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### Chapter

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## Casebooks, Learning Theory, and the Need to Manage Uncertainty

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Law students' principal texts have shifted and evolved over time as the legal academy has absorbed progressive education's principle of learning by doing – or through practice. This chapter traces that evolution, emphasizing both the relevance of progressive theories of education to professional training and the complexities inherent in following progressive education's prescription of teaching law by having students practice using it. The lessons of the history I will trace are the following:

1. Law is, as proponents of legal realism famously claimed, the dynamic and indeterminate product of human interaction.
2. Law's dynamism and interactivity make the progressive principle of learning by doing particularly appropriate for training legal professionals.
3. Practice in using the law is discomforting, for it requires that we accept, and try to manage responsibly, law's indeterminacy.
4. Interactive media facilitate student comprehension and acceptance of the interactive character of lawyering and the indeterminate character of law.

The evolution of law school texts can be quickly summarized. The earliest U.S. law schools<sup>1</sup> are said to have relied principally on expert compilations or statements of the law that I will refer to generically – and somewhat loosely – as treatises. In the beginning, students read treatises, and law professors reportedly recited or described the contents of these treatises in the law school classroom. The iconic law school text shifted in the late nineteenth century from the treatise to what we know as the casebook – books that collected the original texts of judicial opinions (and later of statutes)<sup>2</sup> for students to analyze on their own and in class discussion.<sup>3</sup> Critics complained that judicial opinions are not “cases” themselves but fragments from the late stages in the development of cases,<sup>4</sup> and some authors began to include trial transcripts, exhibits, and other documents for students' consideration.<sup>5</sup> But the focus of the casebook continued to be the judicial opinion, and collections of judicial

opinions continue to be called casebooks. Casebook formats evolved to include more and more elaborate collections of commentary and background materials (the “Cases Materials” format) and, in some cases, to include problems that students were asked to solve in light of assigned cases and materials (the “Cases and Problems,” or “Cases, Problems, and Materials” format). More recently the problem model has expanded to include complex simulated case files that students fill out with their own work product (in the form of documents – office memoranda, pleadings, agreements, briefs, interview reports, etc., and transcribed or taped interviews, arguments, negotiations, etc.). In this simulation model, cases and commentary on cases are largely left for students to find on their own, and students’ filled-out case files become texts for collaborative evaluation and critique. In the simulation model, not only do students learn in the process of doing, but their own work product becomes a principal text for their study.

The textbook genres described previously are rarely discussed in terms of pedagogical theory. Indeed, as with most graduate and professional school teachers, law professors have not worried much or written extensively about pedagogy. Nonetheless, if we review the shifts and combinations among treatises, casebooks, and case files, we can see that law school texts have, in fact, been informed by pedagogical theory, even though that theory has been underdeveloped and rarely articulated. As the following examination of each genre will show, law school texts have consistently evolved in accordance with the tenets of the so-called progressive schools of education to emphasize learning by doing, learning through collaborative practice, and learning to develop expertise rather than simply collect knowledge. They have moved from materials designed to transmit knowledge of the law to materials designed to support mastery of the lawyer’s art. They have moved, that is, from materials that seemed to convey reasonably certain truths to materials that seem to do nothing but pose questions.

#### A. THE TREATISE

The function of the treatise was – and is – to report principles that have been distilled by legal scholars from statutes and judicial opinions. Students in the era of the treatise were not required to read the justices’ opinions in *Pennoyer v. Neff* or *International Shoe Co. v. Washington*. A treatise would simply tell them that through these cases “the conceptual basis of state jurisdiction [shifted] from territoriality and physical power to contacts between the defendant and the forum state and fairness.” Learning in this way, students would not have to puzzle out in different contexts the ambiguities of “contact” or the determinants of “fairness.”

When treatises were law schools’ principal texts, education was seen as a transmittal process. Interpretation seemed the province of the professors and of the scholarly

senior practitioners who authored treatises and presented lectures. The work of the law student was to internalize authors' and professors' scholarly wisdom with the thought that s/he would be prepared to recall and apply that wisdom to future clients' circumstances. The academy was the source of knowledge, and the student was the vessel into which that knowledge was poured.<sup>6</sup> All of this began to change with the invention of the casebook.

## B. THE CASEBOOK

The core function of the casebook is to reproduce for students the texts of judicial opinions, usually at the appellate level, usually edited to highlight particular issues and delete matter thought to be extraneous to those issues, and usually ordered to track the development of lines of doctrine. Casebooks were invented in or about 1870 as Christopher Columbus Langdell (and some of his colleagues and contemporaries) transformed legal education from the passive study of legal principles that could be found in scholarly treatises to active, "Socratic" discourse about the meanings and possible applications of official enactments and judicial pronouncements. With this development, primary sources – constitutions, statutes, and, most prominently, judicial opinions – became the law student's basic texts, and interpretation became the law student's basic task. Internalization and recall remained essential, however. Students had to know the facts, procedural circumstances, rationales, and results of cases. Treatise reading also remained important, for it gave students background knowledge of how experts interpreted and explained doctrinal developments. But this knowledge was no longer the ultimate goal of professional training. It was the foundation from which students could practice the skill – or art – of using the law in new circumstances to serve the interests of a client or a cause. Instead of being given rules to learn, students were called on to ponder new mixes of precedent and circumstance and argue for, or against, fresh readings of doctrine. The implicit (and sometimes explicit) assumption was that lawyers needed to be trained to go beyond recalling and reciting the law to participating in giving it meaning.

