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User Friendly Civil Procedure: Pragmatic Proceduralism Slouching Away from Process Theory

Cover Page Footnote

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BOOK REVIEW

USER FRIENDLY CIVIL PROCEDURE: PRAGMATIC PROCEDURALISM SLOUCHING AWAY FROM PROCESS THEORY

LINDA S. MULLENIX*

Cases and Materials on Civil Procedure. David Crump, William V. Dorsaneo, III, Oscar Chase, and Rex Perschbacher. New York: Matthew Bender & Co., Inc. 1987. Pp. xlii, 1005.

INTRODUCTION

Civil procedure as a discipline is suffering an identity crisis of disturbing dimensions, if one takes seriously the critical commentary appearing in journals and articulated at academic conferences. There is a palpable unease among scholars and classroom teachers concerning what civil procedure is and what it ought to be.¹ Paradoxically, as scholars increasingly demand some intellectual framework for critically contemplating procedural issues,² casebooks in the field doggedly seem headed in the opposite direction.³ Through some inscrutable academic principle of Newtonian physics, as the clamor for a theoretical paradigm grows louder, civil procedure casebooks quietly are becoming more pragmatically oriented.

This unfortunate trend prompts a number of subsidiary questions.

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1. See generally Garth, *ADR and Civil Procedure: A Chapter or an Organizing Theme?*, 37 J. Legal Educ. 34 (1987); Schneider, *Rethinking the Teaching of Civil Procedure*, 37 J. Legal Educ. 41 (1987); Spiegelman, *Civil Procedure and Alternative Dispute Resolution: The Lawyer's Role and the Opportunity for Change*, 37 J. Legal Educ. 26 (1987). These issues also were explored at the AALS Conference on Civil Procedure in Charlottesville, Virginia from June 4 through June 9, 1988.

2. See, e.g., Abrams, *The New Civil Procedure* (Book Review), 32 Wayne L. Rev. 1269, 1270-71 (1986) (reviewing Marcus and Sherman's complex litigation text); Burbank, *The Costs of Complexity* (Book Review), 85 Mich. L. Rev. 1463, 1464-65 (1987) (reviewing Marcus and Sherman's complex litigation text and suggesting that an attempt to postulate an intellectual framework would be premature); Graham, *The Persistence of Progressive Proceduralism* (Book Review), 61 Texas L. Rev. 929, 937-48 (1983) (generally decrying the lack of procedural theory); Sherman, *Restructuring the Trial Process in the Age of Complex Litigation* (Book Review), 63 Texas L. Rev. 721, 744 (1984) (reviewing complex litigation casebooks and suggesting that the texts "are a good beginning for the dialogue that must occur if a coherent and workable methodology of complex litigation is to develop").

3. See, e.g., D. Crump, W. Dorsaneo, III, O. Chase, & R. Perschbacher, *Cases and Materials on Civil Procedure* (1987) [hereinafter Crump Casebook]; J. Glannon, *Civil Procedure, Examples and Explanations: A Student's Guide to Understanding Civil Procedure* (1987); M. Lipson & R. Catz, *Materials on the Process of Federal Civil Litigation* (1988).

What is civil procedure, anyway? Assuming that there is some agreed-upon consensus, why has this discipline failed to develop a coherent intellectual framework for discussion? Is the narrow, pragmatically oriented field of civil procedure antithetical to the formulation of an overarching theoretical framework? Is the insistently urged quest for procedural theory ultimately quixotic?⁴ Are classroom academicians destined to hew to a pragmatic proceduralism that, at best, will always be slouching away from some process theory?

Only the obtuse, the uninterested, or the hopelessly miscast procedure professor could fail to notice the growing gulf between what the market supplies by way of teaching resources and what the academic critics demand by way of principled, pedagogical (or political) reform. Thus, the arrival of a new procedure casebook offers a propitious occasion for peering into and stirring the simmering cauldron of procedural discontent. Because this casebook so consciously adopts a practical approach to the subject, its appearance in the stew is likely to occasion some renewed boiling, toiling, and trouble.

