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Paratexts as Praxis

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Abstract Our essay charts out the pedagogical, technological, operational, institutional, commercial, and theoretical implications of moving from a print-based casebook paradigm to an electronic course book model. Central to this venture is what we call the Conceptions Course Book (CCB), the law school course book of the future. That e-book is, as we discuss, the end product of an entirely new and sophisticated process of creating and distributing materials (textual, audio-visual, and interactive) to be used in law school courses. This process allows professors to develop (in an I-Tunes-like manner) their own custom-designed course books in efficient, economical, and innovative ways best suited to their pedagogical concerns. Unlike proposals for computer-based e-books, our CCB would be designed to take advantage of the unique opportunities offered by more advanced versions of e-readers such as Amazon's Kindle, the Sony Reader, or Apple's I-Pad.

Keywords Education · Casebook · E-book · Paratexts · E-reader · Pedagogical reform · Conceptions Course Book · Open-access material · Christopher Columbus Langdell

This essay is an outgrowth of a Workshop on the Future of the Legal Course Book that we co-chaired with former Dean Edward Rubin of Vanderbilt Law School and former Dean Kellye Testy of Seattle University School of Law, held at Seattle University on September 27, 2008. We are especially appreciative to the following participants in that workshop, among others, who helped shape our thoughts: Kraig Marini Baker, Marilyn Berger, Matthew Bodie, Maggie Chon, Peggy Davis, Steve Friedland, Gene Koo, Paula Lustbader, Bill McCoy, John Mitchell, Richard Mixter, John Palfrey, Dennis Patterson, Michael Schwartz, Greg Silverman, Keith Sipe, Joel Thierstein, and David Vladeck.

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Law is bound by its form.

That is where we began 17 years ago in an article entitled "Paratexts."[1] Our core idea there was that law is the product of its methods of creation, transmission, and execution. Any informed understanding of the culture of law requires a real appreciation of the role played by its modes of communication—whether oral, scribal, print, or electronic. Focusing on the growing prevalence of legal "paratexts" (e.g., audio-visual recordings of legal transactions[2]), the article explored their potential force in reshaping legal interpretation, institutions, and theory.

We now return to where we began, applying some of our earlier theoretical insights to the pedagogical practices of the legal academy. Doing so, we find a curious state of affairs. It is apparent that the path of the law is not what it once was, as the *print way* yields increasingly to the *digital way*.[3] And in this environment, the original 1871 model of the printed casebook is an antiquated vehicle for today's law students who venture down the electronic information highway. And yet 138 years after Christopher Columbus Langdell invented that casebook, legal education still lumbers down the horse-and-buggy path paved by the famous Dean of the Harvard Law School.

When we consider the study of law, we confront a paradox. On the one hand, the calls for innovative pedagogical reforms are constant; we hear demands for skills-building instruction,[4] transactional approaches,[5] interdisciplinary treatments, multimedia experiences,[6] and the like. In one way or another, all of these aspirations challenge the conventional Langdellian message and methodology. On the other hand, the delivery system for educational content remains basically static; unquestionably, the print casebook still dominates the law school classroom. The most creative and far-reaching educational changes are significantly constrained by the print medium. While pedagogical reforms can and do happen within the print format, their potential pales in comparison to what is

[1] See generally Collins and Skover (1992). Our term "paratexts" subsequently became the title of a book by the same name. See Genette (1997).

[2] Though it doesn't seem that long ago, it is amazing for us to recall that our manuscript was submitted to the editors in paper form. Furthermore, the most advanced electronic technology that existed at the time included CD-ROMs and VHS recorders.

[3] See generally Palfrey and Gasser (2008).

[4] See, e.g., Stuckey et al. (2007) and Sullivan et al. (2007).

[5] For one example, the University of Columbia Law School offers a skills-based program called the Charles Evans Gerber Transactional Studies Program, which focuses on complex financial transactions. See http://www.lawcolumbia.edu/center_program/deals.

[6] Columbia Law School Professor Conrad Johnson argues convincingly: "Connecting doctrine to primary sources, leveraging the 'added value' that many publishers already provide, producing text, graphics, audio, animation, and video that reflect and cater to the multiple learning styles present in our target audience, allows students to learn in multiple ways and to develop analytical and persuasive capacities that are not limited by the over-worn 'top down' approach." Johnson (2008). For example, one could imagine an electronic course book that contained pod-cast mini-lectures, video interviews of clients, or audio clips from depositions and recorded police interrogations, and virtual reality experiences in legal settings. See Lustbader (2008). One creative multimedia approach used in Civil Procedure courses is offered by the video documentaries produced by Seattle University Law School Professor Marilyn Berger in *Lessons from Woburn*, which are based on Jonathan Harr's book, *A Civil Action.* See Films for Justice Institute, *Lessons from Woburn*, at http://www.law.seattleu.edu/x1873.xml. Accompanying the videos is a course book that includes research and writing assignments, issues for class discussion, and role-playing exercises. The videos vividly chronicle the story of the *Anderson v. W.R. Grace* case arising from the environmental disaster in Woburn, Massachusetts. See *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986).

possible within the electronic format. For any variety of reasons, we believe that real reform is best served by the marriage of innovative ideas with innovative media.

Today, law students are burdened by the cost, weight, excess, and contents of print casebooks. A typical first-year law student, using some of the more popular texts, could spend upward to $1,000 for the casebooks alone (*sans* supplements, secondary materials, outlines, etc.); will haul around weighty books that, all combined, tip the scales at almost 28 lbs; and will confront the specter of over 8,700 pages in their casebooks.[7] Print publishers have already realized the need to scale back from the dizzying length[8] and exorbitant cost of casebooks.[9] Ironically, while attempting to address the ever increasing demands of curricular reforms, print publishers compound such problems by issuing a never-ending array of supplemental texts dealing with law stories,[10] transactional problems,[11] theoretical readings,[12] and interdisciplinary lessons,[13] among others—all resulting in increases in prices, pages, and pounds. And though it is true that long overdue pedagogical reforms are surfacing within the print medium,[14] such efforts will not likely change the cost + weight + length equation, and are likely to depend on electronic formats for some of their most revolutionary features.

