

Mercer University School of Law

## Mercer Law School Digital Commons

---

Faculty Publications

Faculty

---

2016

### The Course Source: The Casebook Evolved

Stephen Johnson

Mercer University Law School, johnson\_s@law.mercer.edu

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/fac\\_pubs](https://digitalcommons.law.mercer.edu/fac_pubs)



Part of the [Legal Education Commons](#)

---

#### Recommended Citation

[Stephen M. Johnson](#), *The Course Source: The Casebook Evolved*, 44 Cap. U. L. Rev. 591 (2016).

This Article is brought to you for free and open access by the Faculty at Mercer Law School Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

**THE COURSE SOURCE:  
THE CASEBOOK EVOLVED**  
STEPHEN M. JOHNSON\*

*“[I]t is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.”<sup>1</sup>*

I. INTRODUCTION

Law students are changing,<sup>2</sup> law practice is changing,<sup>3</sup> law schools are criticized for failing to prepare practice-ready lawyers,<sup>4</sup> and there is nearly universal consensus that legal education must transform.<sup>5</sup> However, the principal tool that many faculty members rely on to prepare their courses, the Langdellian casebook,<sup>6</sup> is ill-suited for such transformation.<sup>7</sup> This prototypical casebook, which is still the standard for many courses today, was designed for the Socratic dialogue and the case method mode of

---

Copyright © 2016, Steven M. Johnson.

\* W.F.G. Professor of Law, Mercer University Law School. B.S. (Comp. Sci.); J.D. Villanova University; LL.M. George Washington University School of Law. The author is a member of the Board of Directors of the Center for Computer-Assisted Legal Instruction.

<sup>1</sup> ABRAHAM H. MASLOW, *THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE* 15–16 (1966).

<sup>2</sup> *See infra* Part III.

<sup>3</sup> *See infra* Part II.B.

<sup>4</sup> *See, e.g.*, Matthew T. Bodie, *Collaboration and Community: The Labor Law Group and the Future of Labor and Employment Casebooks*, 58 ST. LOUIS U. L.J. 61, 80 (2013); Brent E. Newton, *The Ninety Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 59 (2012); Robert J. Rhee, *On Legal Education and Reform: One View Formed From Diverse Perspectives*, 70 MD. L. REV. 310, 327 (2011); David M. Skover, *Electrified Law: A Brief Introduction to the Workshop on the Future of the Legal Course Book*, 33 SEATTLE U. L. REV. 287, 289 (2010); John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE F. FOR L. & SOC. CHANGE 101, 106 (2009); D. Don Welch, *“What’s Going On?” in the Law School Curriculum*, 41 HOUS. L. REV. 1607, 1616–18 (2005); Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 15 (2002).

<sup>5</sup> *See infra* Part II.B.

<sup>6</sup> *See infra* Part IV (explaining how, in 1870, Harvard Law School Dean Christopher Columbus Langdell created the traditional casebook that is still the primary form of textbook used in law schools today).

<sup>7</sup> *See* Garvey & Zinkin, *supra* note 4, at 105–06.

instruction.<sup>8</sup> Although there is still a place for that method in legal education,<sup>9</sup> other methods of instruction—the carriage bolts and lag screws of modern legal education—cannot be hammered down with the traditional casebook.

Several influential studies of legal education conclude that law schools should focus more heavily on training students in professionalism and in skills vital to law practice.<sup>10</sup> In addition, the American Bar Association (ABA) recently amended its accreditation standards for law schools to require the inclusion of more assessment and experiential learning in their curriculum.<sup>11</sup> Over the last several decades, many faculty members have moved away from the traditional Socratic dialogue and case method form of instruction, at least in upper-division courses.<sup>12</sup> Although many more are receptive to such change, the Socratic dialogue and the case method provide faculty with a high level of control over the classroom, and faculty members are reluctant to abandon those methods unless tools are available to ease the transition to other teaching methods.<sup>13</sup> The traditional casebook does not provide these tools. Faculty members constantly identify a lack of teaching materials as a major impediment to the adoption of the teaching methods necessary to educate today's law students for today's law practice.<sup>14</sup> There is a great demand for turnkey solutions to implement new teaching methods.<sup>15</sup>

---

<sup>8</sup> See *infra* Part II.A.

<sup>9</sup> See Welch, *supra* note 4, at 289.

<sup>10</sup> See *infra* Part II.B.

<sup>11</sup> See AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015–2016, SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, Standards 302, 303, 314, and 315 (2015).

<sup>12</sup> See *infra* notes 69–87 and accompanying text.

<sup>13</sup> See Skover, *supra* note 4, at 289; Transcript, *Workshop on the Future of the Legal Course Book*, 33 SEATTLE U. L. REV. 292, 299 (2010) [hereinafter *Workshop*] (remarks of Gene Koo).

<sup>14</sup> See, e.g., Skover, *supra* note 4, at 289; DAVID I.C. THOMSON, LAW 2.0: LEGAL EDUCATION FOR A DIGITAL AGE 131 (2009); Rhee, *supra* note 4, at 337 n.157 (noting the lack of availability of case studies); Larry A. DiMatteo, *Contract Stories: Importance of the Contextual Approach to Law*, 88 WASH. L. REV. 1287, 1293 (2013) (describing the limited universe of drafting exercises and problems in contracts case books).

<sup>15</sup> See *infra* Part II.B.

Teaching materials and pedagogy are intimately connected,<sup>16</sup> and major shifts in pedagogy can be achieved through the evolution of teaching materials.<sup>17</sup> For instance, when faculty began to adopt the case method of teaching in the nineteenth century instead of lecturing from treatises and commentaries, the transition was facilitated by the development of the prototypical Langdellian casebook.<sup>18</sup> When the wave of legal realism hit law schools in the middle of the twentieth century, new casebooks began to incorporate material other than cases, such as statutes and explanatory text, to aid faculty who were inclined to shift their teaching focus.<sup>19</sup> Similarly, when faculty began to incorporate a problem-based approach in their teaching, casebooks incorporated more problems.<sup>20</sup> Casebooks must evolve to provide faculty with the tools to redesign their courses before there can be widespread adoption of new teaching methods that have a rich focus on skills, professionalism, experiential learning, and assessment.<sup>21</sup> In designing the modern casebook, authors should follow the credo of influential

---

<sup>16</sup> In discussing why he authors casebooks, Professor Myron Moskowitz writes, “My main goal in writing a casebook is not scholarship, but better pedagogy. Having taught for many years, I’ve learned a thing or two about law students—what motivates them and how they learn. . . . My main job as a casebook author is to make learning law as easy and fun for the students as the subject matter permits.” Myron Moskowitz, *On Writing a Casebook*, 23 SEATTLE U. L. REV. 1019, 1022–23 (2000).

<sup>17</sup> See, e.g., Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 218 (2009) (describing the manner in which Herbert Wechsler’s 1941 criminal law textbook synthesized social science materials with cases to transform criminal law teaching from the case method to a more open-ended philosophical approach).

<sup>18</sup> See Stephen M. Johnson, *Teaching for Tomorrow: Utilizing Technology to Implement the Reforms of MacCrate, Carnegie, and Best Practices*, 92 NEB. L. REV. 46, 77 (2013); Garvey & Zinkin, *supra* note 4, at 105–06.

<sup>19</sup> See Johnson, *supra* note 18, at 77; Stephen R. Alton, *Roll Over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339, 355–56 (2010).

<sup>20</sup> See Johnson, *supra* note 18, at 77–78; *Workshop*, *supra* note 13, at 298 (remarks of Michael Schwartz).

<sup>21</sup> Although legal publishers are marketing an array of secondary teaching materials, such as skills books and law stories books that faculty can incorporate into their course design, *see infra* notes 209–215 and accompanying text, those materials are not integrated into traditional casebooks, and adoption of the secondary materials imposes additional costs (and physical burdens) on students, *see, e.g.*, Skover, *supra* note 4, at 289.

American architect Louis Sullivan, who counseled, “[F]orm ever follows function . . . .”<sup>22</sup>

Technology should play a central role in the evolution of the casebook. Today’s students are digital natives,<sup>23</sup> and technology has played a central role in their education beginning in elementary school.<sup>24</sup> The evolved casebook should be an e-book, one unlike any e-book legal publishers have marketed in the past.<sup>25</sup> Rather than a traditional casebook, it should be a “course source,” a one-stop shop for all of a faculty member’s teaching resource needs. The Carnegie Foundation Report, *Educating Lawyers: Preparation for the Profession of Law (Carnegie Report)*,<sup>26</sup> stressed the importance of training students in the *knowledge, skills and values* necessary to the legal profession.<sup>27</sup> A course source should recognize that those three apprenticeships are interconnected. Additionally, a faculty member needs the tools to train students in all of those areas, rather than assume that a separate class focusing on the legal profession or research and writing will develop the student’s skills and values.<sup>28</sup> In addition to the cases, statutes, notes, and problems included in casebooks today, a course source should include simulations, drafting, research, counseling, negotiation and other skills-related exercises, professionalism hypotheticals and problems, as well as quizzes and a variety of formative assessment tools that faculty can incorporate into their courses.<sup>29</sup> As an e-book, it should take advantage of the wealth of materials available online and in a variety of media formats, by incorporating links to content to put the cases, materials, and disputes in the book in context, as well as to provide a fuller and richer understanding of the materials.<sup>30</sup> Ideally, a course source would be created and distributed

---

<sup>22</sup> Louis H. Sullivan, *The Tall Office Building Artistically Considered*, LIPPINCOTT’S MAG., Mar. 1896, at 408.

<sup>23</sup> This term means that they rely on computers and video for their education and entertainment. See *infra* note 148 and accompanying text.

<sup>24</sup> See *infra* Part III.

<sup>25</sup> Many e-books for the law school market are little more than electronic versions of a traditional casebook that may have incorporated a few hyperlinks to some background material or secondary sources. See Johnson, *supra* note 18, at 78.

<sup>26</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

<sup>27</sup> See *id.*

<sup>28</sup> See *infra* Part V.B.2–V.B.5.

<sup>29</sup> See *infra* Part V.B.2–V.B.4.

<sup>30</sup> See *infra* Part V.B.5.

through a Creative Commons license<sup>31</sup> as open-source materials, so faculty can choose the portions of the materials they find most useful and relevant for their teaching and distribute those materials to students at no cost.<sup>32</sup>

This Article outlines a vision for the transformation of the casebook into the course source necessary for the broader adoption of a range of teaching methods by faculty. Part II describes the adoption of the Socratic dialogue and the case method in legal education, the criticisms to those modes of teaching, the development of teaching methods that are used to supplement or replace the Socratic dialogue and the case method, and the forces that are catalyzing the transformation of teaching methods in legal education. Part III describes how the changing nature of the student body in law schools requires faculty members to adopt new teaching methods to supplement or replace the Socratic dialogue and the case method. Part IV outlines the evolution of the Langdellian casebook and demonstrates that most traditional law school casebooks and course books are not designed to facilitate adoption of a variety of teaching methods that are necessary to educate a changing student body. Finally, Part V outlines a vision for the course source, a new generation of teaching materials to replace the casebook. Moreover, Part V discusses the benefits and limitations of the evolved casebook, and the impediments to its evolution. This Article highlights a prototype of the course source: *Wetlands Law: A Course Source*.<sup>33</sup>

## II. EVOLUTION OF TEACHING METHODS AND PRESSURES FOR CHANGE

### A. *Historical Background*

Toward the end of the eighteenth century, the Litchfield Law School, the first proprietary law school in the United States, began to train students for the practice of law.<sup>34</sup> Tapping Reeve, who later served as a judge on the

---

<sup>31</sup> Licenses are available at CREATIVE COMMONS, <https://creativecommons.org/licenses> (last visited Feb. 26, 2016) (explaining that the Creative Commons license retain copyright while allowing others to copy and make some uses of the licensed material).

<sup>32</sup> See *infra* Part V.B.6.

<sup>33</sup> STEPHEN M. JOHNSON, WETLANDS LAW: A COURSE SOURCE, <http://www2.law.mercer.edu/elaw/wetlands/coursebook.html> (last visited Mar. 17, 2016) [hereinafter WETLANDS LAW].

<sup>34</sup> See *The Litchfield Law School*, 20 ALBANY L.J. 72, 72 (1879).

Connecticut Supreme Court, organized the law school.<sup>35</sup> The typical course lasted fourteen months.<sup>36</sup> The teaching method at that first law school was rather straightforward. Reeve lectured slowly and with deliberate repetition on a specific topic for about an hour and a half each day, and students attempted to transcribe the lectures.<sup>37</sup> Over the next five and a half decades, eighteen additional independent law schools began to operate, each using similar teaching methods.<sup>38</sup>

At the end of the eighteenth century, the College of William and Mary and Transylvania University began to offer programs and award degrees for the study of law.<sup>39</sup> The number of private universities offering programs in law grew to six by 1830 and to over one hundred by 1900.<sup>40</sup> The teaching methods employed at those schools were similar to the methods used at the independent law schools.<sup>41</sup> Faculty members relied primarily on lectures, but, by the middle of the nineteenth century, some faculty members assigned students to read and memorize passages from a treatise and then recite the information in class or on a written quiz.<sup>42</sup> Even in schools where students were asked to recite information in class, it was not uncommon for the faculty member to reserve sections of their classroom for students who did not wish to be called on to recite.<sup>43</sup> In general, the instructional techniques used by faculty members for most of the nineteenth century were very passive for students.<sup>44</sup> However, in an 1870 contracts class, Christopher Columbus Langdell, Dean of Harvard Law School,<sup>45</sup> transformed legal

---

<sup>35</sup> See Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 564 (1996).

<sup>36</sup> See *id.* at 564–65.

<sup>37</sup> See *id.* at 565–66.

<sup>38</sup> *Id.* at 567. The term “law school” is used loosely with regard to some of these independent schools. Before the twentieth century, most states did not require lawyers to attend law school and many did not even require them to graduate from high school. See Douglas W. Lind, *An Economic Analysis of Early Casebook Publishing*, 96 L. LIBR. J. 95, 96 (2004). Lawyers simply needed to pass the state’s bar exam and could prepare for the exam in any manner that they desired. *Id.* Many of the early law schools were private programs, run by lawyers, to prepare students for the bar exam, and did not award degrees. *Id.*

<sup>39</sup> See Sheppard, *supra* note 34, at 567–68.

<sup>40</sup> See Lind, *supra* note 38, at 96.

<sup>41</sup> See Sheppard, *supra* note 34, at 567–68.

<sup>42</sup> See Lind, *supra* note 38, at 96.

<sup>43</sup> See Sheppard, *supra* note 34, at 579.

<sup>44</sup> See *id.*

<sup>45</sup> Langdell, an 1854 graduate of Harvard, began his teaching career at Harvard in February 1870, after practicing law in Manhattan for many years. Richard K. Neumann, Jr.,

education pedagogy when he introduced the case method of instruction.<sup>46</sup> Instead of transcribing and memorizing rules delivered in lectures, students learning through the case method read, analyzed, and critiqued common law appellate cases to discover general legal principles.<sup>47</sup> In conjunction with the case method, Langdell engaged his students in a dialogue, commonly referred to as the Socratic dialogue, whereby he asked them a series of questions designed to identify the important facts and distill the holdings in the cases.<sup>48</sup> Although his students were initially hostile to this new form of active learning,<sup>49</sup> the case method spread across Harvard and into other schools.<sup>50</sup> Moreover, although it spread more quickly among schools identified as elite,<sup>51</sup> it became the predominant method of instruction at all law schools in the twentieth century.<sup>52</sup> According to a 1995 survey of law faculty at ABA accredited schools, only 11% of faculty relied on lectures or monologue as a primary means of instruction by the end of the twentieth

---

*Osler, Langdell, and the Atelier: Three Tales of Creation in Professional Education*, 10 LEGAL COMM. & RHETORIC: JALWD 151, 164 (2013). Despite his junior status, he was appointed Dean seven months after he began teaching because none of the other faculty members wanted to serve as Dean. *Id.*

<sup>46</sup> See Garvey & Zinkin, *supra* note 4, at 105; Johnson, *supra* note 18, at 48; Lind, *supra* note 38, at 96; Sheppard, *supra* note 34, at 596–98.

<sup>47</sup> See Garvey & Zinkin, *supra* note 4, at 105; Johnson, *supra* note 18, at 48; Lind, *supra* note 38, at 96; Sheppard, *supra* note 34, at 597–98.

<sup>48</sup> See Johnson, *supra* note 18, at 48–49; Carrie Menkel-Meadow, *Taking Law and \_\_\_\_\_ Really Seriously: Before, During and After “The Law”*, 60 VAND. L. REV. 555, 561–63 (2007); Sheppard, *supra* note 34, at 598.

<sup>49</sup> See Lind, *supra* note 38, at 97. In the contracts class where he first introduced his method, all of the students except seven withdrew from the course. Sheppard, *supra* note 34, at 599.

<sup>50</sup> See Garvey & Zinkin, *supra* note 4, at 105; Johnson, *supra* note 18, at 49. Due to poor eyesight and weakened health, Dean Langdell was forced to revert to a monologue form of teaching in the 1880s, just as faculty around the country were adopting his case method. Sheppard, *supra* note 34, at 607.

<sup>51</sup> Sheppard, *supra* note 34, at 613. However, not all elite schools were quick to adopt the case method. See *id.* at 590. For instance, Yale avoided it until the twentieth century and the University of Virginia did not adopt it until the 1930s. *Id.*

<sup>52</sup> See Johnson, *supra* note 18, at 49; Sheppard, *supra* note 34, at 614; Lind, *supra* note 38, at 97. As early as 1914, a Bureau of Education report concluded that the case method was the primary means of instruction in American law schools. Lind, *supra* note 38, at 97.



century.<sup>53</sup> Supporters of the case method argue it teaches students to “think like a lawyer” (e.g., logically, critically, and carefully), and it is far superior to the passive spoon-feeding of the lecture method that it replaced.<sup>54</sup> Through the case method and Socratic dialogue, students develop professional judgment and learn experientially by developing and applying their knowledge of case law to evolving fact patterns.<sup>55</sup> This is especially useful in first-year courses where there is a heavy focus on teaching traditional legal reasoning (including case analysis, rule and doctrinal synthesis, and statutory and rule interpretation) and grasping the underlying body of law.<sup>56</sup>

However, the case method and Socratic dialogue have been criticized on a variety of grounds from the time they were introduced until today.<sup>57</sup> Many critics complain that the case method does not adequately prepare students for practice because it does not require them to understand the professional, client, community, or social interests involved in the cases they read;<sup>58</sup> it does not focus sufficiently on developing skills in statutory or regulatory interpretation;<sup>59</sup> and the skill to separate the relevant from the irrelevant facts is lost when students learn by reading a series of heavily-edited cases.<sup>60</sup> Others complain that the case method and Socratic dialogue do not engage

---

<sup>53</sup> See Sheppard, *supra* note 34, at 592–93. The survey was distributed to 5,052 professors at all of the ABA accredited schools and generated 513 responses, including 422 related to traditional lecture hall classes. *Id.*

<sup>54</sup> Alton, *supra* note 19, at 351; John E. Dunsford, *In Praise of Casebooks (A Personal Reminiscence)*, 44 ST. LOUIS L.J. 821, 822 (2000); Johnson, *supra* note 18, at 49; Stephen J. Shapiro, *Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method*, 34 CREIGHTON L. REV. 245, 247 (2000).

