

3-2007

## A Case for Another Case Method

Todd D. Rakoff

Martha Minow

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Legal Education Commons](#)

---

### Recommended Citation

Todd D. Rakoff and Martha Minow, *A Case for Another Case Method*, 60 *Vanderbilt Law Review* 597 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol60/iss2/11>

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# A Case for Another Case Method

*Todd D. Rakoff and Martha Minow\**

American legal education is pretty good. Generally speaking, it is rigorous, and generally speaking, students learn a lot. After three years in law school, students usually leave not only with knowledge of specific legal materials, but also with the sharp analytic skills and ability to work in existing legal institutions that people expect from lawyers. But our society is full of new problems demanding new solutions. Less so than in the past—less than in the 1930s and less than in the 1960s—are lawyers inventing those solutions. Much of the action is moving to graduates trained in other disciplines and professions, such as economics, political science, and business. In our view, the stodginess of American legal education is partly to blame.

The plain fact is that American legal education, and especially its formative first year, remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago.<sup>1</sup> Invented, that is, not just before the Internet, but before the telephone; not just before man reached the moon, but before he reached the North Pole; not just before Foucault, but before Freud; not just before *Brown v. Board of Education*, but before *Plessy v. Ferguson*. There have been modifications, of course; but American legal education has been an astonishingly stable cultural practice.

We leave to others in this Symposium the task of giving an adequate historical and sociological account of the persistence of the Landellian case method. As professors interested in how curriculum is shaped, and how it could potentially be reshaped, we instead ask a structural question: What is it in the design of Langdell's case method

---

\* Respectively Byrne Professor of Administrative Law and Jeremiah Smith, Jr. Professor of Law, Harvard Law School. We appreciate, and have profited from, the comments of our colleague Scott Brewer.

1. That method itself echoed medieval casuistry. See generally ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 8-11, 16-332 (1988).

that gave it such staying power? We think the answer—or at least a good part of the answer—lies in the fact that it was constructed to address simultaneously several different questions, each of which must be answered for a professional school curriculum to succeed with all of its constituencies and in all of its domains. The Langdellian case method afforded a way to communicate information; to cultivate a style of reasoning and questioning that was intellectually respectable, yet also well-suited to the paradigmatic law practice of adjudication; and to engage the attention and interests of large numbers of students at relatively little expense for instruction and materials.

That meeting these multiple goals was its purpose, and not just its effect, is plain from Langdell's own statement of what he was trying to do, as set out in his Preface to the very first casebook, *A Selection of Cases on the Law of Contracts*.<sup>2</sup> As Langdell explained it, the law school case method arose from two circumstances. First, the case method arose from his own experience as a learner that the way to learn the law was "by means of cases in some form."<sup>3</sup> Second, the case method arose from the task he then faced as a teacher, to wit: "I was expected to take a large class of pupils, meet them regularly from day to day, and give them systematic instruction in such branches of law as had been assigned to me."<sup>4</sup> To do the second in light of the first, he had to choose cases for students to read. But on what basis could he choose from "the great and rapidly increasing number of reported cases in every department of law"?<sup>5</sup> The answer to this question lay in the fact that "[l]aw, considered as a science, consists of certain principles or doctrines"; that "the number of fundamental legal doctrines is much less than is commonly supposed"; and that it was therefore possible to take a subject like Contracts; and "without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines."<sup>6</sup> (According to Langdell, "[t]he vast majority" of actual cases were "useless and worse than useless for any purpose of systematic study."<sup>7</sup>) Once the cases were selected, students would be able to learn a doctrine "by studying the cases in which it is embodied."<sup>8</sup> But students would be expected to work not only from the

---

2. C. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* v-vii (1871).

3. *Id.* at v.

4. *Id.*

5. *Id.* at vi.

6. *Id.* at vi-vii.

7. *Id.* at vi.

8. *Id.*

particular to the general, but also from the general to the particular, because

[t]o have such a mastery of these [principles or doctrines] as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of the law.<sup>9</sup>

Without a doubt, there is some tension in this argument. It is not clear, for example, on what basis “as a science” one can exclude most of the actual case law as “worse than useless for any purpose of systematic study.”<sup>10</sup> One might well have thought that any specimen of a species had as good a claim to scientific attention as any other. But this tension reinforces the point that Langdell presented a system consciously constructed to work as a practical method of legal education. The strength of his case method lies not in the irrefutability of any of its elements, but in the way it plausibly links together the answers to so many questions. What is there to know? The law consists of a limited number of principles or doctrines. How are we to know them? From systematic organization of the way they are embodied in cases. How will we teach them? By discussing the cases to see what they embody, and by applying the principles to hypothetical sets of facts. What materials will we use? Reports of the cases. Will this be practical? The reports are in the public domain; we can provide all the students copies of the cases, collected into casebooks. Of what use is knowledge of this sort? The application in this way of principles of this sort, to new cases, is what lawyers do.

