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## Casebooks and Scholarship: Confessions of an American Opinion Clipper

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# LECTURE

## CASEBOOKS AND SCHOLARSHIP: CONFESSIONS OF AN AMERICAN OPINION CLIPPER\*

by

E. Allan Farnsworth\*\*

“MR. Fox,” the professor asked, “will you state the facts in *Payne v. Cave*?” So, we are told, the case method of instruction began in the fall of 1870 at the outset of the contracts course at the Harvard Law School.<sup>1</sup> The professor was Christopher Columbus Langdell, immortalized by Harvard’s Langdell Hall. History, perhaps charitably, does not disclose what Mr. Fox replied, but it was evidently not such as to inspire Harvard to name a building in his honor.

Langdell, who spent sixteen years as a bookish lawyer in New York before returning to his alma mater, was the first to compile an anthology of cases for use in legal education. He had collected his cases the previous spring and, when he put them in the hands of his students, the experiment was to revolutionize legal education. My purpose here, however, is not to discuss that experiment but to examine the anthologies that resulted from it. For Langdell’s publication of these cases the following year in a volume entitled *A Selection of Cases on the Law of Contracts* ushered in what I call the Age of Anthology in American legal scholarship. His volume began with *Payne v. Cave*,<sup>2</sup> which looked like this:

SELECT CASES ON CONTRACTS.

### CHAPTER I.

### MUTUAL CONSENT.

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\* This is a revised and annotated version of the eleventh Roy R. Ray Lecture, delivered at Southern Methodist University School of Law on March 30, 1988. The author has drawn on Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406 (1987) with permission of the *Michigan Law Review*.

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1. 2 C. WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* 372 (1908). On the unfavorable reaction among Langdell’s students, see Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 498-501 (1920).

2. 3 Term R. 148 (K.B. 1789).

"Est sntem pactio duorum plurimum in idem placitum consensus."

PAYNE v. CAVE.

IN THE KING'S BENCH, MAY 2, 1789.

[*Reported in 3 Term Reports, 148.*]

THIS was an action tried at the Sittings after last Term at Guildhall before Lord Kenyon, wherein the declaration stated that the plaintiff, on 22d September, 1788, was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M., the agent of the plaintiff in that behalf, the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c., of all which premises the defendant afterwards, to wit, &c., had notice; and thereupon the defendant, in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake and promise to perform the conditions of the said sale to be performed by the plaintiff as seller, &c., undertook, and then and there promised the plaintiff to perform the conditions of the sale to be performed on the part of the buyer, &c. And the plaintiff avers that the conditions of sale hereinafter mentioned, are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days' time, it should be put up again and resold, &c. [stating all the conditions]. It then stated that the defendant became the purchaser of the lot in question for 40*l.* and was requested to pay the usual deposit which he refused, &c. At the trial, the plaintiff's counsel opened the case thus: The goods were put up in one lot at an auction; there were several bidders, of whom the defendant was the last, who bid 40*l.*; the auctioneer dwelt on the bidding, on which the defendant said, "Why do you dwell? you will not get more." The auctioneer said that he was informed the worm weighed at least 1800 cwt, and was worth more than 40*l.*; the defendant then asked him whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was resold on a subsequent day's sale for 30*l.* to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

*Walton* now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller; in the mean time, the person who bid last is a conditional purchaser, if nobody bids more. Otherwise, it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last; and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last outbid would have given

for them. The case of *Simon v. Motivos*,<sup>1</sup> which was mentioned at the trial, does not apply. That turned on the Statute of Frauds.

THE COURT thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus panitentia*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.

*Rule refused.*

<sup>1</sup> S. Burr, 1921.

While it is not our habit to call the books from which you are learning the law "anthologies," that is their essence. We can only conjecture that Langdell was inspired by Francis Turner Palgrave's famous anthology of lyric poetry, *The Golden Treasury*, published only a decade before. We do know that Langdell was already familiar with many of the cases in his anthology from having assisted his teacher and predecessor, Theophilus Parsons, in preparing footnotes for Parsons's treatise on contracts.

As one of the legion of American law professors that have followed in Langdell's footsteps in editing anthologies, I have chosen to say something to you about these works. The Roy R. Ray Lecture is intended especially for first-year students, and the casebook is, after all, a type of legal literature with which first-year students are all too familiar.

With what someone once called "mock humble arrogance," I have styled my remarks "Confessions." At least some might think it arrogant to usurp an appellation associated with Saint Augustine, Jean Jacques Rousseau, and Thomas de Quincy—to whom I owe a special apology for having parodied his title "Confessions of an English Opium Eater." De Quincy, you may recall, was an early nineteenth century Oxford dropout and lifelong opium addict who wrote fourteen volumes of elegant prose for the best of all possible motives—he needed the money.

