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On Writing a Casebook

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I suppose every law professor, at one time or another, has mused about writing a casebook. "This one I'm using is OK, but . . . ." I have written several casebooks in two different areas of law and for two different publishers.[1] I have also written another law school book for a third publisher.[2] Along the way, I have learned a thing or two. If you are thinking seriously about writing a casebook, you might find these tips useful. In this Article, I will discuss my theory for writing a casebook, how to organize the book and select cases, and how to get your book published.

I. A THEORY ON HOW TO WRITE A CASEBOOK

A. Why Write a Casebook?

It takes a lot of work to write a casebook, so you'd better have a good reason to do it.[3] If you are relatively happy with the casebook you are using, don't write a casebook. The book you would write might be so similar to the one you are using now that there would be no significant market for it. Write a casebook to fill a need: your own. This will produce your best work, as you will put your heart into it.

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* Professor of Law, Golden Gate University. Thanks to my fellow casebook authors (some of whom are my competitors) for their helpful comments on a prior draft of this article: Professors Sandy Kadish, Douglas Laycock, Joshua Dressler, Ed Rabin, David Crump, and Roger Bernhardt. Thanks also to Professor Al Alschuler.

1. CASES & PROBLEMS IN CRIMINAL LAW (4th ed. 1999); CASES & PROBLEMS IN CRIMINAL PROCEDURE: THE POLICE (ANALYSIS SKILLS SERIES) (2d ed. 1998); CASES & PROBLEMS IN CRIMINAL PROCEDURE: THE COURTROOM (ANALYSIS SKILLS SERIES) (2d ed. 1998); CASES & PROBLEMS IN CALIFORNIA CRIMINAL LAW (1999).

2. WINNING AN APPEAL (3d ed. 1995).

3. I will assume that the modern casebook, as we have come to know it, is the best vehicle for teaching law. Not everyone agrees. *See, e.g.*, Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143 (1991). Some history regarding the evolution of the casebook is recounted in E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 S.W. L.J. 903 (1988).

For several years, I taught criminal law from someone else's casebook. I tried one, and then another. Both were pretty good, but neither "fit" well with what I wanted to do in my classes. All professors face this difficulty, and we usually resolve it by supplementing the book with our own materials, such as cases or articles. I did this—for awhile.

My particular bent is to teach with problems. I decided early on to treat my students as lawyers trying to solve clients' problems. So I give students a complex problem to chew on in every class, using the materials in the casebook as a "library" of sorts, just as a real lawyer would use a group of cases, statutes, articles, etc., to analyze a client's problem. The students work on the problem before class, and during class I help them try to solve it.

The books I used contained an occasional short hypothetical, but no complex problems. So I wrote my own problems, and we used those. But I wasn't really satisfied. The cases and other materials, selected by the authors of the casebooks, were not selected for use with problems. They worked, but not well. For example, a chapter on self defense would contain four or five cases, each from a different jurisdiction. Rarely would a real lawyer with a real case use such a "library." Almost always, a lawyer works with cases (and statutes) from a single jurisdiction, analyzing them to see how they interrelate. Trying to use a multistate group of cases to solve a "real" problem was like trying to fit a size nine foot into a size eight shoe: you can force it in, but it is not comfortable.

So I decided to fill a need: my own (and, as I saw it, the needs of my students). There was no published casebook on the market that did the job I wanted done, so I did it myself. Initially, I did not think of *publishing* a casebook—just *writing* one. I wanted it for my own classes. After I wrote it and used it (in photocopy form) for a couple of years, it occurred to me that there might be some other professors around the country who would want to use my approach. I then sent the manuscript to some publishers and found a company that wanted to publish it.

This approach is quite different from a "market-oriented" approach. I did not survey the casebook market, look for a hole that might need filling, and then fill it. I filled *my own* need. If the product of that effort filled the needs of other professors, great. If it didn't, it still served its most important function, helping me teach my students to my maximum ability.

Lucky for me, a publisher felt that there were other professors who might feel the same need, so it made business sense to publish the

book. If no publisher felt that way, too bad for me, but I wouldn't (and couldn't) write a different book to satisfy "the market." I couldn't put my heart into filling a need that wasn't *my* need. A casebook might not be great literature, but a lot of creativity goes into it. I can write my own book, but I can't write someone else's—even if I could make some money doing it.

Speaking of money: do not write a casebook to make money. With casebooks retailing for over fifty dollars apiece, there are big bucks in casebooks, but don't expect to see too many of them. The casebook pie is sliced into a lot of pieces. With few exceptions, each author's cut is not great. It's steady money, coming in twice a year as long as the book stays on the market, but it probably won't amount to more than four figures—good pocket money, but don't plan to give up your day job.

There are other sources of satisfaction. There's ego, of course—knowing you've done something well enough that some publisher is willing to put money into it and some professors are willing to assign it. There's name-recognition, which might help your career. And, there's contact. Having my name on a casebook leads other professors to contact me about various issues, and I get a lot out of these interactions.

You could spend the time writing articles instead, but I have found that I can put in a casebook a lot of the points I would have made in an article (not as extensively, of course). It's your book and, within limits, you can pretty much put what you want in it. While an article might sit on a shelf for years gathering dust, my casebooks are in use every day, year after year, and I like that.

B. Casebooks and Scholarship

Will writing a casebook bolster your reputation as a scholar? Maybe, but probably not. Many professors consider casebook-writing a rather low form of scholarship, if scholarship at all. Indeed, some tenure committees give little or no credit for casebooks.[4]

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4 [Y]oung untenured faculty are counseled by their senior colleagues not to waste time working on casebooks. A casebook, they are advised, will not count toward the scholarly production expected for tenure in the way that law review articles would. Writing a casebook, we warn them, merely involves selecting, organizing and editing cases and statutes, appending edited selections from scholarly articles in law, the humanities, and the social sciences, and crafting provocative and thoughtful questions and observations to provoke further student insight in reflecting upon the preceding materials, all to create a coherent picture for the student of a substantive area of law—how could such a project count as scholarship? . . . . Given these attitudes, one could be forgiven for concluding that casebooks are the Rodney Dangerfield of legal scholarship—they just get no respect.