The shift in legal education from passive rule learning to active and interpretive practice coincided with – and was part of – the rise of what came to be known as "progressive" education. A key component of progressive education was learning by doing. Students who learn sums, multiplication tables, and the formulae of algebra, geometry, calculus, and trigonometry are able to apply that learning in order to add, multiply, divide, and calculate the results that mathematical formulae yield. They can report memorized associations and perform prescribed operations. But they do not necessarily understand what they are doing. That is why there is a consensus among educators that students need to "play" with concepts rather than simply apply them.

As did European children's classrooms grounded in the work of Johann Heinrich Pestalozzi, Friedrich Froebel, Edward Seguin, and Maria Montessori, the Langdellian classroom involved learning by doing. Just as Froebel designed toys, puzzles, and games that led children to visualize and play with mathematical concepts, Langdell crafted hypotheticals that led law students to conceptualize and manipulate legal principles. Langdell's Socratic method was in harmony with progressive theories of education championed in the United States by Francis Parker, John Dewey, Charles Eliot, and a transported Maria Montessori, all of whom urged that, as Pestalozzi once put it, the "aim of . . . teaching was to develop the children's own powers and faculties rather than to impart facts," and all of whom, in one way or another, believed that students learn naturally and well when they follow their curiosity to engage in playful problem solving.

In addition to learning for mastery and learning by doing, the progressive school encouraged learning through collaboration. The psychologist Lev Vygotsky, whose work was also a foundation for progressive education, taught that people learn to make and do things through the collaborative discourse and effort involved in trying to make and to do. This kind of learning is social rather than solitary. It depends on the process of exchanging ideas, language, and tools.<sup>7</sup>

Collaborative learning by doing is particularly apt for professional training for at least two reasons. It is, in part, the process by which experts display and report technical knowledge to their less expert, and often junior, collaborators. It is like, but more structured than, the apprenticeship model under which lawyers and members of other highly regulated professions were trained in the past. But it also involves more than merely handing down developed skills. As more and less experienced professional collaborators pursue their projects, they sometimes innovate. They replicate tested techniques and products, but they also fashion new techniques and products and acquire new knowledge. Practicing doctors reclassify diseases and discover new treatments. Practicing architects and engineers modify their understandings of what it is possible to build. Practicing lawyers struggle to apply established rules in new (and often unanticipated) circumstances. As do children playing with mathematical concepts, aspiring professionals need to do more than learn and apply rules and formulae. They need to understand what they are about and to think critically about alternative courses of thought and action. This kind of understanding and critical thought enables creativity and innovation. It also enables career-long professional growth and the advancement of the practitioner's discipline and art. We might say that it enables progress.

Imagine post-Langdellian law students working from the texts of statutes and judicial decisions to understand what the law might require in an arguably novel hypothetical situation. Imagine the dialogue among teachers and students as they struggle together to fashion arguments on each side of the question and to reach a

resolution. You can perhaps see how participating students' analytic and rhetorical skills would sharpen as they construct, argue, and weigh competing interpretations of ambiguous texts.

But you might also imagine a need to return to the treatise. Remembering 12 times 8 is more efficient than conceptualizing it. Like anxious parents whose children are being taught "new" math, anxious law students are impatient for answers. When a hypothetical has been posed for deliberation, they might wonder whether the situation posed in the hypothetical has been considered by an authoritative court or addressed by a learned treatise writer. They might then read ahead in search of a case that raises and answers the professor's hypothetical question. Or they might go out and buy a treatise. Or borrow someone's notes from a prior year. Worst case, they will go out and buy an overly simplified treatise or hornbook. Whichever path students in post-Langdellian Socratic classes take, they can and will at times skip the work of pondering and arguing the outcome of each hypothetical in favor of searching for a canned answer (or, in the case of the more sophisticated student, for a predigested set of arguments on each side of the question). Students who do this might remain in a pre-Langdellian pedagogical environment, reading and remembering rather than working actively to solve problems. But this is not necessarily so. A student armed with knowledge of prior attempts to resolve a doctrinal question may be enabled to think actively – and creatively – about how the question should be (or should have been) resolved. Whether students read for answers or read critically will depend to a large extent on how professors conduct their Socratic questioning. If professors solicit and applaud nothing more than simple repetitions of case outcomes or treatise writers' rules, their students will go to class prepared only to recite. If, on the other hand, professors solicit and applaud argument and critical commentary, their students will go to class prepared to reason and to engage with other students' reasoning.<sup>8</sup>

It appears that Langdell, who is said to have authored the first casebook, took the latter course, demanding students' active reasoning from and engagement with the cases he required them to read.<sup>9</sup> He certainly did not intend that the treatise be abandoned. His conviction that law students should attempt to sort out for themselves the meanings and implications of judicial decisions did not require him to deny the value of scholars' disquisitions on what those texts might mean. Indeed, Langdell was himself hard at work on a treatise on contract law as he developed his pioneering casebook on contracts.<sup>10</sup> He may have hoped that when he asked his students to interpret an important contracts case, the students' responses would reflect and test the judgments of the best treatise writers.

