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Needles in the Haystack: Finding New Legal Movements in Casebooks

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INTRODUCTION

What is the relation between law teaching and scholarship? One may conceive of this relation in many different ways. Some of them are explored in this symposium: Are good teaching and good writing related? Are the most prolific writers good teachers? Can scholarship about teaching be truly excellent? What has the greater correlation with professional success—great teaching or great scholarship?

In this essay I address a different aspect of the connection between teaching and scholarship, namely the entry of new legal movements and ideas into teaching materials, in particular casebooks. Devoted readers of legal arcana may know that I am the author of previous pieces on what might be called the sociology of legal knowledge, articles that explore, for example, who gets invited to participate in symposium publishing,[1] and whether symposium scholarship resists or incorporates new legal thought.[2] I also co-authored an early article on the role of legal indexing systems and categories in confining what may be said.[3]

In this study I examine the way editors of major casebooks—the prime materials of legal education—treat new scholarly movements and ideas. It occurred to me that one measure of the efficacy or inefficacy of legal scholarship in changing the way we teach is the extent to which that scholarship registers in these thick, comprehensive, heavily footnoted, much-labored over tomes that shape students' first exposure to a body of legal doctrine.[4] Though threading my way through some of these casebooks was like looking for needles in a haystack, I thought the project worthwhile. My hope was that this study might

* Research Associate, University of Colorado School of Law. I gratefully acknowledge the assistance of Kristen Kloven in the preparation of this article.

1. *See* Jean Stefancic, *The Law Review Symposium Issue: Community of Meaning or Re-Inscription of Hierarchy?*, 63 U. COLO. L. REV. 651 (1992).

2. *See* Jean Stefancic, *The Law Review Symposium: A Hard Party to Crash for Crits, Feminists and Other Outsiders*, 71 CHI.-KENT L. REV. 989 (1996).

3. *See* Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989).

4. Some of the casebooks I examined were over one thousand pages long with over a thousand citations to cases and other materials.

provide yet another window onto the landscape of legal scholarship, which has been in ferment for the last quarter of a century.

I selected for examination five legal movements that seemed to me to characterize the last few decades—law and economics, critical legal studies, feminist legal theory, critical race theory, and gay/lesbian jurisprudence. I could, of course, have included others; law and literature, pragmatism, and the civic republican revival would have been obvious candidates. But I doubt that their inclusion would have changed my findings significantly. In general my discoveries were that new legal ideas find their way into casebooks at best slowly—though more effortlessly when they are easily named, and when they resonate well with current beliefs.[5] The sole exception I found to this generalization occurred when outsider scholars prepared their own teaching materials, in which case, not surprisingly, the resulting product reflected the author's point of view and that of her school.

The second part of this article explains the methodology I employed. Part three displays and discusses the findings and their meaning. Part four offers a few interpretive comments on the content of casebooks. The final section reflects on what this study might mean for the relation between innovative scholarship and the teaching of law. To my knowledge this is the first study that attempts systematically to explore the diffusion of new scholarship into teaching materials.[6]

II. METHODOLOGY

As mentioned above, I selected five recent scholarly movements that characterize recent times and set out to discover what influence they have had in casebooks. Rather than examine the entire universe of casebooks, the number of which is very large and includes many books that are in little use, I selected four areas of law that are taught in all law schools and are in some sense foundational: constitutional law, jurisprudence, property, and torts. These areas cut across the public-private divide and are also broad enough to incorporate some aspects of new legal scholarship.

5. *See* Delgado & Stefancic, *supra* note 3. *But see* Arthur Austin, *Race and Gender Exclusivity in Legal Scholarship*, 4 U. CHI. L. SCH. ROUNDTABLE 71 (1997).

6. For a recent treatment of canons and canonicity in law, particularly constitutional law, see J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998). For a collection of earlier treatments of casebooks and their structures and premises, see *id.* at 973 n.41.

I selected casebooks published only after 1992, with the thought that those published before this date might justifiably contain few references to movements such as critical race theory or lesbian/gay legal theory, which were just beginning to reach the law reviews when the casebook editors were collecting their materials. I then composed a lengthy list of topic headings that seemed characteristic of each movement—for example, efficiency for law and economics, interest convergence for critical race theory, and indeterminacy for critical legal studies. I also included in my search names of authors associated with the various movements, such as Robin West for feminist jurisprudence, and Janet Halley for lesbian/gay legal theory. Realizing that many of these authors also write mainstream works outside the new movements with which they are identified, I checked each reference to eliminate this possibility.