Janet Ainsworth, *Law in (Case)books, Law (School) in Action: The Case for Casebook Reviews*,

However, an argument may be made to the contrary. While the long exposition typical of law review articles is out of place in a casebook, a casebook author can set out new ideas in shorter form. I often explain my take on a case or concept in a note following a case or topic. While I try not to preach, when I feel strongly about the direction a case (or group of cases) seems to be taking the law, I occasionally take up a bit more space, setting out my views in a page or two.[5] These musings will probably reach a much broader audience than my law review articles do—an audience that will influence the direction of the law for years to come. Some of the law students who read my views will become law clerks for judges, and others will argue cases in this field.[6] Others will write law review articles themselves and might use my ideas as starting points.

Also, don't forget the teacher's manual. This booklet is addressed to a more sophisticated audience: professors. Here the writer can develop and propose *many* ideas—large and small—on a higher level and in more detail, often reaching an audience larger than that of the average law review article. (My teacher's manuals run between 100 and 150 pages.) Arguably, this comes within any reasonable definition of "scholarship."

C. Casebooks and Pedagogy

My main goal in writing a casebook is not scholarship, but better pedagogy. Having taught for many years, I've learned a thing or two about law students—what motivates them and how they learn. When a student comes to see me about an exam grade or about some substantive question, as our discussion concludes I usually ask him or her, "By the way, what do you think of my class? What do your fellow students think of it? How about the casebook?" Students are usually pretty straightforward with me (though I might need to press them a

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20 SEATTLE U. L. REV. 271, 272 (1997). *See also* E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 SW. L.J. 903, 907 (1998) ("Thus, in many law school faculties casebooks count for little in decisions to promote or to grant tenure. . . . . Why are not casebooks regarded as scholarship? At least in part because they are not thought of as either creative or influential.").

5. *See, e.g.*, my criticism of recent cases restricting the right to peremptory challenges of prospective jury members, at the end of Chapter 8 of *Cases & Problems in Criminal Procedure: The Courtroom*, *supra* note 1.

6. "Because casebooks still maintain the center of gravity in legal education, they serve as the vehicle through which each succeeding generation of lawyers is socialized into patterns of thinking about law and legal practice. Ironically, any single popular casebook probably has a more direct and profound influence on the legal culture than all of the other scholarly works on law reviewed in the Michigan Law Review's annual survey put together." Ainsworth, *supra* note 4, at 275.

bit at first). I also interact with my students in class, of course (via Socratic questioning and the like), and I *watch* them to see if they are interested, puzzled, or drifting off. If I sense something is wrong, I might ask the class: "How come no one is getting this stuff? Is it the way I'm presenting it? Is it the book?"

If there is a problem, sometimes it lies with me, sometimes it lies with them, and sometimes it lies with the casebook. If the students have a bad day because of commuting problems or the like, fine. But if the problem seems to have a more recurrent cause, it is my job to deal with it, and sometimes the casebook is the recurrent cause. I can't blame all students for laziness if they can't bring themselves to concentrate on boring material. The casebook writer or the teacher who assigned the book, not the students, is responsible for the boring material.

My main job as a casebook author is to make learning law as easy and fun for the students as the subject matter permits. I don't (and can't) make *the law* easy. I don't avoid hard cases or issues and select easy ones, but I try my best to make *the learning process* easier. By doing this, I make *teaching* law easier and more enjoyable.

II. WRITING THE CASEBOOK

A. Casebooks Serve Two Audiences: Professors and Students

A casebook should serve the needs of both students and professors. Professors need a casebook that adequately covers the key issues of the course, stimulates the students to do the required reading and think about it, and furnishes the basis for class discussion. Students need a casebook that is readable and interesting.[7] If the casebook is enjoyable to read, students will get the most out of it.

As I am writing for students as well as the professor, I need some notion of what a typical law student is like. My target audience is young (many just out of college), has little experience in the world of business and government, lacks much knowledge of law or legal process, has no knowledge (or some misinformation) about this particular topic, and is reasonably intelligent, easily bored, and overworked.

The professor who assigns the casebook wants, first and foremost, his or her students to *read* the assignments. The students won't

7. Some professors feel that many casebooks fail on this point. *See, e.g.*, Douglas Laycock, *A Case Study in Pedagogical Neglect*, 92 YALE L.J. 188, 188 (1982) ("Writing a casebook is difficult. It is not enough to know the subject; the author of a casebook must also think about pedagogy. Many casebooks fail dramatically on the second count, and most have problems. Law teachers are forever grumbling about the books available to them.").

get much out of the class if they haven't read the assignment. Therefore, one of my most important duties as an author is to induce the students to do the assigned reading—by making the book enjoyable for students to read. Perhaps my main goal is to keep them *awake*!

B. Length and Structure

For a three-credit class, I don't want students to have to read more than about fifty pages a week (because they probably *won't*).[8] For a fifteen-week semester, that works out to 750 pages (OK—800). That's plenty. Most casebooks go well beyond this, probably because the author forgot what it was like to be a student with five classes.[9]

Students (and many professors) feel more comfortable when each week of class covers a discrete topic, so I try to structure the book so that one chapter can be covered in one week (with a few inevitable exceptions for longer topics). My books generally have about fifteen chapters, with most chapters limited to about fifty pages.

I might, however, add a chapter or two in order to give professors a choice of topics. I might also add an appendix containing some optional material (such as some sections of the Model Penal Code). I might not use these materials myself, but adding them to the book for optional use by other professors does not make it less "student friendly."

For the moment, I will accept the prevailing orthodoxy that the modern casebook, as we have come to know it, is the best vehicle for teaching an area of law. A few classes are mainly statutory (income tax, UCC, etc.), but even books on those topics are usually structured much the same as books for common law courses.