<sup>55</sup> Professor Steve Sheppard describes the pattern of learning for law students as a three step process: “(1) The student learns some body of law . . . ; (2) The student organizes this body of law into a scheme . . . ; (3) The student applies this body of law to a new situation, using the organization to pick the rules best suited to resolve the situation.” Sheppard, *supra* note 34, at 551. The case method and Socratic dialogue are very useful in developing that process. See *id.*; Welch, *supra* note 4, at 1616.

<sup>56</sup> See Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141, 1143 (2002); Rhee, *supra* note 4, at 334; Larry L. Teply & Ralph U. Whitten, *Teaching Civil Procedure Using an Integrated Case-Text-and-Problem Method*, 47 ST. LOUIS L.J. 91, 93 (2003).

<sup>57</sup> See Johnson, *supra* note 18, at 49; Sheppard, *supra* note 34, at 549–50.

<sup>58</sup> DiMatteo, *supra* note 14, at 1292–93; Johnson, *supra* note 18, at 49.

<sup>59</sup> See Walker, *supra* note 17, at 244.

<sup>60</sup> See Welch, *supra* note 4, at 1614–15, 1617–18.

students collegially<sup>61</sup> and do not resemble the exchanges that students will have in the real world with other attorneys, clients, and judges.<sup>62</sup> Critics also have the following complaints of the Socratic dialogue, as practiced: (1) it is not truly “Socratic,” but is a modern version of the quiz method employed prior to its adoption;<sup>63</sup> (2) it is intimidating and utilized primarily to provide faculty members with a sense of control;<sup>64</sup> and (3) it alienates women and students of color.<sup>65</sup> Further, many academics argue that it is inappropriate to use *any* method as the sole method of teaching in law school because students learn in a variety of ways, and faculty members should use a variety of approaches to reach students in the different ways they learn;<sup>66</sup> and faculty members are trying to teach different skills in first-year courses than in many upper-division courses.<sup>67</sup>

In response to such criticism, many faculty members have, over the years, incorporated additional or substituted teaching methods for the case method and Socratic dialogue into their courses.<sup>68</sup> The legal realist movement at the beginning of the twentieth century prompted some early changes.<sup>69</sup> Although the case method encouraged students to view the common law as objective, scientifically discovered, black letter rules, legal realists argued that legal principles are not static and can be interpreted and applied to effect positive social change.<sup>70</sup> Faculty adherents of legal realism began to focus their teaching more heavily on professionalism and the effect that lawyers’ decisions can have on society.<sup>71</sup> Perhaps the most striking

---

<sup>61</sup> See *id.* at 1618. Socratic dialogue is a very individual learning process for the student. *Id.*

<sup>62</sup> See Dunsford, *supra* note 54, at 822; Newton, *supra* note 4, at 102–03.

<sup>63</sup> See Neumann, Jr., *supra* note 45, at 167–68; Lasso, *supra* note 4, at 17; Sheppard, *supra* note 34, at 619–21. For a full discussion of the classical Socratic dialogue, see Neumann, Jr., *supra* note 45, at 167–68.

<sup>64</sup> See *Workshop*, *supra* note 13, at 299 (remarks of Gene Koo); Newton, *supra* note 4, at 102–03; Sheppard, *supra* note 34, at 621.

<sup>65</sup> Johnson, *supra* note 18, at 50; Lasso, *supra* note 4, at 17.

<sup>66</sup> See Johnson, *supra* note 18, at 50; DiMatteo, *supra* note 14, at 1298–99; Lasso, *supra* note 4, at 17.

<sup>67</sup> See DiMatteo, *supra* note 14, at 1298–99; Sheppard, *supra* note 34, at 621. See also Newton, *supra* note 4, at 83–84, 99–100 (criticizing the lack of focus on the development of skills other than legal analysis and memorization of legal doctrine and proposing required experiential learning in all classes and a required clinical experience during law school).

<sup>68</sup> See Alton, *supra* note 19, at 352–53.

<sup>69</sup> See Johnson, *supra* note 18, at 49; Alton, *supra* note 19, at 352–53.

<sup>70</sup> See Johnson, *supra* note 18, at 49; Alton, *supra* note 19, at 352–53.

<sup>71</sup> See Johnson, *supra* note 18, at 49; Alton, *supra* note 19, at 358–59.

example of the effect of legal realism on teaching law was the widespread transformation at many schools, beginning in the 1930s, of the first-year criminal law course from a course taught through the case method to a course taught through a broader philosophical, social, and moral lens in a manner similar to a liberal arts course.<sup>72</sup>

Although faculty members adopted changes to the *focus* of their teaching in response to legal realism, they adopted broader changes to the *manner* in which they taught in response to some of the other criticisms raised of the case method and Socratic dialogue.<sup>73</sup> For instance, in 1930, Professor Jacob Landman proposed a new “problem method” of teaching, where students were given a factually complex legal problem and were asked to resolve various issues that arose in the problem by focusing on a series of cases and legal and non-legal materials that might be relevant to the problem.<sup>74</sup> This approach became popular in many law school courses beginning in the 1950s and continues to be popular today, although it is more frequently used in courses with a heavy statutory or regulatory focus than in common law courses.<sup>75</sup> Just as many faculty members adopted a problem-based approach to teaching in various courses, some faculty members adopted the case study approach used in business schools and medical schools.<sup>76</sup> Both the problem method and case studies address concerns that the case method and Socratic dialogue do not, such as requiring students to identify relevant facts; to consider the broader professional, client, and social dimensions of legal practice, and to focus on sufficiently interpreting statutes

---

<sup>72</sup> See Walker, *supra* note 17, at 217–19. Professor Anders Walker argues that Professor Herbert Wechsler intentionally—and successfully—revolutionized criminal law pedagogy when he authored a new casebook that de-emphasized cases and included a variety of social science materials, inspiring other criminal law teachers to design their courses along those lines. *Id.* at 217–18. Walker argues that Wechsler designed his book to undermine the case method because Wechsler thought that the case method fostered a “closed-system” view of the law that prompted the Supreme Court’s rejection of many New Deal programs. *Id.* at 217.

<sup>73</sup> See, e.g., Sheppard, *supra* note 34, at 624–25.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 627–28; *Workshop*, *supra* note 13, at 298–99 (remarks of Paula Lustbader). In a 1995 survey of full-time faculty at ABA accredited law schools, faculty teaching statutory-based courses reported using problem-based books in 13% of their courses, while faculty teaching common law courses reported using problem-based books in just 3% of their courses. See Sheppard, *supra* note 34, at 628.

<sup>76</sup> See Sheppard, *supra* note 34, at 625–26; Welch, *supra* note 4, at 1617 (discussing the pedagogical value of case studies); Rhee, *supra* note 4, at 337.

or regulations.<sup>77</sup> In addition, particularly in the case study approach, students can work collegially on problem solving in a way that is not possible through the Socratic dialogue.<sup>78</sup>

In addition to the problem method and case studies, some faculty members have utilized narrative<sup>79</sup> and oral histories<sup>80</sup> in their teaching to help students focus on the context and broader dimensions of the cases or laws they are studying. Faculty members have also relied on technology to place the law and cases in a broader context.<sup>81</sup> Although faculty members have incorporated films, tapes, and other audio and visual materials into their classes for decades, new technologies make it much easier to incorporate those materials into the classroom today.<sup>82</sup>

To foster development of a broader range of skills required for practice and to engage students in more collegial interaction, faculty members have

---

<sup>77</sup> See Welch, *supra* note 4, at 1617–18.

<sup>78</sup> See *id.* Professor Steve Sheppard notes that collegial learning has thrived outside of the classroom in law schools since the nineteenth century through study groups and in a wide array of clubs at law schools. See Sheppard, *supra* note 34, at 631–32.

<sup>79</sup> See DiMatteo, *supra* note 14, at 1287–88. Professor Larry DiMatteo argues,

The narrative approach to teaching law is at its best when it is highly contextualized—including contextual facts of a case (recognized facts); context of the law of precedent as a story of legal development; law creation within context of a particular cultural, economic, and social era; and those elements of case context that are left unrecognized, but likely influence party behavior and conduct (e.g., bias, discrimination).

*Id.* He argues that a narrative approach “better prepares students to respond to their client stories” and “provides students with a better understanding of the law and how it can best be used in advancing the interests of their clients.” *Id.* at 1295–96.

<sup>80</sup> See Johnson, *supra* note 18, at 68. At least one faculty member requires students in a professionalism course to meet with and interview experienced attorneys to produce oral history of those attorneys. Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 696 (2009).

<sup>81</sup> See Sheppard, *supra* note 34, at 628.

<sup>82</sup> See *id.* at 628, 634–36 (noting that by the 1960s, the ABA published a bibliography of 800 movies or film strips that were appropriate for law school courses and noted that one-third of the faculty responding to a 1995 survey indicated that they used videos in conjunction with their courses). Advances in technology also make it easier for faculty to develop their own videos for use in the classroom. For instance, Professor Pat Longan at Mercer Law School and the Mercer Center for Legal Ethics and Professionalism have produced a series of video vignettes involving lawyer and client interactions that are designed for the interactive teaching of ethics and professionalism. See Johnson, *supra* note 18, at 68.

also incorporated negotiation, counseling, oral advocacy, and other simulations into their classes and frequently assign and critique research and drafting exercises during and outside of class meetings.<sup>83</sup>

Although the simulations and exercises build a wider range of skills than the case method and Socratic dialogue, they also provide faculty members and students with greater opportunities to assess their learning during law school.<sup>84</sup> Technology has provided additional tools for faculty members to use to engage in formative assessment, including computerized quizzes and tutorials (CALI exercises),<sup>85</sup> student response systems (clickers),<sup>86</sup> and discussion lists and blogging.<sup>87</sup>

Many of the instructional techniques described in the preceding paragraphs transform faculty from the proverbial “sage on the stage” to the “guide on the side” and cede control of the learning process to students, who take a more active role in their education.<sup>88</sup> Although faculty members are

---

<sup>83</sup> See *Workshop*, *supra* note 13, at 309 (remarks of Dennis Patterson); Rhee, *supra* note 4, at 331, 337 (discussing the benefits of simulations and additional skills instruction in upper division classes); Johnson, *supra* note 18, at 73–77 (discussing the use of simulations in general and the use of computerized simulations in law schools); Ira Steven Nathenson, *Best Practices for the Law of the Horse: Teaching Cyberlaw and Illuminating Law Through Online Simulations*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 657, 657 (2012); Paula Schaefer, *Injecting Law Student Drama into the Classroom: Transforming an E-Discovery Class (or Any Law School Class) with a Complex, Student-Generated Simulation*, 12 NEV. L.J. 130, 134–35 (2011); Garvey & Zinkin, *supra* note 4, at 121.

<sup>84</sup> See Johnson, *supra* note 18, at 70–71; Newton, *supra* note 4, at 99–100.

<sup>85</sup> See Johnson, *supra* note 18, at 63 (noting that CALI has been publishing computerized lessons since 1982 and currently distributes almost one thousand lessons). CALI refers to the Center for Computer-Assisted Legal Instruction, a non-profit consortium of law schools, law libraries, and related organizations. See CALI, *About CALI*, <http://www.cali.org/content/about-cali> (last visited Mar. 1, 2016). In addition to the exercises that CALI distributes, CALI provides software that faculty can use to create their own lessons and quizzes. See Johnson, *supra* note 18, at 64. Separately from CALI, faculty have also created and shared their own multiple-choice quizzes and exam banks on an ad hoc basis. *Id.* at 65.

<sup>86</sup> See *Workshop*, *supra* note 13, at 314–15 (remarks of Greg Silverman); Johnson, *supra* note 18, at 69.

<sup>87</sup> See Johnson, *supra* note 18, at 69; THOMSON, *supra* note 14, at 89–90.

<sup>88</sup> See *Workshop*, *supra* note 13, at 296–97 (remarks of Steve Friedland); THOMSON, *supra* note 14, at 29. There are several consortia of law schools or law faculty that are dedicated to improving teaching methods, holding conferences on those topics, creating reports on those topics and initiatives in those topics, and providing resources to faculty to facilitate improvement of teaching methods. See, e.g., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *About Educating Tomorrow's Lawyers*, <http://iaals.du.edu/educating-tomorrows->

adopting many of these teaching methods in one or more courses, the case method and Socratic dialogue remain the predominant modes of instruction for most first-year courses.<sup>89</sup> To some extent, these traditional modes of instruction persist because they teach students valuable doctrinal and analytical skills that are useful in practice and are the major focus of the bar exam.<sup>90</sup> However, they also persist because the traditional Langdellian casebook does not provide the tools to facilitate adoption of many of the alternative teaching methods on a widespread basis.<sup>91</sup>

### B. Calls for Reform of Legal Education

Although many faculty members have incorporated teaching methods other than the case method and Socratic dialogue into their courses, over several decades the Carnegie Foundation, the ABA, and other influential organizations have concluded that law schools are not adequately preparing students for the practice of law, spurring widespread calls for reform.<sup>92</sup>

---

lawyers/about (last visited Mar. 1, 2016); INST. FOR L. TEACHING & LEARNING, *Mission of the Institute*, <http://lawteaching.org/about> (last visited Mar. 1, 2016). Many of the teaching methods outlined in the preceding paragraphs are discussed in more detail on these organizations' websites.

<sup>89</sup> See Johnson, *supra* note 18, at 49; Garvey & Zinkin, *supra* note 4, at 105; Lasso, *supra* note 4, at 13–15.

<sup>90</sup> See Skover, *supra* note 4, at 287.

<sup>91</sup> See *supra* text accompanying notes 12–14; THOMSON, *supra* note 14, at 131; Skover, *supra* note 4, at 289.

<sup>92</sup> See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* ix, xi–xii (2012); Newton, *supra* note 4, at 55, 59–61; Rhee, *supra* note 4, at 327; David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 250 (2010); Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 107–08 (2010); Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651, 651–52 (2012); Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 736–37 (2011); Judith S. Kaye, *2011 James P. White Lecture on Legal Education: A Chief Judge's After-Life: Reflections on Educating Lawyers Today*, 45 IND. L. REV. 291, 297–98 (2012); John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 363–89 (2007); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34–35 (1992). Critics also argue that it is even more important that law schools prepare students to be practice-ready today because the legal job market has changed dramatically, requiring more students to enter practice on their own. See Newton, *supra* note 4, at 59–60, 65–66; Rhee, *supra* note 4, at 310, 327.

At the beginning of the twentieth century, the Carnegie Foundation for the Advancement of Teaching appointed Josef Redlich, an Austrian law professor, to study the case method and the pedagogy employed in U.S. law schools.<sup>93</sup> In 1914, after visiting ten law schools, Redlich issued his report.<sup>94</sup> Although the report praised the case method as a good way to “train the legal mind,” Redlich also concluded that the case method should be used in a more holistic and practical way in light of the importance of practical legal education.<sup>95</sup>

Several decades later, the ABA Section of Legal Education and Admissions to the Bar—the accrediting entity for law schools—appointed a panel of lawyers, judges, and professors to examine whether law schools were adequately preparing law students for practice.<sup>96</sup> Roger Cramton, Dean of Cornell Law School, chaired the panel.<sup>97</sup> In 1979, the group released a report that contained twenty-eight recommendations.<sup>98</sup> The Cramton report stressed the need to increase the teaching of “fundamental skills critical to lawyer competence” and stressed the importance of additional assessment in law school classes,<sup>99</sup> recommendations that would be echoed by later reports of the Carnegie Foundation, the ABA, and the Clinical Legal Education Association.<sup>100</sup>

The ABA released another influential report regarding legal education in 1992.<sup>101</sup> In *Legal Education and Professional Development*, the ABA Task Force on Law Schools and the Profession criticized law schools for failing to prepare students for the practice of law.<sup>102</sup> The *MacCrate Report*, named for its chair Robert MacCrate, recommended sixty-four reforms of

---

<sup>93</sup> See THOMSON, *supra* note 14, at 60–61.

<sup>94</sup> THOMSON, *supra* note 14, at 61; JOSEF REDLICH, *THE COMMON LAW & THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOL: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* vi (1914).

<sup>95</sup> See THOMSON, *supra* note 14, at 61.

<sup>96</sup> *Id.* at 62.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See *id.* at 63, 65–67.

<sup>101</sup> *Id.* at 62–63.

<sup>102</sup> See A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *LEGAL EDUCATION & PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS & THE PROFESSION: NARROWING THE GAP* 5, 8 (1992) [hereinafter *MACCRATE REPORT*]. The Task Force issued its report after surveying practicing lawyers and professors over a three-year period. *Id.* at xiii, 385–95.

teaching methods and curricula to “systematically integrate the study of skills and values with the study of substantive law and theory.”<sup>103</sup> The *MacCrate Report* identifies ten fundamental lawyering skills and four fundamental values that law schools should address throughout their curricula.<sup>104</sup>

In 2007, almost a century after it issued the Redlich Report, the Carnegie Foundation for the Advancement of Teaching issued another, more influential, report on legal education: the *Carnegie Report*.<sup>105</sup> The authors of the report concluded that most law schools had ignored the recommendations of the *MacCrate Report* and were not adequately training students in professionalism or professional skills.<sup>106</sup> The report identifies three apprenticeships—cognitive, practical, and ethical-social—and recommends that law schools integrate those apprenticeships into the “goal of training competent and committed practitioners.”<sup>107</sup>

Although the *MacCrate Report* focused primarily on reforms to curricula and course content, the *Carnegie Report* adopted a broader focus, directly critiquing the teaching methods employed by law schools.<sup>108</sup> Although the *Carnegie Report* praised the case method as a tool for teaching legal analysis skills in the first year of law school, the report stressed the need to use multiple and diverse teaching methods, including case studies and simulations, to instruct students in skills and values other than legal analysis.<sup>109</sup> Echoing some of the criticisms of the case method outlined

---

<sup>103</sup> *Id.* at 128.

<sup>104</sup> *Id.* at 138–41. According to the report, successful lawyers possess the following skills: (1) problem solving; (2) legal analysis and reasoning; (3) legal research; (4) factual investigation; (5) communication; (6) counseling; (7) negotiation; (8) litigation and alternative dispute-resolution procedures; (9) organization and management of legal work; and (10) recognizing and resolving ethical dilemmas. *Id.* at 138–40. The four fundamental values the report identifies are: (1) provision of competent representation; (2) striving to promote justice, fairness, and morality; (3) striving to improve the profession; and (4) professional self-development. *Id.* at 140–41. “Good lawyers possess four competencies: knowledge, skill, perspective, and personal attributes.” Lasso, *supra* note 4, at 12–13.

<sup>105</sup> See CARNEGIE REPORT, *supra* note 26, at 3.

<sup>106</sup> See *id.* at 189–90.

<sup>107</sup> See *id.* at 27–29, 191. The three “apprenticeships,” described as knowledge, skills, and values, seem quite similar to the four “competencies” identified in the *MacCrate Report*—knowledge, skills, perspective and personal attributes. See MACCRATE REPORT, *supra* note 102, at 140–41.

<sup>108</sup> See Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems”*, 61 RUTGERS L. REV. 867, 889 (2009).