It is no grave criticism of Professors Crump,⁵ Dorsaneo,⁶ Chase⁷ and Perschbacher⁸ that their casebook is unabashedly practical, though theoretically undernourished. Indeed, this casebook joins the parade of traditional texts on the bookshelf,⁹ few of which have made that great leap

4. See *infra* text accompanying notes 18-34.

5. His writings on related matters include Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986) (with Arthur Miller), Crump, *Law Clerks: Their Roles and Relationships with Their Judges*, 69 *Judicature* 236 (1986), Crump, *What a Legal Assistant Can Do For You*, 22 *Law Office Economics & Management* 453 (1982), and, Crump, *Managing a Litigation Matter*, 43 *Texas Bar J.* 576 (1980). Professor Crump also has written pieces relating to business regulation, health service liability, evidence and criminal law.

6. His recent writings include Dorsaneo, *Due Process, Full Faith and Credit, and Family Law Litigation*, 36 *Sw. L.J.* 1085 (1983), and Dorsaneo, *Creditor and Consumer Rights*, 34 *Sw. L.J.* 253 (1980).

7. Professor Chase's other major casebooks are *Civil Litigation in New York* (1983), and O. Chase, J. Weinstein, H. Korn & A. Miller, *CPLR Manual* (2d ed. 1980). He has written extensively on New York civil litigation practice for the *New York Law Journal*. See Chase, *Sanctions in State Courts—Proposed Rule Needs Changes*, 198 *N.Y.L.J.*, Oct. 22, 1987, at 1, col. 3; Chase, *An 'Orwellian' CPLR?*, 191 *N.Y.L.J.*, June 26, 1984, at 1, col. 1; Chase, *Form over Substance?*, 191 *N.Y.L.J.*, March 27, 1984, at 1, col. 1; Chase, *Discovery Reform*, 191 *N.Y.L.J.*, Jan. 31, 1984, at 1, col. 1; Chase, *Confronting Governmental Wrongs*, 190 *N.Y.L.J.*, Nov. 29, 1983, at 1, col. 1; Chase, *Serving Summons Abroad*, 189 *N.Y.L.J.*, June 28, 1983, at 1, col. 1; Chase, *Assigned Counsel in Civil Cases*, 188 *N.Y.L.J.*, July 27, 1982, at 1, col. 1; Chase, *Trends and Cross-Trends in Res Judicata*, 187 *N.Y.L.J.*, May 25, 1982, at 1, col. 1.

8. His writings on related matters include Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in Burger King Corp. v. Rudzewicz*, 1986 *Ariz. St. L.J.* 585; Perschbacher, *Regulating Lawyers' Negotiations*, 27 *Ariz. L. Rev.* 75 (1985), and Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 *U. Fla. L. Rev.* 422 (1983).

9. See, e.g., J. Cound, J. Friedenthal, A. Miller & J. Sexton, *Civil Procedure: Cases and Materials* (4th ed. 1985); R. Field, B. Kaplan & K. Clermont, *Materials for a Basic Course in Civil Procedure* (5th ed. 1984); J. Landers & J. Martin, *Civil Procedure* (1981);

towards a cohesive theory of the subject matter.¹⁰ Rather, the casebook states a more modest goal of outlining the fundamentals of civil procedure in an understandable fashion, accompanied by concrete examples of real-life litigation.¹¹

This is not an intellectually flashy casebook. It is not abstruse, theoretical, or jurisprudential. It certainly is not highbrow stuff.¹² On the contrary, the overriding mission of this casebook is to present civil procedure in an accessible, non-threatening fashion. This casebook's sub rosa theme, if a casebook can be said to have a hidden message, is that civil procedure is your friend. In short, students will love it and many academicians will be dismayed.