We can see, then, that the casebook has not replaced, nor should replace, the scholarly treatise. The casebook has served to make students active and progressive learners by giving them analytic and interpretive work to do, and the treatise has

become a resource rather than the ultimate object of study. The future holds opportunities to use new media and technology to devise more efficient and effective ways of packaging, updating, and delivering the legal knowledge that treatises contain. As we shall see, however, the more important task will be to improve on Langdell's dialogic, casebook method by facilitating and complicating the Freubellian play with which law students discover knowledge on their own and construct new knowledge.

### C. CASES AND MATERIALS

#### 1. *Looking beyond the Judicial Opinion*

In response to criticism that the so-called case method, with its focus on judicial – and usually appellate – opinions gives students an inadequate understanding of law or of lawyers' work, some casebook authors have expanded the notion of a case to provide, with respect to some matters, other parts of judicial records, such as trial or argument transcripts, pleadings, or exhibits. These additional case materials expand a student's field of vision so that s/he sees beyond opinion writers' descriptions of adjudicated controversies to consider how those controversies arose and were presented for decision. This broader field of vision can give students a richer understanding of legal process. In addition – and perhaps more important – it can complicate students' sense of the determinants of judicial decision making by revealing the extent to which outcomes are the result of advocates' strategic or rhetorical choices as well as – or perhaps instead of – the result of pure analysis. With this revelation, it becomes apparent that the lawyer's art involves strategy and persuasion just as it involves reasoning from legal knowledge. It also becomes apparent that lawmakers' decisions can be the result of judgment as much as – and sometimes instead of – the result of reasoning from legal knowledge. We might say that this is the first step in taking an outside view of legal process rather than restricting one's gaze to the language and logic of official texts.

Looking beyond the process of reasoning from legal knowledge can be unsettling to students and to professors alike. It is possible to trust that reasoning from legal knowledge will lead to results that are necessarily correct, if not necessarily just. And a "correct" result is difficult to fault. On the other hand, reasoning in response to an advocate's strategic moves or persuasive powers robs us of any assurance of correctness – or of justice – and leaves a feeling of uncertainty. This uncertainty arouses anxiety that the more accomplished, or the more richly funded, or – worst of all – the least scrupulous lawyering can usually win the day. It is perhaps for this reason that so-called skills training is segregated and devalued in the legal academy.

This kind of training is thought to emphasize methodology rather than substantive law, and we have no appetite to teach or learn how to “work the system.” We would prefer to keep our eyes on the law and our faith in the possibility of a correct result.

The critique of “skills” training that I have just described is, of course, flawed. I will address its flaws presently, but it is necessary first to describe the materials beyond the official records and particular histories of cases that are typically included in what has come to be known as a casebook. Doing so will reveal additional sources of scholarly anxiety about the teaching of lawyering as opposed to the teaching of law.

## 2. *Looking beyond the Case*

Casebook authors typically provide supplemental materials to aid or structure students’ interpretive work. As a result, casebooks are typically titled “Cases and Materials” on some area of law and contain various combinations and quantities of extrarecord information. This extrarecord information can be divided into two prominent categories: 1) Many authors supplement judicial opinions with treatise excerpts and other interpretive commentary so that student readers can consider the interpretive conclusions of legal scholars and other experts. 2) Casebook authors also include factual accounts or research literature that might inform students’ own interpretive conclusions.

Student resort to treatise excerpts, law summaries, and other commentary has been addressed earlier. Whether it occurs because students do independent research or because commentary is structured into a casebook, it can threaten experiential learning by providing answers to questions students should ponder on their own. But, as with the student who takes initiative to discover treatises and other commentary independently, the student provided with commentary can, and should, be encouraged to use it to deepen, rather than to substitute for, his or her own analysis of primary sources. Moreover, the inclusion of commentary enables authors to select for their readers commentary that is scholarly and balanced rather than summary and conclusive.

To say that Cases and Materials texts offer commentary and supplementary documents to aid in the interpretation of law’s original and official sources is to broaden again the student interpreter’s field of vision. Students of law may now look beyond *both* statute or judicial pronouncement *and* the record and immediate circumstances of a case to see the wide range of considerations a decision maker may entertain in interpreting a law. This raises one of law’s most vexing questions: Upon what kind of material may a decision maker legitimacy rely in making an interpretive choice?



### 3. *The Problem of Uncertainty*

To limit or expand the range of appropriate references for legal interpretation is to accept – or to posit that a decision maker might accept – a particular theory of legal interpretation. It is to choose, for example, among the *textualist* belief that a law means exactly what it says, the *originalist* belief that a law means what its authors intended it to mean, or the *functionalist* belief that a law has – or should be read to have – the meaning that would best serve the function that lawmakers intended it to serve (or that it *ought* to serve).

Imagine a world in which all decision makers are strict textualists who believe that the proper meaning of a law is fully expressed by its language. In such a world, interpretation of a newly enacted law should require no more than the text of the law and, perhaps, materials about common or accepted language usage. Similarly, parsing the meaning of a statute that had been interpreted by a court of ultimate jurisdiction would require no more than the text of that court's decision. Imagine instead a world in which all decision makers are strict originalists who believe that the proper meaning of a law depends on the intentions of those who made it. In such a world, consistency would require that a decision maker's interpretation of enacted law be found in evidence of the lawmakers' opinions at the time of enactment, and interpretation of a controlling opinion would be properly aided by evidence of what the deciding judge or judges meant to say. If all decision makers were functionalists and believed that laws should be interpreted so that they served the social function they were meant to (or ought to) serve, then interpretation would be properly influenced both by evidence of the lawmakers' goals and by evidence of the law's actual or predictable efficacy.

