

# The Case Against Commercial Casebooks

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## Introduction

Consider for a moment the commercial casebook. Most of us assign one or more of them, whether for teaching our bar-tested classes or for subjects beyond the basics. For new teachers, they are our lifelines, providing structure and notes that permit us to confidently lead our students through the class, even though we are only just ahead of them. Over time, we often stick with the same books, even as we come to recognize their imperfections and flaws. It takes real motivation to make a change.

This article seeks to provide that motivation. In it, we aim to persuade seasoned teachers to abandon the commercial casebook in favor of free open-source, free casebooks—and to tell teachers entering the profession that these options exist. Open-source casebooks are a free<sup>1</sup> alternative to the for-profit casebook—one that offers a host of benefits for students and professors alike. Online casebooks like the one we used are surprisingly easy to create: literally the click of a button allows you to “clone” existing open-source casebooks, many of which closely track the cases and flow of the most popular commercial casebooks.<sup>2</sup> Once a casebook is “cloned,” it is simple to incorporate your own

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1 Or low-cost. Some professors sell their online casebooks, typically for nominal fees, or publish them for lower costs. See, e.g., CHARTACOURSE (<https://chartacourse.com/about/>); see also LIVECARTA (<https://livecarta.com/about-us/>); see also STEPHEN E. HENDERSON, OUR CONSTITUTIONAL CONSTRAINTS: POLICING (2020).

2 To be clear, casebooks can be open-soure or free without being online—many different

or others' material, enabling professors to center their personal pedagogical goals and values as they train the next generation of lawyers. Open-source casebooks are also free, permitting professors to meaningfully offset some of the educational costs incurred by our students.

We are not the first to make the case for open-source casebooks.<sup>3</sup> But in an era marked by heightened awareness of issues ranging from diversity, equity, and inclusivity to student debt, the case for switching is ever more salient. Open-source materials benefit students, promote access to legal education, and allow for greater tailoring to student and professorial preferences. Furthermore, the collaborative, iterative nature of open-source casebooks aligns fully with some of the most prized ideals of the legal academy and legal profession: learning from and building on the work of others while engaging in an ongoing process of dialogue, revision and improvement.

This article proceeds in three parts, each describing a distinct benefit of switching to an open-source casebook. Part I situates the costs of casebooks in the context of student debt load and the high price of legal education. It thereby surfaces the legal academy's reliance on commercial casebooks as an equity issue and invites law teachers to consider the trade-offs involved when they opt to assign a commercial casebook.

Part II addresses the practical question of how to find, use or build your own open-source casebook. It provides readers with easy options for beginning to use open-source materials in class, whether by adopting modules from existing casebooks or cloning books and adopting them as your own. In addition, we describe in detail the process by which we created our criminal law casebook,<sup>4</sup> which involved enlisting students as co-authors and partners, thereby making our work both less onerous and more meaningful. Our hope is that by demystifying the experience we can create a new norm towards the use of open-source materials.

Part III discusses the trade-offs involved in switching to an online open-access casebook, highlighting the pedagogical benefits of open-source casebooks from the front of the room. Open-access, online casebooks can help address content concerns. The existing set of commercial casebooks tend to

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models exist. For example, CALI casebooks are available free online (or printed for a nominal cost), but they are not "cloneable" the way casebooks in the H2o software platform are. We discuss the various options in Section II, *infra*.

3 See, e.g., Emma M. Wood & Misty N. Peltz-Steele, *Legal Education - Open Your Casebooks Please: Identifying Open Access Alternatives to Langdell's Legacy*, 43 W. NEW ENG. L. REV. 103, 103 (2022), <https://digitalcommons.law.wne.edu/lawreview/vol43/iss1/5>; James Boyle & Jennifer Jenkins, *Open Legal Educational Materials: The Frequently Asked Questions*, 11 WASH. J.L. TECH. & ARTS 13 (2015), ([HTTPS://DIGITALCOMMONS.LAW.UW.EDU/WJLTA/VOL11/ISS1/3](https://digitalcommons.law.uw.edu/wjlta/vol11/iss1/3)); Stephen E. Henderson, *Crowdsourced Coursebooks*, 51 ALTA L. REV. 907, 907 (2014), <https://albertalawreview.com/index.php/ALR/article/view/44>; Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10, 10 (2007), <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1112&context=faculty>).

4 BALL/OBERMAN CRIM LAW CASEBOOK (2d ed. 2021).

enshrine the idea that there is a “canon” of cases that is more than simply a series of editorial choices. The content of this “canon” may not only fail to represent current concerns and sensitivities, but may also end up propagating ideas that have been discredited.<sup>5</sup> In view of our position that open-source casebooks are better for students, professors, and the profession as a whole, we close with a consideration of strategies for encouraging the academy to pivot away from commercial casebooks.

### I. The Cost of For-Profit Casebooks

Let us begin by stating the obvious: law school is expensive. The average law student enters law school carrying five figures of debt.<sup>6</sup> There are few limits on what a law student can borrow, and borrow they do: by the time they graduate, law students owe an average of \$164,742.<sup>7</sup> They borrow money from banks, they borrow from family, they borrow using credit cards. They struggle to pay rent.<sup>8</sup> They struggle to afford food.<sup>9</sup> Books represent just a fraction of their costs, but it’s a fraction that they cannot avoid paying.