This essay is divided into two parts. Part One examines the trend in civil procedure casebooks, placing the Crump text on an historical continuum moving from the theoretically abstruse to the pragmatically concrete. The larger issue entails the potential for development and integration of a theoretical framework into procedure casebooks, course materials, and classroom teaching. Although the literature is replete with critical questioning, an overarching theoretical framework in the field of civil procedure does not yet exist.¹³

Part Two centers upon an evaluation of the Crump casebook's premises, avowed goals, and success. This Review's thesis is that in their attempts to render civil procedure "user friendly"¹⁴ to first year students, the authors have reverted to a style of presentation that amounts to little more than casebook spoon-feeding. While clarity and conciseness are laudable goals, their enshrinement in a first-year casebook contravenes many of the pedagogical goals traditionally associated with first-year courses.

D. Louisell, G. Hazard, Jr. & C. Tait, *Cases and Materials on Pleading and Procedure—State and Federal* (5th ed. 1983); M. Rosenberg, H. Smit & H. Korn, *Elements of Civil Procedure—Cases and Materials* (4th ed. 1985).

10. There are some notable exceptions, however, where authors have attempted to raise policy issues or ethical considerations in their materials. See, e.g., P. Carrington & B. Babcock, *Civil Procedure—Cases and Comments on the Process of Adjudication* (3d ed. 1983); R. Cover, O. Fiss & J. Resnick, *Procedure* (1988); H. Fink & M. Tushnet, *Federal Jurisdiction: Policy and Practice* (2d ed. 1987); D. Karlen, R. Meisenholder, G. Stevens & A. Vestal, *Civil Procedure—Cases and Materials* (1975).

11. See, e.g., Crump Casebook, *supra* note 3, at v: "We believe that these 'real world' materials will help the student to understand the theory of civil procedure better, as well as providing insights into what litigators do." The Crump casebook is reviewed favorably by Professor Jeffrey B. Berman, who approves of its user friendly approach. See Berman, *Book Review*, 55 UMKC L. Rev. 150 (1986).

12. For some examples of highbrow works, see L. Brilmayer, *An Introduction to Jurisdiction in the American Federal System* (1986); R. Cover & O. Fiss, *The Structure of Procedure* (1979); R. Cover, O. Fiss & J. Resnick, *supra* note 10; and H. Fink & M. Tushnet, *supra* note 10.

13. See Burbank, *supra* note 2, at 1463-64 & n.9 (citing G. Hazard, Jr., *Research in Civil Procedure* 63 (1963), and Graham, *supra* note 2, at 946-48).

14. Crump Casebook, *supra* note 3, at v. This is the casebook authors' own phrase to describe their endeavor.

I. SLOUCHING AWAY FROM PROCESS THEORY

It is difficult to predict whether the new Crump civil procedure casebook will set a trend for similar user friendly course materials. Certainly this text rests a considerable distance from the pre-Federal Rules procedure texts, which literally were compilations of common law pleading cases.¹⁵ The ascendancy of the Federal Rules and federal practice substantially reshaped procedure casebooks, and in the latter part of this century, casebooks in all fields began to assume the familiar format of cases leavened with the author's notes and commentary.¹⁶ In recent years, the most notable development has been the appearance of texts organized around a cohesive theory of the subject.¹⁷

Civil procedure, as a discrete subject area, has avoided or evaded much theoretical scrutiny, although there exist at least two types of theory that might prove useful to proceduralists.¹⁸ The first is empirical theory—principles that “would serve to explain the conduct of judges and lawyers in litigation and enable us to predict how they will respond to changes in procedural rules.”¹⁹ The second is jurisprudential theory—the ramifications of some definition of justice for a procedural system.²⁰ Notwith-