In the real world, decision makers are almost never “pure” textualists, or originalists, or functionalists. One can think of cases that would test the ability of any decision maker to hold strictly to any one of these positions. How would a textualist fix the meaning of a sign directing drivers to “proceed at a reasonable speed”? How would a contemporary originalist fix the sign's meaning if it was posted when there were no motorized vehicles? How would a functionalist fix the meaning of the sign if it were posted in error? Most decision makers are eclectic when they choose (or fall into) interpretive theories, and not all decision makers work from – or seek to work from – the same mixes and versions of those theories. Moreover, we know that judges are susceptible to being unwittingly influenced by factors that should, under their espoused theory of interpretation, be irrelevant.

It follows that lawyers should be trained and prepared to argue from text, from lawmakers' intent, or from function and to make judgments about which sort – or combination – of arguments and evidence will be effective in any given situation. Casebook authors have, for the most part, taken this eclectic stance and offered

materials relevant to laws' literal terms, their original intent, and their functionality. Thus, one might find in a casebook dictionary definitions or sociolinguists' essays about the meanings of terms, one might find documents that express or suggest lawmakers' intentions, and one might find studies relevant to the predictable social effects of alternative constructions of a law.

To acknowledge all of these interpretive aids is to see that each may support a different interpretation of a law's meaning. The definition of the words "quiet" and "zone" do not tell me whether I am permitted to hum. A "quiet zone" may have been established by a committee whose reports and other documents reveal that its members had different notions about how quiet people passing through the zone had to be. And empirical studies are unlikely to determine whether a strict or a lenient reading of the "quiet zone" rule will establish over time an intended or desirable atmosphere. Moreover, to attempt to use these aids in concrete cases is to see that each type can, in some circumstances, support a variety of interpretations. Different advocates will define the word "quiet" differently, different advocates will cite different passages from the committee's minutes, and competing experts will say competing things about enforcement rigor and social behavior.

This second excursion beyond the pages of opinions and other official texts intensifies the disquiet of uncertainty. When the entire record of a case could be considered, it became apparent that particular circumstances of litigation, like practitioners' strategic choices, might be outcome-determinative to the extent that they affect what and how much decision makers will know and what authority they will acknowledge. We now see that outcome-determinative variation can also result from the kind of interpretive theory a decision maker holds and the kind of interpretive evidence and argument practitioners' offer.

If students must factor in variations in strategy, resources, and knowledge and then factor in variations in decision-making philosophies, how can they imagine that there is a single, predictable, and correct answer to a legal question? And if there is no such answer, what is the object of Socratic dialogue? If I am preparing to be grilled in a civil procedure class, do I need to know the correct interpretation of *Erie v. Thompkins*? Will a treatise or hornbook statement of its holding serve me adequately? Is my professor seeking answers? Or does the professor want me to appreciate how a probably ambiguous result flowed from interactions among parties, advocates, and decision makers in a particular set of personal, institutional, social, cultural, and political circumstances? Should I be searching for truth or undertaking a critical analysis of interests, philosophies, norms, contingencies, and moves?

There has been abiding controversy about whether, when Langdell enshrined the case method, he thought he was engaging in – or engaging his students in – quests for absolute legal truths or studies of the social construction of rules.<sup>11</sup> This controversy was richly complicated by the work of the legal historian Andrew Chase<sup>12</sup>

and of Langdell's painstaking biographer, Bruce Kimball.<sup>13</sup> The evidence now available suggests that Langdell wavered uncomfortably between the two poles, as many legal scholars do today: As an answer-seeking mortal, he craved definitive truths, but experience and sophistication led him to see legal pronouncements as provisional responses in transitory circumstances.<sup>14</sup>

In the early decades of the twentieth century, the legal realist school of scholars shook the academy by announcing that a sense of uncertainty about the meaning of law or about the answer to a legal question was appropriate. Law, they claimed, is indeterminate. This claim immensely complicated legal interpretation and legal theory, but it proved hard to dispute. Scholars, like their students, were able to look beyond the neat logic of judicial opinions to a sea of contingencies that might have influenced those opinions. Indeed, it was not long after the realists announced their claim that respected, mainstream scholars could say (admittedly with some exaggeration) that "we are all realists now." Still, uncertainty remains disquieting, and the disquiet prevents us from following the pedagogical implications of the realist insight. Few among us speak clearly or coherently to our students about indeterminacy, and many of us postpone the discussion until students have been entrapped by illusions of certainty. Postrealism's critical legal theorists deepened mainstream legal scholars' disquiet over uncertainty by suggesting that in addition to being undeterminable by fixed principles, legal outcomes are – or can be – determined by influence, interest, and bias. This added the insult of impure motives to the injury of unpredictability and further motivated us to cling to the reassurance that accompanies believing that legal outcomes are "correct" in some verifiable way.