So, why do we cling to the time-entrenched print casebook? There are, of course, institutional constraints to deviating from tradition: the ordained structure of the law school curriculum; the long-practiced methods of teaching, studying, and testing; the industry of tie-in study aids; and the bar examination, among others.

But Marshall McLuhan suggested a more far-seeing answer: We drive into the future with our eyes fixed on the rear-view mirror.[15] We prefer the familiar to the unknown; we equate the tried with the true; we give way to inertia rather than expend energy. If legal education remains tethered to print and the case method, if it does not adequately consider interdisciplinary insights, if it ignores the narratives of life and law, if it remains largely oblivious to how law is practiced, and if it forfeits the advantages of new electronic formats, it does so mainly because we remain bound by our comfortable ways. This, in no small measure, explains why the ghost of Langdell still haunts us. Ever since he cabined the law in his casebook, generations of publishers, professors, and students have made a home there. It is time to move on.

Imagine a book unlike anything that is used in law schools today. It contains all of the classroom materials, primary and secondary, that a student would need for his or her legal education. Its contents are not confined to appellate cases and commentaries, but may

[7] These figures represent retail prices plus 7% tax for new first-year law-school casebooks, such as the following: Knapp et al. (2007) (list price: $138/3.4 lbs/1105 pp); Singer (2006) (list price: $139/3.6 lbs/1202 pp); Epstein (2008) (list price: $142/4.2 lbs/1402 pp); Kaplan et al. (2008) (list price: $130/4.2 lbs/1144 pp); Friedenthal et al. (2005) (list price: $134/4.6 lbs/1295 pp); Stone et al. (2005) (list price $142/5.2 lbs/1704 pp); Oates et al. (2006) (list price: $78/2.6 lbs/914 pp).

[8] How many professors who assign such tomes actually cover the entire text, or even a substantial portion of it?

[9] See, e.g., Choper et al. (2008) (list price: $94/2.6 lbs/912 pp). The unabridged counterpart costs $146, weighs 5.3 lbs, and has 1745 pp.

[10] See, e.g., Dorf (2004, 540 pp).

[11] See, e.g., Stark (2007) (476 pp.).

[12] See, e.g., Garvey et al. (2004, 820 pp).

[13] See, e.g., Goldberg (2007, 424 pp).

[14] See, e.g., Carolina Academic Press's series entitled *Contextual and Practice Casebooks* (Michael H. Schwartz, series editor).

[15] See generally Marchand (1980, p. 209).

contain a wide range of skills-building and interdisciplinary educational materials. It has wireless Internet access, hyperlinks, audio-visual experiences, and interactive capacities. Its contents remain always current, and are custom-tailored by professors for each of the courses they teach. It is as thin as most magazines and weighs <12 oz. And its total cost is a fraction of what a student would otherwise spend for its print-based contents. Unimaginable? Hardly. For you have just imagined something that can be actualized—a Conceptions Course Book (CCB), which is the core topic of this essay. In all likelihood, it is a book that Dean Langdell would not have endorsed.

Relearning law in a digital world

His world is not ours. It is easy to overlook that, as one holds onto his legacy, his casebook. But even as we cling to Langdell's past, we are tugged into the future where the entire enterprise that brought him fame is changing conceptually, operationally, and economically. Stepping back in time to his world, we stand to learn how it is vanishing and how a new one is emerging.

When Little, Brown and Company first published Langdell's *A Selection of Cases on the Law of Contracts*,[16] the relationships of the author to his publisher, book sellers, professorial users, and student readers were far different than are such associations today. Those relationships, then and now, are of great pedagogical consequence. For they determine *who* selects content, *what* content is selected, and *how* that content is presented, distributed, and used. This paradigm enabled Langdell to assume his mantle of greatness since he sat at the apex of a hierarchical print publishing model.

At the time, Dean Langdell could count on his message going to law students without substantial intervention or dilution. The only likely constraints on content imposed by his publisher were economic ones (e.g., the length of the work). No content constraints were placed on him by the distributional chain (e.g., book sellers).[17] The handful of contracts professors then at Harvard, Yale, Columbia, and elsewhere might have interfered with the transmission of Langdell's contents to his student readers in only a few ways: by assigning select portions of the book, by supplementing the case materials (nowhere as widespread as today), and/or by shaping and shading understanding through their own lectures. Absent such constraints, however, Langdell controlled the message that would reach and influence his student readers. And this with a nod from Oliver Wendell Holmes: "At all events, we advise every student of the law to buy and study the book."[18]

Long before the advent of digitalized information, the potency of the Langdellian model had been diluted. By midpoint in the twentieth century, a single casebook had multiple authors and a single subject had multiple competing casebooks. The texts burgeoned in size,[19] as they added excerpts from a diverse assortment of secondary materials. Moreover, they were supplemented by a variety of nutshells, outlines, anthologies, hornbooks, and

[16] Langdell (1871).

[17] Since a printed book could only be sold as a packaged work, there was no opportunity for the bookseller to subdivide its contents and sell them independently. As discussed *infra*, that is no longer the case.

[18] Holmes and Wendell (1871, pp. 353, 354) (reviewing Langdell's contracts casebook). Later in his life, Holmes was far less kind toward Langdell's "all for logic" approach to law. See White (1993, p. 197) (April 10, 1881 letter from Holmes to Fredrick Pollock).

[19] Many of today's casebooks exceed the 1,022 pages of Langdell's 1871 work.

other such works. All of this invited professors to cherry-pick materials from both within and outside the casebook. What ultimately filters down to the modern-day student reader is a far less singular message controlled by a print casebook author. As a practical matter, it is almost impossible for one who stands in Langdell's shoes to leave a similar footprint on the law.