Not surprisingly, the heart of a casebook is its cases, which are usually followed by some notes from the author, excerpts from arti-

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8. *See* Douglas Laycock, *Reflections on Two Themes: Teaching Religious Liberty and Evolutionary Changes in Casebooks*, 101 HARV. L. REV. 1642, 1653 (1988) [hereinafter Laycock, *Reflections*] ("The tradition is that law students read only a few pages each day, and that substantially everything they read must be discussed in class. . . . I doubt there is any other discipline in the humanities or the social sciences—any other discipline that works with words—where graduate students read as few pages as law students read."). *See also* Douglas Laycock, *A Case Study in Pedagogical Neglect*, 92 YALE L.J. 188, 202 (1982) [hereinafter Laycock, *A Case Study*] ("There is a limit to how much time and effort students will devote to a course, whatever the faculty might prefer. Casebooks and instructors should channel that effort toward developing the most important skills and teaching the most important subject matter. We should bring students to the edge of insight as quickly and painlessly as possible.").

9. *See* Laycock, *Reflections*, *supra* note 8, at 1654. ("Casebooks generally offer some 1200 pages of cases and notes, but most faculty can teach no more than half of that in a semester, leaving casebook editors to lament that they have 'some really great stuff' in the back of the book that no one ever teaches.").

cles, and a few hypotheticals and problems. It might also include introductory material.

C. The Preface

A preface is usually short—no more than a page or two. It should explain the general approach taken by the author and how the book differs from other casebooks on the same topic. This gives the student an idea of what to expect. As an example, my prefaces explain what is unique about my casebooks—they use the "problem method."

D. Introductions

Casebook and chapter introductions give the student a perspective on what is to follow. Because my books use the "problem method," which might be unfamiliar to students, I begin each *book* with an introduction that explains how this method works. I might include additional material in the introduction. For example, in my criminal law books, I set out a brief summary of the criminal *process* (how a criminal case proceeds from arrest through sentencing), so students will be better prepared to understand the procedural facts set out in the cases.

Alternately, some introductions supply *historical* background about the casebook's topic. For instance, constitutional law books might start with a summary of how the Framers drafted the Constitution, and civil procedure books might begin with a description of the common law forms of action.

I begin each *chapter* of the book with an introduction to the topic that is discussed. This is short, usually just a couple of paragraphs, and rarely more than a page. Because the student usually knows none of the law on the subject, I try to acquaint the student with *tensions* between relevant policies. For example, in a chapter on "stop and frisk," I might mention the need to stop incipient crime and also mention the danger that innocent citizens will be harassed by the police. I tell students to watch for the tension between these policies as they read the chapter.

E. Selecting Cases

It might seem presumptuous to speak of "writing" a casebook, because the bulk of the pages will be taken up by words you did not write: the cases. However, a lot of work and creative thinking does go into the selection and editing of the cases. Cases are the guts of the

casebook. Most of the student's time will be spent reading the cases, so put a lot of time and care into selecting "good" cases.

Some cases are *mandatory* for an area of law—they are considered "landmark" cases. You have no choice; you *must* include them if the student is to learn the particular area of law. For example, no criminal procedure casebook can omit *Miranda v. Arizona*.[10] It is just too central to a major topic: interrogation. *Miranda* lays out the foundations that underlie a series of later cases; in addition, it has practical effects in the "real world" of criminal prosecution. Therefore, it must be included in any criminal procedure book. How many cases are mandatory depends on the nature of the course.

In a constitutional law course, certain United States Supreme Court cases are "landmark" cases that establish a new doctrine or trend, and all other courts are *required* to follow those cases. Thus, almost every constitutional law casebook will include *Marbury v. Madison*,[11] *Brown v. Board of Education*,[12] and *Roe v. Wade*.[13]

In a common law course (torts, contracts, etc.), however, cases are not binding outside the jurisdictions that render them, so there are fewer cases that *must* be included in the casebook. However, a few cases are so prominent and so often quoted by recent cases that students must be exposed to them. For instance, almost every torts casebook includes *Palsgraf v. Long Island Railroad*[14] in its chapter on proximate cause, and almost every contracts casebook includes *Hadley v. Baxendale*[15] in its chapter on consequential damages. In most courses, however, very few cases are mandatory, and you will have a wide range of choice.

In choosing which cases to include, there are several criteria that I generally consider:

Fundamental Issues: I want cases that deal with issues that are fundamental to the course I am teaching, rather than those cases that provide marginal details—even if I find those details quite interesting. While professors might be more intrigued by new directions in the law than the basics we learned long ago, students need the basics. Also, I prefer cases that explain the history and reasons underlying the basic rules, so that students will learn policy reasons for the rule and not just memorize it. Occasionally, an issue might be fundamental even though it does not arise frequently in real life; sometimes, unusu-

10. 384 U.S. 436 (1966).
11. 5 U.S. (1 Cranch) 137 (1803).
12. 347 U.S. 483 (1954).
13. 410 U.S. 113 (1973).
14. 162 N.E. 99 (N.Y. 1928).
15. 156 Eng. Rep. 145 (Ex. 1854).

al facts lead to a seldom-raised issue that forces the court to examine the history and policies underlying the rule of law it is trying to apply.

Readability: I want cases that are readable. Law students see themselves as overworked and overstressed, and they see much of their required reading as dense and boring. I do not need to provide them with video games, but I must provide them with material that does not put them to sleep. Some judges write clearly, and some do not. Those that do not might say some very important things, but I will not require students to trudge through their dull or prolix prose.

Also, some judges (or their law clerks) are not very careful about grammar. Misplaced modifiers and similar grammatical errors appear in their opinions. Students tend to treat the printed word (particularly when written by a judge) as gospel, and I do not want them picking up bad habits. Thereby, I tend not to use such opinions.

I am drawn to cases that are written in a clever (even cute) way. Even though the judge might be a bit of a show-off, he or she serves one of *my* purposes well: keeping students interested.