15. See, e.g., R. Magill & J. Chadbourn, *Cases on Civil Procedure* (3d ed. 1939).

16. See, e.g., R. Field & B. Kaplan, *Materials for a Basic Course in Civil Procedure* (1953). The change in focus and emphasis from pre-Rules casebooks is marked. In the Preface to their casebook, Professors Field and Kaplan explain their departure from the traditional approach to teaching procedure: “And in straining either for omnibus coverage or for the satisfactions that came from historical exposition, the traditional courses dwelt too long on the common law and older code systems and gave less than adequate attention to current practice.” *Id.* at ix. Thus, marking the beginning of a new era for procedure casebooks, Professors Field and Kaplan suggest that the clear emphasis in the new casebooks should be the Federal Rules and federal practice:

[T]he course should give a rounded understanding of a single, modern system of procedure. The choice naturally falls on the Federal system. The common law and older codes may come in by way of comparison and as a reading of the minutes of yesterday's meeting, but the Federal Rules should be a principle theme.

Id. at ix; see also T. Atkinson & J. Chadbourn, *Cases and Other Materials on Civil Procedure* (1948) (refocusing on Federal Rules practice and introduction of authors' notes and supplementary text materials). This refocusing of civil procedure casebooks in the 1950's is also noted in D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. Legal Educ. 461, 485-86 (1987) (discussed *infra* note 78).

17. The most visible examples are conflicts of laws texts, see, e.g., R. Cramton, D. Currie & H. Kay, *Conflict of Laws: Cases—Comments—Questions* (4th ed. 1987); R. Leflar, L. McDougal III & R. Felix, *American Conflicts Law* (4th ed. 1986); A. Lowenfeld, *Conflict of Laws: Documentary Materials—Federal, State, and International* (1986); W. Reese & M. Rosenberg, *Conflict of Laws* (8th ed. 1984); E. Scoles & R. Weintraub, *Cases and Materials on Conflict of Laws* (2d ed. 1972); D. Vernon, *Conflict of Laws: Theory and Practice* (2d ed. 1982); A. Von Mehren & D. Trautman, *The Law of Multistate Problems—Cases and Materials on Conflict of Laws* (1965), and constitutional law texts, see, e.g., P. Brest, *Processes of Constitutional Decisionmaking—Cases and Materials* (1975); L. Tribe, *American Constitutional Law* (2d ed. 1988).

18. See Graham, *supra* note 2, at 937.

19. *Id.*

20. See *id.*

standing these possible avenues of development of procedural theory, existing casebooks do little to encourage critical thinking. "Indeed, some of [the casebooks] suggest that their authors share the contemptuous attitude toward the adjective law that is so widespread in the law school world; the greater part of such books is devoted to 'practical' matters such as mastering vocabulary and doctrine"21 Therefore, proceduralists with a theoretical bent must resort to supplementary, reproduced materials, nurturing scant hope of incorporating such critical materials into orthodox texts. As Professor Graham observes: "Law book publishers are notoriously unenthusiastic about idiosyncratic casebooks"22

In the realm of pure scholarship, the critical proceduralist is impeded by the reigning progressive ideology that defines values, assumptions, and topics worthy of study: "The proceduralist who wants to write from a different perspective has no competing paradigm to rely upon. To reinvent the world of procedure, then explain this new construction so that others can understand it, before turning to the subject of the research presents a difficult task"23

If this prospect were not dismal enough, the professional ramifications for the theoretical proceduralist potentially are daunting. These include unacceptability by student law review editors of submitted works,²⁴ resistance on the part of academic colleagues,²⁵ and unenthusiastic reception by peer review committees evaluating academic promotion, tenure, foundation funding, or appointment to procedure reform committees.²⁶

Even more problematic for the development of procedural theory is

21. *Id.* at 947.

22. *Id.* Professor Graham also expresses extreme pessimism about the ability of proceduralists to articulate theory. He notes that the neophyte proceduralist in most law schools usually does not have much time for critical thought about procedural premises. Moreover, procedure carries the stigma of being a "service course": it is not taught because the subject has any intrinsic appeal, but as an adjunct to understanding substantive courses. *See id.* at 946-47.