Only after I had submitted the title did it sink in that the title required me to find something to confess. And so I have three confessions—"mock humble" confessions, one might say. They are confessions shaped during the more than two decades that I have shared with my colleague William F. Young the responsibility of editing a casebook in Langdell's own field of contracts—a casebook begun by distinguished predecessors a half-century ago.<sup>3</sup>

My first confession is to a nagging fear that as a casebook editor I am redundant. Does the world really need so many contracts professors editing so many casebooks? Your contracts teachers now have a choice among a

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3. Our casebook, designated a "fourth edition," is in reality the eighth version of a work begun by Edwin Patterson in 1935.

score of contracts casebooks<sup>4</sup> on which some fifty contracts professors have labored. Yet more casebooks by other professors are in the works. Would one more or less make a difference? Here is a field in which product differentiation has become a high art. Contracts casebooks now come in a variety of appealing shades of red, blue, brown, and green. They range in length from well under a thousand pages to more than 1500, containing fewer than 150 cases to more than 250. While one teacher favors a particular casebook for "the editors' respectful refusal to edit the heart out of" their cases,<sup>5</sup> a publisher touts another casebook as being "heavily enough edited" that students are not "forced to struggle through unnecessary detail and discussion before reaching the point of the case."<sup>6</sup> How did there come to be so many contracts casebooks?

The revolution begun by Langdell never spread beyond the United States, and even there it proceeded slowly. Although casebooks quickly replaced texts as the grist for student learning at Harvard, the revolution was not welcomed with open arms in most American law schools. Columbia's conversion to the case method was the next of importance and that did not come until the 1890s under the deanship of William Albert Keener, whom Columbia had lured from Harvard. It was in 1898, more than a quarter-century after Langdell called on Mr. Fox, that Keener published his two-volume anthology on contracts, the first real rival to Langdell's. In the meantime, in 1894, Samuel Williston, teaching contracts at Harvard, added a second volume to Langdell's cases.<sup>7</sup> For another quarter of a century—until the 1920s—these two anthologies dominated the field.

Then, in 1921, two more contenders appeared on the scene. Arthur Linton Corbin of Yale and George Purcell Costigan of Northwestern both published one-volume contracts casebooks. Williston followed in 1922 with a single volume cut from his two-volume anthology based in part on Langdell. The total number of anthologies was now four, and one contracts teacher of that time rejoiced that contracts teachers, "fortunate in having a choice between two such excellent classroom tools as the case-books of Professors Williston and Keener," now had two more from which to choose.<sup>8</sup> Another contracts teacher exulted that he now had "an imposing array from which to choose."<sup>9</sup> Little could these commentators have imagined the variety available today.

Fueled by growth in the number of law students and the proliferation of law schools, product differentiation took hold during the decade of the 1930s. In 1931 Grover Cleveland Grismore of Michigan was the first to

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4. *E.g.*, L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* (4th ed. 1981); F. KESSLER, G. GILMORE & A. KRONMAN, *CASES AND MATERIALS ON CONTRACTS* (3d ed. 1986).

5. Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997, 1004 (1985).

6. Matthew Bender's circular letter of March 1988 on W. MCGOVERN & L. LAWRENCE, *CONTRACTS AND SALES: CASES AND PROBLEMS* (1986).

7. Keener's two-volume set contained some 470 cases in 1800 pages. Williston's 1904 two-volume revision included some 460 cases in 1400 pages.

8. Oliphant, *Book Review*, 16 *U. ILL. L. REV.* 645, 645 (1922).

9. Grismore, *Book Review*, 20 *MICH. L. REV.* 373, 374 (1922).

invade what he admitted was "a field in which the handiwork of masters is already available."<sup>10</sup> Harold Canfield Havighurst of Northwestern followed in 1934, as did William Herbert Page of Ohio State in 1935, and Edwin Wilhite Patterson of Columbia in the same year. Patterson's was an unwieldy but influential two-volume anthology designed to be used with a third volume, edited by George Washington Goble of Illinois in 1937, in an eight-hour contracts course. In 1938 George Knowles Gardner of Harvard brought out yet another anthology, and in 1941 Patterson and Goble consolidated their three volumes into a single volume.

By the eve of World War II some ten contracts anthologies were on the market. The post-war era saw new entries by Lon L. Fuller of Harvard in 1947, Addison Mueller of Yale in 1952, and Friedrich Kessler of Yale and Malcolm Pitman Sharp of Chicago, both in 1953. Since World War II more than two dozen contracts books have been on the market at one time or another, and roughly a score are available today. Since the war, well over fifty law teachers have devoted time and energy to the production of this plethora of contracts-teaching materials.

You can understand how this proliferation might give rise to fears of redundancy. That is not to say that I intend to stop editing my own casebook. Nor, I suspect, do others. As long as some 40,000 students crowd the first-year classrooms, contracts professors—egged on by publishers—will be unable to resist the temptation to enhance their notoriety and fill their coffers by attempting to capture a share of this market. And, in spite of this first confession, so shall I.