Readable does not mean *right*. An opinion (or a dissent) might be *wrong*—as a matter of policy or logic—and still be clearly written. Clear writing and good reasoning usually go together, but that is not necessarily the case. So I do not reject all "wrongly" decided opinions. I try to sprinkle a few (not many) "wrong but readable" decisions around the book, because they can stimulate a good class discussion about policy and reasoning. Some casebook writers do not wish to discomfort students who rely on the casebook for the "correct" law. I like to shake students' faith in the infallibility of judges.[16]

Interesting Facts: A good story captures a student's attention. Some stories are long and boring (or written that way), and others are short and eye-popping. I reject opinions containing the former, and I use the latter. I keep an eye out for bizarre facts—especially facts involving sex. For some reason, sex captures a student's unflagging attention. For instance, in one of my criminal law casebooks I included a manslaughter case about voluntary "rough sex" that got out of hand,[17] a burglary case involving a young woman who mistook a potential rapist for her lover,[18] and a conspiracy case about a motorcy-

16. In my criminal law casebook, my chapter on Attempt includes *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973), which discusses the doctrine of "legal impossibility." The opinion is very readable, very scholarly, and very wrong. *See* United States v. Hsu, 155 F.3d 189, 199 (3d Cir., 1998) (noting that *Berrigan* has not been followed). *Berrigan* misunderstands the doctrine of "legal impossibility" and undermines the basic policies of the law of attempt, but it serves my purposes well: it leads to an excellent class discussion, and it helps students learn to examine what they read very critically.

17. State v. Bolsinger, 699 P.2d 1214 (Utah 1985).

18. Regina v. Collins, 3 W.L.R. 243, 2 All E.R. 1105 (Eng. C.A. 1972).

cle gang whose "patched old ladies" worked as prostitutes.[19] I have run into former students years later who told me they never forgot those cases.[20]

Of course, it's not just sex that captures students' interest. I look for cases with facts that might have some relevance to their own lives and futures: quarrels with landlords, lawyers in trouble, family fights, and the like.

Recent Cases: I prefer most of my cases to be relatively recent—no more than twenty years old. A few older cases should be included (as long as they are readable) so that students realize that there is a long tradition behind the particular area of law. But, older cases tend to be less readable, and they often refer to matters that are unfamiliar to students. Also, students want to know what the law *is* more than what it *was*, and a recent case tends to get more respect. Recent cases have another advantage: they often give summaries of older cases, so I get the students to learn about two (or more) cases within the real one.

Dissents: I prefer cases with well-written dissents (and, occasionally, concurring opinions) that present persuasive arguments against the majority opinion. These provoke students to think critically about what they are reading.

Short Cases: I prefer to have at least some short cases in each chapter, because they are easier for students to read and digest. Also, short cases enable me to include more cases within my fifty-page chapter. Sometimes a case appears long, but only a small part of it will be relevant to the topic, so I can edit out the irrelevant parts.

Relation to Other Cases Selected: I want some cases that are factually similar, but come to differing *results*. For example, if I include one case that found a police officer's information sufficient to constitute "reasonable cause" to justify a "stop and frisk," I would include another similar case that found the facts to be insufficient. This forces the students to struggle with distinctions between the cases and to understand the rationale for the rule.

I also want a case or two that *applies* the rule established by a landmark case (like *Miranda*). After all, a rule is just a bunch of words. Students may not understand what those words really mean until they see how the words are applied to a set of facts.

Courts: If, based on the above criteria, two cases are about equal, I select the one from the more prominent court: a state supreme court

19. United States v. Cole, 704 F.2d 554 (11th Cir. 1983).

20. I've also, on occasion, run into a feminist or two who calls me a sexist for including these cases. I didn't make up the facts or write the opinions, of course, but I did select the cases. On balance, I think it's worth taking a little heat if the great majority of students like the cases and get a lot out of them, as they do. The greatest good for the greatest number.

over an intermediate appellate court, or a federal appeals court over a federal district court. However, the prominence of the court is not sufficiently important to outweigh the above criteria. For example, I have chosen a well-written, interesting Alaska or New Mexico intermediate appellate court opinion over supreme court opinions from larger states, without hesitation.

States: All other things being equal, I try to use cases from a variety of jurisdictions. This makes it more likely that students in law schools around the country will see a case from their state, which helps to stimulate their interest. This applies especially to states such as New York and California, as more law schools are located in those states.[21]

Applying the above criteria might make me seem choosy, but usually I can afford to be.[22] It's a big country, and there are thousands of cases from fifty-one different jurisdictions. It is simply a matter of spending some time finding the ones that meet all (well, almost all) of my criteria.

F. Editing Cases

Appellate courts tend to write long opinions. To stay within your page limits and yet include several cases in each chapter, you must edit the cases you select. Before Westlaw and Lexis became available, editing was a nightmare: cutting, pasting (with real paste), crossing out, inserting, etc., and praying that your secretary retyped it the way you intended without any typos. Today, it is easy. Just download the case on your computer and play with it.[23]

On occasion, you've probably had a chance to compare an edited version of a case with the original, and have wondered, "[w]hy did he or she cut *that* out?" Here is why one author did it.

My goal in editing is to make the case even more readable for the student, while preserving the integrity of the opinion. The first way to make it more readable is to make it shorter. As mentioned above, I

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21. I'd love to include cases from Texas and Illinois, which are also large states. For some reason, however, I rarely find a case from those states as well-written and well-reasoned as cases from other states on the same topic. I've discussed this problem with law professors from those states, and their explanations are usually some version of: "Our court system is very political" (said rather regretfully).

22. But not always. Sometimes my range of choice is more limited. My *Cases & Problems in California Criminal Law* is limited to California cases. While California is a large state producing many reported cases, it nevertheless did not give me as broad a choice as the entire country.