A building resting on many load-bearing supports will often stand even if one or two of those supports are weakened. Similarly, Langdell’s case method can survive even if one or another of its component parts is successfully challenged. If, for example, one ceases to believe that the law consists of principles or doctrines, one might still use cases to teach one’s alternative formulation so long as one still cares about working from the particular to the general and back again, in a practical way with a large class, because one thinks this mirrors what lawyers do in practice. This, it seems to us, helps explain why the Realist critique of “law as a science” did not obliterate the case method in law schools; indeed, in many ways the movement just further entrenched it. But perhaps the method’s survival just resembles the endurance of certain religious traditions that, once embedded in custom and experience, give rise to new rationales when the old ones fade away. Thus, the pre-Jewish traditions of shepherds celebrating a new life-cycle carry over to the “Pascal lamb” of

---

9. *Id.*

10. *Id.*

Passover, and then resurface once more in the vision of Jesus as the Lamb of God. And so the case method persists and supports instruction about the indeterminacy of legal results, the arguable nature of facts, or the influence of politics and personality, rather than as the systematic expression of a few coherent ideas that Langdell thought it would illustrate.

Remarkable as such endurance may be, survival is not the only or even the best test of an educational curriculum, especially given the pull of the status quo on teachers and administrators. The fact is, Langdell's case method is good for some things, but not good for others. We are not talking about fancy goals here; we are talking about teaching students "how to think like a lawyer." Langdell's case method fails in this mission. It fails because lawyers increasingly need to think in and across more settings, with more degrees of freedom, than appear in the universe established by appellate decisions and the traditional questions arising from them. The Langdellian approach treats too many dimensions as already fixed. When what is at issue is whether an appellate bench correctly decided a case, or how its decision fits into the general fabric of appellate decisions, self-evidently we have already decided that the paradigmatic institutional setting for thinking about a legal problem is the appellate court. Accordingly, we will restrict our consideration of the proper incidence of legal force to the modes that courts can use. By focusing on appellate cases, we also assume that the facts of the problem are known: if not because they are really known, then because the rules of procedure will treat them as no longer contestable. Moreover, most of what we know will consist of what K.C. Davis denominated "adjudicative facts" rather than "legislative facts": The who, what, and when of the named parties, rather than information about the social situation in general.<sup>11</sup> Typically the procedural rules (either the rules governing how parties frame an issue for decision or the rules governing discretionary review) will also stipulate the issue (or small set of issues) that are open for discussion. All but the most formal of opinions will also present an already-constructed narrative of the situation. By taking a retrospective view of facts already found and procedures already used by a court, the appellate decision does little to orient students to the reality of unfolding problems with facts still to be enacted, client conduct still to take place, and procedural settings still to be chosen and framed.

Of course, teachers fight against these restraints—some more adamantly than others. But it is hard to do so at a deep level. A well-

---

11. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942).

crafted hypothetical, for example, will alter the facts, but it will not alter the sense that facts are fixed and known (not to mention fixable and knowable). Asking students to consider whether legislation should change the will alter the institutional setting; it will not give the students the materials that ought to inform actual committee work on a prospective bill. Similar difficulties arise for the class discussion that would pursue other options such as administrative regulation or, indeed, private ordering. Even the most imaginative and energetic teacher simply needs different materials to present these other options with the kind of depth and rigor that the case method has permitted within the framework of appellate adjudication. If it is too strong to say that the appellate case method presents insuperable difficulties, certainly it is fair to say that this method creates strong pressures in particular, and rather narrow, directions.