My second confession is to a gnawing doubt as to the academic utility of editing casebooks. In academic circles utility is measured in terms of what is called "scholarship"—and casebooks are not regarded as scholarship. Dictionary definitions inform me that scholarship is what scholars write; and one academic, Karl Klare of Northeastern, assures me that "[t]he first-year casebook has been a medium of significant contribution to contracts scholarship."<sup>11</sup> But my colleagues tell me the contrary, that when scholars edit casebooks that is not scholarship. Thus, in many law school faculties casebooks count for little in decisions to promote or to grant tenure. Some years ago, distinguished scholars filled more than 300 printed pages in the *Yale Law Journal* with a symposium on legal scholarship, and in all those pages I detected only one brief reference to a casebook.<sup>12</sup> Why are not casebooks regarded as scholarship? At least in part because they are not thought of as either creative or influential.

The early anthologists did not even try to appear creative. As one commentator said of contemporary constitutional law casebook editors, they "frequently create the appearance of agnosticism with respect to particular

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10. G. GRISMORE, *CASES ON THE LAW OF CONTRACTS* iii (1931).

11. Klare, *Contracts Jurisprudence and the First-Year Casebook* (Book Review), 54 N.Y.U. L. REV. 876, 876 (1979).

12. Symposium, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955, 1114 (1981) (reference by Richard Posner to "the Hart and Wechsler casebook on federal jurisdiction").

outcomes and approaches."<sup>13</sup> The tradition is that the editor of a casebook should be as neutral as the editor of an anthology of poetry might be expected to be. Indeed, the word "anthology" comes from the Greek and means literally "a gathering of flowers." Like Palgrave's anthology of poetry, Langdell's anthology of cases was a true gathering of flowers, without comment by the editor and unadulterated by extraneous material. Even chapter and section headings were few and far between. Editorial presence was slow to intrude itself in the face of this tradition. It began with footnotes.

A quarter of a century after Langdell called on Fox, Williston adopted the practice of dropping footnotes citing cases related to his principal cases. These footnotes eventually became so bulky that when Williston compressed his two volumes into a one-volume edition, a reviewer explained that the elimination of "elaborate footnotes" had made possible this reduction in size.<sup>14</sup>

A half-century after Langdell called on Fox, Corbin went beyond Williston's practice by inserting a few bits of his own introductory text in his footnotes and by offering occasional opinions in his footnotes. Even this restrained editorial presence evoked criticism from a reviewer who faulted Corbin for sometimes using his footnotes "to present the author's views or reasoning rather than as mirrors of the authorities . . . This is leading the student and sometimes it will happen that he is led in a direction which the instructor will think erroneous."<sup>15</sup> The illustrations given to support this criticism seem innocuous today. For example, offense was taken at a footnote noting that "[i]n some cases it has been held that mere forbearance cannot be a consideration and that there must be a promise to forbear, wholly overlooking the possibility of a unilateral contract."<sup>16</sup>

Costigan, whose anthology appeared in the same year as Corbin's, audaciously used footnotes that not only posed questions for the student but also cited and even quoted secondary authorities. It was not until the mid-1930s, however, that Patterson and Goble elevated the note material so that it was, as one reviewer described it, "not printed in forbidding fine print at the bottom of the page" but "after the cases . . . in only slightly smaller type."<sup>17</sup> Patterson explained that he favored using questions and problems so that discussion might be "less an impromptu dialectic between student and teacher, in which the latter triumphantly pulls the rabbit from the hat, and more a sustained exploration of implications which are fully sensed in advance."<sup>18</sup> He was the first to describe his casebook as cases *and materials*—signalling a departure from the pristine anthologies of Langdell and Keener.

Some would carry this trend toward creativity very far indeed. Two de-

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13. Lupu, *Intergenerationalism and Constitutional Law*, 85 MICH. L. REV. 1390, 1393 (1987).

14. Amram, Book Review, 70 U. PA. L. REV. 373, 373 (1922).

15. Whittier, Book Review, 31 YALE L.J. 220, 222 (1921).

16. A. CORBIN, CASES ON THE LAW OF CONTRACTS 267 n.40 (1921).

17. Woodbridge, Book Review, 24 VA. L. REV. 824, 825 (1938).

18. 1 E. PATTERSON, CASES AND MATERIALS ON CONTRACTS II vi (1935).

cases ago Christopher Stone of Southern California urged that constitutional law casebooks become truly creative ventures by undertaking "the formulation of approaches to constitutional law."<sup>19</sup> Others say we have already departed too far from tradition. Thus Anthony D'Amato of Northwestern has recently lamented that

casebooks have evolved along the lines of becoming easier and easier for students to read and digest. The old casebooks challenged the student to think, to figure out why the cases were placed in that order, and what the relationships were, if any, among a case and the ones preceding and following it. The new casebooks tell the student these things.<sup>20</sup>