23. One of my commentators suggests formatting your page on the computer to match the number of words on a typical casebook page, so you can easily control the length of the chapters.

edit out portions of a case that are not relevant to the topic at hand. That's the easy part. After that it gets tricky.

The first part of an opinion presents the facts. I do very little editing of the facts (except to delete facts relevant only to a legal issue unrelated to the topic in my chapter). I hardly ever cut out the court's presentation of the "real world" facts and put my own summary in brackets. Many casebook writers engage in this practice, but I don't like it. The full facts tell the full story,[24] which makes the case interesting to students. And the facts—as seen by the court—control the legal analysis that follows. Some of the facts in the story might not seem to be controlling or even relevant to a proper legal analysis of the issues, so why not edit them out? I don't edit them out because it is part of a lawyer's job to determine which facts in a client's story are relevant, and law students should get used to doing this. Also, a student occasionally finds relevance in a fact the court seemed to ignore, and this is worth discussing in class. I will, however, cut down some of the *procedural* facts (discovery, continuances, etc.) if it is not necessary that the student understand how the case got to the appellate court.

If the court's recitation of facts is too long, more than a page or two, it probably requires too much time and effort for the student to sort out what happened, at the expense of time and effort that could be spent understanding the court's legal reasoning. Here, I simply won't use the case (unless it is "mandatory").

The next part of the court's opinion usually discusses the law. Here, I want to keep the court's explication of the rule and the policy reasons that underlie it; but, when the court discusses *precedent cases*, I bring out my axe. I usually *keep* discussions of precedent cases that include summaries of the facts of those cases, because this lets students see how the rule has been *applied*, which gives them a deeper understanding of the rule and makes it come alive. However, extensive discussion of precedent that does *not* include either factual summaries or discussions of policy is usually ripe for cutting. Such discussion does not add much to the student's understanding of the law, and it can take a lot of room that might be better devoted to something more useful (such as another case).

I do several little things to make the case more readable. I italicize the names of all cited cases, and I cut out all parallel citations. For example, when the opinion says "*Brady v. Maryland*, 373 U.S. 83,

24. Well, not the *full* story. The facts recited in the court's opinion have already gone through several filters: the lawyers, the trial court, and the appellate courts. Why add another filter?

83 S. Ct. 1194, 10 L. Ed. 2d. 215 (1970)," I will change this to "*Brady v. Maryland*, 373 U.S. 83 (1970)." The student has little use for the parallel cites. When the opinion uses ellipses or asterisks to show that it is omitting some text from a prior opinion or lower court transcript, I usually cut these out. The court (or the reporter for the court) is striving for absolute accuracy and compliance with formal rules, but my goal is readability, so I throw out clutter that just makes it harder for students to focus on the substance of the case. Similarly, when I delete certain portions of an opinion, I rarely use asterisks to show the deletion. Usually, these are of little help to the students and tend to clutter up my edited version, making it less readable.

Judges might be appalled at how I decimate their opinions (if they ever bother to look at my casebook, which is highly doubtful), but I don't really care: I work for students, not for the court.[25]

I often delete *concurring* opinions entirely if they are not well-written or if they do not add an interesting new idea to the mix. I am trying to save space wherever I can. While the sharp contrast between majority and dissenting opinions usually serves as good fodder for class discussion, concurring opinions only occasionally add much to this mix. If feasible, I might include just a key paragraph or sentence that states the essence of the concurrence.

I like *dissenting* opinions because they get students to think critically. So I leave in dissents and do not edit them any more severely than I do majority opinions. If, however, the dissent restates the facts without adding new facts, I usually cut out this section.

G. Notes

Like other casebook-writers, I follow most of my cases with notes.

The first note or two will ask questions about *the case itself.* These notes are designed to provoke the student to think a bit more deeply about what the court has done. I might ask about a fact the court mentioned in its statement of facts but ignored in its analysis. I might ask the student if the case can be reconciled with another case in the chapter. I write these notes in a way that hints at a problem or solution, but does not spell it out. I want the student to go through the process of working through problems, and I want to leave some issues open for class discussion.

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25. I know of one casebook writer (who shall remain nameless) who has, on occasion, *changed the holdings* of cases that did not come out the way he thought they should! I am willing to tamper a bit, but this strikes me as beyond the pale.

I then include notes about *other cases* that have a bearing on the issues discussed in the main case. This gives the student some feeling for how other courts handled these issues. Also, it enables me to acquaint the student with cases that I wanted to include in the chapter but rejected for some reason. If, for example, I liked an opinion's discussion of the policies behind a rule but rejected the case because it had long and boring facts, I might summarize the facts and then quote a key paragraph or two from the court's opinion. When writing a note about a case, it is important that I summarize the facts of the case very clearly so I don't leave the student baffled. Sometimes, if the court wrote a good, short summary of the facts—in a paragraph or so—I simply quote the court's summary.

I might also include a note or two quoting an *article* or *book* on the topic. Most of these will be taken from law review articles, but I occasionally quote other sources (even newspaper articles) that add a "real world" spin or bring in the perspective of a different discipline (economics, criminology, etc.). My citations to these sources might lead curious students with a bit of time on their hands to do some further reading on the topic. The citation might also help professors who want to become better acquainted with this area.

H. Hypotheticals and Problems

I use the term "hypothetical" to mean a short set of facts that raises one or two issues. I use the term "problem" to mean a more complex set of facts that raises several issues that the student must organize before trying to analyze them. I think it is important to keep these keep these two concepts distinct, as they have different functions in the casebook and in the class.

Many casebooks include *hypotheticals* in the notes following cases. (Some casebooks call these "problems," but they are not problems as I use the term.) Hypotheticals have two purposes. First, they get the student to think about how the rule of the case applies (or does not apply) to a variant on the facts of the case or to a wholly new set of facts. This helps the student gain a deeper and broader understanding of the rule. Second, they serve as a good point of discussion in class. There is interplay between these two purposes—if the student knows that the professor likes to discuss the hypotheticals in class, the student is more likely to think about the hypothetical before class.