<sup>109</sup> See CARNEGIE REPORT, *supra* note 105, at 186–95.



above, the report noted that the method does not encourage students to recognize the complexities of the case, the real people involved in the case, or the larger social or professionalism issues involved in the case.<sup>110</sup> As law schools focused almost exclusively on summative assessment, the report also encouraged schools to make formative assessment a “primary form[] of assessment” in legal education.<sup>111</sup>

At about the same time that the Carnegie Foundation released its report, the Steering Committee for the Best Practices Project of the Clinical Legal Education Association (CLEA) released *Best Practices for Legal Education (Best Practices)*.<sup>112</sup> Similar to the *Carnegie Report*, *Best Practices* concluded that law schools were not preparing students for practice and urged law schools to reform instructional methods to facilitate the teaching of practical skills and professionalism.<sup>113</sup> The report recommended that law schools articulate clear educational objectives for their programs, share the objectives with their students, and use teaching methods that effectively and efficiently achieve those objectives.<sup>114</sup> It also recommended significant changes to assessment methodologies in law schools.<sup>115</sup> Specifically, the authors called on law schools to adopt “best practices for assessing student learning, including criteria-referenced assessments, multiple formative and summative assessments, and various methods of assessment.”<sup>116</sup> Unlike the other reports, *Best Practices* also explicitly noted that technology could play an important role in implementing the necessary legal education reforms.<sup>117</sup>

---

<sup>110</sup> *Id.* at 187.

<sup>111</sup> *Id.* at 188–89. The report stressed that formative assessment focuses on supporting students in learning, while summative assessment—the primary tool used by law schools—focuses on sorting and selecting students. *Id.* The first law school examinations were administered in 1871 at Harvard University. *See* Neumann, *supra* note 45, at 172. Although exams in most other disciplines focused on pure knowledge that could be memorized and repeated, Dean Langdell administered essay exams that required students to apply the law that they had learned to a specific factual scenario. *Id.* at 173. The exam was usually administered with a three-hour time limit. *See id.* at 174. This exam format became the predominant assessment tool in legal education in the twentieth century and is still the primary means of summative assessment used by many professors. *See id.*

<sup>112</sup> ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007), <http://www.cleaweb.org/best-practices> [hereinafter *BEST PRACTICES*].

<sup>113</sup> *Id.* at 5–6.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 6.

<sup>116</sup> *Id.*

<sup>117</sup> *See id.* at 7.

There seems to be an overall consensus in the *MacCrate*, *Carnegie*, and *Best Practices* reports that there is a place for the case method and Socratic dialogue in legal education in the training of first-year students; a wider variety of teaching methods beyond the case method and Socratic dialogue should be employed throughout all three years of law school; law schools should focus more attention in their curriculum and teaching methods on instructing students in practical skills and professionalism, in addition to the core knowledge required for competency; and law schools should incorporate more assessment, especially formative assessment, into their methods of instruction. Finally, all of the reports stress the importance of integrating the teaching of practical skills and professionalism throughout the curriculum, rather than teaching those skills and values solely in separate courses.<sup>118</sup>

As noted above, many faculty members are using simulations, case studies, exercises, and other teaching methods to incorporate the instruction of practical skills into doctrinal courses, and other faculty may follow their lead if appropriate instructional materials were readily available.<sup>119</sup> Many faculty members also recognize the importance of incorporating professionalism instruction into doctrinal courses,<sup>120</sup> as opposed to limiting the discussion of professionalism to a single, upper-division, required course or even a sequence of required courses.<sup>121</sup> Faculty members model professionalism for students even when they are not deliberately

---

<sup>118</sup> *Id.* at 6; CARNEGIE REPORT, *supra* note 105, at 8; MACCRATE REPORT, *supra* note 102, at 128.

<sup>119</sup> See *supra* notes 73–88 and accompanying text.

<sup>120</sup> See, e.g., Paula Schaefer, *A Primer on Professionalism for Doctrinal Professors*, 81 TENN. L. REV. 277, 278 (2014); Welch, *supra* note 4, at 1610, 1617–18; Newton, *supra* note 4, at 98–99. Professor Schaefer notes, it is difficult to determine the extent to which faculty are incorporating professionalism instruction into their doctrinal classes because there is not a common definition or understanding of what it means to incorporate professionalism instruction into doctrinal classes. Schaefer, *supra*, at 281. She notes, “For one professor, ‘teaching professionalism’ means pointing out a relevant professional conduct rule from time to time, while another thinks professionalism education means discussing civility, service, or something else.” *Id.* Ultimately, she suggests that there are three aspects of attorney professionalism that faculty could address more deliberately in all courses across the curriculum. *Id.* at 282. Specifically, she suggests that faculty could focus on a lawyer’s duties to their client, including the duty of advising the client; the obligations of the professional rules; and the core values that are essential to being a good lawyer. *Id.* at 282–98.

<sup>121</sup> See Newton, *supra* note 4, at 98–99.

incorporating professionalism instruction into their classes,<sup>122</sup> and they can more deliberately incorporate professionalism instruction into their classes by placing students in the role of lawyers through simulations and case studies.<sup>123</sup> As Professor Paula Schaefer notes, it is even possible to explore professionalism issues with students in a Socratic dialogue focusing on cases by shifting the focus of the questions presented to the student.<sup>124</sup> Although Professor Schaefer notes that there are resources available to help faculty members incorporate professionalism instruction into doctrinal courses,<sup>125</sup> those resources are not generally included in the traditional Langdellian casebook.<sup>126</sup>

### C. ABA Standards Reform

Although the *MacCrate*, *Carnegie*, and *Best Practices* reports for many years have urged law schools to adopt significant reforms in legal education,<sup>127</sup> law schools now have a more tangible incentive to adopt fundamental changes. In 2014, the ABA Section of Legal Education and Admissions to the Bar amended the accreditation standards that apply to law schools.<sup>128</sup> The amended standards incorporate many of the

---

<sup>122</sup> See Welch, *supra* note 4, at 1610.

<sup>123</sup> See *id.* at 1617–18; Schaefer, *supra* note 120, at 301–02.

<sup>124</sup> See Schaefer, *supra* note 120, at 299–301. Regarding a lawyer's role as a competent legal advisor, she notes that faculty could ask students the following questions:

What fact investigation and legal research do you think the lawyer completed prior to advising the client? Based on later events in the case, what advice do you believe the lawyer provided? Do you think that advice allowed the client to adequately weigh the risk of this very litigation? Do you think the lawyer made any mistakes in the way he or she handled the matter?

*Id.* at 299. She notes that cases also provide opportunities to discuss how professional conduct rules should influence a lawyer's conduct and how core personal values are consistent with, or conflict with, providing excellent representation to a client in a specific case. *Id.* at 300.

<sup>125</sup> *Id.* at 301–03.

<sup>126</sup> See *id.* at 278.

<sup>127</sup> See *supra* Part II.B.

<sup>128</sup> See generally AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014–2015, SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, (2014) [hereinafter ABA ACCREDITATION STANDARDS]. Although the ABA adopted the changes in 2014, many of the changes that are outlined in this section will not apply until the 2016–2017 academic year, when they will only apply to entering students.

recommendations advanced by the Carnegie Foundation, CLEA, and ABA reports discussed above.<sup>129</sup>

Specifically, as recommended by *Best Practices*, the ABA added a requirement in Standard 301(b) that law schools establish and publish learning outcomes for their program of legal education.<sup>130</sup> Consistent with the *Carnegie Report*'s focus on training students in the knowledge, skills, and values that are central to the practice of law, the ABA's amended Standard 302 requires that law schools establish learning outcomes that include—at a minimum—competency in the following areas: (a) knowledge and understanding of substantive and procedural law; (b) “legal analysis and reasoning, legal research, problem-solving,” and written and “oral communication” in the “legal context”; (c) exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) “other professional skills” needed for competent and ethical “participation [as a member of] the legal profession.”<sup>131</sup> In an interpretation of the standard, the ABA notes that “other professional skills” can include “interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.”<sup>132</sup> The ABA also amended the curriculum portion of the standards to further promote instruction in practical skills: schools must require each student to satisfactorily complete “one or more experiential course(s) totaling at least six credit hours.”<sup>133</sup>

---

*See ABA Section of Legal Education and Admissions to the Bar: Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools*, A.B.A. (Aug. 13, 2014), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2014\\_august\\_transition\\_and\\_implementation\\_of\\_new\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_august_transition_and_implementation_of_new_aba_standards_and_rules.authcheckdam.pdf).

<sup>129</sup> *See supra* Part II.B; ABA ACCREDITATION STANDARDS, *supra* note 128.

<sup>130</sup> ABA ACCREDITATION STANDARDS, *supra* note 128, Standard 301(b). The amended standards also require law schools to evaluate their program of legal education and learning outcomes to determine whether students are attaining those outcomes and to make changes to the curriculum or program of legal education to ensure that students attain those objectives. *Id.* at Standard 315. The Standards identify several methods that schools can use to measure the degree to which students have attained competency in the school's learning outcomes, but do not require schools to adopt specific methods. *Id.* at Interpretation 315-1.

<sup>131</sup> *Id.* at Standard 302.

<sup>132</sup> *Id.* at Interpretation 302-1.

<sup>133</sup> *Id.* at Standard 303(a)(3). According to the standards,

Consistent with the recommendations of the *Carnegie Report* and *Best Practices*, the ABA adopted a new standard that requires law schools to “utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.”<sup>134</sup> As noted above, formative assessment is designed to provide meaningful feedback to improve student learning, and summative assessment is designed to measure the degree of student learning.<sup>135</sup> Although the standards require law schools to use formative and summative assessment across the curriculum, they do not identify specific assessment methods that schools must use, and they do not require schools to apply multiple methods of assessment in any specific courses.<sup>136</sup>

The assessment standards could have major implications for law schools, as in many courses at law schools across the country today, the only means of assessment for the course may be a single exam at the end of the semester.<sup>137</sup> Many faculty members eschew additional assessment tools because it can be time consuming to design and evaluate multiple assessment instruments throughout the semester, and administration of additional assessment instruments during normal class meeting times reduces the scope

---

An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must:

- (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;
- (ii) develop the concepts underlying the professional skills being taught;
- (iii) provide multiple opportunities for performance; and
- (iv) provide opportunities for self-evaluation.

*Id.*

<sup>134</sup> *Id.* at Standard 314. In addition, Standard 315 requires law schools to continually evaluate the school’s assessment methods. *Id.* at Standard 315.

<sup>135</sup> *Id.* at Interpretation 314-1.

<sup>136</sup> *See id.* at Interpretation 314-2.

<sup>137</sup> Johnson, *supra* note 18, at 61; Andrea A. Curcio, *Moving in the Direction of Best Practices and the Carnegie Report: Reflections on Using Multiple Assessments in a Large Section Doctrinal Course*, 19 WIDENER L.J. 159, 159 (2009).

of material they can cover in the course.<sup>138</sup> Nevertheless, numerous studies in other disciplines have concluded that students learn better if they are given multiple assessments and feedback throughout the semester rather than a single exam at the end of the semester.<sup>139</sup>

Although development of additional assessment tools can be time consuming, there are some resources available to faculty members to expand their use of formative and summative assessment.<sup>140</sup> As noted above, CALI distributes almost one-thousand computerized tutorials and lessons that can be used by faculty members for formative or summative assessment, and the organization provides a software program that faculty members can use to develop their own computerized tutorials, lessons, and quizzes.<sup>141</sup> In addition, the Institute for Law Teaching and Learning maintains a website that provides resources for assessment in law schools and higher education.<sup>142</sup> Similarly, many faculty members administer topic-specific blogs and websites that could serve as clearinghouses for assessment resources.<sup>143</sup> A few skills-based books even include some assessment materials.<sup>144</sup> However, this array of resources is scattered and incomplete, and very few of the casebooks used by faculty members incorporate any assessment materials. In light of the assessment requirements of the amended ABA Standards, there will likely be increased demand for “off the shelf” formative and summative assessment instruments addressing a wide variety of topics.<sup>145</sup> Ideally, those materials will be available to faculty in a

---

<sup>138</sup> See Johnson, *supra* note 18, at 61; Curcio, *supra* note 137, at 159–60, 172, 174–76; Emily Zimmerman, *What Do Law Students Want?: The Missing Piece of the Assessment Puzzle*, 42 RUTGERS L. REV. 1, 3, 12–13 (2010).

<sup>139</sup> See Johnson, *supra* note 18, at 61–62; Curcio, *supra* note 137, at 160; Zimmerman, *supra* note 138, at 10. Students also generally prefer multiple assessments rather than a single exam for a course. See Johnson, *supra* note 18, at 62; Curcio, *supra* note 137, at 161.

<sup>140</sup> Johnson, *supra* note 18, at 63.

<sup>141</sup> See Johnson, *supra* note 18, at 63–64. Assessment instruments could be designed as short writing exercises, drafting exercises, moot court or other role playing exercises, multiple choice questions, short answer questions, essay questions, or in a variety of other formats. See *id.* at 65–66. Depending on their purposes, they can be structured as individual projects or as group projects. See *id.* at 66.

<sup>142</sup> See *Assessment*, INST. L. TEACHING & LEARNING, <http://lawteaching.org/teaching/assessment> (last visited Mar. 8, 2016).

<sup>143</sup> Johnson, *supra* note 18, at 66–67.

<sup>144</sup> See *infra* notes 208–12 and accompanying text.

<sup>145</sup> See Johnson, *supra* note 18, at 61–62.

single location, such as their coursebook, rather than scattered across the internet.

### III. EVOLUTION OF STUDENTS AND PRESSURES FOR CHANGE

If the criticisms to the case method and Socratic dialogue, the calls for reform from the various reports and practicing lawyers, and the ABA's amended accreditation standards were not enough for law schools to make fundamental pedagogical changes, the changing nature of the student body provides an additional impetus. Today's law students do not learn the same way that students learned thirty, fifty, or one-hundred-fifty years ago, and faculty members must target their teaching methods to a new breed of students.<sup>146</sup>

Most of the students attending law school today are members of Generation X or Generation Y (i.e., Millennials).<sup>147</sup> Most students in those generations are digital natives, relying on computers and video for their education and entertainment beginning in kindergarten.<sup>148</sup> In their world, information is instantly available, so they have developed a more passive relationship with information.<sup>149</sup> Learning does not take place in a library, and information is delivered "just in time" and not stored "just in case."<sup>150</sup> Accordingly, researchers suggest that Millennials are less likely to have mastered previous learning primarily through books, and they are "more

---

<sup>146</sup> See Eric DeGroff, *Training Tomorrow's Lawyers: What Empirical Research Can Tell Us About the Effect of Law School Pedagogy on Law Student Learning Styles*, 36 S. ILL. U. L.J. 251, 252 (2012).

<sup>147</sup> See Shailini Jandial George, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School*, 66 ME. L. REV. 163, 166 (2013); Eric DeGroff, *supra* note 146, at 251; Kristin E. Murray, *Let Them Use Laptops: Debunking the Assumptions Underlying the Debate over Laptops in the Classroom*, 36 OKLA. CITY U. L. REV. 185, 195 (2011); Joan Catherine Bohl, *Generations X and Y in Law School: Practical Strategies for Teaching the "MTV/Google" Generation*, 54 LOY. L. REV. 775, 779 (2008). Although definitions vary, Generation X is usually thought to include individuals born between 1961 and 1981, and Generation Y includes individuals born between 1982 and 2000. See Wegner, *supra* note 108, at 988.

<sup>148</sup> See Murray, *supra* note 147, at 195; Bohl, *supra* note 147, at 776–77; George, *supra* note 147, at 167. In 2003, 93% of children in kindergarten through twelfth grade used a computer either at home or school. See U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: COMPUTER AND INTERNET USE IN THE UNITED STATES 7 (2003).

<sup>149</sup> See Bohl, *supra* note 147, at 780.

<sup>150</sup> See Lasso, *supra* note 4, at 10, 21–22 (noting that computers and the internet are shifting the center of learning from libraries to individuals); DeGroff, *supra* note 146 at 252–53; Bohl, *supra* note 147, at 782.

likely to be visual learners and holistic, right brained thinkers rather than sequential, logical thinkers.”<sup>151</sup> In light of the easy access to information, they do not generally view faculty members to be an important source of information.<sup>152</sup>

Because these students have been educated on computers from an early age and have spent a significant portion of their life reading and researching in a hypertext world, they tend to be non-linear thinkers.<sup>153</sup> They also tend

---

<sup>151</sup> DeGross, *supra* note 146, at 252.

<sup>152</sup> See Bohl, *supra* note 147, at 782 (noting that today’s students may consider themselves far more the professors’ equal than members of any previous generations).

<sup>153</sup> See Lasso, *supra* note 4, at 22; George, *supra* note 147, at 172. Professor Rogelio Lasso notes that “[l]earning is controlled by who or what controls information.” Lasso, *supra* note 4, at 9. Although the writer controls the path of learning in traditional print text, Lasso points out the reader controls the path of learning with hypertext. *See id.* Moreover, although there are benefits associated with giving the reader more control over learning, some critics complain that, when reading material online, Millennials never read documents all the way through to understand the context, but simply jump from text to text, following hyperlinks. *See George, supra* note 147, at 169. Other critics complain that Millennials have weaker reading comprehension and writing skills than prior generations, but blame the decline on systemic failures in the American education system, rather than simply on a greater reliance on technology in learning. *See Bohl, supra* note 147, at 786–88.

Professor Shailini George suggests that faculty can help students improve their learning by educating them about effective learning techniques. *See George, supra* note 147, at 181. She notes, for instance, that most students are likely unaware that studies have demonstrated that highlighting text and rereading text, two techniques commonly used by students, are generally not effective learning strategies. *Id.* at 183–84. Instead, she argues that students should be made aware of more effective learning strategies, including:

distributing practice on tasks (spreading learning out over time rather than in a massive block or back-to-back sessions—i.e., “cramming”); retrieval practice (testing); interleaved practice (study of one topic interleaved with study of another topic, i.e., studying contracts and torts intermittently); elaborative interrogation (students question the information while studying it) and self-explanation (students explain procedures or information to themselves or others).

*Id.* at 184.

Professor Rogelio Lasso also believes faculty members can have a positive effect on student learning by making some small adjustments in their teaching. *See Lasso, supra* note 4, at 28. Regarding student comprehension of textual material, he notes that faculty members have opportunities to affect student comprehension “before the text is read, while it is being read, and after it is read.” *See id.* Accordingly, he suggests that faculty members can improve their students’ comprehension of textual material by (1) providing foundation



to multi-task to a much greater degree than previous generations.<sup>154</sup> Further, because of their relationship to technology, they have grown accustomed to viewing education as entertainment and expect an educational experience that is accessible and entertaining.<sup>155</sup>

Millennials have other characteristics that are not necessarily related to their relationship to technology.<sup>156</sup> According to many researchers, Millennials are team-oriented and focused on achievement.<sup>157</sup> They work well collaboratively and prefer detailed guidance and feedback in the classroom.<sup>158</sup>

Although faculty members should not abandon the case method and Socratic dialogue—especially in first-year classes—they need to incorporate different teaching strategies, some of which involve technology, in their classes to reach today’s law students.<sup>159</sup> Rather than rely on traditional casebooks, faculty members must use a variety of types of teaching materials designed for multi-modal learning, as students have diverse learning styles (e.g., verbal, visual, oral, aural, tactile, and kinesthetic).<sup>160</sup> Traditional law

---

knowledge about the material to students in interactive ways (handouts, flowcharts, oral previews) before they read the material; (2) providing instructions to students regarding how to read complex text that will assist them while they are reading it; and (3) providing them with a summary of the material after they have read the material. *Id.* at 28–30.