Tables of Authorities and detailed indexes, such as those found in a number of Little Brown-Aspen casebooks, made the task easier. Realizing that not all indexes are equal, however, and that some are prepared with greater care and comprehensiveness than others, I also examined the content of the books in obvious places where a reference, for example, to William Eskridge's examination of gay/legal narratives, might be found. In a few of the books which initially yielded nothing or very little, I turned every page, hoping to find something! The mere inclusion of a case, such as *Hudnut*,[7] *Batson*,[8] *R.A.V.*,[9] or *Romer*,[10] did not, by itself, warrant an entry; it had to be accompanied by discussion and some acknowledgement that scholarship growing out of the new legal movements had something to say about it. I recorded every hit on tally sheets that I then used to prepare the tables discussed immediately following.[11]

7. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

8. Batson v. Kentucky, 476 U.S. 79 (1986).

9. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

10. Romer v. Evans, 116 S. Ct. 1620 (1996).

11. What do I mean by a "hit"? I used the following criteria: Every excerpt by a law and economics, feminist, critical, or lesbian/gay author bearing on that type of analysis; every discussion of a movement or one of its signature themes (even if devoid of references to key players in the movement); every citation to a well-known representative of one of these schools, e.g., Richard Epstein or Catharine MacKinnon. When a well-known writer from one movement, e.g. Duncan Kennedy (critical legal studies) wrote in another area such as law and economics, I sometimes had to make a judgment concerning which perspective predominated. Ordinarily, but not always, it turned out to be the author's original area. Sometimes, I had to decide whether a long note containing two or more references to an author, along with others, warranted counting as one or more hits. In these cases, I asked myself whether the casebook author had made one, two, or more conscious efforts to include the idea or author from the discipline in question.

III. RESULTS

The four accompanying tables each constitute a matrix showing how a particular legal movement, its ideas and major figures, are reflected in four major areas of law. The appendix at the end of this article lists the books that were examined. The way the books are listed in the appendix and in the tables is intentionally not correlated; they are not in the same order. The purpose of this article is not to assign blame; it merely tries to show that some casebooks incorporate new legal movements more or less than others. I list my bibliographic data only to show which books were included.

A final qualification: The aim of the study is to give a profile of each book; the number of hits is not as important as the relation between them. I made a number of judgment calls on borderline cites; other researchers may come up with a different tally. I make no claim to perfection. Nevertheless, I believe that the profiles which emerge offer eye-opening material for scholars of the sociology of knowledge.

CONSTITUTIONAL LAW

Casebooks	Law & Economics	Critical Legal Studies	Feminist Theory	Critical Race Theory	Gay/ Lesbian Theory
A	41	23	35	33	9
B	37	27	89	73	16
C					
D	3	4	11	13	
E	20	33	35	41	26
F	3		1		
G	3		10	11	1

JURISPRUDENCE

Casebooks	Law & Economics	Critical Legal Studies	Feminist Theory	Critical Race Theory	Gay/ Lesbian Theory
A	94	106	115	142	8
B	29	33	24	17	
C	5	8	2	1	

PROPERTY

Casebooks	Law & Economics	Critical Legal Studies	Feminist Theory	Critical Race Theory	Gay/ Lesbian Theory
A	8			1	
B	109	9		5	2
C	38	2	1		2
D	12			1	
E	32	22	15	13	7
F	8	1	1	1	

TORTS

Casebooks	Law & Economics	Critical Legal Studies	Feminist Theory	Critical Race Theory	Gay/ Lesbian Theory
A	49	10	2		
B	17	3	4		
C	121	1	2	1	
D	34		4	3	
E	3				

As the tables show, the casebooks exhibit great variation, even within the same discipline. One casebook showed no cites at all. Others showed a hundred or more. In property, for example, law and economics garnered easily the largest number of citations, although some property casebooks incorporated more of this school of thought than others. The greater incorporation of law and economics than, for example, gay/lesbian jurisprudence is not surprising. More surprising might be that casebooks that liberally included law and economics also tended to include a healthy number of references to other legal movements. Many casebook editors, in other words, if they were ecumenical at all, were relatively even-handedly so.

In public law, where critical scholarship is as well represented as law and economics, the comparative numbers for the four critical schools are revealing. Critical legal studies, the major movement of the 1970s, seems to have matured into an established position. Its citations are solidly entrenched in most of the major casebooks, yet now are nearly matched—and sometimes exceeded—by its vigorous offspring: feminist jurisprudence, critical race theory, and gay legal studies.