#### 4. *The Pedagogic Response to Uncertainty*

If we treat the choice between a quest for absolute truth and a study of social construction as philosophical, we may debate it endlessly without agreement. But the pedagogic issue is practical rather than philosophical. We want to know what beyond the text and the internal logic of a case students need to know or understand. The wise strategy of "backward design"<sup>15</sup> counsels that the desired result of a learning experience be established *before* that experience is designed. In other words, before we construct a learning experience, we should know what we want students to gain from it. Let us remain agnostic about whether any given legal pronouncement might be true or eternal and simply ask what students should know about it.

What we think law students need to know depends on what we understand to be the purpose of law school training. Perhaps surprisingly, this is something about which legal academics seem to disagree. The overwhelming majority of law students go on to participate in the creation, interpretation, and enforcement of law. They become practitioners, administrators, legislators, adjudicators, and adjudication

facilitators.<sup>16</sup> Most of us who teach law students aspire to prepare them to assume these roles, albeit as novices. There is, however, a competing view – expressed most frequently by faculty members who see (or wish to see) law schools more as research facilities and less as professional training grounds. This competing view is that law schools should concentrate on teaching legal doctrine and theory, as practice skills are ephemeral and best learned on the job. In this formulation, legal doctrine presumably means the best contemporary statement of official rules governing a subject area. The contents of an ideal treatise, perhaps? The meaning of legal theory is more ambiguous; often it seems to mean hypotheses about how a subject area or category of human activity is best governed (e.g., a cost-benefit or social welfare theory of torts). At other times it seems to refer to hypotheses about lawmaking and legal process. We might take the theories of interpretation described previously as examples of what legal academics refer to when they talk about this second kind of “theory.”

There are few who doubt that law schools should teach both doctrine and theory of the kinds I have described. However, we who strive to make our students practice-ready argue, following education theorists of the progressive school, that doctrine and theory are best understood in context. This is true, we sense, even for those who intend to teach and to engage in theoretical analysis rather than to practice law. When we say this, we are, in effect, rejecting the theory/practice dichotomy. We are resisting the compartmentalization of legal education into “what” and “how-to” chambers. We are resisting sharp distinctions between “academic” and “clinical” training.

Those who disagree argue that things should at times be broken down into learnable parts; that those who teach law and theory best are not necessarily equipped to teach practice skills, while those best equipped to teach practice skills may have little expertise in theory. What contestants in this argument miss is that the Rubicon has already been crossed, and Christopher Columbus Langdell led the crossing. *When law students began practicing the work of interpretation, they began learning the work of practice.* For this reason, authors of Cases and Materials texts do not choose a theory of interpretation to advance but offer materials to support arguments that might be made to decision makers who embrace a variety of theories. Students have not entered law school to learn a jurisprudential faith (although they may have one or decide to adopt one). They have entered to prepare themselves to predict the judgments of, and to be advocates before, decision makers of every faith. A practitioner may not be agnostic about how laws *should* be made and interpreted, but a successful practitioner must work with the fact that laws *are* made and interpreted in interactions among people who hold a variety of views about the making and interpretation of laws. The same can be said of a skillful scholar.

Recognition that laws and lawmakers are not controlled by any single theory makes controversial the casebook author’s choice of materials as interpretive aids,

for many selected materials will seem inappropriate to those who hold particular theories of interpretation. A textualist, for example, may protest inclusion of stories about the parties' social or economic or personal circumstances on the ground that they are not legally relevant. If the sign says, "No Vehicles," what does it matter that the occupant of a motorized wheelchair is therefore unable to enjoy the park?<sup>17</sup> In certain circumstances an originalist might do the same. If the sign was posted in response to an automobile accident, what does it matter that a toy truck makes a hideously loud noise?

This is an appropriate moment to return to the problem caused by segregating law and theory, on the one hand, and practice, on the other. When we have made students active interpreters of *law* and acknowledged that advocates and decision makers are not bound by a unifying *theory*, we gain a new appreciation of the centrality of *practice*. We see that no one of these elements can be fully grasped unless the other two are also considered.

To recap: We have seen that the earliest law school courses were focused principally on teaching doctrine or the meaning of law itself. Each subsequent step in the evolution of course materials expanded law students' horizons. The casebook empowered law students to practice the art of interpretation on their own. With this, right answers ceased to be offered from the law professor's podium. When the "cases" of the case method were expanded to include the official and historical record beyond the judicial opinion, the law student's universe was opened to a fuller understanding of the facts and circumstances of a case and to matters of strategy and methods of persuasion. With this, legal decision making began to seem to depend on the contexts of deliberation as well as on practitioners' effort and skill. The cases and materials model for law school texts raised the question of what secondary and extralegal materials students should consult if they were to be seen as interpreters of law and not just receptacles for legal knowledge. This expanded students' horizons beyond litigation controversies to offer broader knowledge about personal, political, and social context and the guidance of the human sciences.

#### D. CASES AND PROBLEMS

Is there a logical next step in the development of texts for training lawyers? I believe that there are two: making texts of students' practice experiences and offering texts that address the methods by which students enact those experiences.