<sup>154</sup> See Lasso, *supra* note 4, at 21; George, *supra* note 147, at 170. Although students may believe that this is an efficient way to learn, research suggests that multi-tasking inhibits the development of deep thinking and reasoning skills that are essential to learning and lawyering. See George, *supra* note 147, at 171. Scientific studies using functional Magnetic Resonance Imaging (fMRIs) suggest that persons are continually “task switching” when they are “multi-tasking,” and that “task switching” interferes with the cognitive processes that are essential to encoding information from short term memory into long term memory. See *id.* at 173–79. Therefore, Professor Shailini George suggests that law faculty should educate their students about the “perils of multitasking,” as many students are likely unaware that it impedes learning. *Id.* at 182–83.

<sup>155</sup> See Bohl, *supra* note 147, at 781; George, *supra* note 147, at 168.

<sup>156</sup> See Johnson, *supra* note 18, at 55.

<sup>157</sup> See *id.* at 55; Wegner, *supra* note 108, at 989.

<sup>158</sup> See Johnson, *supra* note 18, at 55; Wegner, *supra* note 108, at 990; George, *supra* note 147, at 168.

<sup>159</sup> See Johnson, *supra* note 18, at 47, 56.

<sup>160</sup> See George, *supra* note 147, at 184–86; Johnson, *supra* note 18, at 56. Differences in learning styles can have significant effects on a student’s success in a particular educational environment. See DeGroff, *supra* note 146, at 259. Cognitive psychologists suggest that multi-modal teaching increases learning for all students, regardless of learning style, because it does not overtax any learning channel (e.g., verbal, aural, oral). See George, *supra* note

school pedagogy has predominantly targeted verbal learners, although most law students are visual learners.<sup>161</sup> Because Millennials are not likely to accept faculty members as the “sage on the stage,” faculty members need to create engaging classes that allow students to play a more active role in learning.<sup>162</sup> Faculty members need to provide students with opportunities to

---

147, at 186. Multimodal teaching can also increase the opportunity to reach students with disabilities by providing alternative gateways to information. See Johnson, *supra* note 18, at 59. Some studies have suggested that almost 10% of first-year college students have physical or learning disabilities. *Id.* Regarding the various learning styles, (1) verbal involves learning through written text; (2) visual involves learning through pictures, diagrams, and models; (3) oral involves learning through talking out ideas; (4) aural involves learning through listening; (5) tactile involves learning through touching; and (6) kinesthetic involves learning through moving and doing. George, *supra* note 147, at 186.

<sup>161</sup> See Johnson, *supra* note 18, at 54; Murray, *supra* note 147, at 197. See also Nancy P. Johnson, *Should You Use a Textbook to Teach Legal Research?*, 103 LAW LIB. J. 415, 425–26 (2011) (noting that 65% of the population generally are visual learners). But see Ben Ambridge, *10 Myths About Psychology, Debunked*, TED (Nov. 2014), 4:17–5:10, [http://www.ted.com/talks/ben\\_ambridge\\_10\\_myths\\_about\\_psychology\\_debunked?language=en](http://www.ted.com/talks/ben_ambridge_10_myths_about_psychology_debunked?language=en) (arguing that learning styles are made up and not supported by scientific evidence and that it is more important to match the material to be learned to an appropriate format—visual, verbal, aural—for the material).

<sup>162</sup> See Bohl, *supra* note 147, at 791, 797 (discussing the importance of active learning); *Workshop*, *supra* note 13, at 296–97 (remarks of Steve Friedland). Professor Joan Catherine Bohl counsels,

Law professors teaching past generations were purveyors of information, revered for the information they could impart. Information, knowledge, and wisdom all seemed inextricably connected. Access to technology severed this connection for the Gen X Y law student. . . . The successful law teacher must transcend the old role of providing information and become a guru.

Bohl, *supra* note 147, at 791. Similarly, Professor Rogelio Lasso advises, “[B]arriers to learning have more to do with whether the methodology is teacher or student centered. . . . Teacher-centered pedagogy impedes success in the classroom, the principal flaw being that it focuses on how teachers teach without taking into account how students learn.” Lasso, *supra* note 4, at 17–18.

work collaboratively on projects,<sup>163</sup> and they need to provide students with more feedback and a more formative assessment.<sup>164</sup>

Although today's law students are members of Generations X and Y, they are also adults; thus, it is helpful to consider adult learning theory in framing pedagogical reforms for legal education. Fortunately, students in Generations X and Y share many characteristics with adult learners generally,<sup>165</sup> so many of the reforms that will benefit adult learners are reforms that were identified above as benefitting today's students.

According to Malcolm Knowles, a pioneer in adult learning theory, adult learners share the following characteristics:

- (1) [T]hey are autonomous and self-directed;
- (2) they need to connect the material they are learning to their life experiences and knowledge;
- (3) they need to know the goals of educational programs and how those goals will help them achieve their own goals; [and]
- (4) they need to know how the material and skills they are learning will be relevant and useful to them in their daily lives.<sup>166</sup>

In light of those characteristics, adult learners are collaborative and active learners, and they prefer continual feedback.<sup>167</sup>

---

<sup>163</sup> See Bohl, *supra* note 147, at 797; Newton, *supra* note 4, at 89 (noting that attorneys are frequently required to collaborate in practice); Rhee, *supra* note 4, at 337; *Workshop*, *supra* note 13, at 295–96 (remarks of David Vladeck) (discussing the value of collaboration in preparing students for the cooperative, as opposed to adversarial, nature of practice).

<sup>164</sup> See George, *supra* note 147, at 184; Bohl, *supra* note 147, at 798; Newton, *supra* note 4, at 104. Professor George notes that the assessment instruments need not be burdensome and observes,

Some easily incorporated assessments include: group feedback on practice exams, comments on drafts of papers, computer feedback, audience response systems, conferences with students, posting of quizzes or papers on a class website, podcasts discussing a problem or issue from class or going over a sample answer, one minute papers, student surveys and many, many more.

George, *supra* note 147, at 189.

<sup>165</sup> Bohl, *supra* note 147, at 783.

<sup>166</sup> Johnson, *supra* note 18, at 56. See also Timothy W. Floyd et al., *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 OHIO N.U. L. REV. 257, 264–65 (2011); Bohl, *supra* note 147, at 783–86 (listing six characteristics of adult learners).

<sup>167</sup> See Bohl, *supra* note 147, at 783–86. According to Professor Bohl, adult learners must be “actively engaged with new material through discussion, problem solving, or

Consequently, like Millennials, adult learners will benefit if faculty members use materials designed for multimodal learning and create engaging classes that provide opportunities for active learning, collaboration, and significant feedback.<sup>168</sup> As noted in the preceding section, many faculty members would incorporate these techniques in their teaching if they did not have to design materials from scratch.<sup>169</sup> However, the traditional Langdellian casebook provides very few resources to ease the adoption of these pedagogical improvements.<sup>170</sup>

#### IV. EVOLUTION OF THE CASEBOOK

Pedagogical reforms, motivated by the demands of critics and the necessity to change as student demographics do, are coming slowly,<sup>171</sup> but they could be implemented much more quickly if casebooks evolved to ease the transition. The casebook determines much of what faculty members teach and how they teach, and, at the turn of this century, almost 90% of faculty members continued to rely on casebooks as their primary course materials.<sup>172</sup> The casebook is still “the written centerpiece of legal education.”<sup>173</sup> Just as the Langdellian casebook ushered in an era of case method and Socratic dialogue,<sup>174</sup> a new generation of course books could provide the impetus for another major pedagogical shift.

The first law schools in the United States relied on lectures as the primary method of instruction for almost a century.<sup>175</sup> Faculty used British treatises—primarily Blackstone’s *Commentaries* and Coke’s *Institutes*—as the primary course materials on which to base their lectures.<sup>176</sup> Over time, faculty also adopted treatises authored by American legal scholars, such as Joseph Story and James Kent, as the bases for their lectures.<sup>177</sup> To some

---

writing.” *Id.* at 784. In addition, she notes that they prefer “frequent and varied opportunities for evaluation.” *Id.* at 785. Like Millennials, adult learners prefer collegial professors rather than authoritarian professors. *Id.* at 783.

<sup>168</sup> See Bohl, *supra* note 147, at 784–85.

<sup>169</sup> See *supra* Part II.A.

<sup>170</sup> See *supra* Part II.A.

<sup>171</sup> See Sheppard, *supra* note 34, at 623.

<sup>172</sup> See *id.*

<sup>173</sup> Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10, 10 (2007).

<sup>174</sup> See Johnson, *supra* note 18, at 47.

<sup>175</sup> See *supra* notes 34–44 and accompanying text.

<sup>176</sup> Sheppard, *supra* note 34, at 553, 556; Lind, *supra* note 38, at 96.

<sup>177</sup> See Sheppard, *supra* note 34, at 562, 574–75.

extent, students studied law from British case reporters as well as treatises, but the reporters were never more than a secondary source.<sup>178</sup>

This changed in 1870 when Dean Langdell adopted the case method and Socratic dialogue in his Contracts class.<sup>179</sup> Because Langdell believed that knowledge of the law could be best derived from reading cases, the treatises of Blackstone, Coke, Story and others would not suffice as course materials.<sup>180</sup> Langdell's new pedagogy demanded new course materials, and thus the modern casebook was born.<sup>181</sup>

The first casebook, *A Selection of Cases on the Law of Contracts*, published in 1871 by Little, Brown & Co., was a thousand-page collection of cases, mostly unedited, with a topical index and no commentary other than a three-page preface.<sup>182</sup> In the second edition of the book, Langdell added at the end a short summary of the principles covered by the cases in the book.<sup>183</sup> Langdell published two more casebooks shortly after,<sup>184</sup> and a few of his Harvard colleagues, most notably James Barr Ames, followed suit.<sup>185</sup> Ames was an early adopter of the case method and, whereas Langdell chose cases for his casebooks primarily to demonstrate the evolution of legal principles, Ames included cases in his casebooks that had interesting facts to stimulate student discussion.<sup>186</sup>

For the first few decades, schools were slow to adopt the case method, and the market for casebooks was weak.<sup>187</sup> Although publishers could market treatises and commentaries to lawyers as well as law students, lawyers had little need for casebooks after law school.<sup>188</sup> Consequently, for

---

<sup>178</sup> *Id.* at 553, 595.

<sup>179</sup> See *supra* notes 45–52 and accompanying text.

<sup>180</sup> See Sheppard, *supra* note 34, at 597.

<sup>181</sup> See *id.* at 599.

<sup>182</sup> See *id.* at 599, 601; Lind, *supra* note 38, at 99; Neumann, *supra* note 45, at 169. The casebook included over 300 cases. Lind, *supra* note 38, at 99.

<sup>183</sup> Sheppard, *supra* note 34, at 602.

<sup>184</sup> *Cases on Sales* was published in 1872, followed by *Cases on Equity*. *Id.*

<sup>185</sup> See *id.* at 604–05. Ames authored casebooks on Torts, Commercial Law, Partnership, and Trusts. *Id.* at 640 n.330.

<sup>186</sup> *Id.* at 604–05.

<sup>187</sup> See *id.* at 612. In 1893, only Columbia and Harvard were exclusively using the case method. *Id.* Twelve other schools used the case method in some classes, while thirty-six schools did not use it at all. *Id.*

<sup>188</sup> See Lind, *supra* note 38, at 97–98; Bodie, *supra* note 4, at 66. Although there were approximately 90,000 lawyers in 1890, there were only about 5,000 law students. Lind, *supra* note 38, at 98.

several decades, most faculty members that used the case method developed their own casebooks and self-published them, or they had them published by local publishers.<sup>189</sup> Prior to 1908, 171 casebooks were produced, and the faculty at Harvard had authored more than one third of them.<sup>190</sup> Most of the early casebooks resembled Langdell's, with unedited cases and little commentary, and they were very expensive.<sup>191</sup>

However, in 1908, West Publishing introduced its *American Casebook Series* with the goal of creating a standardized casebook that would appeal to a national market.<sup>192</sup> The books included edited opinions, annotations, questions, and a general survey of the law, which could be adopted by a broad range of schools using the case method.<sup>193</sup> West launched the series with five titles but promised to publish casebooks covering all thirty-one of the areas of law covered in the traditional law school curriculum at the time.<sup>194</sup> The preface to each book noted it was part of a larger series, which could address the entire curriculum, and urged schools to adopt the case method of instruction.<sup>195</sup>

As casebooks became widely accessible, more schools adopted the case method; by 1914, the U.S. Bureau of Education reported that the case method was "the principle, if not exclusive, method of teaching in nearly all of the stronger law schools in the country."<sup>196</sup> Between 1915 and 1941, almost one hundred casebooks were published each year.<sup>197</sup> Thus, in one

---

<sup>189</sup> See Lind, *supra* note 38, at 98; Sheppard, *supra* note 34, at 615; Bodie, *supra* note 173, at 12. Ames had to self-publish his torts book. Lind, *supra* note 38, at 99. Even Langdell's books were published by a local publisher, as Little, Brown & Co. was based in Boston. See Neumann, *supra* note 45, at 169. Although West published twenty-five casebooks between 1895 and 1899, it published most of those books for the University of Michigan and the Detroit College of Law. Lind, *supra* note 38, at 106.

<sup>190</sup> Lind, *supra* note 38, at 102.

<sup>191</sup> See Lind, *supra* note 38, at 99. Professor Ames's Torts book cost \$10 in 1893, and tuition for a term at the University of Iowa law school cost \$20 at about the same time. *Id.*

<sup>192</sup> See Lind, *supra* note 38, at 107; Sheppard, *supra* note 34, at 615; Bodie, *supra* note 173, at 12; Bodie, *supra* note 4, at 66.

<sup>193</sup> See Lind, *supra* note 38, at 108; Sheppard, *supra* note 34, at 616; Bodie, *supra* note 4, at 66.

<sup>194</sup> Lind, *supra* note 38, at 108.

<sup>195</sup> See *id.* at 108, 110.

<sup>196</sup> Lind, *supra* note 38, at 110 (internal citation omitted).

<sup>197</sup> Lind, *supra* note 38, at 110; Bodie, *supra* note 173, at 12.

generation, the case method and casebooks supplanted lectures and treatises as the predominant form of teaching in law schools.<sup>198</sup>

A. *Evolutions in Content*

The casebook has continued to evolve over time, frequently responding to, or prompting, pedagogical changes in legal education or general trends in the law.<sup>199</sup> Although the early casebooks included unedited cases and little else, over time, authors began to heavily edit cases and include commentary, questions, and secondary material, including excerpts of law review articles.<sup>200</sup> When legal realism took hold in law schools, many casebooks expanded the amount and variety of secondary source materials included, often incorporating materials from other disciplines.<sup>201</sup> As noted above, criminal law casebooks were fundamentally transformed during that era.<sup>202</sup> With the “statutorification” of law, casebooks incorporated more statutory and regulatory materials.<sup>203</sup>

When Professor Landman introduced his “problem method” in 1930, faculty members were slow to adopt it because few books or resources included problems.<sup>204</sup> However, over time, casebooks incorporated more problems, enabling more faculty members to take a problem-based approach into their teaching.<sup>205</sup> Some books added a few short problems or hypotheticals, while others were wholly organized around problems.<sup>206</sup> The problem-based approach also grew in popularity with the statutorification of law.<sup>207</sup>

---

<sup>198</sup> See Sheppard, *supra* note 34, at 608, 614. In a 1995 survey of faculty, only 3% of faculty responding indicated that they used treatises as primary course materials. *Id.* at 592–93.

<sup>199</sup> See Lind, *supra* note 38, at 95.

<sup>200</sup> See *supra* note 193 and accompanying text; Bodie, *supra* note 173, at 12–13.

<sup>201</sup> See Johnson, *supra* note 18, at 77; Alton, *supra* note 19, at 356.

<sup>202</sup> See *supra* note 72 and accompanying text.

<sup>203</sup> See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (2009). Judge Guido Calabresi coined the term “statutorification” to refer to the transformation of American law, beginning early in the twentieth century, from a legal system dominated by common law to a system dominated by statutes. *See id.*

<sup>204</sup> ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 215 (1983).

<sup>205</sup> See Johnson, *supra* note 18, at 77–78; *Workshop*, *supra* note 13, at 298 (remarks of Michael Schwartz); Sheppard, *supra* note 34, at 628.

<sup>206</sup> See Sheppard, *supra* note 34, at 628.

<sup>207</sup> See *supra* notes 74–75 and accompanying text.

Although publishers incorporated secondary materials and problems into the traditional Langdellian casebook to respond to some pedagogical shifts, they created entirely new and independent series of books to address other pedagogical shifts.<sup>208</sup> For instance, recognizing that many faculty members were seeking materials that used a narrative approach to expose the broader context in which cases arise and to illustrate the impact of the law and lawyers on people,<sup>209</sup> Foundation Press launched a *Law Stories Series* in 2002.<sup>210</sup> There are now thirty-seven titles in that series.<sup>211</sup> Similarly, shortly after the publication of the *Carnegie* and *CLEA* reports, Carolina Academic Press launched a *Context and Practice Series* of casebooks that are practice-oriented, include numerous problems designed to help students build practice skills, and provide materials that can be used to help professors conduct multiple and varied assessments.<sup>212</sup> West Academic Publishing and LexisNexis also publish separate series of books that include materials designed to build practical skills.<sup>213</sup> Although the number and type of secondary course materials marketed by publishers has grown significantly in the last decade, publishers have marketed materials

---

<sup>208</sup> See Bodie, *supra* note 4, at 66.

<sup>209</sup> See *supra* notes 79–82; Sheppard, *supra* note 34, at 633.

<sup>210</sup> See Paul L. Caron, *Back to the Future: Teaching Law Through Stories*, 71 U. CIN. L. REV. 405, 405 (2003).

<sup>211</sup> See WESTACADEMIC, <http://www.westacademic.com/Professors/ProductSearchResults.aspx?tab=1&series=18&searchtypeasstring=ADVANCED-SEARCH> (last visited Mar. 14, 2016). Aspen Publishers has a similar *Cases in Context* series, although it currently only publishes two titles in the series. See WOLTERS KLUWER, *Cases in Context*, <http://www.wklegaledu.com/series/cases-in-context> (last visited Mar. 14, 2016).

<sup>212</sup> See Michael H. Schwartz, *Improving Legal Education by Improving Casebooks: Fourteen Things Casebooks Can Do to Produce Better and More Learning*, 3 ELON L. REV. 27, 33–34 (2011). Professor Michael Schwartz, the creator of the line of casebooks, describes them as “learning-centered casebooks written by experts in law teaching. . . . [C]asebooks that engage students in all three Carnegie apprenticeships. . . .” *Id.* at 33.