Yet there’s a good chance most law professors do not even know the retail price of the casebooks they assign for their classes. That’s at least partly because we do not have to buy them ourselves. Publishers give us their books for free, in the hopes that we’ll adopt them. Promotional materials might not even mention what the students will pay for them.

5 We discuss these concerns in greater detail in Part II C, *infra*.

6 The average law student enters law school with a loan balance of almost \$34,000 from their undergraduate school. *2020 Law School Student Loan Debt Survey Report*, ABA YOUNG LAWYERS DIV., (2020), [https://www.americanbar.org/content/dam/aba/administrative/young\\_lawyers/2020-student-loan-survey.pdf](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2020-student-loan-survey.pdf).

7 *Id.* Furthermore, about ninety-five percent of law students took out loans to attend law school, and over ninety percent of law students leaving law school with at least \$65,000 in loans. Law school debt is not a marginal issue, but rather, it affects almost all law school graduates.

8 The struggle to afford basic necessities while in law school has only been exacerbated by the COVID-19 pandemic. The LSSSE 2021 Annual Survey reported that twenty-nine percent of law students were concerned about losing their housing because of the pandemic. This statistic grows even more concerning when such responses are analyzed based on race. Thirty-seven percent of Black students, thirty-six percent of Latinx students, and thirty-three percent of Asian American students reported increased worries of eviction, compared with twenty-five percent of white students. *The COVID Crisis in Legal Education: LSSSE 2021 Annual Survey Results*, INDIANA UNIV. CENTER FOR POSTSECONDARY RESEARCH (2021), <https://lssse.indiana.edu/wp-content/uploads/2015/12/COVID-Crisis-in-Legal-Education-Final-10.28.21.pdf>.

9 *Id.* Moreover, forty-three percent of law students reported increased concerns about having enough food to eat, following the onset of the pandemic. This finding likewise reveals racial disparities: over half of all Black (fifty-five percent), Latinx (fifty-seven percent), and Asian American (fifty-two percent) students were more concerned about whether they had enough food.

Casebooks are expensive. Consider the costs of one popular constitutional law casebook. New, it runs close to \$250.<sup>10</sup> The electronic version is almost as pricey, at \$235.<sup>11</sup> Sometimes students purchase used copies of casebooks, but that market is limited because many casebook authors publish new editions every few years, making the old volumes “obsolete” even when there are few changes from the prior edition. And many casebook authors and publishers create commercial supplements designed to complement or update their casebooks, which can tack on an additional cost of ten to twenty-five percent of the casebook.<sup>12</sup> Casebook rental is not cheap, either, typically costing \$105 for one semester.<sup>13</sup> Multiplied across a semester, students are paying up to \$1000 for their commercial casebooks.

Nor are casebooks a sound investment, at least not compared with treatises or books one might use in law practice. To effectively participate in class, students must have current casebooks—no one would advise a student to attempt law school without buying books.<sup>14</sup> Yet these same books have little utility once the final exam is over. Unlike books in other disciplines, the costs of which might be partially recouped by buying or selling on the secondary market, most casebooks are updated so often that there is little resale value.<sup>15</sup>

10 A new copy of CONSTITUTIONAL LAW (Sixth Edition) by Erwin Chemerinsky is currently available on Amazon for \$233.76 in the United States. The Amazon listing indicates that the \$233.76 price is discounted by 22%, and as such, the original price of a new copy of the book would be \$298. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW (6th ed. 2019), <https://www.amazon.com/Constitutional-Law-Connected-Casebook-Aspen/dp/1543813070>. A copy on Aspen Publishing’s site is in fact \$298. See *Constitutional Law, Sixth Edition*, ASPEN PUBLISHING, <https://www.aspenpublishing.com/chemerinsky-conlaw6> (last visited May 25, 2022).

11 ASPEN PUBLISHING, *supra* note 10.

12 See, e.g., a traditional pairing of a commonly assigned property casebook, PROPERTY CASES AND MATERIALS (9th Edition 2007) by Cribbet, Findley, Smith & Dzienkowski, and a popular accompanying supplement, UNDERSTANDING PROPERTY LAW (4th Edition 2017) by John G. Sprankling. A new hardbound copy of PROPERTY CASES AND MATERIALS can be purchased from West Academic’s website for \$255. See West Academic, John E. Cribbet, et al., PROPERTY CASES AND MATERIALS (9th Edition 2007), <https://www.westacademic.com/Cribbet-Findley-Smith-and-Dzienkowskis-Property-Cases-and-Materials-9th-9781599412528> (last visited May 23, 2022). A new copy of UNDERSTANDING PROPERTY LAW can be purchased from the LexisNexis online store for \$41. See LexisNexis, John G. Sprankling, UNDERSTANDING PROPERTY LAW (4th Edition 2017), <https://store.lexisnexis.com/products/understanding-property-law-skusku-us-ebook-00585-epub/details> (last visited May 23, 2022). Buying the supplement adds an additional 16.08 percent to the cost of the casebook.

13 *Supra* note 9.