But were the old casebooks really as neutral as they appeared to be? Even Professor D'Amato concludes that, "[i]n retrospect, the 'old' casebook editors were pretty subtle; their editorial work showed up not in notes and comments, but in the perceptive selection and ordering of cases that could efficiently be used as vehicles for creative problem solving."<sup>21</sup> Lawrence Friedman of Stanford goes further, arguing that "these bare, spare books carried to its extreme a most striking characteristic of the style of teaching they reflected. This was the Socratic masquerade: The art of saying everything while appearing to say nothing at all."<sup>22</sup>

Some contemporary writers make much of the ordering of cases in supporting Friedman's thesis. Langdell's cases, within each topic, were largely in historical order, much as Palgrave had ordered the poems in his anthology. But Mark Kelman, a Stanford professor active in the critical legal studies movement, notes that a "commonly used contracts text (Fuller and Eisenberg) introduces nearly every section with a case expressing the privileged position, *then* poses limiting cases," and Kelman suggests that this "surreptitiously communicates" the idea that acceptance of this position is primary in legal education.<sup>23</sup> Mary Jo Frug, a New England School of Law professor active in the feminist movement, criticizes a leading casebook that begins with *Hawkins v. McGee*, a principal case awarding expectation damages against a doctor who had performed plastic surgery on the hand of a male patient, followed by *Sullivan v. O'Connor*, a note case awarding reliance damages against a doctor who had performed plastic surgery on the nose of a female patient. Frug argues that this order puts down both the reliance measure and women as secondary.<sup>24</sup> And Karl Klare writes of Fuller's "major innovation" in his 1947 anthology of putting remedies up front, at the very beginning of the book, signalling the message that one cannot "understand the nature of legal rights . . . without knowing what

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19. Stone, *Towards a Theory of Constitutional Law Casebooks*, 41 S. CAL. L. REV. 1, 5 (1967).

20. D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 485 (1987).

21. *Id.* at 486.

22. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 632 (2d ed. 1985).

23. M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 292 (1987).

24. Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065, 1099-1100 (1985).



courts can and actually will do to and for litigants."<sup>25</sup>

Yet even if the anthologies have had a kind of subliminal effect, this would scarcely be regarded as "creative" in the sense that scholarship is expected to be creative. Nor have casebooks qualified as scholarship in terms of their influence on the law. Surely an editor of a widely used casebook might be expected to have an influence on the law, if only through the students who went out into the profession after having studied from the casebook. Williston reminded us that law teachers influence the development of the law "by the direct influence of their teaching on their pupils" as well as "by their writings."<sup>26</sup>

Yet in spite of the circumstance that for over a half-century a small number of anthologies dominated the market and were studied by most law students, their influence on the development of the law was slight. Even a casual reading of judicial opinions will show that judges virtually never cite casebooks. And, as the Yale symposium suggests, scholars also pay little attention to casebooks. In fact, if one excludes book reviews, casebooks have been largely ignored in legal literature of all kinds. I will speak only to the influence of the contracts anthologists in two respects: on the cases that are recognized as leading contracts cases and on the development of contract doctrine.

The contracts anthologists had some influence on leading cases. The most popular of their cases, reused in anthology after anthology, were to become part of the taught tradition of American law, revered by the many lawyers whose first acquaintance with the field came from reading those cases. Where did the anthologists themselves get their cases?

Sometimes they were the by-product of other writing. Casebooks are in many respects merely reflections of something else; here, reflections of the editor's other work. Langdell got many of his cases from having been Parsons's student research assistant. Williston and Corbin both published their first anthologies the year after publishing new editions of treatises originally written by others. And it should come as no surprise that the anthologists took cases from each other, the cases themselves not being covered by copyright laws. The anthologies reflected not only what the anthologists had done but what others had done. Williston, of course, openly borrowed from Langdell, as have many of us who have revised works of our predecessors. Others not formally connected with their predecessors nevertheless acknowledge similar debts. And whether acknowledged or not, such debts are inevitable since future editors learned from then-existing anthologies. As Corbin admitted, "[o]ne cannot use a particular casebook . . . for more than 15 years without being greatly influenced by . . . the choice of cases . . ."<sup>27</sup> And it is surely more than mere coincidence that so many future anthologists under-

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25. Klare, *supra* note 11, at 882. The latest edition of this casebook, which no longer begins with remedies, discards this "major innovation."

26. S. WILLISTON, *SOME MODERN TENDENCIES IN THE LAW* 107-08 (1929).

27. A. CORBIN, *supra* note 16, at x.

took to review earlier anthologists.<sup>28</sup>

The early anthologists had a pronounced fondness for English cases. Langdell himself was a notorious anglophile in choosing cases. He recalled his contracts professor, Parsons, exhorting beginning students to study English decisions because "England governs us still, not by reason of force but by force of reason."<sup>29</sup> Langdell took this to heart and nearly ninety percent of the cases were—like *Payne v. Cave*—English. Most of the rest came from the two northeastern states of New York, where Langdell had practiced law, and Massachusetts, where he taught. Early casebooks by Langdell's Harvard colleagues showed the same parochialism, and as late as 1950 one of Keener's revisors confessed to an "old-fashioned fondness for the leading English, Massachusetts, and New York cases."<sup>30</sup> Thus, the law reflected in the early anthologies was largely English law.