<sup>213</sup> LexisNexis markets a *Skills and Values* series that currently includes sixteen titles. See LEXISNEXIS, <http://www.lexisnexis.com/store/catalog/catalog.jsp?pageName=catalogProducts&catId=cat80002&id=cat80154> (last visited Mar. 14, 2016). WestAcademic markets two skills-based series of books: (1) a *Developing Professional Skills* series, which currently includes seven titles and (2) a *Bridge to Practice Series*, which currently includes fourteen titles. WESTACADEMIC, <http://www.westacademic.com/Professors/ProductSearchResults.aspx?tab=1&series=8&searchtypeasstring=ADVANCED-SEARCH> (last visited Mar. 14, 2016); WESTACADEMIC, <http://www.westacademic.com/Professors/ProductSearchResults.aspx?tab=1&series=4&searchtypeasstring=ADVANCED-SEARCH> (last visited Mar. 14, 2016).



to supplement the traditional Langdellian casebook for several decades.<sup>214</sup> More than thirty years ago, legal publishers began marketing anthologies and theoretical readers that faculty members could incorporate into their courses.<sup>215</sup>

The skills books and stories books are valuable additions to the teaching arsenal of law faculty. However, most of the books are designed to supplement other course materials,<sup>216</sup> creating two problems. First, by assigning multiple books for a course, faculty members impose additional costs on students.<sup>217</sup> More importantly, though, if the materials required to teach skills and professionalism are not integrated into the primary materials for a course, faculty members and students may tend to view development of expertise in those areas as secondary to a primary goal of mastering the substantive law of the course. Including the materials in the primary casebook for a course sends the message that a student must master those skills as part of mastering the course's subject matter. In addition, if the materials required to teach practical skills and professionalism are integrated into a primary casebook for a course, more faculty members will likely incorporate development of those skills into their pedagogy than if they needed to find separate books and materials to supplement the primary book that they are using in a course.

### *B. Technological Evolutions*

As the content of the traditional Langdellian casebook has evolved, so has the method of creating and delivering the book. In 1992, Ron Staudt, a professor at Chicago-Kent College of Law, created the first electronic casebook for law schools, covering computer law.<sup>218</sup> Although there has been a significant increase in the use of e-books at universities<sup>219</sup> in general, law faculty members have been slow to adopt them in the two decades since Staudt unveiled his book. Although Staudt designed his book to take

---

<sup>214</sup> See Sheppard, *supra* note 34, at 630–31; Caron, *supra* note 210, at 405.

<sup>215</sup> See Sheppard, *supra* note 34, at 630–31; Caron, *supra* note 210, at 405.

<sup>216</sup> See Sheppard, *supra* note 34, at 630–31.

<sup>217</sup> For a discussion of the costs of books, see *infra* notes 357–360 and accompanying text.

<sup>218</sup> See Sheppard, *supra* note 34, at 637. Professor Staudt used Folioworks software to create his book. *Id.*

<sup>219</sup> Seventy percent of undergraduate students responding to a 2012 survey by EDUCAUSE indicated that they used an e-book in one of their courses. Stephen E. Henderson & Joseph Thai, *The Future of Law School: Crowdsourced Course books*, 51 ALBERTA L. REV. 907, 909 (2014).

advantage of the technology available, many of the early e-books that were created for law schools were simply digitized versions of traditional print casebooks that incorporated a few hyperlinks.<sup>220</sup> Much more can be done with the medium and should be done to cater to the learning styles and preferences of today's students and their facility with technology.<sup>221</sup> To the extent that e-books have made some inroads in legal education, it has been in areas outside of the traditional Langdellian casebook. In light of the fact that statutes and regulatory materials are not generally protected by copyright and can be easily downloaded and formatted into a book, many faculty members have adopted digital statutory supplements to replace print versions in code-driven courses.<sup>222</sup> E-books have also become popular in legal research courses, because of their heavy focus in those courses on internet and computer-based research.<sup>223</sup>

Just as the major law book publishers were slow to embrace the Langdellian casebook before the market developed,<sup>224</sup> they have been slow to take advantage of new technologies for creating and delivering casebooks.<sup>225</sup> Further, to the extent publishers have marketed materials in e-formats, they have frequently done so in ways to encourage students to buy and use other products that they market.<sup>226</sup> Of the major publishers, LexisNexis has done the least to take advantage of technology, as it has simply digitized a few of its traditional print casebooks and offered them for sale in an e-reader format (epub) that allows students to read, search, highlight, copy, bookmark, and annotate the material in the books.<sup>227</sup>

---

<sup>220</sup> See Johnson, *supra* note 18, at 78; Bodie, *supra* note 173, at 11.

<sup>221</sup> See Johnson, *supra* note 18, at 78; *Infra* Part V.B.

<sup>222</sup> See C. Steven Bradford & Mark Hautzinger, *Digital Statutory Supplements for Legal Education: A Cheaper, Better Way*, 59 J. LEGAL EDUC. 515, 542 (2010). CALI provides several digital statutory supplements to students for free through its eLangdell Press. See *The eLangdell Bookstore*, CALI, <http://www.cali.org/the-elangdell-bookstore> (last visited Mar. 14, 2016).

<sup>223</sup> See Johnson, *supra* note 161, at 417–18 (“E-textbooks match the way that students study and access their media, so an e-textbook may provide them with a better experience.”).

<sup>224</sup> See Johnson, *supra* note 18, at 77; Bodie, *supra* note 4, at 65.

<sup>225</sup> See Johnson, *supra* note 161, at 420.

<sup>226</sup> See, e.g., *Law School eBooks / eTextbooks—FAQs*, LEXISNEXIS, <http://www.lexisnexis.com/ebooks/documents/LawSchooleBookQA.pdf> (last visited Mar. 14, 2016) [hereinafter *eBooks / eTextbooks FAQs*].

<sup>227</sup> See Henderson & Thai, *supra* note 219, at 910; *eBooks / eTextbooks FAQs*, *supra* note 226. The hyperlinks in the books frequently link to the proprietary LexisNexis database, and

Although West Academic offers digital versions of traditional print casebooks with similar features as LexisNexis,<sup>228</sup> it also markets an *Interactive Casebook Series* of digital books that tries to take advantage of technology by including more graphics, diagrams, text boxes, and hyperlinks.<sup>229</sup> West also recently began bundling several of its products in a “CasebookPlus” format.<sup>230</sup> For casebooks for which this is available, students can purchase digital access to a print casebook, as well as access a “learning library” that includes self-assessment quizzes and links to other West Academic materials, such as hornbooks and study guides related to the casebook topic.<sup>231</sup> The “CasebookPlus” is similar to the “Connected Casebook” program that Aspen Publishing recently introduced.<sup>232</sup> Through the Connected Casebook program, which was initially available for eleven casebooks, Aspen provides students with a print version of the casebook; a digital version of the casebook with the ability to search, highlight, copy, annotate, and bookmark material; and access to a “study center” that includes quizzes and links to several other study aids marketed by Aspen.<sup>233</sup> In addition, unlike the other products marketed by LexisNexis and West, Aspen’s “Connected Casebook” program allows faculty members to make changes to the digital book and to incorporate their own materials, links, and exercises into the digital book.<sup>234</sup>

Although the traditional law book publishers have been focusing primarily on using technology to repackage and market their existing

---

the publisher limits the number of pages that students can print from the books. *See eBooks / eTextbooks FAQs*, *supra* note 226.

<sup>228</sup> *See Online Book FAQs*, WESTACADEMIC, <http://store.westacademic.com/Static/onlinebooksfaq> (last visited Mar. 14, 2016). West also limits the number of pages that students can print from these books, and students only have access to the book for twelve months. *Id.*

<sup>229</sup> *See Henderson & Thai*, *supra* note 219, at 910; *Interactive Casebook Series*, WESTACADEMIC, <http://www.interactivecasebook.com> (last visited Mar. 14, 2016). Many of the hyperlinks direct readers to the proprietary Westlaw database. *See Interactive Casebook Series*, WESTACADEMIC, <http://www.interactivecasebook.com> (last visited Mar. 14, 2016).

<sup>230</sup> *See Casebook Plus FAQs*, WESTACADEMIC, [https://system.na1.netsuite.com/core/media/media.nl?id=610229&c=3668083&h=703f49a196c995617292&\\_xt=.pdf](https://system.na1.netsuite.com/core/media/media.nl?id=610229&c=3668083&h=703f49a196c995617292&_xt=.pdf) (last visited Mar. 14, 2015).

<sup>231</sup> *See id.*

<sup>232</sup> *Compare id.*, with *Casebook Connect*, WOLTERS KLUWER, <https://www.casebookconnect.com/learnmore> (last visited Mar. 15, 2016).

<sup>233</sup> *See Casebook Connect*, *supra* note 232.

<sup>234</sup> *See Henderson & Thai*, *supra* note 219, at 911.

products, CALI is focusing on re-visioning the way casebooks are designed and distributed. Through its eLangdell Press, CALI has recruited faculty members to create course books that are designed to take advantage of new technologies, as opposed to digitizing versions of existing print books.<sup>235</sup> CALI distributes the eLangdell series at no cost to law schools that are members of the consortium, and the books are distributed in a variety of e-reader formats (e.g., epub, mobi, pdf, and Word).<sup>236</sup> The books are distributed through a Creative Commons license, so that faculty members who adopt them can modify them in any way appropriate for use in their classes.<sup>237</sup>

Although casebooks generally have not yet been designed to take advantage of the digital medium, students benefit from the adoption of digital books, even when the books are simply digitized versions of traditional print books, thus making it much easier than with a print book for students to search for material, highlight and annotate material, and copy it into outlines.<sup>238</sup> Some academics argue that digital books should also facilitate “social reading” of material, which is not yet possible for any of the books published by West, Lexis, Aspen, or CALI.<sup>239</sup> Professors Stephen Henderson and Joseph Thai argue that course books should be linked to a community where readers can post comments and ratings of material in the book, read and respond to the comments and ratings posted by other readers, and sort the material to discover sections that were the most popular or generated the most commentary.<sup>240</sup> They argue that readers could also compare the nature of the comments over time or geographic area.<sup>241</sup> Faculty could improve the coursebook based on that feedback from students and other readers, including other faculty members.<sup>242</sup> Professor David Thomson agrees that new casebooks should include a platform for social reading, as today’s students have been educated and encouraged to learn in a Web 2.0 world, where they assume that they can create, contribute, and interact with what they are learning.<sup>243</sup> With widespread social reading, there are also opportunities for faculty members to more closely monitor and

---

<sup>235</sup> Johnson, *supra* note 18, at 81.

<sup>236</sup> *See id.*

<sup>237</sup> *Id.*

<sup>238</sup> *See supra* notes 227–234 and accompanying text.

<sup>239</sup> *See* Henderson & Thai, *supra* note 219, at 909–11.

<sup>240</sup> *Id.* at 916–17.

<sup>241</sup> *Id.* at 917.

<sup>242</sup> *Id.* at 917–18, 922.

<sup>243</sup> *See* THOMSON, *supra* note 14, at 13, 88–89.

evaluate the extent to which individual students are understanding and engaging with the course material.<sup>244</sup> Although there are clear, pedagogical benefits to that increased monitoring, Professors Henderson and Thai, among others, raise concerns about student privacy and argue that social reading platforms should be designed in a way that protects student privacy.<sup>245</sup>

Digitizing print casebooks provides other benefits to faculty, even if the books are simply digitized versions of traditional print casebooks, as long as faculty can modify the casebooks for distribution to their students. As Professor Matthew Bodie notes, the traditional print casebook promotes conformity in teaching, as it is logistically difficult for faculty to modify the book without imposing additional mental and financial costs on students.<sup>246</sup> With a print casebook, whenever a faculty member wants to deviate from, update, or reorder the materials in the book, the faculty member must provide the students with supplementary materials and direct the students to ignore or replace other materials in the book.<sup>247</sup> When coupled with a syllabus that directs students to proceed from Chapter 1 to the second half of Chapter 4 to the first quarter of Chapter 3, there is a good chance that students periodically misplace material or prepare the wrong material for class. With a digital casebook, on the other hand, the faculty member can remove, add, and reorder material and provide students a seamless coursebook that covers the material in a preferred order, using their preferred resources.<sup>248</sup>

### C. *Evolution in Authoring*

Although the content of casebooks and the mode of delivering casebooks have evolved over time, so has the manner in which they are authored. Dean Langdell's casebook was a solitary endeavor, as were many of the early Langdellian casebooks.<sup>249</sup> Today, however, most casebooks have multiple authors.<sup>250</sup> Although there are pedagogical and social reasons

---

<sup>244</sup> See *Workshop*, *supra* note 13, at 314–15 (remarks of Greg Silverman).

<sup>245</sup> See Henderson & Thai, *supra* note 219, at 919–20. Professors Henderson and Thai note that complete anonymity of commenters could yield unconstructive online discussions and prefer a system that allows the instructor to choose an appropriate level of anonymity for commenters. *Id.* at 920.

<sup>246</sup> Bodie, *supra* note 173, at 10.

<sup>247</sup> See *id.* at 16.

<sup>248</sup> See *id.*

<sup>249</sup> See *supra* notes 179–91 and accompanying text.

<sup>250</sup> See Moskovitz, *supra* note 16, at 1036.

for collaboration, market forces have contributed to the proliferation of co-authored casebooks, as publishers prefer quick and immediate adoptions of books, which are more likely when a book has multiple authors.<sup>251</sup>

Although it is not unusual for three or more faculty members to collaborate on a casebook, some academics envision a future where casebooks are authored by entire communities of faculty members, perhaps through an open-source format similar to Wikipedia.<sup>252</sup> There is some precedent for broad and dispersed collaboration on casebook authoring in the pre-internet era. At a 1946 meeting of the Association of American Law Schools, Professor W. Willard Wirtz convinced faculty members teaching labor and employment law that new teaching materials were needed and that they should be developed collaboratively.<sup>253</sup> Because of that conference, faculty members teaching in those areas created the Labor Law Group, which convened conferences to create those teaching materials.<sup>254</sup> In 1947, forty-five academics and practitioners met at the first conference of the Labor Law Group and began a six-year process of developing, using, and editing a labor law casebook.<sup>255</sup> Rather than assigning responsibility for various topics to individual members and reviewing those collectively, the group developed all of the materials collectively.<sup>256</sup> In 1953, Little, Brown & Co. published the book *Labor Relations and the Law*, which was ultimately authored by thirty-one professors and practitioners.<sup>257</sup> Authors did not receive any royalties from the book, as the group placed the royalties into a trust to fund the creation of future casebooks.<sup>258</sup> By 2013, more than eighty academics and practitioners had contributed to the production of nine books by the group.<sup>259</sup>

The influence of the Labor Law Group has waned over the years, such that the books do not dominate the law school labor law casebook market.<sup>260</sup>

---

<sup>251</sup> *Id.*

<sup>252</sup> See Johnson, *supra* note 18, at 81; Bodie, *supra* note 173, at 11; Bodie, *supra* note 4, at 63–64.

<sup>253</sup> See Bodie, *supra* note 4, at 61–64; Bodie, *supra* note 173, at 26.

<sup>254</sup> See Bodie, *supra* note 4, at 61–62.

<sup>255</sup> *Id.* at 67–68.

<sup>256</sup> *Id.* at 70. Although the group experimented with assigning task forces to develop modules of course materials that could be combined to create a single casebook, they abandoned that approach in light of logistical and commercial roadblocks. See *id.* at 71–72.

<sup>257</sup> *Id.* at 68.

<sup>258</sup> *Id.* at 68–69.

<sup>259</sup> *Id.* at 62.

<sup>260</sup> *Id.*

Nevertheless, Professor Matthew Bodie suggests the group could have positive long-term effects for the collaborative development of casebooks.<sup>261</sup> First, he praises the collaboration of academics with practitioners in the group, which could be vital in preparing materials that help students develop practical skills.<sup>262</sup> He also notes that technological advances may reduce some of the practical roadblocks to sharing documents and meeting across time zones, and he suggests that the Labor Law Group could be a model for collaborative development of casebooks by academics and practitioners in other specialized areas, such as environmental law or intellectual property law.<sup>263</sup>

Although Professor Bodie praises the collaborative process utilized by the Labor Law Group, he has a much grander vision for a fundamental transformation in the way casebooks are authored.<sup>264</sup> It is a vision advanced independently by Professors Stephen Henderson and Joseph Thai, as well.<sup>265</sup> In contrast to the close-knit cooperation of the Labor Law Group, Bodie, Henderson, and Thai envision “crowdsourced” and “open-source” law school course books.<sup>266</sup> In their models, dozens or even hundreds of individual faculty members prepare sections of a book (perhaps as small as cases, statutes, regulations, articles, commentary, notes, problems, or hypotheticals) and post them online in a database or other platform where faculty members can combine them and modify them as they deem appropriate into a book that is tailored to their pedagogical and philosophical approach.<sup>267</sup> Books developed from the materials could also be posted to the database or platform.<sup>268</sup> Bodie argues that the open-source movement in technology has led to dramatic innovations<sup>269</sup> and that the “commons based

---

<sup>261</sup> See *id.* at 64.

<sup>262</sup> See *id.* at 79–80.

<sup>263</sup> See *id.* at 62–64.

<sup>264</sup> See Bodie, *supra* note 173, at 11.

<sup>265</sup> See Henderson & Thai, *supra* note 219, at 917–18, 922 (describing “crowdsourced” casebooks); Bodie, *supra* note 173, at 11 (describing “open source” casebooks).

<sup>266</sup> See Henderson & Thai, *supra* note 219, at 917–18; Bodie, *supra* note 173, at 11.

<sup>267</sup> See Bodie, *supra* note 173, at 11, 21–23.

<sup>268</sup> *Id.* at 22.

<sup>269</sup> With open-source software, developers generally distribute the software for free and allow users to access the underlying source code for the software so that users can fully understand how the software works and can make changes and improvements to the program or adapt it for other uses. *Id.* at 20. The license for the software requires that persons who use and modify the software cannot charge users for the derivative products. *Id.* The Linux

peer production” used in projects like Wikipedia could be a model for the development of open-source casebooks.<sup>270</sup> All of the materials posted to the database or platform, including casebooks created from the materials, would be distributed through a Creative Commons license.<sup>271</sup>

To aid faculty members in assembling a book that meets their needs, the database or online platform would be linked to some social media tool (e.g., a blog, discussion list, wiki) that facilitates commenting on and ranking materials included in the database and posting additional materials to the database.<sup>272</sup> CALI, through its Legal Education Commons,<sup>273</sup> and the Berkman Center for Internet and Society, through its H2O Project,<sup>274</sup> have taken steps to facilitate the creation of such “crowdsourced” casebooks by providing platforms to upload cases, course materials, and other building blocks for casebooks.<sup>275</sup> CALI is also advancing the vision by distributing all of its eLangdell casebooks through a Creative Commons license,<sup>276</sup> which allows users to modify and redistribute the materials as they deem fit as long as the derivative works attribute the original author and are distributed through a Creative Commons license.<sup>277</sup>

Professor Bodie identifies several benefits to the creation of open-source course books.<sup>278</sup> First, he notes that faculty members are often dissatisfied with the casebook they use, but are reluctant to create their own materials to supplement the book because it is time consuming and imposes additional costs on students.<sup>279</sup> However, he argues that faculty members would

---

operating system, which runs on about 30% of the servers connected to the World Wide Web, is perhaps the best-known open-source program. *Id.* at 19–20.

<sup>270</sup> *See id.* at 20–21.

<sup>271</sup> *See id.* at 29.