14 Over the years, we each have had students tell us that law school is the first time they have bought books for class. At first, we simply shook our heads with disbelief and disdain at the way these students had opted to manage the high costs of college by avoiding classes that required books, or by simply skipping the reading. Today, however, we understand that our obligations as educators are not so easily disentangled from their struggle to afford an education. When we ask our students to buy books, we should feel confident that the purchase is a worthy one for them.

15 *Should I Sell My Law School Casebooks?*, JD ADVISING, <https://jdadvising.com/should-i-sell-my->

For our subject, criminal law, casebooks have particularly little enduring value. They are not at all useful in practice because criminal law is governed by state-specific laws. A criminal lawyer must work within the context of the jurisdiction's penal code and case law, yet most popular criminal law casebooks use cases from a hodgepodge of state court decisions, each of which interprets a different set of statutes.

In opting to teach from commercial casebooks, edition after edition, we generate significant downstream economic consequences for our students. Of course, the costs may be justified in the case of a terrific casebook. The question is whether one actually feels that way about one's current casebook. We owe it to our students to ensure that the expenditure is justified.

The good news, as we describe in the following section, is that open-source casebooks are not only cheaper but better.

## II. How to Open-Source

The world of open-source casebooks is surprisingly vast—multiple platforms, each with lots of free casebooks to choose from.<sup>16</sup> In fact, navigating the options may be part of the barrier to getting started—a sort of “adoption-choice paralysis.”<sup>17</sup> In this section, we help readers to navigate their options by offering practical advice for narrowing the field.

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law-school-casebooks/) (last visited May 23, 2022).

16 *The eLangdell Bookstore*, the open-access publishing wing of CALI which publishes free, open eBooks for legal education that educators can adopt and edit at no-cost. See *The eLangdell Bookstore*, THE CENTER FOR COMPUTER-ASSISTED LEGAL INSTRUCTION, <https://www.cali.org/the-clangdell-bookstore> (last visited June 20, 2022). Students and faculty can access and use eLangdell casebooks for free as well. H2o is another platform that was developed by the Library Innovation Lab at Harvard Law School, is another platform that which facilitates the creation of casebooks; <https://opencasebook.org/> (last visited June 20, 2022). Authors can import US case law directly into the casebook and edit cases to include only the relevant portions. Moreover, authors can write introductory text or create annotations for each case, tailoring the books to their own pedagogical vision. Another open casebook platform is the Open Textbook Library, is a curated collection of open textbooks that are either used at multiple higher education institutions or “affiliated with a higher education institution, scholarly society, or professional organization.” *Free and Low Cost Course Materials*, DUKE LAW GOODSON LAW LIBRARY (Nov. 2021), <https://law.duke.edu/lib/faculty/course-materials/> (last visited May 23, 2022).

17 The two largest platforms for open-source casebooks—H2o and CALI's eLangdell Library—offer a combined total of 398 free casebooks. H2o is built on top of the Caselaw Access Project which created a database of over 6.5 million court opinions that are freely available online. H2o currently lists 333 casebooks and 5906 legal documents from 129 different authors in its domain—all for free. *About H2o*, LIBRARY INNOVATION LAB AT HARVARD LAW SCHOOL, <https://opencasebook.org/pages/about/> (last visited May 23, 2022). CALI's eLangdell Bookstore currently lists sixty-five casebooks from thirty-six different authors. *About eLangdell*®, THE CENTER FOR COMPUTER-ASSISTED LEGAL INSTRUCTION, <https://www.cali.org/clangdell/about> (last visited on May 23, 2022).

### A. What to Expect from an Open-Source Casebook

In many instances, open-source casebooks contain the same content that is found in commercial casebooks. This is so because, unlike many college textbooks, which feature original, copyrighted materials, law school casebooks consist largely of materials that are freely available in the public domain. There is no copyright in reported cases, as they are government works.<sup>18</sup> The same is true of statutes.<sup>19</sup> As a result, if a professor wants simply to teach a free version of the same material, it is easy to find casebooks which replicate the cases found in commercial casebooks.

To be sure, as is true of commercial casebooks, the various open-source casebooks may contain different cases or may feature different edits or a different ordering of familiar cases. Others go further (again, as with commercial casebooks) and emphasize different materials and/or highlight different approaches.<sup>20</sup> Still, as you start perusing the options, you'll find that many of the existing open-source casebooks are built around the conventional canon. Indeed, chances are you will find books that feature the cases you already teach, presented in a familiar order. This is permissible because, even though copyright law applies to an original course sequence with freshly edited cases, the legal canon in many subjects is relatively fixed, such that many casebooks feature the same set of cases, organized in a manner that has changed little over the course of decades.<sup>21</sup>

Open-source casebooks may also contain links to articles and news items. Scholarly articles typically are not in the public domain and cannot be reproduced in full, which is why commercial casebooks rely on copyright

18 Under 17 U.S.C. §105 (1976), any work of the United States government is not protected by copyright. 17 U.S.C. §101 (2010) defines a “work of the United States Government” as “a work prepared by an officer or employee of the United States Government as part of that person’s official duties.” As a result, judicial opinions are excluded from domestic copyright protection.