Law has long been text-centric, more so than many other professions that interact with the physical world. And alphabetic text is likely to remain a key medium within legal education. After all, it is difficult to imagine that legal arguments, which typically portray a compendium of facts and sustain a complex and logical line of thought, are not going to depend at all on sustained reading. While the future of the legal course book may still be bright, the same may not be said of its print manifestation.[20] These are times of transition—from print to electronic formats. While that transformation is still incomplete, there are evident signs that the pure print form is clearly inadequate to suit the needs and demands of a generation "born digital".[21]

The advantages of digital content simply cannot be blinked. It "is weightless, can be easily searched, linked, and copied, and has no marginal cost of distribution."[22] Within the legal academy, it is already the case that digital research—on LexisNexis, Westlaw, and Google—has largely replaced its print predecessor. Additionally, print casebooks are now supplemented with Internet texts replete with hyperlinks.[23] There are even e-casebooks that can be downloaded and printed. Such hybrid materials, however, leave the Langdellian enterprise mostly intact, though it is surely under siege.

The future is near, quite near. In it, we will witness more significant changes in the relationships between author–publisher, author–distributor, author–professor, and author–student. At each stage, as we discuss below, the old and rigid paradigm will become more elastic and less determinative, more interactive and less dogmatic, and more multi-experiential and less textual. Just as the Gutenberg invention overtook scribality, so now the Digital invention is poised to overtake print.[24] But that revolution will not occur so long as print publishers are the primary distributors of law school course books; and it cannot take place so long as the primary receptacle for reading digital information is the computer as we now know it.

It is a truism: readers read books. They shun reading books on computer screens.[25] But what kind of books will they use if print ones are undesirable and computer ones are

[20] Bill McCoy, General Manager of the Digital Publishing Business at Adobe Systems Incorporated, predicted a relatively short remaining life for print-based law school texts: "It seems obvious that legal course books, along with most other textbooks, are going to be substantially replaced by digital content, with a significant portion (i.e., well over double-digit percentage) of this replacement occurring within the next 5 years." See McCoy (2008).

[21] This moniker refers to the youth of Generation Y who "were all born after 1980, when social digital technologies, such as Usenet and bulletin board systems, came online." Palfrey and Gasser (2008, p. 1).

[22] McCoy (2008). Following this thought, the digital publishing expert opined: "Institutions that remain paper-centric will be marginalized and their learning experiences devalued by digital-savvy students."

[23] One experiment in integrating print casebooks with interactive instruction is being attempted by Thomson-West in its "Interactive Casebooks Series." See http://interactivecasebook.com/.

[24] See generally Collins and Skover (1992).

[25] Tim O'Reilly, the founder and CEO of the esteemed computer book publishing company O'Reilly Media, has noted a "strong preference of our customers for PDFs" (i.e., portable documents downloadable to e-readers) over either print books or online computer reading. See http://radar.oreilly.com/2006/05/gentlemen-prefer-pdfs.html.

unwieldy? Today will become tomorrow once e-readers[26] enter into the equation and enable course book customization and distribution websites to realize their full potential. One such website, which we propose below, would facilitate the creation, delivery, and use of self-designed law e-books—what we call Conceptions Course Books (CCBs).

In one form or another, the CCB model will happen. It is inevitable. And when that time arrives, there will be a turning point in legal education, one far more significant than that ushered in by Christopher Columbus Langdell. To appreciate that turning point it is critical to understand the technology and process that make it possible. In the next section of this essay, we outline the operational process by which CCBs would be created, and thereafter explore the theoretical implications of such an endeavor. Having done so, one readily begins to discern the extraordinary transformations that CCBs portend. There will be no turning back.

The Conceptions Course Book: process & product

The central idea behind our CCB model is to reinvent the way law school course materials are created with an eye to the following: (1) dramatically expanding the breadth of primary and secondary materials, available within a single database, that may be easily integrated into a custom-designed CCB; (2) significantly enhancing professorial options regarding selection of materials; (3) encouraging professorial interaction with the materials (e.g., as when a professor adds commentaries, questions, or problem exercises to a custom-designed CCB); (4) decreasing student user costs; (5) increasing student user options regarding the inclusion of secondary materials (e.g., commercial outlines and nutshells) within a CCB; and (6) furthering pedagogical reform to the degree that professors are open to re-conceptualizing the legal course book (e.g., bringing torts materials or economic analyses into a contracts CCB).

It is important to emphasize that we do not offer CCBs as a panacea. Indeed, certain changes in the consciousness and culture of the legal academy (some major, others minor) would have to precede and then work in tandem with CCBs for path-breaking pedagogical reforms to occur. After all, the CCB is an instrumental means to further educational changes, not the driving force for such changes. Without the innovative professorial mindset required for real reform, without the institutional support to alter everything from the first-year curriculum to the bar exam, the CCB cannot maximize its greatest potential. What is certain is that the benefits accruing from the use of CCBs will span a spectrum from modest advantages (e.g., CCBs that are glorified casebooks) to moderate gains (e.g., CCBs that redefine subject categories) to momentous ones (e.g., CCBs that include audio-visual interactive role-playing strategy games to teach negotiation skills).

Basically, a CCB comes into being in the following way: (1) The construction of a course book customization and distribution system owned by a non-profit corporation, a for-profit corporation, or a consortium, (2) on which a database, containing both open-access and restricted-access materials,[27] would be developed by teams of scholars,

[26] For current examples, consider the KindleDX by Amazon, the Sony Reader, the Pixelar e-Reader, and Apple's I-Pad. As we will later explain, however, all of these e-readers will have to evolve to actualize some of the proposals that we set forth in this essay.

[27] Open-access material is available to all users free of charge, whereas restricted-access material is typically available only for a fee.

lawyers, and other professionals, (3) that would enable professors to create their own course books by selecting, arranging, and contributing materials, and (4) that would permit students to download the materials to an e-reader or computer. The resulting file constitutes a CCB.

