one of the interactive exercises that might be available on the database. I think we have to recognize that it's not whole hog or nothing. Those of us here who are much more willing to go whole hog are not likely representative of the legal academy. If you really wish to reform pedagogy generally, and not just at the fringe, then I believe this e-book platform has to be broad enough to allow traditionalists to come on board.

BERGER: You don't get converts from creating it ourselves, and then saying, "Look what we did for you, and you should follow suit." You have to get them to buy-in. This could be done perhaps by setting something up at AALS and having a larger email discussion about scope and next steps. That way the tent becomes bigger. Also, it's important to remember we're mixing two different things: the pedagogy of moving innovation into courses, and digitizing. I agree with David Skover that people don't have to do both at once. I advocate opening the discussion to AALS, and let's all do the publicity to get a big room of people talking.

VLADECK: I wanted to respond to David Skover's point that we're the outliers and that our colleagues are driving this because by and large they're hide-bound—they are going to use the Langdell case model no matter what. I don't think any of my colleagues like casebooks the way they are. No one just starts at page one and goes through the casebook and ends at page 900. People use casebooks because they are convenient, because they are there, and because the alternative is doing it themselves, which they do not want to do. I don't think there's sort of any affection for the casebooks out there. Everybody is always looking to see if there's a better casebook more suited to their needs, so I don't think that's an issue we have to confront. David is right, many of our colleagues are going to want something that's organized and looks like a casebook, and this is an issue we have to confront. They will be fearful about going to a website and pressing buttons to assemble their own. Part of what we have to do is develop a prototype. I'm indifferent about whether we focus on one subject or focus on the platform, and do it across subject lines. I think the only way we are going to get people excited about this is if we can actually build a prototype. I think there's a Tom Sawyeristic aspect to gaining widespread adoption. If we do it and it's exciting, then they'll come. It needs to appeal to exactly the kind of people David is talking about, the ones who want a ready-made course book. It can be organized a little differently than the book they're using, or leave out some of the stuff they are not going to cover anyway, to make it less expensive for their students. If it isn't adopted in electronic format, we haven't lost anything because they can still use the conventional model of a casebook.

COLLINS: Marshall McLuhan once said, "We drive into the future with our eyes on the rear-view mirror," which could be very dangerous. I think it's safe to say that after this workshop, we have our eyes on the road. You can expect we'll be pursuing future initiatives, future venues, possible foundation funding, and new and diverse collaborators. I can assure you, you will hear from us more, so this is not the end. This is just

the continuation of an ongoing conversation. I would like to thank Kellye Testy, Dean of Seattle University School of Law, who didn't balk for a second. She was very excited. This wouldn't have been possible without her efforts, so Kellye, a big thank you. In the spirit of collaborative capitalism, we would like to thank Microsoft and Aspen who also made this possible. Finally to you, our content providers, a big thank you.

Ladies and gentlemen, we're done.