

# CASEBOOK REVIEW

## PREFACE

### Law in (Case)books, Law (School) in Action: The Case for Casebook Reviews

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Legal academia, and by extension law professors, has an ambivalent, nearly schizophrenic, attitude towards the casebook. On one hand, law professors have an abiding appreciation for the centrality of the casebook within the law school curriculum. Although it is fashionable to claim that law school pedagogy has long since transcended the casebook method bequeathed to us by Christopher Columbus Langdell<sup>1</sup>—embracing clinical training,<sup>2</sup> simulated lawyering exercises,<sup>3</sup> and computer assisted exercises<sup>4</sup>—the truth is that, for the overwhelming majority of law school classes, the casebook still occupies the pedagogical center of the course. In fact, when law professors who teach the same subject meet, the first question they invariably ask is, “What casebook do you use?” And with good reason. The nature of the casebook chosen is a handy shorthand way to locate new acquaintances both in terms of the spectrum of substantive ideological attitudes towards the subject matter and as to general

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1. See, e.g., the evocatively entitled bibliography of law school teaching methodology, Arturo L. Torres & Karen E. Harwood, *Moving Beyond Langdell: An Annotated Bibliography of Current Methods for Law Teaching*, 1994 GONZ. L. REV. 1 (1994).

2. See, e.g., Amy L. Ziegler, *Developing a System of Evaluation in Clinical Legal Teaching*, 42 J. LEG. EDUC. 575 (1992).

3. See, e.g., SYMPOSIUM ON SIMULATIONS, 45 J. LEG. EDUC. 469-529 (1995).

4. See, e.g., Paul F. Teich, *How Effective is Computer-Assisted Instruction? An Evaluation for Legal Educators*, 41 J. LEG. EDUC. 489 (1991).

pedagogical stance. If they use the same casebook as you do, then you have a golden opportunity to pick someone else's brain about how to teach a problematic case or troublesome section of the book. Or, if you are so inclined, you can regale your newfound colleagues with your own successful approach to thorny cases or materials in the book. If they use a different casebook, you are presented with the possibility of finding out whether you're missing out on a better casebook than the one you presently use. Even the most satisfied casebook user<sup>5</sup> is always on the lookout for a better book to trade up to. All of this suggests that legal academics do indeed have a healthy regard for the importance of the casebook to our profession.

On the other hand, other practices within the legal academy seem to betray a lack of esteem for the casebook as a serious contribution to legal scholarship. For example, young untenured faculty are counseled by their senior colleagues not to waste time working on casebooks. A casebook, they are advised, will not count towards the scholarly production expected for tenure in the way that law review articles would.<sup>6</sup> Writing a casebook, we warn them, merely involves selecting, organizing and editing cases and statutes, appending edited selections from scholarly articles in law, the humanities, and the social sciences, and crafting provocative and thoughtful questions and observations to provoke further student insight in reflecting upon the preceding materials, all to create a coherent picture for the student of a substantive area of law—how could such a project count as scholarship?

Once published, casebooks are largely ignored by legal scholars within the pages of the law reviews. True, sporadically a review of a casebook might appear from time to time within the book review sections of law reviews. But, to put it into perspective, consider the Michigan Law Review's annual issue of reviews of books relating to the law, acknowledged as the premier showcase for reviews of legal scholarship. In the past three years,<sup>7</sup> the Michigan survey has reviewed 121 recently published books about law, of which exactly one was a casebook. Given these attitudes, one could be forgiven for concluding that casebooks are the Rodney Dangerfield of legal scholarship—they just get no respect.

It is with the intention of rectifying this attitude and giving casebooks the respect to which they are due that Seattle University

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5. With the possible exception, of course, of those faculty who have authored the casebook they presently use.

6. Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 936 (1990).

7. This particular sample included the issues in the 1994, 1995, and 1996 volumes.

Law Review is proud to inaugurate its first annual issue dedicated to casebook reviews. In most core subject areas, there are between ten and twenty different casebooks competing for professorial attention. Some are overtly imbued with a particular ideological or pedagogical point of view. Others are more like the classic "little black dress" that can be, and probably needs to be, individually accessorized by the professor in order to be pedagogically satisfying. Particularly for the beginning law teacher, it is difficult to figure out how to winnow down this embarrassment of riches and select the casebook that, with any luck, will be used for years to come.<sup>8</sup>

The problem of how to select a casebook is not limited to the newly hired teacher, however. Experienced law teachers often decide to change casebooks—sometimes due to dissatisfaction with the currently-adopted casebook, sometimes to switch from an aging book to a more current one, and sometimes to reinvigorate a course that has begun to go stale through professorial complacency induced by repetition of the same old cases in the same old order. And, of course, seasoned law faculty often take up new courses for which they must pick a casebook from amongst the potential contenders. Even for the more experienced professor, however, it is by no means obvious merely from leafing through a book how it will "teach" in the classroom. In today's world, we are accustomed to having *Consumers Reports* and similar resources to provide in-depth information from users with "hands-on" experience to help us make informed decisions about the products we buy, so why not a similar resource to guide the law professor in the choice of casebooks?