These problems seem to us to be fundamental on both the theoretical and practical levels. First, as to theory: the study of law is inevitably drenched now in the multiple theories that have washed through scholarship in the century since Langdell. "Truth," in modern and post-modern views, is much more constructed, much less simply discovered, than the Langdellian model of "science" supposes. What is known is much more the result of active human agency, and is much more contextual and perspectival. But this cannot be fixed simply by pointing out that Langdell worked before Einstein because it is not accidental that Langdell's view fits easily with the study of appellate decisions. The opinions state "the facts." Even when countered with contrasting statements by a dissent, these factual statements do little to equip students to navigate overlapping and diverging witness accounts, gaps in forensic material, disputes over significance levels in statistical studies, or the influence of a narrative frame. Appellate opinions hide, rather than display, how "facts" are constructed and how more than one narrative can be consistent with "raw data." The students we now teach are all raised with media renditions of multiple perspectives, time shifts, and conflicting realities; even if they have not seen *Rashômon*, they live in a world that presumes the influence of perspective on what is known and what is real. The appellate decision neither acknowledges this world nor equips the student to unpack how courts stabilize lived experiences so that the law may be applied. The imaginative teacher can work hard with cases to resurrect or imagine the unstable reality behind the result—felt injustices, injuries, justifications, beliefs, actions—but still the appellate adjudicatory setting will eliminate or make irrelevant much of what he or she wants to consider.

This theoretical point seems to us to recur in the practical life of the lawyer, and so forms our second fundamental complaint. We do

not agree with Langdell that mastery of doctrines so as “to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer.”<sup>12</sup> Lawyering is more creative and less determinate than that formulation supposes. All lawyers need to be able to take a set of facts and see that alternative doctrinal characterizations might be applicable, and that the choice of which doctrine will be applied will depend partly on how they shape the case. Lawyers need to see how conflicting narratives might be built on the data, and to think about how those narratives might equilibrate in one setting or another. Lawyers need to be able to think about not only the specific version of a problem that presents itself, but also about the more general version of which it is but an instance. Lawyers need to be able to consider solving problems not just through litigation, but also through alternative forms of dispute resolution, through legislation, and through regulatory or executive action.

All of this is not to say that lawyers do not need to think very cleanly, very precisely, very analytically. We have no more tolerance for mush than the next law professor does. As we said at the start, we think the current curriculum does produce students who are sharp in ways that we, and the society, value. What we are saying, however, is that students need more, and they need more not for arcane or unusual careers, but simply to be good lawyers. While an expert in differentiating mental skills could probably produce a raft of labels for what they also need, when we think of what students most need that they do not now get, we think: “legal imagination.” What they most crucially lack, in other words, is the ability to generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions, to which they could apply their very well honed analytic skills. And unless they acquire legal imagination somewhere other than in our appellate-case-method classrooms, they will be poorer lawyers than they should be.

As a pedagogical matter, it seems to us that the place to start in creating these additional skills is the time frame by which materials are assigned. Appellate cases present the world as already structured in almost all dimensions, so that the few open issues can be decided crisply. Insofar as professors try to alter those frames, they must retrace steps that have already been taken. We need to start instead with a much more open-ended presentation of the world, and

---

12. LANGDELL, *supra* note 2, at vi.

walk onward.<sup>13</sup> We need (if the language of the VCR is not already hopelessly out-of-date) to shift from “rewind” to “play.” (Indeed, since we want to start with raw data, we might even say we are advocating using a “facts-forward” mode.)

Of course, some of this already happens in law schools. Students who have a first-rate clinical experience probably learn a lot of what we are talking about, although they may be limited in the institutional mechanisms they are able to consider. More importantly, because they are representing clients, they (and their teachers) must worry about a whole range of performance skills. These skills are not necessarily linked to the intellectual skills we address. And perhaps for just that reason, clinical education that is done right (and is not just a name for farming students out to poorly supervised externships) is very expensive. Langdell, as we said, saw as an essential part of his problem that he was “expected to take a large class of pupils [and] meet them regularly from day to day.”<sup>14</sup> The very practical matter of efficiently using resources seems still to be one of the equations that have to be solved by any proposed alternative.

Another place where some of what we are talking about happens is in other professional schools: notably business schools, but also schools of public policy and some medical schools. The archetypical “case” at a business school consists of much more information, and a much more open-ended situation, than the appellate cases used in law schools. They are taught by teachers asking different questions, often in classes as large as law school classes. A careful study by a Harvard Business School professor comparing the methods used in several of Harvard’s professional schools found that alternative “case methods” do indeed develop

---

13. The fact that many law school exams present unfolding problems, albeit in a truncated form, in effect confesses the gap between the appellate opinion and the lawyers’ tasks that we seek to address.

[I]t has become apparent on several levels that professors do not test what they teach, as often during the first year curriculum they “teach by the case method and actually test by the problem method.” Typically, first-year law students are greeted in the first weeks of school with massive reading assignments of appellate court opinions (the standard Case Method) followed by class periods which engage in some form of Socratic dialogue regarding those cases. At the end of the semester, although taught by the Case Method system, typically they are presented with the standard three-hour exam with loaded fact patterns providing complicated legal problems for which they have received little or no explicit training.

Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 673 (1994) (quoting Myron Moskovitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 260 (1992)).

14. LANGDELL, *supra* note 2, at v.



different skills.<sup>15</sup> Business school students, for example, generate alternative solutions and choose among them more ably than the typical law student; medical school students more successfully learn to identify what they do not know and how to find it out.<sup>16</sup>

Similar materials have been used sporadically at law schools, too,<sup>17</sup> although we do not know of any effort to make very open-ended, problem-based materials—materials that would, for example, not be linked to a particular doctrinal subject—an integral part of the first-year curriculum. But the type of materials we have in mind can be described in general. Students ought to be presented with relatively dense materials that lay out a situation, experienced as a problem for a person, or group of people, for legal treatment. Students should face a choice that challenges them to identify options and that permits multiple resolutions, sometimes within a relatively tight ambit. Such resolutions might include issues such as which settlement offer would make it sensible to forego litigation. Sometimes these choices might be within broader (but still specifiable) alternatives, such as whether trying to get particular legislative language adopted would be feasible and preferable to private ordering. The problems ought not to be situated in one doctrinal area, but should present opportunities for mental maneuvering around the legal universe. Teaching should emphasize generating alternative solutions as well as appropriate grounds for choosing among them. And criteria for resolution should include legal, normative, and practical considerations.

Indeed, we are members of a committee that is presently recommending to our faculty a set of curricular revisions that include the creation of problem-solving materials of this sort, to become prominent features of our required first-year curriculum. Although, as must be apparent, we are enthusiasts for the project, we also have tried to think of what might be said against the proposal. We think

---

15. David A. Garvin, *Making the Case*, 106 HARVARD MAG., Sept.-Oct. 2003, at 56.

16. *Id.*

17. Although we admire many teaching efforts that use a "problem method," we distinguish the detailed fact-drenched case studies we are proposing from the short paragraph-length problems that are often used in published casebooks. Closer to our proposal are efforts to give students the actual documents and place them in developed roles with assignments to produce analyses, recommendations, and decisions. *See, e.g.*, DAVID R. HERWITZ, BUSINESS PLANNING: MATERIALS ON THE PLANNING OF CORPORATE TRANSACTIONS app. A at A1-A37 (2d ed. 1984); *see also* Frank E. A. Sander, *Learning by Doing*, 25 HARVARD L. SCH. BULL., Apr. 1974, at 16 (tax workshop). Stanford Law School has developed a series of environmental law case studies in this direction. *See* STANFORD LAW SCHOOL, CASE STUDIES ABSTRACTS, available at [http://www.law.stanford.edu/publications/casestudies/case\\_abstracts](http://www.law.stanford.edu/publications/casestudies/case_abstracts). Georgetown Law Center recently developed three international and comparative law problems and assigned each first year law student to work on one of them for a week. *See* GEORGETOWN UNIVERSITY LAW CENTER, WEEK ONE: LAW IN A GLOBAL CONTEXT, available at <http://www.law.georgetown.edu/documents/weekone2006.pdf>.

there are four issues to be addressed. First, law schools teach law, and we, the professors, may fear that teaching these kinds of problems may not feel like teaching law. Second, we may simply worry that we do not have the needed materials and do not know where they will come from. Third, we may fear that even if we ought to teach like this, we do not know how to do it. And lastly, we may think that all this is fine, but it is best done with third-year students, at the end of the day, rather than as part of the first-year experience.

We hope that what we have already said goes some distance to addressing the first difficulty: convincing faculty (and students also) that distinctly legal capacities are engaged in the analysis of complex, rich factual descriptions of problems and in the generation of alternative avenues for problem-solving. For this is a good part of what lawyers actually do: formulate unique assessments of options based on specialized knowledge about the institutional, conceptual, and practical benefits and difficulties of each. It cannot be done nearly as well by someone who does not know “the law” in all senses of the term, including the most traditional. We may need to develop a better vocabulary for denominating the particular skills involved, but that they are legal skills seems to us clear.

In regard to the second difficulty, producing the teaching materials will indeed require an investment of resources, similar to what is required when business and policy schools produce case studies, complete with teachers’ notes. Pooling efforts in this direction is crucial for the same reasons that traditional casebooks enable law professors to teach without each, personally, having to generate all the materials for the class. Case studies that already exist in business and policy school contexts are a start, but as far as we know, these treat law as a “black box.” (Indeed, the “thinness” of the legal framework of the cases we have seen is one of the things that most convinces us there is a distinctly legal expertise that needs to be brought to bear.)