23. *Id.* at 947. The nub of Professor Graham's pessimism is his belief that the profession is largely a captive of the ideology of "progressive proceduralism." This ideology is characterized by: (1) Anglomania; (2) the idea that judicial power is legitimized by the procedures employed, rather than the justice of decisions; (3) the consistent use of instrumental justifications for procedural rules; (4) the belief that a trial is a scientific inquiry, rather than a political struggle; (5) the drive for procedural uniformity; and (6) the belief that procedure is a value-free science. *See id.* at 940-45.

24. *See id.* at 947.

25. As Professor Graham observes:

While few scholars would deliberately give low marks to a work of merit because they did not share the author's ideology, the dominance of Progressive proceduralism is such that it is easy to mistake merit with adherence to the tenets of Progressivism. And as those who are not Progressives can attest, it is a devilishly difficult business to be fair to a piece of work based on principles you abhor.

Id.

26. *See id.* at 947-48. Professor Graham recognizes these problems as essentially prudential concerns. *See id.*

the discipline's somewhat unique claim to scientific validity.²⁷ To challenge the premises of procedural principles is to engage in a question of values, and scientific rules are supposed to be value-free. From this perspective, then, civil procedure claims a legitimacy unique in the law school curriculum by virtue of its unarticulated premise of being value-free. Traditional procedure professors, many of whom unthinkingly accept this ideology, have a great deal to lose by challenging the basic premises of the subject.²⁸

Thus, the quest for a theoretical framework for procedure is inherently threatening, containing within it the potential for undermining the legitimacy of the rules. If procedural rules can claim no special authority as the rules that determine the course of decision on the substantive merits, then critical procedural theory threatens conventional notions of justice as well. Therefore, traditional procedural ideology embodies powerful disincentives for those who would pursue process theory.²⁹

In 1963, Professor Hazard observed that "[w]ith but few exceptions, the product of procedural scholarship in the last 25 years is conspicuously bare of any serious attention to what might be called the philosophy of procedure."³⁰ Twenty-five years later, with rare exceptions,³¹ the same assessment remains true. Clearly, much work remains to be done.

27. *See id.* at 944.

28. "Progressive proceduralism is a useful ideology for academics because it enhances their power. If procedure is a 'science,' then academic experts who have studied it have a better claim to influence than lawyers and judges whose authority is based on greater experience in dealing with procedural problems." *Id.* at 948.

29. Professor Graham further stresses:

Only the complacent or the ideologically blinded can avoid the issue of the complicity of rules of procedure in fostering inequality. But this is ultimately a question of values, of choosing sides in a deeply political struggle—it cannot be answered by "scientific" methods. To come down on the side opposing the status quo is not simply to take up arms against very powerful interests, it is also to abandon the posture of political neutrality that many proceduralists see as their sole claim to authority.

Id. at 948.

Professor Graham concludes that it is not surprising that so many procedure teachers turn to active scholarship in other fields. His discouraging perspective, however, fails to account for the relative success of the exploration of theoretical premises in other areas of the law. Certainly, the prudential concerns he identifies exist for all young scholars, regardless of academic interests. Innovative, critical thinking, and especially speculative theorizing, always has been a professionally risky undertaking. Nonetheless, many young scholars in other disciplines have pursued the difficult questions, ignoring potential professional consequences. Nor does his thesis account thoroughly for the failure of established scholars to think broadly about procedure, when such scholarship more likely would be received, if not embraced, by colleagues. Similarly, the argument that the failure of procedural theorizing is political explains too much and too little. The charge that theoretical speculation endangers the very legitimacy of the endeavor applies equally to "substantive" law. Nonetheless, scholars in other fields have accepted the challenge to examine critically the premises of their subjects, even if such theoretical scrutiny ultimately questions the legitimacy of received propositions.

30. G. Hazard, Jr., *Research in Civil Procedure* 63 (1963) (cited in Burbank, *supra* note 2, at 1464 n.9).

31. *See* Burbank, *supra* note 2, at 1464.