The quandary posed by casebook selection is compounded as modern casebooks become further and further removed from the familiar pattern of casebooks from which we learned and have taught in the past. For instance, the coming introduction of electronic casebooks provides significant pedagogical challenges to a generation of law professors and students with varying degrees of comfort with and enthusiasm for computer technology. Richard Warner's insightful discussion of the experiences of one law school struggling to integrate electronic casebooks into its curriculum asks critical questions about the nature and effectiveness of electronic casebooks, and suggests how we might begin to develop the answers to those questions as well as to consider possible future questions that these new media will pose. In a different vein, John Mitchell's provocative exploration of what a

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8. For some good generic advice to beginning law teachers on casebook selection, see Eric L. Muller, *A New Law Teacher's Guide to Choosing a Casebook*, 45 J. LEG. EDUC. 557 (1995).

clinical casebook might look like is an exciting challenge to the paradigmatic Langdellian casebook, but beyond that, represents a fundamental challenge to the traditional separation between doctrinal courses and lawyering skills education.

Throughout the reviews in this issue, the reviewing authors provide a rich motherlode of concrete suggestions from which to draw in both selecting and using a casebook. The reviews call attention to specific features of the casebooks, containing both appreciative plaudits as well as constructive criticisms of the reviewed books. In that sense, we believe that the casebook reviews do serve as a kind of consumer review of an important resource for the law school community.

The significance of these reviews, though, transcends the mission of assisting in casebook selection and use, important though we see that to be. Even the reader who will never have the obligation to select a casebook can profit by these reviews. As the reviews in this issue make clear, casebooks provide a window through which we can see the contemporary landscape of legal thought. For example, Michael Kelly's review of Randy Barnett's *Contracts, Cases and Doctrine* demonstrates the degree to which common law induction is disappearing from modern legal analysis, replaced by statutory construction and application. He suggests that a casebook such as Barnett's is a useful corrective to the traditional first year curriculum's overdependence on common law reasoning even as it is increasingly displaced in contemporary legal practice. Geoffrey Watson's review of Farnsworth and Young's *Cases and Materials on Contracts* considers the advantages and disadvantages of using a highly traditional doctrinal casebook to teach first-year contracts, and suggests ways to supplement its weakness in contemporary jurisprudential and interdisciplinary perspectives. Sidney DeLong's review of Summers and Hillman's *Contract and Related Obligation: Theory, Doctrine and Practice*, in contrast, applauds that casebook's nontraditional approach of situating bargain contract within a larger framework of civil obligation, and in doing so, its foregrounding of problems of legal professionalism and the lawyering process in its doctrinal development of contract law.

Casebooks provide their authors with an opportunity to construct a thoroughly realized, if often inadequately articulated, instantiation of their own particular jurisprudential and normative belief systems. In that regard, DeLong sees in the Summers and Hillman casebook the pervasive though largely unacknowledged influence of Lon Fuller's perspectives on contract law. Kellye Testy's review of Barnett's *Contracts, Cases and Doctrine* likewise uncovers the degree to which Barnett's ideological commitment to a theory of consent as the

normative basis of contract law permeates his casebook, but discusses the ways in which she uses this material to problematize the consent theory of contract, and by extension, to encourage a critical and reflective attitude on the part of her students toward law in general. Far from being captive by the unspoken ideological position taken by the casebook, Testy points out the paradox that such a casebook may actually promote students' ability to ferret out assumptions that the law makes about the "natural" social order, and so develop their potential to use the law as a vehicle for social change.

Several of the reviews highlight the question of how today's casebooks deal with issues of the social context in which law is embedded. For example, Watson and DeLong both note the striking absence from their reviewed casebooks of issues involving race, class, gender, and sexuality, not only omitting and effacing such factors from the cases and problems but also neglecting to include jurisprudential voices such as critical race and feminist theory among the scholarly perspectives to which students are exposed. Testy's discussion of Barnett's casebook reveals that even those casebooks that do contain cases from which such social issues can be raised are not without serious challenges for the professor seeking to move beyond invocation of stereotypes into a sensitive and sophisticated appreciation of law in society.

In the aggregate, these casebook reviews demonstrate the significance of the casebook, with its strengths and weaknesses, not just in shaping the temporary experience of students and teachers in the law school classroom but more profoundly for the longer-term development of the legal profession. Because casebooks still maintain the center of gravity in legal education, they serve as the vehicle through which each succeeding generation of lawyers is socialized into patterns of thinking about law and legal practice. Ironically, any single popular casebook probably has a more direct and profound influence on the legal culture than all of the other scholarly works on law reviewed in the Michigan Law Review's annual survey put together. A critical examination of casebooks has much to tell us about who we in the legal profession are, and who we might aspire to be. This collection of casebook reviews, then, represents the first installment in what we hope will be an important on-going discussion about the nature of law, its role in the contemporary world, and the resulting implications for legal education.