The casebook serves to frame discursive learning experiences as much as it serves to transmit information. It provides the original sources whose meaning professors and students will debate in the classroom, as well as commentary and materials that enrich classroom debate. As law school text authors absorbed this idea, they began to offer, in addition to commentary and enrichment materials,

problems for students to ponder after they had read the original source materials of statutes and case law. With this move, casebook authors relieved professors who assigned their texts of at least some of the responsibility for structuring class debate, and a Cases and Problems model emerged. Whereas students had typically been surprised in class by the hypothetical scenarios and problems they had to confront, the problem method gave them the opportunity to think through at least some questions in advance. The practice of giving students problems prior to their class performances is preferable pedagogically because each student who prepares for class can try to apply what s/he has read. On the other hand, law professors often substitute or mix in surprise questions, either on the theory that lawyers must be trained to “think on their feet” or because discussion leads organically to unanticipated issues.

It is possible to construct problems for students that have a definitive answer key. Similarly, it is possible to organize a Socratic discussion in which all questions are, in educators’ jargon, inauthentic – questions for which the questioner already has in mind a fixed answer. But the best cases and problems texts – as do the best Socratic teachers – minimize or avoid these fill-in-the-blanks questions and regularly pose genuine questions that require students to anticipate the next development in a line of doctrine or to confront a scenario that confounds what seemed in other circumstances to be a sensible rule. Here too, then, uncertainty reigns, and students worry, as Langdell’s students worried nearly a century and a half ago, whether their professors know any law and why, if they do, they will not simply “teach” or tell it to them.

#### E. SIMULATIONS – STUDENT WORK AS TEXT

Education theory may tell us that people learn best by doing, and we may or may not be persuaded. But in law, what is done – and how it is done – is all there is to learn. There are theories from many disciplines that will help us to assess lawyers’ and decision makers’ strategic, rhetorical, and policy choices, both prospectively and retrospectively. But there is no grand theory that will allow us to deduce how participants in a free and open society will in the future arrange their affairs and resolve their disputes. Only the scattered few who cling to outmoded claims of legal certainty would argue otherwise.

The case method permitted students to study and to practice interpreting the opinions issued at the end of a litigated matter or motion and to test the relevance of those opinions to new matters. Cases and materials gave students materials, both within and outside the records of cases, that might inform their interpretive practice. Cases and problems gave students contexts for interpretive practice. The simulation model turns students’ own work into the text. It gives them concrete and complex

problem scenarios and asks that they do what needs to be done to resolve a legal matter. It then takes what was done – students’ memoranda, videotapes of meetings, arguments, outcomes, and coparticipant reactions – as text for critical study. Law, theory, and practice join as strategic, rhetorical, ethical, and policy choices are analyzed and alternatives are considered. Students become more sophisticated, both about doing law and about what law is.

The texts that are given to students for simulations differ radically from the casebook. When students engage in simulations, primary and secondary sources are for the most part *not* provided but left for students to find through their own research. Faculty who supervise simulations must understand the primary sources upon which students in role are most likely to rely, but these sources (and secondary sources interpreting or explaining them) are materials for a teachers’ manual rather than for student consumption. What students need is a set of materials that will place them convincingly in role and give them the information and guidance they need to carry out a lawyering task.

The professional skill of practicing or rehearsing in role is initially awkward for many law students. In time they will see that suspending disbelief in a simulation – suspending one’s knowledge that the work is not “real” or that it does not fully “count” – is as natural and as essential for a professional lawyer as dedicated training is for a professional athlete or dedicated rehearsal is for a professional actor. But the adjustment process is facilitated to the extent that information and direction are provided in role. For this reason, it is best that student materials be provided in the form of a simulated case file and through oral or written communications from simulated supervisors, clients, officials, and other interested parties.

To be effective, simulations must both encourage students to be reflective and function at the “growing edge” of the students’ abilities. What is required to achieve these pedagogic goals is a case file that does at least four things:

1. *It lays the foundation for fact development.* Each simulation will begin with a set of given facts. Some of these will be buried in documents. Others will be in the role assignment memoranda for persons (students, teaching assistants, or actors) playing the client, supervisor, official, witness, or some other party. In either case, they are for the student to find in careful document review and interviewing.
2. *It poses one or more debatable legal questions.* Good simulations, as do most matters for which people need sophisticated legal representation or counsel, involve questions of law that can be answered or argued more than one way. They involve interpretive choices that are likely to be made differently by different thoughtful students. Legal indeterminacy is, then, at the heart of a well-designed simulation.

3. *It assigns students one or more tasks that require a) developing and integrating facts and b) analyzing and applying law in order to c) solve a problem or achieve a goal.* Thoughtful development and interpretation of facts, skillful research and penetrating interpretation of law, strategic integration of law and fact, and mindful problem solving are the central lawyering arts. Practicing them raises skill levels and at the same time deepens understanding of how they interconnect to shape a legal culture.
4. *It structures and sequences students' progress through the assignment (or through a set of assignments) to assure that they are working reflectively and at the growing edge of their abilities.* Practice alone does not make perfect; repetition does not assure improvement. The most important component of a simulation is critical reflection on one's choices, and the most important benefits of the process of practice and reflection are the expansion of skills and the enhancement of critical judgment.