Langdell's emphasis on English cases also served the end of what Grant Gilmore called "the apparent unity of doctrine,"<sup>31</sup> a matter of no small importance to a field dominated by the laws of now fifty different states. In 1823 Nathan Dane wrote in his *Abridgement of American law* that "the evil to be feared in our country is [that we] will produce too much law and in too great a variety."<sup>32</sup> The heavy reliance on English cases was a counterweight to this tendency. Cases from a single jurisdiction, England, gave an artificial semblance of unity and rationality that could not have been accomplished by the use of unconnected and perhaps conflicting cases from a variety of American states.

The challenge to this dominance of English cases came not from later anthologists but from a different quarter. In 1923 the American Law Institute was founded. As part of an ambitious attempt to formulate rules that were representative of American common law, the institute undertook a *Restatement of Contracts*. The *Restatement*, in which Williston played a leading and Corbin a supporting role, was completed in 1932 and proved a formidable competitor to the English cases so prized by the early anthologists. It, too, could be used to suggest an "apparent unity of doctrine." In the 1933 edition of his anthology Corbin cautioned students that the *Restate-*

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28. Thus John Dawson, whose casebook appeared in 1959, reviewed Kessler and Sharp's casebook in 6 J. LEGAL EDUC. 405 (1954); while Sharp, whose casebook appeared in 1953, reviewed Fuller's casebook in 15 U. CHI. L. REV. 795 (1948); and Harold Shepherd, whose casebook appeared in a second edition in 1946, also reviewed Fuller's casebook in 1 J. LEGAL EDUC. 151 (1948). Gardner, whose casebook appeared in 1939, reviewed both Goble's casebook in 51 HARV. L. REV. 188 (1937) and Patterson's two volumes in 45 YALE L.J. 1153 (1936); while Goble, whose casebook appeared in 1937, reviewed Costigan's third edition in 27 U. ILL. L. REV. 592 (1933). Havighurst, whose casebook appeared in 1934, also reviewed Costigan's third edition along with Patterson's two volumes in 21 IOWA L. REV. 661 (1936); and Grismore, whose casebook appeared in 1931, reviewed both Corbin's and Costigan's casebooks in 20 MICH. L. REV. 373 (1922).

29. C. WARREN, *supra* note 1, at 312.

30. Wormser, Book Review, 3 J. LEGAL EDUC. 145, 145 (1950).

31. G. GILMORE, THE DEATH OF CONTRACT 55 (1974).

32. 1 N. DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW xiv (1823). The royalties from this book funded the academic chair occupied by Parsons, Langdell, and Williston.

ment "cannot be swallowed like an oyster," but explained his "constant references" to it as an "aid in the process of analysis and *generalization*."<sup>33</sup>

For Corbin and his contemporaries the new *Restatement* served the end of giving some "apparent unity of doctrine," much as English cases had done for the earlier anthologists. While ninety percent of Langdell's cases had been English and roughly half of Keener's and Williston's cases had been English, the proportion had dropped to a fifth or less in the anthologies near the time of World War II. Today's casebooks retain only a few of the most durable products of English judges. American students still read *Adams v. Lindsell*<sup>34</sup> (the "mailbox rule"), *Carlill v. Carbolic Smoke Ball Co.*<sup>35</sup> (the "smoke ball" case), *Dickinson v. Dodds*<sup>36</sup> (indirect revocation), *Hadley v. Baxendale*<sup>37</sup> (unforeseeable damages), *Hochester v. De La Tour*<sup>38</sup> (anticipatory repudiation), *Raffles v. Wichelhaus*<sup>39</sup> (the case of the ship "Peerless"), and *Taylor v. Caldwell*<sup>40</sup> (the "music hall" case). But to a large extent it is the *Restatement* that now does for you what English cases did for Fox in giving an "apparent unity of doctrine." Nevertheless, the *Restatement* was not a contribution of the anthologies themselves, though two of the anthologists, Williston and Corbin, played a leading role in drafting it. The anthologies, rather, reflected the *Restatement*.

Now what of the influence on doctrine as contrasted to cases? To what extent did the anthologists use their anthologies to influence the development of rules of contract law? Given their limited editorial presence, one might suppose that they had little concern with this. But was there no subliminal effect? I shall hazard some observations on these questions drawn from two areas that you know well. In both of these areas contract law experienced an upheaval at the time when the early anthologists dominated the market. Both involve important questions of the role of reliance in contract law.

The first question is: Can an offeror who has sought performance instead of a return promise, an offeror who has made a unilateral offer, revoke the offer once the offeree has relied by rendering part of the performance? If an offeror promises \$100 in return for the offeree's walking across the Brooklyn Bridge and then revokes when the offeree is half-way across, is the revocation effective?<sup>41</sup>

Langdell harbored no doubts on this. Since the offeror's "promise is made in legal intendment at the moment when the performance of the consideration is completed," not until the bridge was crossed, it follows that the offer

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33. A. CORBIN, *CASES ON THE LAW OF CONTRACTS* vi (2d ed. 1933) (emphasis added).