Problems serve these purposes, but serve other purposes as well. Problems raise *several* issues that stem from the cases ranging throughout the whole chapter. This forces the student to *organize* his or her analysis and determine where one issue leaves off and another

begins. Because problems raise issues from various cases and other materials in the chapter, they force the student to read the chapter as a whole and see how issues relate to each other. I have discussed the virtues of the problem method elsewhere.[26] Here is how I write a casebook designed to employ this method.

My strategy is to begin each chapter with a single complex problem, followed by a "library" of statutes and cases to use in solving the problem. Because a lawyer would look primarily to statutes and cases from the jurisdiction in which a problem arises, I set my problem in a particular jurisdiction and then give the students statutes and cases from that jurisdiction. Thus, my chapter on larceny begins with a problem set in New York, followed by New York statutes and cases (with a few cases from other jurisdictions noted after the main cases). Therefore, I begin my search for cases by seeking a jurisdiction with a group of "good" cases on the topic, pursuant to the criteria discussed above ("Selecting Cases").

After selecting my jurisdiction and cases, and after editing my cases, I write the problem. The problem is carefully designed to raise issues from all the cases in the chapter, to force students to distinguish or reconcile the cases, and to get them to see the policies underlying those cases. Some issues in the problem will be easy, most will be moderate, and occasionally I will include one that is difficult. A professor will have students with a range of abilities and stages of analytical development. I want issues with a variety of difficulty in order to challenge the more advanced students while not wholly frustrating students who are still developing their skills. In the earlier chapters of the book, I might include some particularly easy issues, because students are just getting adjusted to the problem method. Each problem will involve some facts that are "close"—it will be difficult to predict how a judge might resolve the issue raised by those facts.

The facts of my problem are simple and generally involve something that most young students already know about. For example, the characters in my problem drive a car, shop in a store, are involved in a family dispute, or go to law school. They are not trading stock options, dealing with Department of Agriculture regulations, or coping with genetic engineering. Many students have no knowledge of such matters, and they will feel especially uncomfortable if a few students show familiarity with them. My goal is to help students learn the law and how to analyze legal issues. Those skills are hard enough to develop. Why add to their burdens unnecessarily by giving them an

26. *See* Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992).

unfamiliar set of facts?[27] I also want to make it as easy as possible for *all* students to feel comfortable participating in class discussions. (The same applies when I write short hypotheticals: I keep the facts simple and within the ken of young law students.)

This is the main reason why I invent my own problems and do *not* simply adapt the facts of decided cases. Many casebooks using true problems (not mere hypotheticals) use the facts of decided cases. These often involve situations well outside the life experience of some (or most) young law students, who have enough trouble struggling with legal analysis without the added burden of trying to understand an unfamiliar set of facts. In addition, the issues that decided cases raise will not "fit" exactly with the cases in the chapter. They do not cover *all* the cases, or they raise issues not covered by *any* of the cases. It is more work to create my own problems, but it is well worth it.

Whenever possible, I try to have the issues in the problem appear in the same order as the cases. Because the chapter will be discussed for two or three consecutive classes, it is easier for the students (and the professor) if the problem flows in the same order as the cases in the chapter.

After the problem come the statutes. The statutes are followed by cases. The cases are presented in chronological order. This makes the cases more readable, because later cases often refer back to the earlier ones. It does pose a challenge for the students, because case one might involve the same issue as case four, but not cases two or three. The student will have to figure this out without the obvious hint that would result from placing the two cases next to each other. A practicing lawyer has to learn to do this, so the students should get used to doing the same analysis.

I put my problem at the beginning of the chapter, in order to make the student read the cases with an eye for "solving" the problem, just as a lawyer would. You might prefer to put problems in the middle of the chapter, or even at the end. Many casebooks do. This tends to make the problems more of a supplement (or afterthought) to the main body of material, rather than the focus of the class (which I prefer). But, if a professor using my book wants to discuss the problem after discussing the cases (or not discuss the problem at all), he or she is free to do so. While you might plan to use your book in a certain way in class, other professors might want to use it in a slightly different way. So build some flexibility into the book—so long as you do not change your basic scheme.

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27. Some casebook writers disagree: as students will need to know about these matters when they practice, they might as well start learning them now.

II. THE TEACHER'S MANUAL

A Teacher's Manual is a guide to how you or another professor might use your casebook in class. There are two reasons to prepare a Teacher's Manual. First, a Teacher's Manual will make it easier for other professors to use your book. Your insights will give them a notion of why you did things the way you did, and your summaries and suggestions might save them some time. This, in turn, will make it easier for your publisher to market the book. Second, your *preparation* of the Manual will improve the book itself. Let me explain this.

My Teacher's Manuals are broken into chapters, each chapter corresponding to a chapter in my casebook. And each chapter in the Teacher's Manual follows the same arrangement as the corresponding chapter in the book. It begins with an analysis of the problem, giving an outline of an analysis of the problem that shows where and how each case in the chapter fits into the outline. I then go through the cases, giving my summary of each case and some ideas of how it might be discussed in class.

When I write my summary of the case, I must read the case very carefully—even though I think I have read it carefully before. Sometimes I discover that I have made a mistake in editing the case—I deleted something that is essential to understanding the case (often a procedural fact), or I included something that is unnecessary. Then I must edit the case again. Occasionally, during the process of writing the summary I decide that the case really does not meet my needs as well as I thought it did, and I delete the entire case.

This "back and forth" work is even more important for editing the problems. When I originally created the problem, I tried to imagine how students would analyze it and how it would play out in class. I tried to include some easy issues and some hard issues, and I tried to raise issues that would force the student to consider the policies underlying the rules discussed in the cases. I tried to write my story clearly so students would not be distracted or confused by irrelevancies. But as I write the analysis for my Teacher's Manual, I *always* discover that I have made some mistake in writing the problem. I then go back and fix the problem. (I do the same thing when writing exams: I write an answer, or an outline of an answer, to my own question. When I do, I usually find little, and sometimes big, ways in which I have screwed up writing the exam itself. Now I can fix the defect before inflicting it on my students.)