As I have already mentioned, a good simulation needs to generate student work that is both reflective and at the “growing edge” of a student’s ability. The first requirement may be more readily perceived in the preceding discussion, but the second requirement is just as important to experiential methodology. The progressive learning methodologies most famously promoted in the United States by John Dewey are supported and illuminated by the work of Lev Vygotsky. Vygotsky saw learning as a social process in which people work collaboratively with others – usually more expert others – to do things that they could not do on their own. We can imagine that for each person there is a category of things s/he is unable to do, a category of things s/he is able to do with help, and a category of things s/he can do on her own. Novices learn as they work with others to do things they could not do on their own, and eventually the things they work on are edged into the category of things they are able to do on their own. Vygotsky called the place between what one has mastered and what one can master with help the zone of proximal development;<sup>18</sup> following Bruner, I refer to it as a student’s “growing edge.”<sup>19</sup> Successful simulations are sequenced – with one another and with other kinds of learning experiences – to assure that students are not working by rote or aimlessly but are working for growth.

The case file materials described earlier cannot be properly presented in a bound book format, for simulation materials should be both individualized and sequenced. The overall design of simulation materials should be modifiable so that their challenges can be tailored to suit the preferences of professors and the goals of the varied courses for which they will be used. Modifiability is desirable for any published teaching materials, but it is especially important that simulation materials be adaptable to jurisdictions and to the sizes and time constraints of different courses. The rigidity of a bound volume is especially problematic for simulation materials, for



they invariably need to be tailored to the evolving needs and progress of different groups of students and, ideally, to the needs and progress of individual students. Simulation materials should, of course, be individualized for students working in different roles. Students working as advocates for a side or as parties, information sources, or decision makers can not work effectively or credibly if they are all exposed to the same facts and responding to a common set of directions. Just as important, simulation materials must be *modifiable in sequence, rather than all at once*. A simulation should present students with challenges that are responsive at critical points to their own strategic choices and to the strategic choices of students working in different roles. If at all possible, simulation materials should also be responsive to particular students' developmental progress. Individualization and responsiveness of these kinds are compromised by the use of bound, or even of printed, materials.

Case materials are not all that students need for a successful learning experience in simulation work. A simulation requires the exercise of a variety of skills, and students are entitled to guidance in developing those skills. It is often in a simulation that the skill of legal analysis is most explicitly broken down into its functional parts and methodological guidance is offered so that students have a clear sense of what they are doing and how they might go about doing it more expertly. In the careers of many law students, it is *only* in simulation and clinical courses that the often neglected skills of fact development, interviewing, counseling, and formal and informal advocacy are broken down functionally and explicitly developed. Since the need for students to use – and opportunities for them to develop – these skills will recur throughout the stages of a simulation and across the simulations of a course, guidance for developing them is best provided in electronic format so that it can be hyperlinked to simulation materials and referenced repeatedly and as needed. Electronic formats also permit guidance that is not limited to written instruction but can include demonstrations and interactive exercises. Since fact development, interviewing, counseling, and formal and informal advocacy are interactive, they are best developed when students can interact easily and then record and review their interactions. Electronic formats not only facilitate interactions but also allow their recording, annotation, and repeated review.

#### F. MANAGING THE UNCERTAINTY

The increasingly experiential approaches to law teaching that I have described highlight uncertainties that can be, as we have seen, disquieting on several levels. They expose litigation and legislative histories in ways that highlight the uncertain effects of circumstance, strategies, and choices. They focus on alternative reasonable interpretations of the law rather than on correct interpretations. They expose lawyers and judges as moral agents making interpretive choices rather than announcing fixed

principles. The disquiet generated by exposure of these uncertainties has, I think, inhibited experiential learning's acceptance and development in the law school setting. Some critics of experiential methods for training lawyers argue that students should not be confused by what they see as a constant harping on uncertainty when so much in law is fixed and clear. Others worry that frank discussion of alternative theories of interpretation carries worrisome "C[ritical] L[egal] S[tudies] overtones."<sup>20</sup> Critiques of this kind are sometimes made with respect to first-year courses on the ground that beginning students need to be oriented by some amount of learned doctrine. Later, these critics argue, with some law under their belts, students can engage more responsibly and more comfortably with the idea of indeterminacy. In their first year of study it can only confuse them.

The difficulty with this approach is that it instills a more profound confusion than frank discussion of uncertainty could ever arouse. Students typically enter law school with the fervent belief and faith that their mission is simply to learn the law. Dissonance is created when they endlessly debate reasonable alternative statements or interpretations of various laws in Socratic classes. But the faith survives because they are also convinced that their futures will depend importantly on whether they know enough black letter law to score well in each of their courses on a single, final, time-limited examination in which knowledge often seems to matter more than judgment. Too often the result is a cognitive splitting; students know at some level that law is indeterminate but speak and act as if it were fixed and certain. Alas, some of their professors display the same kind of cognitive splitting as they expound upon cases' subtle vagaries yet then, without explanation, give their students only short answer and multiple choice exams or only ask fill-in-the-blanks questions during what professes to be Socratic dialogue.

The form and substance of course materials also contribute to students' tendency to think and work as if law were rigidly fixed. Coping with the fluidity and unpredictability of simulation case materials and with colleagues' varied judgments and interpretations of fact and law helps students to see law as the living, interactive, and changing thing that it is rather than as a fixed code. This lesson of indeterminacy is instinctively grasped in the kind of give and take that is possible in electronic formats, for these formats easily permit – and often require – responsiveness to competing and ever changing opinions and interests.