34. 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818).

35. [1893] 1 Q.B. 256 (C.A. 1892).

36. 2 Ch. D. 463 (Ch. App. 1876).

37. 9 Ex. 341, 156 Eng. Rep. 145 (Ex. 1854).

38. 2 E.&B. 678, 118 Eng. Rep. 922 (Q.B. 1853).

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

40. 3 B.&S. 826, 122 Eng. Rep. 309 (K.B. 1863).

41. See Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 136-37 (1916).

may be revoked up to that moment.<sup>42</sup> Sixty years later, following an extensive debate in the law reviews, the *Restatement* propounded a contrary rule in its section 45. Under that rule, once the offeree has rendered partial performance, the offeror is bound by an option contract and is not free to revoke.<sup>43</sup> To what extent did the anthologies exert an influential role in this controversy? Almost none.

Langdell's casebook had only one case, *Offord v. Davies*<sup>44</sup>—an English case—that touched on this matter, and then only in a dictum that he offered in his *Summary* as supporting his view. Williston, who presumably shared Langdell's view, also used a later Georgia case, decided in 1887, that seemed to reflect this view. But he passed over two other American cases with which he evidently disagreed.<sup>45</sup>

Whether this was biased selection of cases is of little practical importance because of a skirmish that broke out in the law reviews during World War I over the merits of Langdell's view.<sup>46</sup> When Corbin's anthology appeared in 1921, he added two American cases to *Offord v. Davies* and devoted a long footnote to the law review debate.<sup>47</sup> The anthologies had begun to reflect the law reviews.

How, then, did Williston, as Reporter for the *Restatement*, come to reverse his position and write section 45 only a few years later? Not, it seems, as a result of anything in the anthologies of the time, but because the debate in the law reviews convinced him that Langdell was wrong. Though the anthologies of Williston and Corbin reflected their views on the controversy, they seem to have had little impact on its resolution. The battle was fought and won in the pages of the law reviews and not in those of the anthologies.

The second question is: Can a promisor who has made a gratuitous promise retract it once the promisee has relied on it? A hoary example is *Kirksey v. Kirksey*,<sup>48</sup> handed down by the Alabama Supreme Court in 1845 and holding that a widow's reliance on her brother-in-law's gratuitous promise by moving her family did not make the promise enforceable. *Restatement* section 90, the "promissory estoppel" section, counsels a different result.

Of course Langdell did not include cases from the remote state of Ala-

42. 2 C. LANGDELL, *CASES ON THE LAW OF CONTRACTS* 988 (2d ed. 1879).

43. See *RESTATEMENT OF CONTRACTS* § 45 (1932).

44. 12 C.B. (N.S.) 748, 142 Eng. Rep. 1336 (C.P. 1862).

45. Williston used *Biggers v. Owen*, 79 Ga. 658, 5 S.E. 193 (1887). He omitted *Plumb v. Campbell*, 129 Ill. 101, 18 N.E. 790 (1888), and *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 P. 1086 (1902).

46. The first article was Ashley, *Offers Calling for a Consideration Other Than a Counter Promise*, 23 HARV. L. REV. 159, 160-61 (1910). It disagreed with Langdell and was expanded on by McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644 (1914). Langdell's view was defended in Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136 (1916). The debate was summarized in Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 195 (1917). A later short piece is Ballantine, *Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested*, 5 MINN. L. REV. 94 (1921).

47. See A. CORBIN, *supra* note 16, at 190-91 n.2. Corbin's cases were *Los Angeles Traction Co. and Brackenbury v. Hodgkin*, 116 Me. 399, 102 A. 106 (1917).

48. 8 Ala. 131 (1845).

bama in his anthology, but he must have agreed with it. Indeed the heresy of section 90 would not have occurred to Langdell, who was trained in the orthodoxy that a promise needed consideration or a seal to be binding. For a mind that resisted the leap expressed in *Restatement* section 45, the larger leap expressed in section 90 was inconceivable.

Keener was no different in this regard from Langdell. His 1898 edition contained a New York case holding a charitable subscription unenforceable for lack of consideration,<sup>49</sup> but there was no hint that an alternative basis for enforceability might have been overlooked. Nor did the law reviews produce early discussions of the effect of reliance on a gratuitous promise comparable to those that paved the way for section 45.