The construction stage: on the construction of the CCB system

Technological functions

Although the technical specifics of the CCB system cannot be usefully addressed here, the framework must be constructed for maximum flexibility in the creation, distribution, and use of instructional content. It should accommodate everything from ordinary text files and audio-visual learning objects to interactive exercises and, more imaginatively, multiplayer online role-playing games for legal instruction.[28] Obviously, technologically complex and sophisticated educational contents, which are labor-intensive and expensive to develop, are most likely to be created for commercial purposes. Accordingly, the framework should be built to handle both open-access and restricted-access, or proprietary, formats.

Design

Here, too, we need not resolve the exact mixture of so-called open-source[29] and proprietary design elements for the system. Whether or whatever the hybrid, the design should ensure the harmonization of technical standards and the ease of operation in all of the system's processes—whether regarding the integration of differently formatted learning objects or the compatibility of CCB materials with a student's e-reader or computer. Moreover, if CCBs are to vie with their print counterparts, at the very least they must offer the same degree of integrity and reliability. Hence, while the system should be designed to allow professors to add their own glosses to materials before their CCBs are finalized, it should not permit students who have downloaded those CCBs to modify the contents or copy and distribute them.

Ownership

There are essentially three models of ownership for the CCB system. It could be constructed, maintained, and operated by a non-profit corporation, a for-profit corporation, or a consortium of such corporations. A non-profit entity is more likely to provide materials free of charge, where the converse is true for a commercial entity. Nevertheless, for a non-profit owner to become self-sustaining—that is, without having to rely on government or foundation grants or law school institutional support—it is likely that the CCB system would offer both free and for-charge content (and receive a percentage of the proceeds). As explained more fully below, the richness of a CCB will be increased by the availability of gratis and for-pay materials from diverse sources.

[28] A pioneering vision for a "virtual learning ecology" offering massively multiplayer online role playing games for legal instruction is offered by Silverman (2008). In this regard, see generally Gee (2007).

[29] For a thoughtful article on the possibility of an open-source database for developing electronic course books, see Bodie (2007). See also Hodnicki (blog entry posted January 8, 2008).

The development stage: on the development of a rich database

Database contents

For each core subject matter, there would be a body of hyperlinked[30] primary, secondary, and interdisciplinary materials. These would include cases, annotated constitutions and statutes, legislative histories, administrative regulations, topical overviews, notes and questions, treatise and article excerpts, restatement sections, interdisciplinary readings, historical materials, assorted narratives, transactional problems, audio-visual materials[31] and lectures,[32] interactive practice problems and exams, course outlines, teacher's manuals, and more. To the extent feasible, such materials would be available in both unedited and edited forms (e.g., an entire case or snippets from it).

Initially, we envision the collection process to mirror the more traditional topical categories now used in legal education—contracts, torts, property, etc. The database will, however, allow professors to mix information among topical categories. For example, a torts CCB might well include materials selected from the database areas relating to contracts, property, evidence, and constitutional law. There could conceivably be prompts at various topical points suggesting such incorporations. For the more imaginative, there would be the option to create their own topical categories (e.g., private harms/public harms), or draw from materials outside legal subject matters (e.g., economics, engineering, medicine, biotech, the environment).

In time, there likely would be competing websites with their own databases—different CCB systems or non-CCB websites—that might elect to interact with each other in a way profitable to all. The CCB system, for example, might contract with another (free or proprietary) containing a remarkable database entirely dedicated to the law of civil procedure so that CCB users might tap into the rich vein of information that such a particularized database offers.

Editors

The database contents would be collected and edited by teams of academics and legal professionals.[33] Central to the integrity of the CCB model is the recruitment of learned lead editors and talented assistant editors working under them.

Initially, their selection of materials would mimic existing kinds of course book contents. For any given field of law, they would upload to the CCB database the most widely used cases, statutes, regulations, etc. They would then select and upload a variety of secondary materials, consistent with copyright requirements. Thereafter, the teams would design the CCB website interface so that all of the materials were arranged in templates by

[30] For example, links in a Constitutional Law CCB might direct students to SCOTUSBLOG or OYEZ to remain current on developments of the day.

[31] See, for example, New York Law School's *Visual Persuasion Project*, overseen by Professor Richard Sherwin at www.nyls.edu/pages/2734.asp.

[32] A variety of digitally created visual and audio law school lectures could be made available on the CCB database for professor and student use. A professor might want to assign such a video lecture. Imagine, for example, a constitutional law professor who wanted to require readings on executive powers, but did not want to cover such readings in class. S/he might assign students to watch a streaming video lecture, available in the CCB, by a noted constitutional scholar such as Laurence Tribe or Akhil Amar.

[33] The CCB team might be organized similarly to the structure—e.g., reporters, consultants, editorial revisers, and advisers—used by the American Law Institute for its Restatements.

subject matters, topics, and sub-topics. Take the subject matter of criminal law. Its template might have: Principles of Punishment (Deterrence, Rehabilitation, etc.), Culpability (Requirement of an Act, Strict Liability, etc.), Homicide (Manslaughter, Murder, etc.), and so on. The objective of such templates is to allow professors to select particular topics and discrete materials as the contents of their individualized CCBs.

Alternatively, the editors themselves could create one or more CCBs with pre-packaged materials (e.g., *Vladeck on Federal Courts*), which might be adopted by other professors in whole or in part. Yet another option would be available if the overseers of the database arrange with existing law book publishers to license the contents of various course books. The contracts template might include a selection for the entirety of the Schwartz & Riebe casebook,[34] or for excerpts from it—all for a designated price.[35] This option would permit professors to select content for the same CCB from different proprietary sources (e.g., Aspen and Carolina Academic Press), and to mix it with open-source materials.