Law students are intelligent adults. We who teach them need not treat indeterminacy as if it were, in the words of one of my colleagues, "law's dirty little secret." Our students can absorb the idea that laws are the products of public and private commerce and of human discourse, decision making, and compromise. They can simultaneously understand, without dissonance or confusion, that laws can and usually do have both generally agreed-upon and patently absurd constructions. They can accept that some agreed-upon constructions should be learned yet still appreciate

the need to master and constantly critique the process of construction. If taking in all of this is confusing, then students need to be confused. The alternatives are to deny professional choice by maintaining a delusion of certainty or adjusting to cognitive splitting. Both alternatives are unpleasant, because both hide the need to take, and the possibility of taking, moral and civic responsibility for the professional choices one inevitably makes. As Lon Fuller argued in his illuminating 1958 debate with H. L. A. Hart,<sup>21</sup> to deny uncertainty and choice is to suspend judgment, and the consequences range from absurdity to atrocity: If we commit to a clear, fixed meaning for the law that says “No Vehicles in the Park,” we risk closing the park to children’s tricycles or to the fire truck that might save an occupied and burning puppet theater.

## NOTES

1. This description applies to formal, school-based legal education, not to the apprenticeship training that was common and legally adequate before the development of law schools and law school accreditation.
2. I refer here to statutes and regulations, as well as to cases, as primary sources of law. In the nineteenth century, before the extensive codification of common law and the rise of the administrative regulatory state, cases were a nearly exclusive focus of legal study.
3. For more detailed accounts of this history, see Anthony Chase, “The Birth of the Modern Law School,” *American Journal of Legal History* 23 (1979): 329; Bruce A. Kimball, *The Inception of Modern Professional Education: C. C. Langdell, 1826–1906* (Chapel Hill: University of North Carolina Press, 2009). See also Peggy Cooper Davis, “Desegregating Legal Education,” *Georgia State University Law Review* 26 (2010): 1271, 1271, 1275–8, and authorities cited therein.
4. See Jerome Frank, “Why Not a Clinical Lawyer School?” *University of Pennsylvania Law Review* 81 (1933): 907.
5. See, e.g., Richard Lempert, Samuel Gross, and James Liebman *A Modern Approach to Evidence: Text, Problems, Transcripts, and Cases* (St. Paul, MN: West, 3rd ed., 2000) (using transcripts in the teaching of evidence); Jack Friedenthal, Mary Kay Kane, and Arthur Miller, *Civil Procedure: Cases and Materials* (St. Paul, MN: West, 4th ed., 2005) (using case files in the teaching of civil procedure).
6. For a vivid description of this knowledge-dispersing view of education, see Paulo Freire, *Pedagogy of the Oppressed*, trans. Maya Bergman Ramon (London: Continuum Publishing, 1970).
7. I use the term “tool” broadly to include, for example, the forms a police officer or social worker might fill out or the classification systems by which legal sources are referenced.
8. See Peggy Cooper Davis and Elizabeth Ehrenfest-Steinfeld, “A Dialogue about Socratic Teaching,” *New York University Review of Law and Social Change* 23 (1997): 249.
9. Kimball, *Inception of Modern Professional Education*, 147–60.
10. *Id.*, 102.
11. See Carrie Menkel-Meadow, “Taking Law and \_\_\_\_\_ Really Seriously: Before, During and After ‘The Law,’” *Vanderbilt Law Review* 60 (2007): 555, 561–4; see also Edward

- Rubin, "What's Wrong with Langdell's Method, and What to Do about It," *Vanderbilt Law Review* 60 (2007): 609, 631–5 (arguing that Langdell viewed law as a fixed system, like a pre-Kuhnian natural science); Davis, "Desegregating Legal Education," 1279.
12. Chase, "Birth of the Modern Law School."
  13. Kimball, *Inception of Modern Professional Education*.
  14. Davis, "Desegregating Legal Education," 1288–9.
  15. See Grant Wiggins and Jay McTighe, *Understanding by Design* (Upper Saddle River, NJ: Prentice Hall, 2005).
  16. Of all employed graduates from the class of 2009, approximately 55.9 percent work in private practice, 13.5 percent in business, 11.4 percent in government, 8.7 percent as judicial clerks, 5.7 percent in public interest, and 3.5 percent in academia, with 1.4 percent employed in an unknown category. Of the business jobs, 28.9 percent require bar passage. Overall, 81.4 percent of the jobs held by the class of 2009 require bar passage. National Association for Law Placement, "Class of 2009 National Summary Chart," accessed 8 March 2011, [www.nalp.org/uploads/NatlSummaryChartClassof09.pdf](http://www.nalp.org/uploads/NatlSummaryChartClassof09.pdf).
  17. See H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593; Lon Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630 (*The Hart v. Fuller Debate*).
  18. Lev Vygotsky, *Educational Psychology* (Boca Raton, FL: CRC Press, 1997).
  19. See Jerome Bruner, *Actual Minds, Possible Worlds* (Cambridge, MA: Harvard University Press, 1986), 77.
  20. Correspondence within the Special Committee to Report on the Lawyering Program (12 November 2009, 11:47 a.m.) (on file with the author).
  21. *Hart v. Fuller Debate*.