It was Williston who, in his 1920 treatise, first produced a thorough analysis of the subject. But he was cool to the recognition of reliance as a ground for enforceability of promises except for charitable subscriptions. While broader recognition was "by no means without intrinsic merit," he wrote, "it is opposed to the great weight of authority."<sup>50</sup> His selections in the anthology of cases where reliance appeared reflected this view. His four cases included *Kirksey v. Kirksey* and the New York charitable subscription case used by Keener, both of which ignored the question of reliance.<sup>51</sup> A footnote, however, admitted the possibility that a charitable subscription might be enforceable if there had been reliance.<sup>52</sup>

Corbin saw the matter differently. In his 1921 anthology, Corbin used nine cases where reliance was involved, as opposed to only four in Williston.<sup>53</sup> Lest the reader miss the significance of these cases, Corbin introduced them with a remarkably suggestive section caption: "Reliance on a Promise as Consideration (Must Consideration be the Motive of the Promisor or the Inducing Cause of His Promise?)." The message suggested by this title and confirmed by the cases was plain: the doctrine of consideration was itself sufficiently flexible that at least some gratuitous promises should be regarded as supported by consideration even though the reliance on the promise was not "the motive of the promisor or the inducing cause of his promise." Corbin would have expanded the doctrine of consideration to include unbargained-for reliance.

By 1926, however, Williston had made a shift. In documents prepared in connection with the *Restatement*, Williston suddenly found fault with *Kirksey*, saying: "The injustice of the result is manifest."<sup>54</sup> Apparently under the prodding of Corbin, Williston was cautiously changing his mind—never going as far as Corbin would have in expanding the doctrine of consideration to encompass unbargained-for reliance, but going as far as section 90, an

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49. *Presbyterian Church v. Cooper*, 112 N.Y. 517, 20 N.E. 352 (1889).

50. 1 S. WILLISTON, *THE LAW OF CONTRACTS* § 139 (1920).

51. *Id.* § 139. Williston's two other cases were *Devecmon v. Shaw Devries*, 69 Md. 199, 14 A. 464 (1888), and *Martin v. Meles*, 179 Mass. 114, 60 N.E. 397 (1901).

52. See S. WILLISTON, *supra* note 50, § 139.

53. Corbin's nine included Williston's four.

54. *ALI, COMMENTARIES ON CONTRACTS RESTATEMENT* No. 2, at 18 (1926) (S. Williston, Reporter).

alternative to consideration rather than an expansion of it. Corbin came gamely to accept his partial victory, later writing that he generally "accepted and followed" the *Restatement* analysis.<sup>55</sup>

But although Williston and Corbin, both notable anthologists, had played central roles in the development of section 90, the impact of their anthologies on this development is questionable. It is not even clear to what extent Williston's anthology reflected his view at the time he drafted section 90, for its relevant part had not been significantly revised for two decades. Corbin's casebook, on the other hand, surely reflected his view, but it had only a few years to gain influence. What role it played in Corbin's attempt to push Williston in the direction of recognizing reliance must be left to surmise. But whatever one's conclusion as to this, neither the history of section 45 nor that of section 90 suggests that anthologists exerted a significant influence in the recognition of reliance in contract law. You can, perhaps, see why all this might give rise to a gnawing doubt as to whether casebooks are scholarship.

My third and last confession is to a persistent suspicion that editing casebooks actually has had a deleterious effect on scholarship. For this I see two reasons.

The first is that the anthologies drained the energies of editors who might have engaged in more scholarly activities. Before Langdell, professors lectured; and to do so they had to organize and describe. In every set of lecture notes was the germ of a legal treatise. After the revolution in law teaching inspired by Langdell, professors taught from cases and could seek refuge in the Socratic method to avoid organization and description. Since the casebook has never taken hold in English legal education, the phenomenon that I am describing is peculiarly American. One English observer, A.W.B. Simpson, now at Michigan, has pointed out that with the case method there came "a need for a type of literature that generations of American academics have spent their energies producing."<sup>56</sup> And another English academic, William Twining, has observed that the "judgment of history may well be that, for all its virtues, the American casebook tradition has been a major brake on progress in American law schools, by absorbing energies which might otherwise have been more fruitfully employed."<sup>57</sup> In brief, one might surmise that "opinion clipping"—like opium smoking—makes it difficult to do much else.

The second reason is that the anthologies not only absorbed the energies of contracts teachers, but they also diverted their attention from the world of the bar to the world of the law student, at that time a student who was likely to be less well educated and less carefully selected than the student of today. Before the advent of the anthology, what was taught about contract law—and about law in general—reflected what was written about it. Story and

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55. 1A A. CORBIN, *CONTRACTS* § 193, at 190 (1963).

56. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 677 (1981).

57. W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 57 (1973).

Parsons wrote for practicing lawyers. With the coming of anthologies, what was written about law began to reflect what was taught about it. The anthologies became the grist for the teacher's scholarly mill. Professor Friedman writes, with some hyperbole, that "Langdell drove the textbooks and treatises out of the temple of legal education."<sup>58</sup> But if the temple was ultimately emptied of "textbooks and treatises," in the sense of Story's and Parsons's works, it was quickly refilled with student handbooks, the precursors of modern "outlines" and other paperback "student aids."