I write my Teacher's Manual *while* I am writing the book—not after. Immediately after I write a chapter of the book, I write the cor-

responding chapter in the Teacher's Manual, while everything about the topic is fresh in my mind.

I actually enjoy writing a Teacher's Manual. It improves the book, it serves as my guide for my own teaching, and it is a nice way to communicate with professors who adopt my book.

III. DEALING WITH PUBLISHERS

A. Sending Your Casebook to Publishers

The first question is when to try to line up a publisher. I usually write the entire casebook and Teacher's Manual and send off the whole shebang.[28] Because I am writing the book for my own use, it is no great loss if a publisher rejects it—I can still use it for my own classes. Another option is to send a table of contents and a chapter or two in order to give the publisher an idea of where you are going. If the publisher accepts it, then write the rest of the casebook. If no one accepts it, you can cut your losses by using someone else's book in your classes.

If you use the first method, I strongly recommend that you *not* send the book to a publisher until you have used the book yourself in your classes a couple of times. This will give you a chance to see what works and what does not, and to make the necessary adjustments before the book becomes frozen in print.

Whether you send a publisher a complete manuscript or only a table of contents and a chapter or two, be sure to write a *cover letter* describing the book and why you think there is a market for it. This is the key concern for the publisher. If the book advances the cause of legal education, fine, but that will not be enough to persuade the publisher that other professors will adopt it. Show the publisher that the book fills a niche that needs filling and that other professors feel the same way. You might even call up a few professors in your field. If they tell you they would consider adopting such a book, mention this in your cover letter.

Publishers like quick and guaranteed adoptions. Therefore, they like co-authors—the more the merrier. If you have two or three co-authors, that means three or four immediate adoptions. This helps the publisher recover initial costs quickly, so further adoptions go straight into profits. I have had publishers tell me, "Get a couple of co-authors and we'll publish your book." Like any great artiste, I politely decline: "I don't write well with committees." Many other casebook

28. No, you don't need an agent.

authors (who, unlike me, were properly taught to play with other kids) happily go the multiauthor route. It cuts down on the work (unless quarreling adds to it[29]) and increases the chance of getting the book published.

I will not list the casebook publishers here. The big players do not change often (though they have been on a merger binge lately), but smaller publishers do move in and out of the business occasionally. Just take a look at the casebooks on your office shelf to get the names and addresses of those presently in the game.

Which publisher should you write to? As many as you like. There is no "rule" that you must send your manuscript to one and then wait for an answer before sending it to another. If, however, you send it to several and get an offer from one, it might be a bit awkward delaying an acceptance to see if another publisher wants it.

B. Multiple Offers

If you are lucky enough to get more than one offer, which one should you accept?

The contract each publisher offers will be pretty much the same. You can expect a royalty of about fifteen percent to twenty percent of the publisher's gross sales (retail price minus the markup). However, do not expect any casebook publisher to give you an advance on royalties.

In my experience, publishers are much the same in the way they edit a book and treat their authors. If, however, you have special needs (e.g., graphics), you might find some publishers more willing than others to foot the bill for this.

The key consideration when deciding which offer to accept will probably be sales. The more books the publisher sells, the more money (and glory) you reap. You might assume that "big name" publishers will sell more, but this is not necessarily true. Smaller publishers often hustle more, and because they will have a smaller lists of titles, they might put more effort into selling your book. A large publisher will probably have several titles in the same field as yours, and when a salesperson gets into a professor's office, he or she might push another title more. As long as the publisher gets an adoption, it does not really care which title is adopted.

Some publishers do not have salespeople. They might do a good job of advertising, but they lack the in-person contact that often in-

29. Someone (not me) should write an article on the joys and woes of co-authorship.

creases sales. I tend to choose a publisher with salespeople over one without.

C. The Care and Handling of Publishers

A publisher phones to tell you that they want to publish your book. Delighted, you accept. Now what? First, you sign the publisher's form contract. Like most lawyers, you probably will not bother to read your own contract (because you can't bill anyone for your time). So I'll tell you what is probably in it.

If you have not completed your manuscript, the contract will set a date on which you must deliver it (and, perhaps, a Teacher's Manual)—both in electronic format and on hard copy. If you fail to meet the date, the publisher may cancel the deal. The contract will have you assign your copyright on the casebook to the publisher. If you want to keep the copyright (or share it with the publisher), you will have to negotiate this and amend the publisher's form contract accordingly. The contract will set your royalty, usually between fifteen percent and twenty percent of the publisher's gross sales at wholesale prices. This should include sales in "electronic format." The contract will provide that you receive an itemized accounting of the sales twice a year[30] and get your royalty check soon thereafter. The contract might require the author to prepare supplements and new editions, or it might instead give the author the "first right" to prepare these things. The contract might contain an arbitration provision.

Your contract might require you to obtain permission to include any quotations in your book. While "fair use" doctrines might permit you to use these without permission from the copyright holders, publishers like to play it safe: they want written permission whenever you use a quotation more than a line or two. Law review articles are usually copyrighted by the university that sponsors the law review rather than by the author. Law reviews grant permission as a matter of course, as they like the publicity. I usually seek permission from the author as well as the law review, just as a matter of courtesy. (I've never been turned down. Authors are flattered to have their articles quoted.) Obtaining permissions can be a hassle, and I have usually managed to persuade my editors to handle this (even if my contract provides otherwise—I whine about being stuck out on the West Coast, and sometimes it works). On rare occasions, a copyright holder (a magazine publisher, perhaps) will demand some payment (perhaps

30. I suppose you have the right to challenge the publisher's accounting if you suspect some hanky-panky. I've never done this. I'm the trusting sort.

$50 to $150) for permission. If there are not too many of these, you might persuade your publisher to pick up this expense.