<sup>272</sup> *See* Henderson & Thai, *supra* note 219, at 918; Bodie, *supra* note 173, at 21–22.

<sup>273</sup> *See* Johnson, *supra* note 18, at 81. CALI has already uploaded 700,000 cases from PublicResource.org to the Commons, and all of the CALI lessons are accessible from the CALI website. *Id.*

<sup>274</sup> *See id.*

<sup>275</sup> Outside of the law school market, Rice University has launched the Connexions Project, which administers a database of casebooks and learning objects that can be combined into casebooks, all of which can be modified and repurposed by faculty. *See Workshop, supra* note 13, at 323 (remarks of Joel Thierstein).

<sup>276</sup> *See supra* notes 235–37 and accompanying text.

<sup>277</sup> *See About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses/> (last visited Mar. 16, 2016) [hereinafter CREATIVE COMMONS].

<sup>278</sup> *See generally* Bodie, *supra* note 173.

<sup>279</sup> *Id.* at 10–11, 14–15.



incorporate appropriate exercises and modules of casebooks into their teaching if they were readily available and inexpensive for students.<sup>280</sup> Additionally, he argues that faculty members would be willing to contribute modules to a coursebook because the cost of preparing a module is minimal compared to the cost of preparing an entire book.<sup>281</sup>

Logistically, Bodie acknowledges that development of an open-source casebook would require software to establish the database for the casebook, a server to store the database, and managers to administer the casebook project.<sup>282</sup> He suggests that managers would need to organize the materials in the database so that they could be easily accessed and used by faculty members; administer the social media platform that facilitates collaboration on the materials in the database; and potentially solicit certain types of contributions (e.g., exercises and edited cases) for the database.<sup>283</sup>

Bodie acknowledges that there could be impediments to implementation of open-source casebooks.<sup>284</sup> First, some important materials might not be able to be included in the database or distributed through a Creative Commons license because they are protected by copyright.<sup>285</sup> Second, faculty members might not have adequate incentives to develop and submit sufficient building blocks to the database to construct casebooks.<sup>286</sup> On the other hand, if too many faculty members provided too many building blocks for the database, the resources may overwhelm faculty members, and it may be difficult for them to review and choose the appropriate materials for a book.<sup>287</sup>

## V. THE COURSE SOURCE: THE NEXT GENERATION OF THE CASEBOOK

Over the past century and a half, the content of casebooks and the way in which they are created and delivered to students has slowly evolved.<sup>288</sup> Changes in educational pedagogies and in today's students—and calls for fundamental reform of legal education—necessitate a more fundamental transformation of casebooks.<sup>289</sup> Before outlining a model for a course source—the next generation of the casebook—it is helpful to briefly explore

---

<sup>280</sup> *See id.* at 15–16, 22–24.

<sup>281</sup> *Id.* at 22–24.

<sup>282</sup> *Id.* at 21–22.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 23.

<sup>285</sup> *See id.* at 29–31.

<sup>286</sup> *See id.* at 22–24.

<sup>287</sup> *Id.* at 26–28.

<sup>288</sup> *See supra* Part IV.

<sup>289</sup> *See supra* Parts II–III.

the value of the modern casebook. What functions do casebooks serve? If fundamental features or components of the Langdellian casebook exist to serve the pedagogical needs of faculty members and facilitate the implementation of necessary legal education reforms, they should be preserved in the next generation of casebooks.

A. *Value of the Modern Casebook*

Writing at the turn of this century, Professor Myron Moskowitz succinctly remarked that “casebook[s] . . . serve the needs of both students and professors. Professors need a casebook that adequately covers the key issues of the course, stimulates the students[,] . . . and furnishes the basis for class discussion. Students need a casebook that is readable and enjoyable.”<sup>290</sup>

For faculty members, a casebook often drives pedagogy and provides the overall structure and organization for the course.<sup>291</sup> This is especially true for new faculty members because law faculty generally receive very little training in teaching before stepping into the classroom for the first time.<sup>292</sup> Casebooks and the accompanying teachers’ manuals not only educate faculty about the substance of the law (including the history, context, policy, and interdisciplinary issues) but also about teaching methods for the course, and model syllabi, and answers to all of the notes and problems in the book.<sup>293</sup> Although this is beneficial to new faculty, it provides authors with an opportunity to evangelize their own jurisprudential and normative belief systems, and the structure of casebooks promotes conformity.<sup>294</sup> The next generation of casebooks will need to incorporate a

---

<sup>290</sup> See Moskowitz, *supra* note 16, at 1023.

<sup>291</sup> See *id.* at 1020, 1023; Janet Ainsworth, *Law in (Case)books, Law (School) in Action: The Case for Casebook Reviews*, 20 SEATTLE U. L. REV. 271, 271 (1997); Johnson, *supra* note 161, at 425–26; Moskowitz, *supra* note 16, at 1022–23.

<sup>292</sup> See Dunsford, *supra* note 54, at 821–22; Daniel B. Bogart, *A Casebook for Teaching Teachers: Jesse Dukeminier and James E. Krier*, Property, 22 SEATTLE U. L. REV. 921, 921 (1999). Professor Bogart suggests, “Given the absence of explicit training in teaching effectiveness, the single most important tool for teaching law professors is the casebook.” Bogart, *supra* note 292, at 923.

<sup>293</sup> See Moskowitz, *supra* note 16, at 1035; Bogart, *supra* note 292, at 921–31.

<sup>294</sup> See Ainsworth, *supra* note 291, at 274; *supra* notes 246–47 and accompanying text. Professor Karl Llewellyn astutely remarked that “much more important things have commonly been left out of the casebook by the [author] than are left in it for the instructor to leave out.” K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 95 (1981).

wider variety of resources to provide faculty with greater flexibility in their choice of teaching methods.

Several elements of the Langdellian casebook are valuable and should be retained in the next generation of casebooks. First, even if faculty members adopt teaching methods to supplement the case method and Socratic dialogue, law students will always need to learn how to read and analyze cases.<sup>295</sup> Thus, Professor Moskowitz argues the cases that faculty select to include in a casebook and the way in which the cases are edited can greatly influence not only the nature of the dialogue on the issues in the cases but also whether students engage with the material in the book.<sup>296</sup> For instance, some of the factors that Moskowitz considers in choosing cases for his books include<sup>297</sup>: (1) Are there landmark cases that must be included?; (2) Are there fundamental issues that need to be addressed in a case?; (3) Do the cases outline the history and reasoning behind rules?; (4) Do the cases involve interesting fact patterns?; (5) Are the opinions well written?; (6) Do the cases demonstrate the prevailing rule of law?; (7) How old and how long are the cases?; (8) What court issued the opinions?; and (9) Do the cases have dissenting or concurring opinions that provide counterpoints? Although the case selection process across casebooks has led to over-selection of opinions by some judges,<sup>298</sup> and although editing cases deprives students of the opportunity to discern the relevant from irrelevant,<sup>299</sup> case selection and editing provides some value to faculty members, as noted by

---

<sup>295</sup> See *supra* Part II.B; Teply & Whitten, *supra* note 56, at 99; Henderson & Thai, *supra* note 219, at 908.

<sup>296</sup> See Moskowitz, *supra* note 16, at 1025–31.

<sup>297</sup> See *id.* at 1026–29. Professors Gulati and Sanchez frame the issue a little more generally. They argue that casebook authors should choose cases that “serve[] as an effective tool to engage students, generate discussion, convey information about substantive doctrine, and teach students to think through legal problems.” Gulati & Sanchez, *supra* note 41, at 1148.

<sup>298</sup> See Gulati & Sanchez, *supra* note 41, at 1146. Professors Gulati and Sanchez argue that casebook editors choose cases that serve their research and writing purposes, and that the “superstar effect” in choosing cases “result[s] in one method of analysis being disproportionately represented in casebooks and . . . dominating the education of law students.” *Id.* They cite the prevalence of opinions by Judges Posner and Easterbrook, leading to a disproportionate focus on the theories of the “Chicago School of Law and Economics” in law school classrooms. *Id.* at 1146–47.

<sup>299</sup> See *supra* note 60 and accompanying text. Professor Moskowitz notes that he rarely edits the facts of opinions, other than procedural facts, because “it’s part of a lawyer’s job to determine which facts in a client’s story are relevant.” Moskowitz, *supra* note 16, at 1030.

Professor Moskowitz.<sup>300</sup> Consequently, the next generation of casebooks should continue to include a core set of edited cases.

There are other features of the traditional Langdellian casebook that should be retained in the next generation of casebooks. To the extent that modern casebooks include notes to explore issues in the cases or the law in greater depth, background materials and stories about cases, interdisciplinary materials, and other features should be retained in the next generation of casebooks.<sup>301</sup> Similarly, hypotheticals and problems included in modern casebooks to train students to apply the law are valuable, and they should be included in the next generation of casebooks.<sup>302</sup> In some respects, therefore, the next generation of casebooks will be an evolution of the modern Langdellian casebook. However, in other ways, the next generation of casebooks should look and feel much different to facilitate the necessary changes in legal education pedagogy and to engage today's students. There are many features of the Carolina Academic Press Context and Practice Series of casebooks that could be incorporated more widely into the next generation of casebooks to facilitate broader changes in pedagogy.<sup>303</sup>

#### *B. The Course Source: Proposal for a New Model*

The next generation of casebooks should be more than books. They should be platforms that include resources for all of a faculty member's teaching needs and a student's learning needs. For that reason, it may be appropriate to refer to the next generation of casebook as a "course source," rather than a casebook or coursebook. There are several elements that should be incorporated in the next generation of teaching materials.

##### *1. Digital*

Unlike casebooks of the past, a course source should be digital. Although it will be appropriate to make significant portions of the materials

---

<sup>300</sup> See *supra* note 296 and accompanying text.

<sup>301</sup> See Moskowitz, *supra* note 16, at 1031; Teply & Whitten, *supra* note 56, at 103–04; Gulati & Sanchez, *supra* note 41, at 1207; Henderson & Thai, *supra* note 219, at 908; DiMatteo, *supra* note 14, at 1287–88, 1293–98; Sarah Krakoff, *Keeping an Eye on the Golden Snitch: Implications of the Interdisciplinary Approach in the Fourth Generation of Natural Resources Law Casebooks*, 78 U. COLO. L. REV. 751, 751 (2007).

<sup>302</sup> See *supra* notes 205–207; Teply & Whitten, *supra* note 56, at 106. Professor Moskowitz defines a "hypothetical" as "a short set of facts that raises one or two issues" and a "problem" as "a more complex set of facts that raises several issues that the student must organize before trying to analyze them." Moskowitz, *supra* note 16, at 1032.

<sup>303</sup> See Schwartz, *supra* note 212, at 33–34.

available in a traditional print format, the primary mode of delivery should be an interactive e-book.<sup>304</sup> There are several reasons for this choice. First, today's students are digital natives and have grown accustomed to learning through computers and technology.<sup>305</sup> It only makes sense to provide them with an opportunity to continue to use the same learning tools in law school. Second, by providing the materials in digital format, faculty members can incorporate video, audio, interactive diagrams, and a variety of other resources to reach out to students with a variety of learning styles.<sup>306</sup> Third, the addition of such resources should also create a more entertaining and engaging learning environment for the students. Fourth, by providing the materials in a digital format, there are greater opportunities to include interactive tutorials or exercises, which allow students to take a more active role in their learning. Fifth, the materials will include an abundance of hyperlinks, which should enhance learning opportunities for non-linear thinkers.<sup>307</sup> Finally, because it is delivered in a digital format, the course source and accompanying teacher's manual can be quickly and easily updated by the author.<sup>308</sup>

---

<sup>304</sup> Ideally, course sources will be available in a variety of formats (e.g., pdf, mobi, epub), so that they can be accessed on many different platforms by a variety of different devices (e.g., smart phones, eReaders, Kindles, computers). As noted above, CALI distributes its books in the eLangdell Press in epub, mobi, pdf, and Word formats. See *supra* note 236 and accompanying text.

<sup>305</sup> See *supra* notes 148–50 and accompanying text.

<sup>306</sup> See *supra* notes 160–161; Johnson, *supra* note 18, at 79.

<sup>307</sup> Although it is possible to incorporate a wide range of resources into a digital book, they should only be incorporated to the extent that they advance learning objectives and pedagogical goals. See Johnson, *supra* note 18, at 80.

<sup>308</sup> Professor David Thomson has even grander visions for teacher's manuals that are delivered in digital format. He notes that printed teacher's manuals outline the author's vision—at the time of creation of the book—of how the text can or should be used, but he suggests,

It would be far better if all teachers' manuals were provided online in the form of a wiki. That way, professors who adopt the text—or who think of doing so—would have access to the wiki [teacher's manual]. Because the [manual] would be in that form, the professors and the authors could together edit and adjust the [manual] as time goes on. In this way the adopters could suggest to the authors methods of using the textbook that the authors might not have thought of.

THOMSON, *supra* note 14, at 90.

## 2. *The Carnegie Apprenticeships*

As with the Carolina Academic Press series, a course source should include teaching resources to train students in the knowledge, skills, and values necessary to law practice.<sup>309</sup> Problems, simulations, and exercises to train students in practical skills such as drafting, counseling, negotiation, oral advocacy, and professionalism training should be integrated throughout the course source so that students and faculty members will understand that their course focuses on more than mastery of the substantive or procedural law that is the subject matter of the course.<sup>310</sup>

## 3. *Assessment Resources*

A course source should include a variety of tools (e.g., multiple-choice questions, short essay questions, short writing problems, and other exercises) that can be used for formative and summative assessment, and guidance regarding the optimal ways to use the tools.<sup>311</sup> Until such tools are more readily available in course books, it will be difficult to transform law school assessment in the manner envisioned by the ABA and legal education reformers.<sup>312</sup>

## 4. *Simulations and Resources to Facilitate Collaborative Learning and Other Alternative Pedagogical Approaches*

Just as many faculty members may lack the time, creativity, or energy to develop powerful formative assessment tools, they may lack the time, creativity, or energy to develop simulations, role-plays, or other tools to facilitate collaborative learning, experiential learning, or pedagogical approaches different from the familiar case method, the lecture method, and Socratic dialogue. A course source should include those materials and guidance on their use, so that willing faculty members can expand their teaching pedagogies, abandon their role as the sage on the stage, and adopt

---

<sup>309</sup> See Schwartz, *supra* note 212, at 33, 35 (describing the *Context and Practice Casebook Series*).

<sup>310</sup> See *id.* at 34–36.

<sup>311</sup> See Schwartz, *supra* note 212, at 57, 61; Johnson, *supra* note 18, at 79. In describing his contracts casebook, Professor Schwartz indicates that his book includes suggestions for using the assessment resources in ways that minimize the burden on the professor, including “practice tests with peer feedback using the model answer in the teacher’s manual, practice tests with self-grading using the model answer in the teacher’s manual, practice tests where the teacher reviews two or three typical answers, and group projects/competitions.” Schwartz, *supra* note 212, at 61.

<sup>312</sup> See *supra* Part II.B.

the role of guide on the side.<sup>313</sup> Because the material is delivered in a digital format, it is possible to deliver richer simulations using video and the web.<sup>314</sup>

### 5. *Cases, Evolved*

Although the course source should include a core set of edited cases, it should include links to unedited versions of those cases and links to other important cases that have not been reproduced in the course source.<sup>315</sup> This would allow faculty to easily choose alternative cases, provide students with unedited opinions, or revise the opinions provided in the course source.<sup>316</sup> As noted above, the course source should also take advantage of the wealth of materials available online and in audio, video, or another format, to put the cases into context by providing links to those materials.<sup>317</sup> For instance, in a symposium on the future of the course book, Professor Paula Lustbader described how video interviews with clients and persons involved in legal disputes could demonstrate the “richness of their cultural backgrounds” and

---

<sup>313</sup> See Johnson, *supra* note 18, at 79; Schwartz, *supra* note 212, at 57–58 (discussing some of the simulations, role plays, and collaborative exercises included in the contracts casebook, and the instructions in the teacher’s manual regarding implementation of collaborative exercises).

<sup>314</sup> See Johnson, *supra* note 18, at 79. In a recent symposium on the future of the course book, Professor Dennis Patterson explained how a video that outlined the process for shipping scallops from Tokyo to New Jersey could help students engage more fully in a dispute resolution role play involving bills of lading. See *Workshop*, *supra* note 13, at 309 (remarks of Dennis Patterson). In the same symposium, Professor Marilyn Berger discussed a video of a fictitious trial that she produced to demonstrate trial skills. *Id.* at 310–11 (remarks of Marilyn Berger).

<sup>315</sup> This proposal is not revolutionary. Indeed, for years, Professor Patrick Wiseman has distributed edited cases to his students in a digital format that allows them to easily expand the opinions to read the portions that Professor Wiseman redacted. See Austin Groothuis, *Prof. Wiseman’s Free, Edited, and Expandable Con Law Cases*, CALI (Jan. 22, 2010, 3:13 PM), <http://www.cali.org/blog/2010/01/22/prof-wisemans-free-edited-and-expandable-con-law-cases>.

<sup>316</sup> Digital delivery of cases opens opportunities for even more creative manipulation of cases. For instance, Professor Greg Silverman incorporates “interventions” into digital versions of cases, embedding audio files and flash movies—at appropriate times in the margin of the pdfs for the cases—to clarify issues in them. *Workshop*, *supra* note 13, at 314 (remarks of Greg Silverman).

<sup>317</sup> See *supra* note 301 and accompanying text; Johnson, *supra* note 18, at 79; *Workshop*, *supra* note 13, at 315–16 (remarks of David Vladeck) (discussing the use of websites and audio recordings of oral arguments in teaching constitutional law).

would provide students with a better understanding of the way that disputes affect real people.<sup>318</sup>

#### 6. *Open Source, Creative Commons*

Ideally the course source should be published in an open-source format and distributed through a Creative Commons license, such as CALI is doing through its eLangdell Press.<sup>319</sup> This would allow faculty members to customize the materials—deleting materials or adding their own—and redistribute them in whatever form they feel appropriate for their students.<sup>320</sup> As a bonus, students would not have to pay for the materials.<sup>321</sup>

#### 7. *A Resource Library*

In many ways, a course source resembles a traditional casebook in that the author or authors arrange cases, notes, questions and comments, secondary materials, problems, hypotheticals, simulations, role-plays, practical skills exercises, professionalism problems, quizzes, and assessment tools in the traditional chapter and page structure of a book, and they provide faculty members with a teacher's manual that outlines the manner in which the tools included in the book can be used to teach the course.<sup>322</sup> The book can also be printed, and major portions of it will be accessible off-line.<sup>323</sup> However, a course source could incorporate Professor Bodie's vision, to some extent, by dis-aggregating all of the materials in the course source into a resource library, which could be linked to a social platform where faculty could add cases, exercises, and other modules, comment on and rate modules in the library, and create and upload their own books or book chapters and teachers' manuals.<sup>324</sup>

---

<sup>318</sup> See *Workshop*, *supra* note 13, at 298–99 (remarks of Paula Lustbader).

<sup>319</sup> See *supra* notes 235–237 and accompanying text.

<sup>320</sup> See Bodie, *supra* note 173, at 11.

<sup>321</sup> See, e.g., *id.* (discussing how the Linux operating system is an example of a collaborative system that is free to all).