Responding in time to the ever more vociferous calls for pedagogical reforms, the editorial teams would strive to enrich the database by including a plethora of non-traditional course contents. Moreover, professors may offer for posting consideration the educational resources that they have created (e.g., text-based or video lectures, interactive quizzes, etc.).

Licensing of materials

Whenever necessary, permissions would need to be secured or licensing arrangements made in order to provide use of copyrighted materials. For any public domain resources (e.g., cases, statutes, regulations, etc.), of course, no such copyright concerns arise.[36] But propriety materials (e.g., restatement or model code provisions, law review articles, or book excerpts, etc.) would be unavailable absent authorization or fair use.[37] The CCB system would be designed so as to compensate copyright holders by way of a pay-per-use structure analogous to I-Tunes.

The access stage: on the provision of access to professors & students

Password access

Although the CCB website templates (e.g., the table of contents for the trusts and estates materials) could be viewed by anyone, registration would be required for professors who wish to create a CCB or students who wish to download one. Upon registration, professors would be assigned passwords to access the CCB database. Similarly, when a specific CCB is completed, students would be assigned passwords to download that particular CCB and any additional secondary materials that might accompany it.

[34] Schwartz and Riebe (2009).

[35] Assuming technological standardization were achieved, private publishing companies might prefer to maintain proprietary content in their own databases, but to develop their website systems so as to interact seamlessly with the CCB system.

[36] Obviously, if public domain documents were uploaded from commercial databases such as LexisNexis or Westlaw without stripping them of headnotes, hyperlinks, and other features added by the publishers, copyright issues would arise and a licensing arrangement would be required.

[37] These and related points are ably discussed in Bodie (2007, pp. 28–34).

Controlled access

In order to prevent copyright violations and to ensure its own economic viability, the CCB system must contain adequate digital-rights-management safeguards to prevent unauthorized sharing or copying of the CCB.

The selection stage: on the professor's selection of CCB materials

General subject matter selection

A professor would first select a subject matter area (e.g., contracts, evidence, corporations, tax, etc.). Within that subject area, s/he might decide to confine a CCB only to certain topics. Someone who picked the law of contracts might limit a CCB only to topics such as the bargaining process, policing the bargain, interpretation, and remedies. By the same measure, s/he might not choose the topics of statute of frauds, third-party beneficiaries, and assignment and delegation.

A similar selection process would occur if s/he opted to use a pre-packaged CCB (whether free or proprietary). Assume that Aspen Publishers, for example, licensed the full contents of the latest edition of *Problems in Contract Law: Cases and Materials* by Charles L. Knapp et al., and agreed that the materials could be purchased in full or in part. A professor might decide to select only 60% of the casebook and to re-arrange its contents. S/he might also add original content and other non-proprietary items from the database.[38] Having done so, the professor might elect to make that CCB available to a colleague at the same or different institution for full or partial adoption consideration. The same would hold true for a professor who created a largely non-proprietary CCB that contained a few proprietary items.

Specific subject matter selection

Within each topic (e.g., contract interpretation), different kinds of content might be selected. In order to introduce students to notions of objective and subjective theories of interpretation, a professor might pick *Raffles v. Wichelhaus*[39] followed by selections from Holmes's "The Theory of Legal Interpretation"[40] and excerpts from Grant Gilmore's

[38] Georgetown Law School Professor David Vladeck expressed his eagerness for an electronic course book that would permit him to fuse self-generated instructional materials with portions of a traditional casebook:

> My vision is that, at some point, technology will permit publishers … to offer teachers flexibility to adapt their own teaching materials, perhaps by taking a conventional textbook and adding material that the teacher wants to include. For instance, I would be happy to use one of several civil procedure books, provided that I could add a new introduction, set forth my introductory fact-pattern, add a few cases that pose current problems, and include some skills exercises that involve drafting pleadings and discovery. I would also appreciate being able to exclude material that will not be covered in the class.… We all now edit by addition and subtraction, but we're stuck with casebooks that are one-size-fits-all and non-adaptable. My hope is that technology will permit us at some point to use casebooks as menus that offer teachers choices about what to cover; permit us to add and subtract material; and enable us to make the book conform to our choices about how to teach our students doctrine and how that doctrine is used in law practice. (Vladeck 2008)

[39] 2 H. & C. 906, 159 Eng. Rep. 375 (1864).

[40] Holmes and Wendell (1899, pp. 39–49).

The Death of Contract.[41] This would be an example of mixing non-proprietary and proprietary materials.

Professorial input

The CCB system should provide a blank template to allow a professor to incorporate within a CCB assigned to his or her class any introductory comments, summations, outlines, notes, questions, problems, quizzes, past exams, etc. that s/he authored. There would, of course, have to be a guarantee of indemnification for any breaches of law for which the professor might be responsible.[42]

Arrangement of materials

The CCB template must enable a professor to select (i.e., click) the materials desired for inclusion, and to arrange the items in whatever order s/he sees fit. A contracts CCB might start with materials on remedies or with the bargaining process or elsewhere. A constitutional law CCB might begin with the text of the federal Constitution, or the Federalist vs. Anti-Federalist debate, or judicial review, or congressional commerce powers.

Teacher's manual

The CCB database would be designed to permit professors to create a separate CCB for themselves and a slightly different one for their students. The former might contain, among other things, sections of a teacher's manual (or any variety of them) woven into the materials selected; it might also include relevant sections from treatises, and lecture notes from other professors made available on the CCB database.

Professor as author/editor

Before the advent of CCBs, most professors used casebooks such as those prepared by Professors Arthur Corbin (contracts), Gerald Gunther (constitutional law) and William Prosser (torts). Given the CCB system, unless a professor confines selection entirely to prepackaged materials, s/he stands to become an author/contributing editor of his or her CCB. The title page of the CCB might even read something like: *Cases and Problems on Torts* by Prosser, Collins, and Skover. Or depending on the selections and input, the professor might be identified as sole author/editor of the CCB. Some consideration would have to be given, of course, as to how copyright law might affect rights of attribution.