19 Under the Government Edicts Doctrine, neither judges nor legislators may be considered the “authors” of the works that they produce in the course of their official duties as judges and legislators. Thus, statutes and codes are not subject to copyright and are in the public domain. *See also Georgia v. Public Resource Org, Inc.*, 140 S. Ct. 1498 (2020).

20 We ourselves were also motivated by the need for new approaches and new materials, as we discuss in sections II C and III, *infra*.

21 *See e.g.*, JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* vii (8th ed. 2019) (reprinting the introduction to the First Edition in which he thanks Sandy Kadish, saying, “I studied criminal law from his casebook (Paulsen and Kadish; and then Kadish and Paulsen) and, for fifteen years, I taught the subject from his book (now, Kadish and Schulhofer). With the publication of my own casebook comes my professional bar mitzvah, but I can think of no higher accolade than if someone were to say of this book, ‘Why, it is a son-of-Kadish (and Schulhofer).’”). Indeed, Dressler’s casebook features the same basic structure and replicates many familiar cases, in essentially the same order as is still found in SANFORD H. KADISH, ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (11th ed. 2022).

permission or the fair use doctrine to publish excerpts.<sup>22</sup> Open-source cases adapt to this problem by replacing reproductions of articles with links, as most law reviews host paywall-free versions of their articles online, as do many news sources. For sources that do not have a free online version, open-source casebooks typically use a link that permits students to access the relevant material via their university's electronic library resources.

What there are less of, in open-source casebooks, are the notes and interstitial text—the short summaries and explanations that connect one section to another—and the questions that follow the cases.<sup>23</sup> For new teachers, this absence may be a barrier, as these additions help create a coherent throughline for the class. For those who have been teaching in an area for some time, this loss may matter far less, as most will have developed their own hypothetical problems and begun to rely on their own material when making transitions and summarizing the various sections of their courses. Regardless, as we describe below, there are easy ways to work around the problem of missing text, notes and problems.<sup>24</sup>

Finally, the open-source casebook is more likely to contain recent cases and articles—those that might have arisen after the publication date of a commercial casebook, or those that reflect the author's particular area of interest. This

22 Scholarly articles are considered authored works that are protected by copyright. However, under the fair use doctrine of the U.S. copyright statute, codified in 17 U.S. Code § 107, it is permissible to use limited portions of a work protected by copyright for a limited scope of purposes, such as commentary, criticism, news reporting, and scholarly reports. No legal rules setting a specific number of words or percentage of a work that may be replicated under the fair use doctrine. Instead, whether a particular use qualifies as “fair use” depends on the totality of the circumstances. In determining “fair use,” the following four factors must be considered: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” *Can I Use Someone Else's Work? Can Someone Else Use Mine?*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-fairuse.html> (last visited May 23, 2022).

23 For professors who rely heavily on their casebook's case notes and problems, this reliance on their casebook authors' creative work product constitutes perhaps the best justification for the high cost of casebooks. But our experience suggests that most professors cover relatively few of their casebook's notes and problems in class—if they assign them at all. Instead, our sense is that professors typically teach their classes from the cases, adapting or creating their own hypotheticals over time and supplementing the cases with problems drawn from current events and more recent developments in the law. That said, this is obviously not universally true. Our casebook has extensive notes and questions, as do several of the other open-source casebooks with which we are familiar. *See, e.g.*, COREY RAYBURN YUNG, CRIMINAL LAW: (3d ed. 2021) (published online at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3911434](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911434)); ALICE RISTROPH, CRIMINAL LAW: AN INTEGRATED APPROACH (2022) (available online at <https://www.cali.org/criminal-law-ristroph>).

24 *See infra* at notes 25–29, and accompanying text. For those interested in our casebook, our forthcoming teacher's manual (Spring, 2024) will include answers to our note questions, suggested hypotheticals, and quizzes.

shift is a reflection of the fact that it is so simple to add new materials and cases to an online book. There is no need for a separate supplement with its own pagination (and expense!). For rapidly-evolving subjects like intellectual property, this feature is a game-changer. But even for relatively fixed areas of law, one finds that many open-source casebook authors take advantage of the ability to include new cases and cutting-edge issues in their casebooks.

### B. Options for Getting Started

Now that you understand what to expect from open-source casebooks, there are several ways to get started. The first is to identify a casebook in the subject matter of your choice. There are a variety of platforms to choose from. The two biggest collections are H<sub>2</sub>O,<sup>25</sup> which is Harvard's open-source platform, and CALI.<sup>26</sup> Each of these platforms typically has a range of options for most conventional law school classes. "Adopting" an open-source casebook on H<sub>2</sub>O is quite simple: with the push of a button, you create a "clone" of the casebook you like best, which you can rename (or keep as is) and assign to your class. There is literally nothing else involved—one click, and you're done. For CALI, you simply direct students to the CALI website and have them download a digital copy or pay to have it printed.<sup>27</sup>

In the event that the casebook you've chosen does not include interstitial text—the sort of short road-map overviews that typify most casebook chapter introductions—you need not draft your own. Instead, one easy solution is to consider assigning or recommending students use a hornbook. The *Understanding Law* series represents an affordable, reliable supplement—so popular that many students already purchase them in their effort to get a solid overview of the subject matter.<sup>28</sup> Even better, unlike a casebook, a hornbook will have both resale value and potential enduring utility for the purchaser.