<sup>322</sup> See Brodie, *supra* note 173, at 11, 17; Schwartz, *supra* note 212, at 32 (discussing the attributes of a traditional casebook which include such items as hypotheticals, assessment tools, and teacher's manuals).

<sup>323</sup> Just as faculty members routinely must have back-up plans for teaching if technology resources fail, faculty members should design course sources to provide a critical mass of material that can be accessed in an off-line environment. For instance, if the course source includes a video of a simulation or role play, it would be helpful to include a transcript of the simulation or role play in the teacher's manual.

<sup>324</sup> See Brodie, *supra* note 173, at 24, 27.



Although the elements outlined above should be the foundation of the next generation of casebooks, a few other elements are desirable, though not necessarily required. First, to create more robust and interactive casebooks that include resources to enable faculty members to adopt different teaching approaches, law faculty should work closely with technology, learning theory, and education specialists who have an expertise that legal faculty members may lack.<sup>325</sup> Although they may collaborate with technology specialists, it is probably overly optimistic to assume that faculty members will collaborate with specialists in learning theory in developing new materials, in light of a weak track record of collaboration in the past.<sup>326</sup> Second, in recognition of the impact that graphic design and visual design can have on perception and learning, law faculty should consult with specialists in those areas for assistance in creating instructional materials.<sup>327</sup> Unfortunately, collaboration could be expensive and difficult to fund if the next generation of materials are distributed at no cost.<sup>328</sup>

Finally, Professors Bodie, Henderson, and Thai outline an optimistic vision of a future in which dozens, or even hundreds, of faculty members collaborate to create casebooks from scratch.<sup>329</sup> Although that could happen in the long term, it may be easier to begin with a model where a course source, or the building blocks for a course, are created by a smaller community of faculty members and significantly expanded over time by the larger academic community. There is, after all, some value to having a book

---

<sup>325</sup> Johnson, *supra* note 18, at 80.

<sup>326</sup> *Id.*

<sup>327</sup> See Michele G. Falkow, *Visual Literacy and the Design of Legal Web Sites*, 97 LAW LIBR. J. 435, 435–37 (2005) (discussing the importance of visual and graphic design in conveying information on legal web sites); Henderson & Thai, *supra* note 219, at 924 (discussing the importance of a “clean, intuitive and . . . beautiful interface”); *Workshop*, *supra* note 13, at 309–10 (remarks of Heidi Hellickson) (discussing the value of moving the notes that traditionally follow cases into “call-out boxes” that are incorporated into the cases); *Workshop*, *supra* note 13, at 310–12 (remarks of Marilyn Berger) (discussing the graphic design of her casebook, including the use of illustration boxes and other techniques); *The Magic of the Blue Boxes*, WEST ACAD., <http://interactivecasebookseries.com/videos.asp?v=3&ID=6awTCSAu4Lk&h=The+Magic+of+the+Blue+Boxes> (last visited Mar. 17, 2016) (discussing the use of blue boxes to attract student attention to information); Welch, *supra* note 4, at 1614; Janeen Kerper, *Let’s Space Out: Rethinking the Design of Law School Texts*, 51 J. LEGAL EDUC. 267, 269, 283 (2001).

<sup>328</sup> See Brodie, *supra* note 173, at 24, 34 (discussing how startup and copyright costs, especially for law review articles and other secondary sources, will likely create a barrier to free access).

<sup>329</sup> See *supra* notes 264–272 and accompanying text.

to modify as opposed to simply having a collection of materials from which to craft a book. A casebook provides structure and organization for faculty members, as the authors have spent a great deal of time and thought in selecting and editing cases, preparing notes, exercises, and problems to illuminate the issues in those cases, and determining the best order in which to present the material.<sup>330</sup> Most faculty members would likely feel more comfortable tweaking and improving an existing book to meet their needs than searching through a massive library of cases, problems, exercises, and secondary materials to create their own book. As Professor Bodie notes, his proposed model for open-source creation of course books could provide a mass of information that could overwhelm a faculty member who wanted to build his or her own book.<sup>331</sup> He also acknowledges that course books created from scratch by a faculty member from a library of materials will not have a consistent theme throughout the book and may include a variety of different editing styles.<sup>332</sup> Ultimately, however, he argues that faculty members need not always design their own books from scratch in his model, as they could continue to choose course books written by authors in the more traditional manner, or they could modify course books created through the new open-source collaborative process.<sup>333</sup> To some degree, therefore, social authoring seems to hold promise for the next generation of course books.

Although social authoring could be a valuable component of the next generation of course books, the prospects for including social reading are less optimistic.<sup>334</sup> Although there are certainly times when a faculty member might decide that it would be valuable for students and faculty members to

---

<sup>330</sup> See *supra* notes 291–94 and accompanying text. As Professor Janet Ainsworth notes, “Casebooks provide their authors with an opportunity to construct a thoroughly realized . . . instantiation of their own particular jurisprudential and normative belief systems.” Ainsworth, *supra* note 291, at 274.

<sup>331</sup> See Bodie, *supra* note 173, at 26–27 (empathizing with the faculty member who might have to choose between forty different edited versions of *Pennoyer v. Neff*). Professor Bodie suggests that the problems could be minimized if the database manager organized and maintained it in a way that made the materials easy to access and review; the contributors of each resource in the database were identified, so that users could choose to incorporate resources, to some extent based on the reputation of the contributors; users could post comments and ratings regarding the resources in the database to a social media platform, which could be easily searched; and users could easily determine how many times a particular resource in the library was used by other faculty. See *id.* at 27.

<sup>332</sup> See *id.* at 28.

<sup>333</sup> See *id.*

<sup>334</sup> See *supra* notes 239–43 and accompanying text.

engage in social reading of a book or other course material, there are also times when a faculty member would prefer that students critically read and analyze materials on their own, especially in first-year classes when they are developing critical legal reasoning skills. Ideally, practicing lawyers do not rely on an analysis of the number of “likes” or comments from anonymous blog posters to solve their client’s legal problems, so social reading may be building skills not particularly useful in practice. In addition, ubiquitous opportunities for social reading can lead students down blind alleys or—worse yet—subject them to flaming or abuse on unmoderated social media platforms. Faculty members can choose to incorporate social reading into a class at appropriate times throughout the semester, but it may be counterproductive to provide a platform for social reading of the entire body of course materials.

*C. Wetlands Law: A Course Source—The Prototype*

*Wetlands Law: A Course Source* is a prototype for the vision of a course source, and it is being published by CALI’s eLangdell Press.<sup>335</sup> Like all of the books in the eLangdell series, it is open source and is distributed in a range of digital formats through a Creative Commons license.<sup>336</sup> It includes materials designed to train students in all three Carnegie apprenticeships:

To address the *knowledge* apprenticeship, the “course source” includes all of the traditional elements of a casebook or coursebook (cases, commentary, notes and questions) and includes several hypotheticals and problem exercises that focus on reinforcing wetlands law. . . .

To address the *skills* apprenticeship, the “course source” includes sixteen separate legal research exercises, several drafting exercises (including exercises that focus on drafting a [Freedom of Information Act] request, drafting comments on a proposed regulation, and drafting a citizen suit complaint and 60 day notice letter), and an interviewing and counseling exercise.

To address the *values* apprenticeship, the “course source” includes several professionalism scenarios, with questions related to the scenarios.<sup>337</sup>

---

<sup>335</sup> See WETLANDS LAW, *supra* note 33.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at x–xi.

Although the exercises are currently included as scripted dialogues, video vignettes of the scenarios are being developed and will be posted to YouTube.<sup>338</sup>

To facilitate greater use of formative and summative assessment, every chapter of the course source includes one or more CALI exercises as a quiz to reinforce the material covered in the chapter.<sup>339</sup> Additionally, the course source links to other CALI exercises.<sup>340</sup> Many of the problems, hypotheticals, and exercises in the course source could also be used as assessment tools.<sup>341</sup>

To facilitate collaborative learning, the Wetlands course source includes a negotiation and a mediation simulation.<sup>342</sup> Several of the exercises in the course source could also be completed collaboratively.<sup>343</sup>

Although the course source includes a core set of edited cases, it includes links to the unedited versions of those cases and links to dozens of other unedited cases.<sup>344</sup> Similarly, when statutes and regulations are reproduced in part in the course source, they are linked to the full versions of those statutes or regulations. The cases, statutes, and regulations to which the course source links are all provided in an open-source, Creative Commons format, so faculty members can easily edit the external material.<sup>345</sup>

---

<sup>338</sup> See, e.g., *id.* at 43–45.

<sup>339</sup> *Id.* at xi.

<sup>340</sup> *Id.*

<sup>341</sup> Although the teacher's manual for the Wetlands course source includes solutions to the problems, exercises, and hypotheticals, the teacher's manual for a course source would ideally include directions, such as the directions provided in the Carolina Academic Press *Context and Practice Series*, for faculty regarding optimal use of the assessment resources. See *Context and Practice Series*, CAROLINA ACAD. PRESS, <http://www.cap-press.com/CAP> (last visited Mar. 17, 2016). To that extent, the Carolina Academic Press Series is a far better model for an ideal course source.

<sup>342</sup> WETLANDS LAW, *supra* note 33, at xi.

<sup>343</sup> As with the assessment resources, the teacher's manual for a course source would include directions for faculty regarding ways to optimize collaborative work by students. That is not included in the initial version of the teacher's manual for the Wetlands course source.

<sup>344</sup> *Id.* at xiii–xxi.

<sup>345</sup> The cases are linked to full versions in Justia, see generally JUSTIA, <https://www.justia.com> (last visited Mar. 17, 2016), and the statutes and regulations are linked to full versions in the Legal Information Institute, see generally LEGAL INFO. INST., <https://www.law.cornell.edu> (last visited Mar. 17, 2016).

The course source also includes a wealth of audio and video materials and external links to put the cases, disputes, and materials in the book in context and bring them to life.<sup>346</sup> For instance, links are provided to the audio for the oral arguments in most of the principal cases excerpted in the book.<sup>347</sup> A Google map is included in the book, identifying the location of the properties involved in all of the principal cases excerpted, so that students can see the wetlands that were preserved in the cases or the development that replaced the wetlands.<sup>348</sup>

For most of the principal cases that are excerpted in the book, there are links to decision documents, administrative orders, property maps, pictures, local media coverage or other background materials. . . . Throughout each chapter, there are several “Resource” sections that identify reports, databases, audio or visual materials, government documents, and other materials that are relevant to the topics covered in the chapter.

The book also links to (1) a series of videos prepared by the Army Corps of Engineers that describes the wetland delineation process, wetland mitigation, the wetland permitting process and many other wetland-related issues; (2) videos demonstrating mountaintop removal mining; and (3) videos outlining the values and functions of wetlands . . . .<sup>349</sup>

In addition, the book contains links to interviews on various wetland topics on YouTube conducted with local attorneys and the Department of Justice, the National Wildlife Federation, and the Environmental Council of the States.<sup>350</sup> The 400-page book includes almost 1,000 hyperlinks.<sup>351</sup>

Finally, most of the links and materials in the book have been repurposed as a web-based library of wetlands resources, which, like the book itself, can be modified, reorganized, and redistributed in whole or part

---

<sup>346</sup> WETLANDS LAW, *supra* note 33, at xxii–xxv.

<sup>347</sup> *Id.* at xxiv–xxv.

<sup>348</sup> *Id.* at xxiv; see *Wetlands Sites*, GOOGLE MAPS, <https://www.google.com/maps/d/viewer?mid=z7VLNS5X2EBs.k2lYjQFqDWiI> (last visited Apr. 11, 2016).

<sup>349</sup> WETLANDS LAW, *supra* note 33, at xi.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at xii.

as faculty members find helpful.<sup>352</sup> The material in the “Administrative Law Basics” chapter or the “Regulatory Takings” chapter could easily be adapted for use in a range of different classes, including Property, Land Use, Local Government Law, Health Law, Labor Law, Environmental Law, or any number of other administrative law-related courses. The Wetlands course source does not currently include a social authoring platform, but that could be added over time.<sup>353</sup>

#### *D. Benefits of the Proposed Model*

There are many benefits to the course source model for the next generation of casebooks. As already noted, the model addresses many of the concerns raised by legal reformers and the ABA, and addresses the changing nature of the student body by providing resources that faculty members can use to focus more directly on providing instruction in practical skills and professionalism: resources for formative and summative assessment; resources to enable faculty members to present materials in a variety of formats geared to the variety of student learning styles; resources to facilitate collaborative learning and experiential learning; resources that facilitate presentation of material in an entertaining and engaging format; and material to students in a format in which they have been accustomed to learning and which facilitates active learning.

In addition, the digital and open-source format benefits faculty members in that it gives them much more control over their course materials because they can freely add or delete material from a course source and redistribute it to their students.<sup>354</sup> The broader availability of materials that can be repurposed and redistributed also lowers the transaction costs of developing course materials, creating opportunities for a more diverse group of faculty members to make their distinctive voices heard, and for faculty members to develop materials in niche areas where publishers traditionally might have felt that the market would not support a printed casebook. Faculty members

---

<sup>352</sup> *Wetlands Law: A Course Source*, ENVTL. L. TCHRS. CLEARINGHOUSE, <http://www.envirolawteachers.com/wetlands-law-a-course-source.html> (last visited Mar. 18, 2016).

<sup>353</sup> *Id.*

<sup>354</sup> See Bodie, *supra* note 173, at 16. As evidence of the importance of faculty control over course materials, a recent survey of contracts professors disclosed that “personal course packets” were the third most popular “casebook” used by those faculty members. DiMatteo, *supra* note 14, at 1293. Similarly, many legal research faculty members prefer to use their own materials, frequently in digital format, instead of the popular textbooks that are on the market. See Johnson, *supra* note 161, at 417–18.

can also update digital materials more quickly than print materials, incorporating new cases, exercises, or problems into the materials with a click of the mouse as soon as the resources come “off the presses.”<sup>355</sup>

The format provides significant benefits to students as well. First, it is much easier to search course materials in digital format than in print format.<sup>356</sup> It is also easier to cut and paste segments of the course materials into notes and outlines or vice-versa in a digital format than in print format, and there is no loss of highlighting or annotation functionality as students move from print versions to digital versions of materials.<sup>357</sup> Digital materials are significantly lighter and more portable than print materials.<sup>358</sup> Most importantly, digital materials that are distributed through a Creative Commons license can be provided to students at no cost,<sup>359</sup> resulting in significant cost savings.<sup>360</sup> For traditional print materials, it is estimated that first-year students spend, on average, \$1,000 for casebooks.<sup>361</sup> Many courses require supplemental materials, which could cost several hundred dollars more, and some publishers are now bundling supplements with the casebooks so that students must incur the additional cost even if their professor does not require it.<sup>362</sup> Although digital books have not been adopted broadly in law schools, they have been used frequently in legal research classes, and digital statutory supplements have been used frequently in other classes; surveys of students using them for those purposes

---

<sup>355</sup> See Bradford & Hautzinger, *supra* note 222, at 519; Bodie, *supra* note 173, at 10; Moskovitz, *supra* note 16, at 1039–40 (discussing the process for updating print materials).

<sup>356</sup> See Bradford & Hautzinger, *supra* note 222, at 519.

<sup>357</sup> See *id.*; Henderson & Thai, *supra* note 219, at 909–10; *Casebook Connect*, *supra* note 232 (describing the highlighting and annotation functionality of Aspen’s ebooks).

<sup>358</sup> See Bradford & Hautzinger, *supra* note 222, at 517–18; Bodie, *supra* note 173, at 10.

<sup>359</sup> See CREATIVE COMMONS, *supra* note 277.

<sup>360</sup> The materials could also be distributed more widely to the public at large for free, increasing access to the law and access to justice.

<sup>361</sup> See Johnson, *supra* note 161, at 418; Skover, *supra* note 4, at 288. The cost of print casebooks has climbed from beyond \$100 per book at the beginning of this century to almost \$200 per book. See Bodie, *supra* note 4, at 67; Bodie, *supra* note 173, at 10. According to a study conducted by the Student Public Interest Research Groups, a new edition of a casebook costs 12% more than a new copy of the previous edition and 45% more than a used copy of the previous edition. See Johnson, *supra* note 161, at 418. The high cost of casebooks is certainly not unprecedented, as casebooks cost about half the cost of a semester’s tuition when they were first introduced in the nineteenth century. See Henderson & Thai, *supra* note 219, at 924.

<sup>362</sup> See Bradford & Hautzinger, *supra* note 222, at 516 (noting that students could spend \$500 or more on statutory supplements over three years); Johnson, *supra* note 161, at 419.

suggest that they prefer digital books in light of the benefits outlined above.<sup>363</sup>

*E. Limitations of the Proposed Model*

There are some limitations to the model outlined in this Article, but most of the limitations are related to the proposal that the next generation of casebook should be distributed digitally and through a Creative Commons license. Copyright laws present one clear limitation to this new model.<sup>364</sup> Traditional casebooks include excerpts from books, law review articles, model laws, and Restatements or other materials of the American Law Institute, many of which are protected by copyright from reproduction and redistribution.<sup>365</sup> Although some academics may rely on “fair use”<sup>366</sup> arguments to support the reproduction and distribution of these materials in an individual classroom, it is difficult to imagine that those arguments could justify worldwide free distribution of the materials on the web as part of an e-book covered by a Creative Commons license.<sup>367</sup> Unless course source authors can persuade copyright holders to allow those materials to be included and redistributed through a Creative Commons license, authors will not be able to include them.<sup>368</sup> This may create some roadblocks, but faculty members could include in a course source links to many law review articles and books that are available on the web through SSRN, Google Books, and similar sources, and more resources will likely move online over time, as some law reviews are beginning to publish under a Creative Commons license.<sup>369</sup>

The digital format could also create some access issues. If the course source includes links to significant amounts of material that are only

---

<sup>363</sup> See Bradford & Hautzinger, *supra* note 222, at 533; Johnson, *supra* note 161, at 423–24.

<sup>364</sup> See Johnson, *supra* note 18, at 80.

<sup>365</sup> See Bradford & Hautzinger, *supra* note 222, at 524; Bodie, *supra* note 173, at 28–31.

<sup>366</sup> See Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1786–88 (2010) (“fair use” is an excuse from an act that would typically be classified as infringing).

<sup>367</sup> See Bodie, *supra* note 173, at 32–34.

<sup>368</sup> See Bradford & Hautzinger, *supra* note 222, at 543; Bodie, *supra* note 173, at 30.

<sup>369</sup> See *About This Journal*, BROOKLYN L. SCH., <http://brooklynworks.brooklaw.edu/blr/about.html> (last visited Mar. 18, 2016); *Open Access Law Adopting Journals*, CREATIVE COMMONS, [https://wiki.creativecommons.org/Open\\_Access\\_Law\\_Adopting\\_Journals](https://wiki.creativecommons.org/Open_Access_Law_Adopting_Journals) (last visited Mar. 18, 2016) (listing law journals that have adopted the Open Access Law Journal Principles or have policies consistent with them).



available online and are not embedded within the book, students will need to have access to the internet to take full advantage of the materials. Although most law students have Wi-Fi or other internet access at school, their access at home or outside of school may be more limited.<sup>370</sup> Without internet access, a course source may lose some of its functionality. Accordingly, faculty members should build their course sources with that limitation in mind. A core set of materials that are necessary for success in the course should be accessible to the students in the course source at all times in the absence of internet access. The online materials should add value to the course but should not be so fundamental to the course that a student cannot succeed without them. If they are, faculty members should find a way to make those materials accessible in an off-line format or make the internet more accessible to the students.