Order finalization

The last stage in the professor's creation of a CCB is the finalization of an online order. The professor would know in advance the total pages and cost (if any) for the selections made. Moreover, s/he would supply information on the law school, the name of the course, and the number of students enrolled.

[41] Gilmore (1995).

[42] Such breaches might include violations of copyright, tort, contract, libel, or obscenity laws.

The delivery stage: on the delivery & use of a finalized CCB

Downloading

Once a CCB order is finalized and professors and students have received their passwords, they can download the CCB with any applicable charges. Before they complete their transactions, however, students might opt to select secondary materials—commercial outlines or study guides, for example—to be incorporated into their CCBs. Such add-ons might be purchased in their entirety and placed at the end of a CCB. Alternatively, if such materials were properly coded, they might be integrated at relevant spots within a CCB. For example, a book excerpt[43] on the history of the *Palsgraf* case[44] could be tagged to that landmark precedent, or a nutshell excerpt[45] on the law of negligence could be situated at the end of the case or topic.

Receptacle

The student might wish to read, listen to, watch, or otherwise interact with CCB contents on an e-reader,[46] a desktop, a laptop, or some kind of electronic hand-held device. Ideally, wireless e-receptacles should be able to access hyperlinked materials or related information outside the CCB database, and students should be able to highlight, underline, or make marginal notations in the CCB.

Modifications of CCB

A professor may, for whatever reason, wish to modify or expand a CCB. By following the process above, s/he can revise the CCB file for the current academic period or for a future one. If proprietary information is selected, current students would be charged a modest supplemental fee to download the new file, whereas future students would pay the price, if any, of a new CCB.

As we foresee it, the proposed CCB model would have the following effects: (1) Professorial use would, in a relatively short time, be extensive; younger generations of digital-savvy instructors would not balk at the move away from print publications, and any inertia to change that older, more established teachers might feel would likely be overcome by law school institutional pressures to accommodate student preferences[47] and reduce student costs. (2) Pedagogical reforms would be advanced significantly beyond what is possible in print; without accounting for all of the CCB's capacities, just the individualization of course materials and the interactivity of electronic course books alone would encourage innovative teaching methods that print materials cannot duplicate. (3) Production and student purchase costs would be greatly reduced; although there clearly would be

[43] See, e.g., Manz (2005).

[44] *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).

[45] See, e.g., Kionka (1999).

[46] Current examples of such e-readers are mentioned *infra* note 26. To reiterate, our ideas are not confined to the limitations of existing technology. On this point, see generally Hodnicki (2008) and Koo (2005).

[47] Generally speaking, the technological divide between today's law professors and their younger students is significant, in that the latter are far more receptive to electronic alternatives to print casebooks. Regarding this point and digital literacy, see Rich (2008, p. 1).

start-up costs to the CCB system, ultimately it would avoid the high expenses associated with print production, delivery, and storage.[48] (4) Publisher profit margins would be sufficient to encourage continued and expansive innovation and licensing of proprietary products; the future for any print content is dismal, as evidenced by the plight of American newspapers.[49] (5) Quality control would be maintained; the gate-keeping function normally performed by print publishers will be continued by the CCB database teams, but their editorial decisions will not be similarly burdened by the costs of production, distribution, and warehousing and the constraints of mass-marketing associated with the print casebook industry.[50] And (6) Intellectual property problems, although challenging, would be overcome; we say this because the advantages and potential of CCBs would be so great as to necessitate reconciliation with intellectual property norms.

Admittedly, such pedagogical, institutional, and economic effects are, to a greater or lesser degree, quite practical in character. The CCB model, however, stands to have considerable theoretical and jurisprudential impacts as well. It is to those that we now turn.

Putting practice into theory

To help illustrate the theoretical dimension of the CCB venture, we begin with the thoughts of two great American judges, and then consider the implications of their ideas, and those of others, for pedagogical and jurisprudential purposes.

A dozen or so years after he began his service on the Massachusetts Supreme Judicial Court, Justice Holmes gave a lecture to commemorate the opening of a new hall at Boston University School of Law. The address, delivered on January 8, 1897, was titled "The Path of the Law."[51] That lecture, it has been said, "pushed American thought into the twentieth century."[52] Though many of its core ideas traced back to what Holmes had written in *The Common Law* (1881),[53] the lecture was cast in bold strokes. With "The Path of the Law" Holmes brought some provocative blaze into the humdrum world of his life on the bench. Lighting an occasional bushfire to stimulate the legal mind seemed to excite him; it also permitted him to move beyond the pettiness of his work to engage the grandeur of his imagination. By this time, Holmes was also breaking ranks with Dean Christopher Langdell, taking exception to the Old Master's belief in, and obsession with, the purported logic inherent in the common law. While Holmes did not discount the role of reason in the

[48] According to Kantor: "E-books are a boon for publishers. While the cost of content … remains the same, the cost of production and delivery obviously drops significantly. There's no paper to buy, no shipping charges to pay, no worries about how big a production run should be." Kantor (2006). It is already evident that cost savings in electronic book publishing are passed in substantial part down to the reader. For example, Leigh's *The Wikipedia Revolution* (2009) is priced at $25.00 list for the print version and at $10.00 list for the electronic one. See http://www.amazon.com/The-Wikipedia-Revolution/dp/B001UQO41Y/ref=kinw_dp_ke. Those cost-savings would readily overcome the initial expense that the student would bear for purchasing an e-reader or other receptacle.

[49] See, e.g., Lieberman (2009).

[50] Carolina Academic Press CEO Keith Sipe estimates that most law casebook publishers now need to sell between 800 and 1,200 units before it would be feasible to publish a casebook. Phone interview with Keith Sipe, 18 March 2009.

[51] Holmes (1897).

[52] Horwitz (1992, p. 142).