IV. INTERPRETIVE ANALYSIS

As we saw in the immediately preceding section, new legal ideas are slowly being absorbed into casebooks. In the private law arena, law and economics sweeps the field, outdistancing, as might be expected, movements that seek social as well as doctrinal reform. In public law, however, critical legal movements have made as much if not more headway. The number of cites or acknowledgements of scholarship, however, is exceptionally small considering that most casebooks are nearly one thousand pages long, and that many of the citations to new legal movements are found on the same pages.

What happens when new legal movements are mentioned? My perusal of these references revealed a number of stock forms. Sometimes a single scholar, such as Richard Epstein, Duncan Kennedy, Derrick Bell, or Martha Minow would be made to serve as a stand-in for the entire movement. At other times, the critical or economic view would be mentioned but only in a string cite, as though it constituted an eccentric variation of what might be thought, or grist for the experimentally minded reader. Occasionally, recent scholarship was overlooked in favor of a very early warhorse piece, such as Richard Delgado's 1982 *Words That Wound*[12] article instead of more recent treatments of hate speech either by that author or younger scholars.

Why do casebook authors include or exclude secondary scholarship? Certainly the first criterion must be because it illustrates or supports a point. Occasionally the piece has become so famous that to exclude it just begs trouble. Often the research and writing the casebook editor has done in the past, in environmental justice or First Amendment free speech issues for example, will influence the sources that immediately spring to mind when writing that particular section of her casebook. Sometimes having access to an expert in a certain area of law on the author's own faculty colors the cites that show up in a casebook. Casebook writers at NYU, for example, found some way to cite Derrick Bell.[13]

When an author is well versed in one of the new scholarly movements, citation to and discussion of that perspective are well integrated into the text, sometimes showing up in the hypotheticals, questions, and continuing policy notes that may be given separate des-

12. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

13. *E.g.*, Norman Redlich and Bernard Schwartz, co-authors of NORMAN REDLICH ET AL., CONSTITUTIONAL LAW (3d ed. 1996), which is not to say that other casebook writers did not cite to Bell.

ignated sections running throughout the book. Casebooks with a critical bent bring in more interdisciplinary sources, reflecting the connection of those perspectives with other areas of study. An author might cite Gary Becker, Andrew Hacker, Kevin Phillips, or Leon Litwack hoping to draw on a professor's general knowledge or a student's undergraduate experience in reading economics, sociology, political science, or history. This makes a casebook richer but harder to write.

V. Concluding Thoughts

Empirical research, although tedious and time-consuming, occasionally tells us things we may not especially want to acknowledge but need to hear if we are to do a better job in acting as custodians and teachers of legal knowledge. Many professors surely have had the experience of finding that an otherwise well-organized, well-executed casebook lacks a reference to a favorite article that the teacher deems highly important and instructive. My research revealed, unfortunately, that this experience is not at all isolated. Perhaps weighed down by the enormous task of assimilating and displaying centuries of legal knowledge in ways that are orderly and pedagogically sound, a number of casebook writers and editors appear to give scant attention to new currents that may be revolutionizing the field even as they write. There are some signs, however, that authors are shortening their casebooks or finding different ways to approach the materials. But that is the subject for someone else's article perhaps. Casebooks written by newcomers, while by no means perfect, show that it is possible to do better.

Perhaps the editors and publishers of the major presses such as West, Foundation, Aspen, and Carolina could be more insistent about broad, probing inclusion. Newer arrivals on the publishing scene might consider entering the casebook market as some seem to be doing already. Teachers dissatisfied with the breadth of coverage of a classic textbook should feel free to nominate and send suggestions to the book's editors for possible inclusion in the next edition as some editors invite them to do. In the next ten years casebook editors will undoubtedly have to address certain new topics now under discussion in the law reviews: alienage and the new citizenship debate, lesbian/gay marriage, transracial adoption, raced-based jury nullification, the privatization of civil rights, the black/white binary of anti-discrimination law, and the progress of law and economics into new areas such

as family law and pollution permits. Alert and well-read students often complain that casebooks do not teach them what they want to know and are missing material that they know about from outside reading. Anecdotal evidence has it that fewer students today, in contrast to twenty years ago, come to law school with knowledge of literature, deconstruction, European philosophy in general, or a grounding in ethnic or race studies. Many more law students have some background in economics or economic theory as it relates to political or environmental science for example. Therefore the law and economics perspective in the law school classroom seems more natural, attractive, and ultimately useful. Nevertheless, public life in the United States in the late twentieth century is as much determined by social relations as by economic ones. Students miss out if these perspectives are altogether missing from their legal education.