In our case, in addition to drafting some short introductions to the various sections, we advised students to buy used copies of *Understanding Criminal Law*,<sup>29</sup>

25 *Supra* note 15. This is the platform we used to create our criminal law casebook, available at no cost to students and scholars alike at <https://opencasebook.org/casebooks/3553-balloberman-crim-law-casebook/> (last visited June 23, 2022).

26 *Id.*

27 Alice Ristroph's book costs under \$20 plus shipping. See Alice Ristroph, *Criminal Law: An Integrated Approach*, THE ELANGDELL BOOKSTORE, <https://www.cali.org/criminal-law-ristroph> (last visited 1/22/2023).

28 The LexisNexis *Understanding* series is a collection of more than fifty individual user-friendly student treatises on a variety of topics. Each *Understanding* title provides a foundation for true understanding of the subject through concise, yet comprehensive, analysis. See, e.g., LEXISNEXIS STORE, <https://store.lexisnexis.com/products/understanding-law-school-skusku-us-ebook-01376-epub/details> (last visited June 20, 2022).

29 Used copies of the seventh edition of UNDERSTANDING CRIMINAL LAW in "good condition" are available on Amazon for \$8.99 in the United States. See Joshua Dressler, *Understanding Criminal Law* (2015), AMAZON, <https://www.amazon.com/Understanding-Criminal-Law-Joshua-Dressler/dp/1632838648> (last visited May 23, 2022).



which has changed little over time, tracks our online casebook, and, at around \$20, costs less than a tenth of the price of a new casebook.<sup>30</sup> We much prefer its summaries to the truncated versions from our old commercial casebook.

As for notes and problems, you will find that many open-source casebooks already include questions and problem sets.<sup>31</sup> In fact, you might borrow notes and problems from any of the open-source casebooks in your subject, selecting those you like and adding them to your own casebook.<sup>32</sup> Of course, seasoned teachers likely have their own set of hypotheticals, which can readily be added to their online casebooks.

If all of this sounds a bit overwhelming, you can also just dip a toe into the open-source world, adopting some materials while retaining your commercial casebook. For instance, you might create (or adopt) a free supplement by assigning a chapter or set of readings from an existing open-source project. You might consider using this method to adopt materials that address a topic your book omits (say, mass incarceration, in the criminal law context), or one that your book treats in ways you find objectionable (say, the conventional canon on rape).<sup>33</sup> As we describe below, this was our original goal—not to create our own criminal law casebook, but to supplement and amend the commercial casebook we used.

On the other hand, if all of this sounds enticing, you might easily create your own original casebook. This need not be a hugely cumbersome task because, at least for the core law school curriculum, you will be able to work off of the foundation laid by other online casebook authors. You might proceed by adapting a single open-source casebook, or by pulling together sections from a range of others, then adding material of your own. You might even work with a group of people at your school or region (say, family law professors in

30 A new copy of the casebook we formerly used, *CASES AND MATERIALS ON CRIMINAL LAW* (8th Edition) by Joshua Dressler & Stephen Garvey, is currently available on Amazon for \$173.45 in the United States. The Amazon listing indicates that the \$173.45 price is discounted by thirty-two percent, and as such, the original price of a new copy of the book would be \$255.00. *CASES AND MATERIALS ON CRIMINAL LAW* (2019), <https://www.amazon.com/Constitutional-Law-Connected-Casebook-Aspen/dp/1543813070> (last visited May 23, 2022). A new copy on West Academic costs \$255; <https://www.westacademic.com/Dressler-and-Garveys-Criminal-Law-Cases-and-Materials-8th-9781683288220> (last visited May 23, 2022).

31 See e.g., sections 1.7, 1.9, and 1.14 of the BALL/OBERMAN CRIM LAW CASEBOOK.

32 We view this opportunity to borrow and share notes and problems from authors and colleagues around the country as one of the key advantages of the open-source format. See e.g., BALL/OBERMAN CRIM LAW CASEBOOK, Introduction (2020) (“Our working model has been central to our work, rendering this casebook less a ‘product’ than the current version of a collective, collaborative, work-in-progress. ‘Our’ casebook is yours—clone it, revise it, make it truly your own. And let us know how you’ve improved on our work.”), <https://opencasebook.org/casebooks/981-balloberman-crim-law-casebook/>.

33 There are also commercial casebook authors who have made parts of their casebooks open-access. See, e.g., MARGO SCHLANGER, SHEILA BEDI, AND DAVID SHAPIRO, *INCARCERATION AND THE LAW: CASES AND MATERIALS* (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3802905](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802905).

Texas) and divide up the job. The heaviest lift is getting started. Once you have a plan, you likely will find the collaboration and exchange of ideas to be rewarding. After all, such exchanges are central to the work of lawyers and academics alike.

To give you a sense of the time involved (and to bolster the courage of the technology-phobic) we describe below the process we used to create our criminal law casebook.