[53] Consider White (1993) ("the two works have often been contrasted, and the current scholarly view appears to be that Holmes' jurisprudential views evolved considerably between the late 1870s and 1897.").

judicial decision making process, he was far more interested in the role that policy, particularly economic policy, played in that process.

Over a century later, the workings of the legal academy tend more towards Langdell than Holmes—or so it seems. Still, Holmes rises from the ashes like the great phoenix to move minds. Judge Richard Posner has one such mind. In an insightful article titled "The Speech Market and the Legacy of *Schenck*,"[54] Judge Posner developed certain strands in Holmes's jurisprudence to urge us to rethink much of existing First Amendment doctrine. The result was both creative and provocative, in the way that Holmes was.

Generally speaking, Posner invites us to take seriously the cost-benefit implications in Holmes's opinions in *Schenck v. United States*[55] and *Abrams v. United States*.[56] Infusing economic analysis into Holmes's clear-and-present-danger standard and his competition-between-ideas maxim, Posner recommends an instrumentalist approach to freedom of speech protection. That approach would permit a legislative or regulatory restriction only if the public benefits secured by the restriction could be convincingly demonstrated by the government to exceed the costs to society in the loss of information plus the administrative costs of regulation. Posner argues that such a "cost-benefit approach, however alien to the characteristically high-flown rhetoric in which lawyers and judges tend to talk about free speech, is consistent with the Amendment's language and history (including its judicial history)."[57] To prove his point, he plies his economic analysis across a broad spectrum of free speech restrictions, including pornography, hate speech, subversive advocacy, commercial advertising, and election campaign finance regulation. And Posner highlights the implications of his instrumental approach for future scholars who might ground their work in factual inquiries useful for determining the real-world benefits and costs of speech restrictions.

Mindful of the foregoing, assume that a professor teaching freedom of expression law was frustrated by the fact that all of the leading casebooks treat *Schenck* and *Abrams* in largely identical ways, bereft of instrumentalist thought such as that of Posner. Under the print casebook regime, the most s/he could do would be to lecture on the matter, offer hand-outs, or direct students to the library to read the article in the book in which it appeared. By contrast, the CCB option would place the professor in the same position as the author of a casebook. That is, s/he might weave a Posnerian instrumentalist perspective into the course materials at the precise point where it would be most relevant. In that process, s/he might incorporate snippets of the Posner article by way of fair use, or might arrange with the CCB editors to secure copyright permission for uploading the entire article, which then could be included, in whole or in part, within the course materials. Operationally, this might be done by arranging to have the materials placed on the CCB database as a selection option accompanying the *Schenck* and *Abrams* case choices. The professor might also alert colleagues to this innovation, and invite them to adopt those sections for their own CCBs.

Another consideration might come into play. Assume that Judge Posner had elected, in the first instance, to publish his *Schenck* article on the CCB database instead of in a book. He might suppose that his thought would reach a wider and more receptive audience and be

[54] Posner (2002, pp. 121–151).

[55] 249 U.S. 47 (1919).

[56] 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[57] Posner (2002, pp. 128–129).

more influential in this forum than in a print- based one.[58] Here again, his article would be keyed to the *Schenck* and *Abrams* cases and materials in the database. There is a larger point here: the net effect of such a decision is to transform the CCB system into a publishing entity akin to a law journal, a university or trade press, or the SSRN and other such scholarly databases. We will explore this point further in our subsequent discussion.

To continue our hypothetical, assume the following: The year after the professor first incorporated the Posnerian instrumentalist approach to free speech into a CCB, s/he reads *Law without Values* by Albert Alschuler,[59] and becomes convinced that the instrumentalist approach smacks of the type of amorality that Alschuler equated with Holmes.[60] Now, s/he wants to revise the course materials to reflect this new thinking. The professor can easily amend, supplement, or delete the content in question.

Implicit in all of this are several observations of theoretical significance. First is the notion of the homeostatic nature of information and knowledge in the digital law school. Law as it is taught need not be bound, static, out-dated; these characteristics are associated with the print model of transmitting information. Today's legal educational content, however, can be fluid, malleable, and ever-current; these characteristics are associated with the CCB model. Nor need the law as it is taught be hierarchical—substantially delimited and dictated by the top–down decisions of print casebook authors[61] and publishers. Rather, it might be made more democratic—greater control over educational contents can be rendered up to the individual decisions of professors. In these regards, the CCB process is Heraclitus-like: nothing need endure but change.[62]

Second, the commonplace notion of authorship is challenged in the CCB domain. As evidenced in the hypothetical above, once professors become active creators of CCBs, they cease to be mere recipients of packaged information fixed in printed casebooks. Instead, they stand to become developers of unpackaged information selected for customized CCBs. In short, the CCB process is transformative: its professorial users become "authors."[63]

Third, the traditional relationships of author-publisher, author-distributor, author-professor, and author-student will likely be changed by the operation of the CCB system. Whereas in the print world, casebook publishers have the final say as to who will or will not be deemed an author, in the CCB world the converse is true. Short of breaches of the law, the CCB publisher is willing to allow any professor to be deemed an author and to create his or her own course book. Whereas print casebook publication decisions hinge

[58] There may well be warrant for this assumption, as evidenced by the very few professors who seem to know of Posner's seminal article. A recent Lexis search indicates that the article has been cited in legal periodicals a paltry 11 times since its publication 7 years ago, and two of those citations were by editors of the book in which the article first appeared. Lexis Search of "The Speech Market and the Legacy of *Schenck*," undertaken 19 March 2009. Should this opportunity to publish within the CCB database become popular, the system might develop a tracking mechanism to calculate how often a particular item was selected for download within CCBs. Moreover, it might be possible—though this is a far more complicated matter—to create a LexisNexis-like function for identifying where an article like Posner's was used or cited in CCBs.

[59] Alschuler (2000).

[60] For the record, we are not entering into this philosophical fray.