In addition to the general access issues, the digital format could create special access issues for students with disabilities. Faculty members must take care to design the course source in a way that accommodates those students, just as they must design other course materials and their pedagogy, in general, to accommodate the needs of students with disabilities.<sup>371</sup>

Beyond the copyright and access issues, the digital format could impose other limitations. Although the ease of updating digital materials can be beneficial to faculty members, it can also create problems.<sup>372</sup> If a faculty member updates the course source too frequently throughout a semester, it may be difficult to ensure that all of the students are relying on the same version of the course source. For most faculty members, however, this should not create insurmountable problems, as it will probably not be

---

<sup>370</sup> According to a 2013 survey conducted by the Pew Research Center, although 76% of all Americans aged eighteen or older have access to the internet at home, there are still variations in the rate of access based on race and income. *See How Americans Go Online*, PEW RES. CTR. (Sept. 25, 2013), <http://www.pewinternet.org/2013/09/25/how-americans-go-online>. Although 79% of white Americans aged eighteen or older access the internet at home, only 70% of black Americans and 63% of Hispanic Americans have access at home. *Id.* Similarly, although 92% of Americans aged eighteen or older who have a household income of \$75,000 or more access the internet at home, only 63% of those with a household income of less than \$30,000 have home access. *Id.*

<sup>371</sup> *See* Johnson, *supra* note 161, at 420–21 (discussing the difficulty that students with visual disabilities may have in using e-book readers). *See also* Johnson, *supra* note 18, at 59–60 (discussing the increasing number of students with disabilities entering college and the ways that technology can facilitate “universal instruction design” to reach all learners, including students with disabilities).

<sup>372</sup> *See id.*

necessary to make significant changes to the materials multiple times during a single semester.

Student acceptance of the format might be a more fundamental limitation. Although student surveys indicated a preference for digital statutory supplements and digital legal research materials,<sup>373</sup> students using those materials are not reading large amounts of information on a screen as they would be if they were reading the cases, notes, and problems that are included in traditional casebooks and will continue to be included, to some extent, in a course source.<sup>374</sup> Although some academics suggest that this generation of students is more comfortable reading on digital devices, others suggest that they continue to prefer to read in print.<sup>375</sup> Ultimately, a course source does not present students with such a dilemma. Students can have the best of both worlds. To the extent that reading a course source is a more interactive experience, students will likely prefer to engage with the material in a digital format. However, in situations in which they must read and digest multiple pages of text, they can always choose to print out those materials and read them off line.

#### *F. Impediments to Adoption of the Proposed Model*

As with the limitations discussed in the preceding section, the impediments to adoption of the course source model as the next generation casebook primarily relate to the digital format of the materials and the manner of distribution. First, there may be insufficient incentives for faculty members to produce course materials that will be distributed to students at no cost through a Creative Commons license. Second, to the extent that faculty members adopt laptop bans in their classrooms,<sup>376</sup> students will not be able to use their course materials in the classroom. Although those impediments exist, they are not insurmountable.

---

<sup>373</sup> See Bradford & Hautzinger, *supra* note 222, at 533; Johnson, *supra* note 161, at 424.

<sup>374</sup> See Bradford & Hautzinger, *supra* note 222, at 520; Bodie, *supra* note 173, at 22.

<sup>375</sup> Compare Johnson, *supra* note 161, at 420 (citing a student survey suggesting that 70% of students would prefer to read textbooks in print if cost were not a factor), with Bradford & Hautzinger, *supra* note 222, at 520 (noting that “this generation of law students is much more comfortable with computer screens than past generations” and “many of today’s students read on computer screens all the time”). See also *Workshop*, *supra* note 13, at 317 (remarks of Bill McCoy) (noting on the one hand that “immersive digital reading is possible for most people, although many people have a 20–30% measured degradation in efficacy when reading digitally,” but that “more recent studies are starting to show that decrease in efficacy dropping to zero in some cases”).

<sup>376</sup> Johnson, *supra* note 18, at 71.

### 1. Faculty Incentives

If the next generation of course materials are distributed through a Creative Commons license, publishers will not receive any revenue for producing the materials. Most publishers, therefore, will have little incentive to market those materials or to pay authors to produce those materials. If publishers will not compensate authors, conventional wisdom would suggest that faculty members would not have any incentive to produce the materials.

Although faculty members would not have a financial incentive to produce casebooks under this model, they might continue to do so if casebook authoring were valued in the promotion and tenure process.<sup>377</sup> However, on many faculties, casebook authoring is not perceived as serious scholarship for purposes of promotion and tenure.<sup>378</sup> The stigma of casebook publishing might be exacerbated under the new model, as authors might have to rely on non-traditional publishers or self-publishing to produce and distribute their materials.

Therefore, it seems as though faculty members would have no incentive to author casebooks that would be distributed at no cost. However, even under the current model of casebook production and marketing, faculty members generally do not receive significant compensation for authoring books, and most faculty members do not write casebooks for the money.<sup>379</sup>

Faculty members receive other benefits when they author books. Primarily, casebook authoring can enhance a faculty member's reputation and open up opportunities to speak (such as at conferences, to the media, or as an expert before legislative and regulatory bodies) or to serve as a consultant on legal matters.<sup>380</sup> All of those experiences can increase the faculty member's knowledge and expertise as well as advance their career

---

<sup>377</sup> See Lasso, *supra* note 4, at 55–56; *Workshop*, *supra* note 13, at 311 (remarks of Marilyn Berger).

<sup>378</sup> See Bodie, *supra* note 173, at 13; Ainsworth, *supra* note 291, at 272; Moskowitz, *supra* note 16, at 1021.

<sup>379</sup> See Moskowitz, *supra* note 16, at 1021, 1037; Bodie, *supra* note 173, at 13; Henderson & Thai, *supra* note 219, at 919. Although faculty members receive little compensation for authoring casebooks for law students, many faculty members also write books, or chapters of books, for the ABA, for which they frequently receive no compensation. See *Seeking Book Contributors*, A.B.A., [http://www.americanbar.org/groups/labor\\_law/publications/book\\_contributors.html](http://www.americanbar.org/groups/labor_law/publications/book_contributors.html) (last visited February 8, 2016).

<sup>380</sup> See Moskowitz, *supra* note 16, at 1021.

and career objectives. They can also benefit students by providing the faculty member with experience to bring back to the classroom.

Casebook authoring also creates opportunities to collaborate and exchange ideas with other faculty members.<sup>381</sup> Collaboration is valuable because it not only provides wonderful learning opportunities for faculty members, but, like casebook authoring, it also enhances a faculty member's reputation and creates speaking and consulting opportunities.

In addition to those benefits, Professor Myron Moskowitz argues that, despite the stigma associated with casebook authoring in the promotion and tenure process, a casebook author can provide a succinct outline of the author's theories and ideas to a much broader audience in a casebook than most faculty members can reach in a law journal.<sup>382</sup> Consequently, readers may be more likely to implement those theories and ideas so that the author could have a far greater effect than authors of law journal articles have on the law.<sup>383</sup>

Finally, some faculty members choose to author casebooks for pedagogical reasons either because there are no casebooks available for the subject that they teach or because the existing casebooks do not include materials to teach the subject in the manner in which they wish to teach it.<sup>384</sup> Those faculty members will likely continue to author casebooks regardless of whether they will receive compensation and regardless of whether traditional publishers feel that there is a market for the book.<sup>385</sup>

Although there are many reasons why faculty members author casebooks other than for financial gain, it is hard to imagine that a significant number of faculty members would author casebooks if they did not receive *any* compensation for their work. In addition, the reputational benefits for casebook authors would likely diminish if authors had to rely primarily on self-publishing. Although impediments to widespread adoption of the new model of casebook distribution, non-profit organizations could take the lead in coordinating the development, distribution, and marketing of casebooks in the new model, providing compensation to the authors and eliminating any stigma associated with self-publishing.<sup>386</sup>

---

<sup>381</sup> See Dunsford, *supra* note 54, at 826–27; Bodie, *supra* note 4, at 73.

<sup>382</sup> See Moskowitz, *supra* note 16, at 1021–22.

<sup>383</sup> See *id.* at 1022.

<sup>384</sup> See *id.* at 1020.

<sup>385</sup> See *id.* at 1020–21.

<sup>386</sup> To maximize the reputational benefits, authors and publishers would likely need to be more aggressive in identifying the extent to which a book has been adopted for use in law schools.

CALI has taken the lead in publishing and distributing law school casebooks through a Creative Commons license, marketing its eLangdell series of casebooks, and other non-profits could follow suit.<sup>387</sup> Promoting greater access to the law to students and the public would likely fit squarely within the mission of many non-profit organizations.<sup>388</sup> Law schools could play an important role, as well, either by publishing casebooks or by providing grants, scholarships, and financial and technical support to faculty authors.<sup>389</sup>

If all of the incentives described above are not sufficient to prompt faculty members to author casebooks in this new model, perhaps the open-source or crowd-sourced model of casebook development envisioned by Professors Bodie, Henderson, and Thai would provide the necessary impetus. As noted above, the model distributes the workload much more broadly so that faculty members could develop new course materials with much less individual effort.<sup>390</sup> In addition, their model provides greater opportunities for collaboration with other faculty members, yielding the reputational and other benefits outlined above.<sup>391</sup>

Ultimately, even if there are not sufficient incentives for faculty members to develop course materials distributed at no cost, the model for the next generation of casebook outlined in this Article should not be abandoned. A course source that is developed in the manner outlined in this Article and delivered in a digital format by traditional publishers for a fee, rather than through a Creative Commons license, will still provide all of the

---

<sup>387</sup> See Johnson, *supra* note 18, at 81.

<sup>388</sup> For example, one could envision the Environmental Law Institute or sections of the Association of American Law Schools or the ABA sponsoring course books.

<sup>389</sup> See *Workshop*, *supra* note 13, at 301 (remarks of Edward Rubin) (noting the need for law schools to provide release time to faculty to create new materials); *id.* at 311 (remarks of Marilyn Berger) (noting the need for law schools to provide technical support for faculty in developing materials, and recognition in the promotion and tenure process for creation of the materials); *id.* at 338 (remarks of Paula Lustbader) (describing a process for providing financial and technical support to faculty to “makeover” course materials); THOMSON, *supra* note 14, at 131 (discussing the lack of incentives for faculty to create new materials).

<sup>390</sup> See *supra* note 281 and accompanying text. Professor Bodie notes that the open-source course book could thrive “even with some percentage of participating professors who contributed nothing to the project.” Bodie, *supra* note 173, at 24.

<sup>391</sup> The collaboration in the open-source development of a course book is, however, less intimate than the collaboration in the creation of a course book among a few faculty members. Thus, open-source collaboration would not necessarily provide the same reputational and associated benefits as collaboration with a small group of faculty members.

pedagogical benefits outlined above. It will not be perfect, but it will be a significant upgrade from the status quo.

## 2. *Laptop Ban*

The other major impediment to the course source envisioned by this Article is the practice, adopted by some faculty members, of banning the use of laptops or similar digital devices (e.g., tablets and smart phones) in the classroom.<sup>392</sup> If a course source exists primarily in digital format, it will be difficult for students to access the course materials in a class where the professor has banned laptops and digital devices.

Faculty members who have adopted a ban on laptops identify several reasons for the ban.<sup>393</sup> First, they argue that students who use laptops in class frequently multi-task and are distracted from the material taught in the classroom.<sup>394</sup> They also argue that the use of laptops distracts other students,<sup>395</sup> creates a physical and mental barrier between the students and the professor,<sup>396</sup> and promotes note-taking techniques that detract from learning.<sup>397</sup> Supporters of laptop bans also report that students ultimately

---

<sup>392</sup> See Johnson, *supra* note 18, at 71.

<sup>393</sup> See Kevin Yamamoto, *Banning Laptops in the Classroom: Is it Worth the Hassles?*, 57 J. LEGAL EDUC. 477, 485 (2007); Johnson, *supra* note 18, at 71.

<sup>394</sup> See Steven Eisenstat, *A Game Changer: Assessing the Impact of the Princeton/UCLA Laptop Study on the Debate of Whether to Ban Law Student Use of Laptops During Class*, 92 U. DET. MERCY L. REV. 83, 84–85 (2015) (citing a study that found that 90% of laptop users were engaged in online activities unrelated to their course work for at least five minutes each class and 60% were engaged in such activities for half of the class, and noting that student comprehension levels suffer when students engage in multi-tasking); Yamamoto, *supra* note 393, at 485–86. Nevertheless, supporters of the ban concede that students may be distracted from the material presented in the class even when they do not have access to laptops. See Yamamoto, *supra* note 393, at 487.

<sup>395</sup> See Eisenstat, *supra* note 394, at 85–86; Yamamoto, *supra* note 393, at 487–88.

<sup>396</sup> See Eisenstat, *supra* note 394, at 85–86; Yamamoto, *supra* note 393, at 489–90.

<sup>397</sup> See Eisenstat, *supra* note 394, at 91–97 (describing three studies that concluded that student comprehension suffers when students attempt to transcribe classroom discussions verbatim and concluded that students were more likely to attempt to transcribe discussions verbatim when taking notes on computer than when taking notes by hand); Yamamoto, *supra* note 393, at 491–92, 501–03; Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263, 302 (2009). *But see* Murray, *supra* note 147, at 202–04. Professor Kristen Murray argues that students take notes in different ways because of differences in their learning styles and that some students benefit from recording as much information as possible during class to process later. *Id.* at 202. She also points out that students will frequently try to transcribe class discussions in their notes even when they are taking notes by hand. *Id.* at 203. Perhaps

favor such bans when they are imposed in a class, despite initial opposition.<sup>398</sup>

Opponents of laptop bans argue that laptops can provide many benefits to students in class, such as allowing students to look up cases or supplementary material to understand words or concepts, or put material in context as it is introduced; to communicate with each other during class without distracting other students; and to easily incorporate material from class into their notes and outlines and vice versa.<sup>399</sup> They also argue that allowing students to use laptops in class respects student autonomy and encourages faculty members to prepare engaging and entertaining classes.<sup>400</sup>

Although individual faculty members have adopted bans on the use of laptops in class, institutions have not followed suit, preferring to leave the pedagogical choice to individual faculty members.<sup>401</sup> Many faculty members have adopted less draconian measures to address the use of laptops in class, including informally monitoring student laptop use;<sup>402</sup> adopting an acceptable use policy for classroom use of laptops;<sup>403</sup> limiting the use of laptops to specific sections of the classroom (i.e., front and back rows);<sup>404</sup> allowing the use of laptops in class while disabling internet access;<sup>405</sup> and educating students about the ways that laptop use might impede learning (such as by encouraging students to attempt to create a verbatim transcript of the classroom dialogue), so that students can choose appropriate ways to

---

most importantly, though, in surveying students at Temple and George Washington Law Schools, she concluded that 70% of the students did *not* attempt to transcribe discussions verbatim when taking class notes on their laptops. *Id.* at 204.

<sup>398</sup> See Eisenstat, *supra* note 394, at 105–08; Yamamoto, *supra* note 393, at 511.

<sup>399</sup> See Eisenstat, *supra* note 394, at 104–05; Yamamoto, *supra* note 393, at 481–82; THOMSON, *supra* note 14, at 76–80. Professor David Thomson notes that not everything that happens in a law school classroom is essential to learning. Thomson, *supra* note 14, at 79. He writes, “Suppose, for example, a student asks a question to which another student already knows the answer. That second student will just sit there bored—unless he or she has a laptop with which to check something else or work on class notes. This seems like a good use of time, rather than a bad one.” *Id.* He also suggests that faculty can help students to learn to multi-task more effectively by allowing them to use their laptops in class and providing them with some instruction regarding effective ways to use them. *Id.*

<sup>400</sup> See Marcus, *supra* note 397, at 302; Yamamoto, *supra* note 393, 481–82; THOMSON, *supra* note 14, at 76–80.

<sup>401</sup> See Eisenstat, *supra* note 394, at 108–09.

<sup>402</sup> See *id.* at 20; Yamamoto, *supra* note 393, at 494.

<sup>403</sup> See Yamamoto, *supra* note 393, at 494.

<sup>404</sup> See Eisenstat, *supra* note 394, at 101; Yamamoto, *supra* note 393, at 493.

<sup>405</sup> See Eisenstat, *supra* note 394, at 100–01; Yamamoto, *supra* note 393, at 493.

use the technology.<sup>406</sup> Advocates of laptop bans complain that these measures do not adequately address the disruptions that laptops cause to the student learning process.<sup>407</sup>

In short, faculty members who support laptop bans support them because they do not believe that student laptop use provides sufficient educational benefits to justify the costs they impose on student learning. Ideally, course sources—the next generation of casebooks—will include resources that will provide clear educational benefits to students, including: (1) resources to present material to students in a variety of formats designed to reach a variety of different types of learning styles; (2) resources to facilitate active, collaborative, and experiential learning; and (3) resources to create engaging and entertaining classroom experiences. Ideally, those educational benefits, coupled with instructions for students about the educational hazards created by improper use of laptops in class, should outweigh the costs that classroom use of laptops could impose on learning, so that most faculty members will feel comfortable allowing students to use a digital set of course materials in class. Faculty members who persist in banning laptops from the classroom will need to choose their casebook from a more limited selection of materials, but there should be an ample amount of faculty members who appreciate the educational value added by a new generation of digital course materials to ensure that the transition to digital materials will be viable.

## VI. CONCLUSION

It has been almost a century since Langdellian casebooks firmly displaced treatises and commentaries in law schools and the U.S. Bureau of Education concluded that the case method had become the predominant pedagogy in legal education.<sup>408</sup> Despite widespread calls for reform from the ABA, education specialists, and the practicing bar, in many of today's

---

<sup>406</sup> See Eisenstat, *supra* note 394, at 103–04.

<sup>407</sup> See *id.* at 99–105 (noting that disabling internet access in a classroom will not be effective, as students will still be able to access the internet through smartphones and other devices; noting that instructing students about the perils of verbatim note-taking without otherwise limiting laptop use will not reduce distractions caused by their use and that it might not even be effective in changing their note-taking behavior; noting the difficulties of monitoring and enforcing acceptable use standards in a large class; and noting that laptop-free zones do not provide any protection for students in the zones where laptops are allowed); Yamamoto, *supra* note 393, at 489, 493–95 (raising similar concerns, noting that monitoring will distract professors from presenting material in class, and suggesting that failing to take any measures at all to limit student distractions caused by laptop use would be “unethical”).

<sup>408</sup> See Johnson, *supra* note 18, at 48–49.



classrooms, law faculty continue to teach students in the same manner as faculty members taught them a century ago. The traditional Langdellian casebook—the tool that revolutionized legal education over a century ago—is now forestalling the next revolution in legal education. Major shifts in pedagogy require major shifts in pedagogical tools. Although the traditional Langdellian casebook has evolved over time to accommodate some pedagogical deviations from the case method, radical change is necessary to reach today's students and to enable faculty members to implement the necessary legal education reforms. This Article and *Wetlands Law: A Course Source* outline a vision for those changes. Yesterday's hammer cannot tighten today's carriage bolts and lag screws.