*C. Co-Creating with Students: One way to Create your own Casebook*

As criminal law professors who had been teaching from the conventional canon for decades, we knew firsthand some of the problems with the cases used by most commercial casebooks. First, there is the canon itself, which, as Alice Ristroph explains in her excellent article *The Curriculum of the Carceral State*, “depicts criminal law as a necessary and race-neutral response to grave injuries,” when in reality the system has always been so marked by racial disparities that the mass incarceration of Black and brown Americans is more a feature than a bug.<sup>34</sup> The canon ignores the drug-related cases and petty crimes that comprise the bulk of criminal law practice and omits direct consideration of mass incarceration or the prison industrial complex. It is a gross disservice to our students to teach criminal law by focusing, as the canon does, predominantly on violent crimes without explicitly addressing the realities arising at the intersection of race and crime.

Then there are the canon’s cases themselves, many of which are dated and problematic, particularly on sensitive subjects such as sexual assault and mental illness. The commercial casebook we formerly used is replete with unnecessarily sexualized cases and notes. In teaching homicide, it gratuitously includes a note regarding a “dominatrix” whose customer had a fatal heart attack.<sup>35</sup> More problematically, it uses statutory rape hypotheticals in teaching inchoate offenses and accomplice liability, then builds out that material by way of a violent rape case<sup>36</sup> and a note about a police officer with a cannibalism fetish for eating “Girlmeat.”<sup>37</sup>

Finally, we found that teaching from the canon not only reinforced false narratives about the law but also did little to help our students see themselves in the legal profession. Like many law schools, Santa Clara has worked hard to recruit a diverse student body. Almost a quarter of those in our incoming class in 2021 were the first in their families to attend college.<sup>38</sup> Many speak a language other than or in addition to English in their homes. Many do

34 Alice Ristroph, *The Curriculum of the Carceral State*, 120 COL. L. REV. 1631, 1633 (2021).

35 DRESSLER & GARVEY, *supra* note 21, at 329, n11.

36 *Id.* at 845 (excerpting *Commonwealth v. Cook*, 459 A.2d 1244 (1977)).

37 *Id.* at 844, n1.

38 2021 Class Profile, SANTA CLARA UNIVERSITY SCHOOL OF LAW (2021), <https://law.scu.edu/admissions/2021-class-profile/> (last visited May 23, 2022).

not know any lawyers who look like them. To the extent that identifiably minority actors appear in the criminal law canon, they typically are defendants accused of committing crimes.<sup>39</sup> As part of our effort to help students develop a professional identity, we wanted to find some cases that featured people—parties, lawyers, and judges—drawn from a wide range of backgrounds.

Over the course of the pandemic summer of 2020, we hired a team of eleven law students to work with us to fix the shortcomings of our commercial casebook. Our collective aim was not to sanitize criminal law; it is by definition a gritty, challenging subject. Instead, we sought to be thoughtful about when and how we expose students to difficult material, aiming to give them the context and the analytical tools needed to process it. Working in small groups, students reviewed each chapter, identifying troubling cases and notes and suggesting alternative, fresh cases that might accomplish the same pedagogical purpose with less distraction.

In addition to lightening our load, working closely with students provided invaluable insight into what worked for them, and what left them cold or otherwise alienated. As a result, we no longer teach from cases about, say, a man who provides telephone answering services for “call girls” in the 1950s<sup>40</sup> and instead use cases and materials that are more likely to resonate with the lived realities of our students.

As we embarked on our project, we took for granted that we would continue to assign the same commercial casebook; between us, we had been using it for decades. We assumed we would use our supplementary materials to help us teach against the casebook when approaching many of the topics our book did a particularly poor job contextualizing: mental health, sexual assault, gender, race, and sexual orientation.

As our work got underway, however, one of our colleagues (Eric Goldman) pointed out that we were effectively replacing most of the commercial casebook and that having students go back and forth from the commercial book to our supplement would confuse students, increase our workload, and have little pedagogical upside. A chance encounter on Twitter (thanks, Karen Tani!) steered us to Harvard’s H2o open-source casebook platform, and in spite of the initial reluctance of the technophobic member of our partnership, we quickly apprehended the ways in which we and our students would be better served were we to leave the old casebook behind. In short, in our case, adaptation bled into creation.

39 See, e.g., DRESSLER & GARVEY, *supra* note 21, at 354 (excerpting *State v. Sophophone*, 19 P.3d 70 (Kan. Sup. Ct. 2001), where appellant Sanexay Sophophone of Southeast Asian descent appealed his felony-murder conviction for the death of his co-felon, Somphone Sysoumphone, who was also of Southeast Asian descent); see also *id.* at 322 (excerpting *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971), in which appellants Walter Williams and Bernice Williams, a married Native American couple, appealed their negligent manslaughter conviction for failing to supply their seventeen-month-old child with necessary medical attention).

40 *Id.* at 836 (excerpting *People v. Lauria*, 59 Cal. Rptr. 628 (Cal. Ct. App. 1967)).