[61] In this regard, Grant Gilmore once described Langdell's casebook project as "dogmatic." See Gilmore (1995, p. 14).

[62] See Guthrie (1967, Vol. 1, pp. 435, 449–454).

[63] Much as any print casebook author does, the CCB author would, of course, be obliged to give credit to those who wrote the materials s/he selected for the course book.

largely on mass-marketing concerns, the CCB author can publish a course book for a class of five and use it for one time only. The economics of the system would not prohibit such publication. Whereas print authors depended on several middlemen (i.e., warehouses, distributors, and bookstores) to stock and sell their casebooks, the CCB system consolidates all of their functions. In this environment, the law school bookstore may go the way of the phone booth. Whereas the print world clearly demarcated authors from professors who adopted their casebooks, that pronounced demarcation may soon fade considerably. Whenever a professor creates a unique CCB, the author-professor dichotomy collapses.[64] And whereas the print author maintains control over the contents that a student user reads within a casebook, the CCB scheme allows some opportunity for students to become, as it were, co-contributors. At a minimum, they would have the option of selecting and integrating certain secondary materials into their assigned CCBs. In sum, on the print stage, the players' roles were fixed and publishing relationships rigid; on the CCB stage, however, roles would begin to merge as relational boundaries increasingly dissolve.

Fourth, the concept of scholarship might be substantially affected. Traditionally, scholarship has been associated with publication in printed books or journal articles, the academic merits of which were evaluated by learned editors and outside reviewers. It was this gatekeeping function that greatly validated the purported worth of any published work. By comparison, the CCB system's gatekeepers make similar evaluative decisions as to the overall contents of the database, but have no interest in the particularized work product of a CCB professor. For a custom-designed CCB to count as scholarship, at least one of two events would have to occur. The intellectual merits of a professor's own contributions to a CCB would be assessed mainly by institutional figures, such as the law school dean, advancement committee, professorial colleagues, and outside reviewers.[65] Or some weight might also be given to determinations by the CCB editors when they elect to showcase an outstanding CCB[66] developed by one or more professors whose original contributions are extraordinary. Hence, when scholarship goes from print to digital, its standards may well be reconfigured.

Fifth, the possibilities for pedagogical reforms expand beyond anything yet experienced. But so long as book content is determined by the profitability of the print publishing market, meaningful opportunities for diversity and innovation in educational materials are marginalized accordingly. In that market, different jurisprudential movements—everything from law & economics and law & literature, to feminist studies and critical legal studies, to transactional and skills-training approaches—all compete for their share of the print

[64] Naturally, there would be some professors—the less innovative and the novice—who would not be immediately attracted to creating their own CCBs. They would, instead, prefer to order a reliable prepackaged set of materials—either a proprietary package (e.g., Redish and Sherry (2006)) or an already developed CCB made available for selection by the system editors (e.g., our earlier reference to *Vladeck on Federal Courts*). Such professors would rather remain consumers of information than become authors of it.

[65] Presumably, such institutional figures make similar decisions today in the case of professors who maintain scholarly blogs, such as Professor Jack Balkin's blog, "Balkinization," Professor Eugene Volokh's "The Volokh Conspiracy," or Professor Richard Hasen's "Election Law Blog."

[66] Generally speaking, we envision something akin to or approximating the long unpublished but widely copied and distributed 1958 manuscript, *The Legal Process*, written by Professors Henry Hart, Jr., and Albert Sacks, which has been praised as "the most influential book not produced in movable type since Gutenberg" See Hyman (1976, p. 1286 n. 70). Over 30 years after its inception, the uncompleted manuscript was finally published in print. See Hart et al. (2001). See generally Eskridge and Frickey (1994). To be sure, the coin of the CCB realm need not be as remarkable as the Hart & Sack's manuscript. Nonetheless, the editorial decision to make a noteworthy CCB available for professorial adoption is analogous to Foundation's publication of *The Legal Process*.

publishing pie. With the dominance of the casebook method, jurisprudential ideas and educational strategies that deviate from that standard are likely to be consigned to snippet add-ons within the text or to supplementary readers. By contrast, the CCB system would more evenhandedly accommodate the preferences of traditionalists who hew to the casebook line and non-traditionalists who strive to break away from it. In sum, the jurisprudential tent of legal education may be stretched to the limits of our imagination.

The emerging diversity in CCB materials might well clash with certain institutional norms and commercial expectations. For example, insofar as criminal law casebooks are largely uniform, their pedagogical messages are similar. In such printed texts, one can safely find the familiar—the law of homicide, the felony murder rule, the law of voluntary and involuntary manslaughter, the law of conspiracy, and so on. Beyond that, one can also expect to discover the same key cases—*People v. Washington*,[67] *State v. O'Brien*,[68] *Rowland v. State*,[69] and *Griffin v. State,*[70] among others—and all of them edited in much the same way. Casebooks thus set the measure for everything that follows: how courses are taught and tested, how commercial study aids are designed, and how the bar examination is administered.

But what would happen when many professors in the 200 ABA-accredited law schools begin to experiment with developing their own criminal law CCBs? As the canonical approach to teaching criminal law is contested, those institutional and commercial conventions might be set into flux. This is not to say that chaos would reign, for the hold of doctrine is likely to remain mighty. But the print-based norms that govern institutional and commercial perspectives would become less rigid and dogmatic, more elastic and adaptable. After all, when the law as taught changes, then law itself may change.

The digital path of the law is both realistic and mysterious. It is a path that traces back in time and arches forward into the future. By traveling it, to draw on Holmes, we may become greater masters of our calling. In a grander sense, the journey may enable us to tap into the "most far-reaching form of power"—"the command of ideas." And to do that, even in ways only partially realized, is to connect our ideas "with the universe" and then, perhaps, to "catch an echo of the infinite…."[71] Or so is the hope.

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[71] The string of quotes in these sentences is taken from Holmes (1897, p. 466).

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