In addition to what your contract gives you, your publisher will probably give you certain "perks." Publishers like to keep their authors happy as long as it does not cost them much. They will send you half a dozen or so copies of your book—enough to send to relatives who wonder if you really work for a living. Some publishers will give you free or discounted use of some of their other books and services. And you can expect gourmet snacks (Ritz crackers, Velveeta cheese—nothing but the best!) at AALS receptions. Sometimes, they will even spring for a free dinner.

Your publisher will assign an editor to work on your manuscript and get it ready to send to the printer. I have had prospective casebook writers call me for advice, and they often worry about editors. They have had bad experiences with young law review editors who love to meddle with the substance of their articles. I tell them not to worry. Sometimes student law review editors need to "leave their mark" on your article and display their brilliance by changing it, but casebook editors are usually more mature. Publishers are businesspeople: their editors want to get the job done quickly and well, and they know that you—not they—are the expert. If anything, they tend to err in the other direction. Usually, when I send in a manuscript, no nonstudent has yet read my casebook. I *want* some feedback as to whether what I wrote was clear and made sense. And occasionally (*just* occasionally), I get it from an editor who cares (but is not too pushy about it). On the whole, I've found casebook editors helpful and easy to deal with.

After the edited manuscript is sent to the printer, but before the book is finally printed, you will receive a set of *page proofs*: the printer's first run of the whole book. I strongly advise you to *read them carefully*! When I started reading the page proofs for my first casebook, I began to yawn. I'd read it all before, of course (because I wrote it), and quickly became bored looking for typos and the like. So I stopped reading. Then the book came out, I began using it in class, and I discovered some mistakes. Not many, and not awful—but enough to really grate. I could have prevented them by taking a bit of time to grind through the page proofs. Do it; it's worth it.

You might find not just the editor's mistakes, but your own. You wrote something that seemed right at the time, but you now realize that it is wrong, or just a bit off. If you feel strongly about it, tell the editor that you want it changed. But don't do this too often, and don't make the changes very long. Printers charge the publisher for

these changes, and publishers don't like to pay extra. This is why I use my books in class for a couple of semesters before sending them off to publishers; I work out the kinks (most of them, anyway) so they don't appear in print.

Your editor might seek your advice or even give you your choice regarding certain things: the title of the book, a dedication page (to those who put up with you while writing the book), perhaps even the color of the book.

Your editor might also seek your ideas regarding marketing the book: who might adopt it, and what pitch might work with them. Because you wrote the book, you might well have some good ideas along these lines.

D. Supplements and New Editions

Well, you've done it. Your casebook is published. You can sit back, admire it on your office shelf, and wait for those royalty checks to start rolling in. Not quite. Your new baby needs constant care. New things happen in your area of the law. Cases are overruled, new cases come down. You must make your readers aware of important changes.

An annual *supplement* is a good vehicle for this. I read various services that report on new developments in my area. When I spot a new case or article that has a bearing on one of my chapters,[31] I put a note in my file about it (or simply copy the case or article and put it in the file). About once a year, I use these to write a supplement.[32]

The size and frequency of the supplements will depend on how active this area of the law is. Criminal *law* tends to move rather slowly, while criminal *procedure* moves like lightning. So my criminal law supplements are small, and I might not write one every year. But my criminal procedure supplements are fat and frequent. Some casebook writers keep their supplements thin, reporting only the most important new cases (such as new U.S. Supreme Court cases). I prefer to include quite a few of the most interesting new cases I come across, and let the professor choose which to assign. I write synopses of most of these cases rather than include them whole, as this cuts down on the length of the supplement. Only a few of the cases warrant full inclusion (after my editing). Doing all this is a lot of work, but I enjoy it.

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31. I am particularly watchful for cases that fill in a gap or expand upon some issue that my casebook discusses but leaves unresolved.

32. If a case I'd like to include in the supplement has been sitting in my file for a while, I'll be sure to check to see if it has been wiped out by the grant of a rehearing, grant of review by a higher court, etc.

It is my way of making sure that I keep abreast of my areas of specialty.

Publishers like authors to prepare supplements. They make a few dollars on them (and you get some small royalties), they keep adopting professors happy, and they serve as an excuse to advertise the book.

Publishers like supplements, but they *love new editions*. Indeed, some publishers insist that authors prepare a new edition every three years.[33] They claim that they want to offer professors the "best and latest" presentation of this area of the law. Some skeptics think that publishers are really concerned about shutting out competition from the used book market, but I can't imagine where they get such fanciful ideas.

Keeping my supplements in good order gives me a head start in writing a new edition. I put some of my synopses of new cases in the new edition, and I use some of the important new cases in the new edition.

But here's the difficulty. It is very tempting simply to add the new cases to the new edition. This, however, would make the book much longer than the former edition. To maintain my goal of making the book readable for students—which includes keeping the length manageable—I must cut some old cases when adding new cases. This is hard, but it must be done. It takes discipline, which I don't always have. I find that my new editions suffer from "case-creep"—they tend to be a bit longer than prior editions (though not much).

When looking for old cases and other materials to cut, be aware that professors already using your book might have worked those things into their teaching routines. Many professors are fussy: they don't like to change their class notes. If you take out a choice hypo or case they have been using, you might upset them. Still, you can't let the book grow forever. So here's how you might deal with this. Don't cut anything that is short, such as a three-sentence hypothetical. It doesn't take much space anyway. If you cut a case, either write a synopsis of the case or add a new case that discusses the old case.

E. Conclusion

In conclusion, I'd just like to reinforce one point. Your target audience is a group of poor, overworked, understimulated law students whose eyes glaze over when reading many casebooks now on the market. Your mission, should you choose to write a casebook, is to

33. Your contract might give the publisher the right to hire someone else to write a new edition if you refuse to do it.

make their lives a little less miserable. I hope the tips I've passed along will help to keep you on this path. Just do me one favor: don't use these tips to write a new criminal procedure or criminal law casebook. I already have more than enough competition, thank you.