In the open-source world, we soon learned that adaptation and creation aren't so distinct. We began building our casebook by "cloning" two casebooks that largely tracked our commercial casebook. We liked the sequencing of materials and appreciated the authors' editing of the classics. The H2o software automatically attributed the original edits and materials to the authors, so credit was given where credit was due. Within a day, we had the bones for our new casebook. It bears noting that this borrowing of materials isn't unique to open-source materials. Indeed, our commercial casebook's author noted, in his first edition, that he had borrowed the structure and sequence of cases from a different, older casebook.<sup>41</sup>

The rest of our work involved further editing on the cases we intended to assign, and adding our new cases and materials. Here, too, the online format offers significant advantages over the static commercial casebook. For example, one of the cases in our prior textbook, *State v. Norman*, contained graphic descriptions of spousal abuse and torture. For many of our students, the extent of the abuse made it difficult for them to engage in class, particularly those who had grown up in households with intimate partner violence. We wanted to keep the valuable insights from the case's discussion of imminent harm and battered women's syndrome while reducing the amount of graphic detail. To do so, we used H2o's "elision" function, replacing some of the text with ellipses and a parenthetical description (e.g., "[Further graphic description of abuse.]"). Students who wanted to read all the facts could click on the elision and read everything from the original option. For many of them, that level of detail was instructive. Other students, who knew that reading a graphic description would be more traumatic than instructional, could still get the gist of it. This modality accommodates students for whom a post-traumatic reading would impede their comprehension without censoring the case itself.

Liberated from the constraints of the canon, we were able to include contemporary topics in our casebook, such as readings on prison abolition and news items on the trial of the officers involved in the murder of George Floyd. Likewise, we opted to use fresh, relevant examples for teaching old topics. Our casebook opens with a section on the purposes of punishment that features *The Queen v. Dudley & Stephens* (the old cannibalism case), but also includes the briefs from a 2020 California murder prosecution of a woman addicted to methamphetamine following a miscarriage.

The result, in our first year, wasn't perfect. Although we succeeded in uploading and editing the full set of cases we needed for teaching purposes, along with our own chapter introductions and some notes and problems, the editing was rough. We struggled to find an easy way to link to the *Model Penal*

41 See *supra* note 19. This pattern has been true for generations of casebook authors. See e.g., E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 Sw. L. J. 903, 910 (2016) (noting that it should be "no surprise" that authors "took cases from each other, the cases themselves not being covered by copyright laws...Williston, of course, openly borrowed from Langdell, as have many of us who have revised works of our predecessors.").

*Code*, which we had come to rely on as a point of reference throughout the class, but which is copyright protected. We worried the students would protest the book, somehow seeing it as “less than” the commercial casebooks they used in their other classes. We were explicit with them about the financial and other reasons we were using an open-source casebook, and frankly acknowledged the shortcomings of our book. We invited their feedback.

Their response was overwhelmingly positive: our students were grateful for the cost savings, and when we explained the book’s origins and intentions, they quickly embraced the project. Student feedback led to quick additions, subtractions and corrections. Again, this was incredibly easy to do. Indeed, we added some cases in the middle of the semester without needing to repaginate our syllabus. The second edition, completed in summer, 2021, is a much-improved product, and, given the ease of updating materials, it is our hope that the third edition (Fall 2022) surpasses it.

### III. The Trade-Offs

In this section, we turn to the question of the trade-offs entailed by making the switch from commercial casebooks. For many, the primary trade-off is one of time. In your first year using an open-source casebook, you will need to spend more time than usual preparing for the semester. You may also find yourself needing more time to prepare each class, as you may need to create slides and content to replace the written material your commercial casebook used to connect one section to the next.<sup>42</sup>

To be sure, there is little reward, beyond the pleasures of a job well done, for investing time revamping a class, once it is in passable form. Yet many of us do it to some degree anyhow, year after year. We do it because we care about the pedagogy of law teaching. It is not simply an information dump; we understand ourselves as helping to shape the profession. This section is addressed to these same professors, because beyond the obvious benefits to students, the most salient benefits of open-source casebooks are pedagogical in nature. Indeed, as we explain below, online casebooks generate a range of benefits to professors and to the legal academy at large.

The pedagogical benefits of using your own open-source casebook come into view once you consider the ways in which you’ve typically worked around any shortcomings you’ve found in the commercial casebooks you’ve been using to teach your classes. Although some of us love the books we use to teach our classes, water cooler conversations in the faculty lounges of our memories suggest that many of us simply make our peace with the flaws in our commercial casebooks. We lecture, rather than assign certain passages; we skip problematic cases and notes; we teach against the cases; we post additional cases; we create supplements. Because—let’s be honest—the canon featured by most commercial casebooks has not always aged well.

42 Though many open-access authors, including us, provide slides, quizzes, and notes on request.

The pedagogical payoff for these commercial casebook workarounds is limited. While we might skip an offensive note or a troubling case, we cannot stop students from seeing them and from internalizing whatever messages are sent by their inclusion in the book. When we assign new cases and additional readings, students necessarily understand them as being apart from the “real” class material and somehow a reflection of our personal agenda. This forces us to make the case for why the supplemental readings are important—a task that puts the professor on the defensive, taking the focus off the materials themselves. Students may be interested in our critique of the cases the book presents, but in the end, it would seem only fair that they also hold us responsible for having chosen to use the book and having required them to buy it.