Another sensible tactic is to draw upon history. For example, what understanding of the world lay behind the decision of environmental-protection lawyers to advocate the use of pollution credits as a regulatory tool, and what other options could they have pursued? The creation of workers’ compensation as a substitute for judicially enforced tort liability, the combination of criminal defense work and media strategy for Martha Stewart, the resistance of the Catholic Church over requiring employers to supply domestic partner benefits that led to an inventive compromise in San Francisco, the possible innovations in U.S. and South African patent laws so as to enhance the distribution of much-needed pharmaceuticals: in these and so many other examples, historical experiences offer the detail, nuance, and insight that would spark the legal imagination.

But mostly, following the business school model, we think that case writers will need to get their materials from practitioners. In our experience, lawyers like to talk about what they have done. While there may be some need to change facts to protect confidentiality, we have no doubt that law school cases could be written through consultation with practitioners. It would not hurt to talk to some clients, too. Case studies can be written effectively in installments, with five to fifteen pages laying out the initial situation up to a decision point for a key actor like the lawyer consulted by a client, and a next installment that details choices made, repercussions encountered, and new issues identified. At times a third and even a fourth installment can follow. One very real benefit of such a format is to locate students in time so that they can see the consequences of legal choices and the continuing duties of the lawyer even after an initial decision has been made. All of this will cost money—undoubtedly more money than is required just to reproduce appellate opinions written for our pedagogical benefit at public expense. But if it works for business schools and public policy schools, we do not see why the materials cannot be used by enough students for enough years to amortize within reason the cost of generating them.

Now we come to the unspoken fear of faculty members: Am I competent to teach these kinds of materials? The worry may be a matter of pedagogy, or a matter of substantive knowledge. Insofar as it is a pedagogical anxiety, we think it is largely misplaced. True, what we are suggesting will require, for many professors, asking new types of questions about new types of materials. The focus will be more on alternatives, choices, and living with the sequential consequences of earlier choices; both students and faculty will be able to draw upon detailed descriptions of particular transactions and conflicts, with psychological, economic, and political dimensions detailed in the materials; and actual documents (entire contracts, treaties, regulations, notices), the range of players, and institutional options will all be in the students' hands. But in terms of pedagogical style, we think the materials ought to allow roughly the usual degrees of latitude for those teachers who want to be traditional and those who want to be experimental. Those who are daring could break the class into small groups for extended simulations; or devise extensive use of online real-time searching and writing by students in and out of class; or generate settings in which students work with practicing attorneys; or experiment with various other approaches. But those who are not can rely on traditional question-and-response, open discussion, and the like; and if that is usually their *métier*, we suspect that here, too, they will meet with success.

The substantive anxiety is, in our view, more apropos. Law professors were good law students, and given the history of legal education, this means that they almost universally feel comfortable handling appellate opinions in the classroom even if they have no experience doing so in practice. By contrast, for many of us, the arenas of the legislature, the agency, the political movement, the media—perhaps even the trial courts—are ones we may only remotely watch. Ideally, case studies and teachers' notes could be crafted so that they could be taught by professors as we know them in law schools as we know them. But, frankly, many of us will need to learn some new things. Is this, though, so different from learning the new Supreme Court decisions each term, or a new statutory or regulatory framework, or the new reliance on economics or political science in many of our subjects? We are supposed to keep up with what is happening in our fields. It does not seem to us that we ought to defend an out-dated curriculum on the basis that it is the only thing that matches our out-dated knowledge.

Finally, we come to the question of why problems of this sort ought to be part of the required first-year curriculum, rather than being reserved for capstone courses. Our answer is based on what we have learned from Langdell: The template for legal thinking established in the first year of law school has real staying power. In our view, what we have called "legal imagination" is every bit as much a part of thinking like a lawyer as are the analytical skills we already teach. Truly, it is hard to ask students to start learning to move about the whole legal structure when they have only just learned the location of the rooms and the names of the furniture. But we think the greater fear is that, if we do not make the effort to challenge students in this way, students will learn to think of the legal system as only so many rooms, so many pieces of furniture, that they can never reorder. As we said at the start, our society is full of new problems demanding new solutions, and less so than in the past are lawyers inventing those solutions. We think we can, and ought to, do better.

\*\*\*