Law teachers, especially those of us who teach in the first year, cherish the illusion that our use of anthologies stimulates the student's critical faculties and develops independence of mind. This was the justification for the pristine quality of the traditional anthologies. We law teachers would rather not think about the paperback "student aids" that permit survival—and perhaps more—with little use of critical faculties and minimal independence of mind. Poor Fox was caught by Langdell in 1870. If Fox had waited a year to enroll, he would have had the benefit of the first of these aids. For the bound version of Langdell's *Cases* that appeared in 1871 had as an index a remarkable outline. There the student could find the rule in *Payne v. Cave* under the heading "bidding at auction." It was recorded in the index that bidding is "a mere offer, and revocable until the hammer falls," citing to *Payne v. Cave* on page one. The entry looked like this.

INDEX.

ACCEPTANCE OF OFFER.

See OFFER.

ABSENT.

See OFFER.

AUCTION.

See BIDDING AT AUCTION.

BIDDING AT AUCTION.

Is a mere offer, and revocable until the hammer falls. *Payne v. Cave*, 1.

But see *Warlow v. Harrison*, 1 El. & El. 295, 309.

. . .

Fox's successors who used Langdell's casebook at the end of the decade had the benefit of Langdell's *Summary of the Law of Contracts*, a 250-page text that accompanied the second edition of the casebook. Unlike the earlier works of Story and Parsons, which were addressed primarily to practitioners, the *Summary* was written primarily for students. Its sixteen chapters, curiously arranged in alphabetical order, covered only the areas dealt with in the casebook, and the list of cases discussed in the *Summary* is substantially the same as that contained in the casebook. Langdell had written his own "student aid." Had Fox had the benefit of the *Summary*, he could have found the following:<sup>59</sup>

19. It was decided in *Payne v. Cave*<sup>1</sup> that a bid at auction is in the nature of an offer, which is accepted by knocking down the hammer;

58. L. FRIEDMAN, *supra* note 22, at 624.

59. See C. LANGDELL, *supra* note 42, at 997.

and perhaps it is too late to question the correctness of the decision. On principle, however, it is open to much doubt. The true view seems rather to be, that the seller makes the offer when the article is put up, namely, to sell it to the highest bidder; and that, when a bid is made, there is an actual sale, subject to the condition that no one else shall bid higher. This view was urged by the plaintiff's counsel. If the bidder can retract at any time before the hammer falls, so also can the seller; and hence a bid will secure no right to the bidder, whether there is any higher bid or not. The article may be withdrawn, if the bidding is not satisfactory, though it were put up with the express announcement that it should be sold to the highest bidder.<sup>2</sup> That the decision in *Payne v. Cave* has not been acquiesced in by sellers at auction appears from the frequent attempts that have been made to render bids irrevocable by a provision to that effect inserted in the conditions of sale.<sup>3</sup> That such attempts are unavailing is no argument in favor of *Payne v. Cave*, but rather the contrary.

<sup>1</sup> 3 T. R. 148, Cas. on Contra. 1.

<sup>2</sup> Compare *Warlow v. Harrison*, 1 El. & El. 295, 309.

<sup>3</sup> Dart on Vendors (5th ed.), 124.

Thus no sooner had the anthology been introduced than means were needed to lessen its rigors, and much energy was channeled into providing those means. Langdell's *Summary* was not alone. In 1896 Edward Avery Harriman of Northwestern published a small volume "intended especially for the use of students" that had indications of where the cases he discussed were to be found in the anthologies of Langdell and Williston and of Keener.<sup>60</sup> There were other similar works. Indeed, in 1906, when Williston brought out an American edition of Pollock's English textbook on contracts,<sup>61</sup> Corbin offered the wry comment that Williston's *Pollock*

may be used with great convenience in connection with Professor Williston's recent [1904] collection of cases on contracts, the notes in which frequently appear bodily in the new edition of *Pollock*, and the cases printed therein at length [in most chapters] being very largely the ones discussed and criticised by Pollock . . . and by the American editors . . . .<sup>62</sup>

One supposes that this bit of advice was not lost on first-year students looking for help in plowing through Williston's two-volume anthology. To understand his anthology they could read *Pollock*—Williston's "student aid." (In this regard it is well to recall that the original anthologies contained roughly twice as many cases as the present-day casebooks.) You can see how these developments might contribute to a persistent suspicion that editing casebooks has had a deleterious effect on scholarship.

Thus my three confessions. I cannot say that I feel contrite, nor am I likely to get absolution, since at this very moment my publisher is trumpeting the virtues of yet another new edition of our contracts casebook. Is it

60. E. HARRIMAN, *ELEMENTS OF THE LAW OF CONTRACTS* viii (1896).

61. The book was entitled *Wald's Pollock on Contracts*.

62. Corbin, Book Review, 15 *YALE L.J.* 310, 311 (1906).



needed? Is it scholarship? Will it hurt scholarship? When you return to your usual places and open your casebooks—or your “student aids”—you may not retain much interest in these questions. But I hope that you will have a little better understanding of how, during a little more than a century, today’s casebooks came to be.