The open-source casebook solves all these problems, permitting each of us to set the foundation for our classes, signaling to the students what is legitimate, what is important, and what matters most. By harnessing the enduring utility of a case-based approach to law teaching, open-source casebooks enable one to disrupt the canon as much (or as little) as one likes while centering the material and message of one’s choosing. You can curate your materials according to your pedagogical goals and personal preferences. Moreover, it is easy to remix and tailor your casebook to the interests and needs of your students. When new stories or cases arise, even during the course of a semester, it is simple to add new content without an expensive supplement while keeping all the material in the same place. Class preparation and casebook editing become two sides of the same coin.

The benefits of free-to-use, open-source casebooks extend beyond the empowerment of individual professors to the profession at large. The mode of “cloning” casebooks opens the door to collaboration with law teachers from around the country and, indeed, throughout the world. Professors with subject matter expertise are able to create modules that others might use when teaching. As a result, those using open-source casebooks can crowdsource their own teaching materials from experts in the relevant areas. It is simple to pick and choose topics from a number of casebooks—say, remixing one professor’s materials on sexual assault with another’s discussion of property crimes.

There is great potential in the ability to harness such expertise for teaching purposes. One might easily collaborate with other experts, co-creating a module or set of materials for use by others (e.g., immigration consequences of criminal law, cybercrimes, disability and criminal law, etc.). There is a benefit to the profession as a whole when we draw on the work of those who have deep expertise, pulling on their work to expose our students to the best thinking the academy has to offer.

Finally, in the process of consciously choosing the canon we use to teach, we deepen our engagement with our sense of what matters to us as teachers. For this reason, along with the others, and fully cognizant of the time commitment involved, we are convinced that the move to open-source casebooks will benefit not only our students, but ourselves and our profession.

## Conclusion

We hope you agree with us about the potential upsides to making the switch to open-source, online casebooks. The question, moving forward, is how to overcome the obstacles to it. New law professors may have good reasons for adopting commercial casebooks and sticking with them through tenure. By contrast, midcareer law professors have the expertise and job security to leave their commercial casebooks behind. But persuading them to do so likely will take a new set of norms and incentives.

We opened a conversation on movement building at our February 2021 conference, *Defunding Casebooks*, which was attended by over 100 faculty and law librarians from around the country and beyond.<sup>43</sup> Inspired by the California State University system, which has moved dramatically toward free materials,<sup>44</sup> we discussed creating a campaign in which law schools pledged to lower the cost of casebooks. We also explored how this might be accomplished, whether organizing by area of specialty, endeavoring to build support for online casebooks among faculty teaching the same subjects, or by working within one's own school.

It seems clear, though, that the surest way to shift the industry norms would be for the legal academy itself to incentivize it. The commercial casebook system as it stands mostly serves to reward casebook publishers.<sup>45</sup> Casebook publishers keep the vast majority of the money they charge our students. Unlike book publishers in other industries—say fiction, where there is a risk that a book will flop—casebook publishers are all but guaranteed an audience and a profit. The market is predictable because students have to use the books. The cost of copyright clearance is also minimal: almost all of the materials are in the public domain. There is little need to budget advertising or marketing costs; professors choose casebooks from a closed universe of options, and once they've chosen, they don't need marketing to keep them loyal. Once they become comfortable with a chosen casebook, it is easier to simply continue using it, rather than to take time away from scholarship and other endeavors to

43 See *Defunding Casebooks Conference*, SANTA CLARA UNIVERSITY SCHOOL OF LAW <https://law.scu.edu/event/defunding-casebooks-conference/> (last visited June 23, 2022).

44 Alisia Ruble, *CSU's Affordable Learning Solutions Initiative Saves Students \$77 Million Every Year*, THE CALIFORNIA STATE UNIVERSITY (August 4, 2021), [https://www.calstate.edu/csu-system/news/Pages/CSUs-Affordable-Learning-Solutions-Initiative-Saves-Students-77-Million-Every-Year.aspx?fbclid=IwARidXtWvNjZ08Ne4AUrSwHcwxq4MWbudR8\\_tDHmLo4QWkr3Ullr8p304](https://www.calstate.edu/csu-system/news/Pages/CSUs-Affordable-Learning-Solutions-Initiative-Saves-Students-77-Million-Every-Year.aspx?fbclid=IwARidXtWvNjZ08Ne4AUrSwHcwxq4MWbudR8_tDHmLo4QWkr3Ullr8p304)

45 And the rare, lucky casebook author whose book pays significant royalties. To be clear, casebook authors do put in work, and we are not suggesting that this labor go unpaid. However, in a fundamental way, law professors are already paid for this work by their institutions. Professors get publication “credit” for producing a casebook and publication is, along with teaching and service, what justifies our salaries. Any royalties from casebooks is arguably a form of double payment. In some sense, this arrangement distorts incentives away from producing novel scholarship: one is paid royalties for producing new editions of casebooks, but not for writing original articles placed in law reviews or other academic journals.

engage in what they imagine will be a time-consuming and unrewarded effort to do better by their students.

It will take a conscious effort on the part of the legal academy to offset the incentives to stay the course. But the effort need not be onerous. It would be relatively easy for law schools to encourage professors to adopt open-source casebooks by offering summer stipends to those willing to make the switch. They might find ways to credit the work in the annual review process. They might publicize and celebrate those who have invested the time and effort to offset the cost of books. And in so doing, they will help us move more swiftly to a system that will benefit all.