Interestingly, student notes and comments were cited with more frequency than one might expect, in some casebooks more often than articles written by law professors. Perhaps some law students are influencing legal education in a similar manner as do those who draft legal opinions for Supreme Court justices—a weighty thought. However, proponents of new legal movements have the most power of all. If an author of a casebook in a mainstream subject like torts or constitutional law approaches it from a law and economics or a critical perspective, and if that casebook is brilliantly conceived and well written, it will be widely accepted and shape the way law is taught for generations to come.

APPENDIX

CONSTITUTIONAL LAW

Braveman, Daan, William C. Banks, and Rodney A. Smolla. *Constitutional Law: Structure and Rights in Our Federal System.* 3d ed. New York: Matthew Bender, 1996.

Cohen, William and Jonathan D. Varat. *Constitutional Law: Cases and Materials.* 10th ed. Westbury, N.Y.: Foundation Press, 1997.

Farber, Daniel A., William N. Eskridge, Jr., and Philip P. Frickey. *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century.* St. Paul, Minn.: West Publishing Co., 1993.

Lockhart, William B., Yale Kamisar, Jesse H. Choper, Steven H. Shiffrin, and Richard H. Fallon, Jr. *Constitutional Law: Cases—Comments—Questions.* 8th ed. St. Paul, Minn.: West Publishing Co., 1996.

Redlich, Norman, Bernard Schwartz, and John Attanasio. *Constitutional Law.* 3d ed. New York: Matthew Bender, 1996.

Rotunda, Ronald D. *Modern Constitutional Law: Cases and Notes.* 5th ed. St. Paul, Minn.: West Publishing Co., 1997.

Stone, Geoffrey R., Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet. *Constitutional Law.* 3d ed. New York: Aspen, 1996.

JURISPRUDENCE

Christie, George C. and Patrick H. Martin. *Jurisprudence: Text and Readings on the Philosophy of Law.* 2d ed. St. Paul, Minn.: West Publishing Co., 1995.

Gottlieb, Stephen E. *Jurisprudence: Cases and Materials.* Charlottesville, Va.: Michie Co., 1993.

Hayman, Jr., Robert L. and Nancy Levit. *Jurisprudence: Contemporary Readings, Problems, and Narratives.* St. Paul, Minn.: West Publishing Co., 1994.

PROPERTY

Cribbet, John E., Corwin W. Johnson, Roger W. Findley, and Ernest E. Smith. *Cases and Materials: Property.* 7th ed. Westbury, N.Y.: Foundation Press, 1996.

Donahue, Jr., Charles, Thomas E. Kauper, and Peter W. Martin. *Cases and Materials on Property: An Introduction to the Concept*

and the Institution. 3d ed. St. Paul, Minn.: West Publishing Co., 1993.

Dukeminier, Jesse and James E. Krier. *Property*. 3d ed. Boston: Little Brown, 1993.

Kurtz, Sheldon F. and Herbert Hovenkamp. *Cases and Materials on American Property Law*. 2d ed. St. Paul, Minn.: West Publishing Co., 1993.

Nelson, Grant S., William B. Stoebuck, and Dale A. Whitman. *Contemporary Property*. St. Paul, Minn.: West Publishing Co., 1996.

Singer, Joseph William. *Property Law: Rules, Policies, and Practices*. 2d ed. New York: Aspen, 1997

TORTS

Epstein, Richard A. *Cases and Materials on Torts*. 6th ed. New York: Aspen, 1995.

Franklin, Marc A. and Robert L. Rabin. *Tort Law and Alternatives: Cases and Materials*. 6th ed. Westbury, N.Y.: Foundation Press, 1996.

Henderson, Jr., James A., Richard N. Pearson, and John A. Siliciano. *The Torts Process*. 4th ed. New York: Aspen, 1994.

Little, Joseph W. and Lyrissa Barnett Lidsky. *Torts: The Civil Law of Reparation for Harm Done by Wrongful Act*. 2d ed. New York: Matthew Bender, 1997.

Mullenix, Linda S. *Mass Tort Litigation: Cases and Materials*. St. Paul, Minn.: West Publishing Co., 1996.