The challenge is to encourage a discipline with an avowedly practical orientation towards thinking more broadly and critically about underlying premises.³² A new generation of scholars is beginning to examine procedural variations from the norm of trans-substantive procedure embodied in the Federal Rules.³³ With various procedural reforms underway,³⁴ the time is propitious for the articulation of a philosophy of procedure to serve both as a basis for reform, as well as a legitimating authority.

II. USER FRIENDLY CIVIL PROCEDURE

With this challenge in mind, the Crump casebook dramatically illustrates the widening gulf between theoretical thinkers and classroom pragmatists. The authors of the Crump casebook note that their book is "mostly traditional in approach,"³⁵ organized to track a litigation from jurisdiction through posttrial motions and appeals. Also, "[f]or the most part,"³⁶ it avows to utilize the traditional case method. The book includes all the standard cases one would expect in a basic text,³⁷ is extremely current in its case coverage,³⁸ and displays no glaring omissions. In its highly unpretentious manner, it feigns no attempt at procedural theory, either grand or unassuming.

In addition to "careful" case selection, the book utilizes four devices to organize its subject matter: (1) actual litigation documents, including pleadings, motions, briefs, and orders;³⁹ (2) separate chapter comments

32. As Burbank observes:

The challenge for the law reformer is not to get carried away: not to let one set of practical problems characteristic of complex litigation preclude attention to others, not to let images of complex litigation preclude attention to litigation that is not complex, not to let practical problems preclude attention to process values other than efficient administration, and not to consider process values in the vacuum of trial or pre-trial procedure.

Id. at 1487 (footnotes omitted).

33. *See id.* at 1473-74 & nn.58-61.

34. *See id.* at 1487 & nn.138-40.

35. *See* Crump Casebook, *supra* note 3, at v.

36. *Id.*

37. The cases included run from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (jurisdiction) through *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (preclusion doctrines).

38. Among the cases included are: *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (jurisdiction); *Burlington N. R.R. v. Woods*, 107 S. Ct. 967 (1987) (*Erie* doctrine); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986) (federal question jurisdiction); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (summary judgment); *Schiavone v. Fortune, Inc.*, 477 U.S. 21 (1986) (Rule 15 amendments to pleading); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (class action jurisdiction and choice of law); multiple excerpts from *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd*, 107 S. Ct. 1519 (1987) (supersedeas bonds, *see* Crump Casebook, *supra* note 3, at 826; judgment liens, *see id.* at 927); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985) (Rule 11 sanctions), *cert. denied*, 108 S. Ct. 269 (1987); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (federal common law).

39. *See, e.g.*, Appendix to Chapter 2, *The Anatomy of a Forum Contest: Litigation*

entitled "Improving the System" aimed at theoretical discussion;⁴⁰ (3) incorporation of comparative procedural practice from the benchmark states of California, New York, and Texas;⁴¹ and (4) problems.⁴² While the overall casebook concept is thoughtful and enticing, the book promises more than it delivers.

The prefatory comments to the text reveal a disturbing underlying pedagogical philosophy. For example, the two stated principles guiding case selection and redaction are quite interesting. The authors express a preference for current cases, so they illustrate most doctrines with post-1980 decisional law. While in itself a harmless preference, the authors send an implicit message that there is something distasteful about having to read musty old cases. The authors' second principle of selection is less innocent: "We also have attempted to use cases with simple, clear, correct reasoning, on the theory that teaching from a correctly reasoned case is more effective than criticizing a 'wrong' decision."⁴³ This seemingly innocuous premise embodies the fundamentally distressing problem with this casebook venture: that students are not to be bothered with the complex, the unclear, the difficult, the challenging—or, heaven help us—the wrongly decided case. In their efforts to create the ultimate "user friendly" first-year casebook, the authors quite successfully have sani-

Documents in *George Miller Co. v. Computata, Inc.*, Crump Casebook, *supra* note 3, at 151-72; Appendix to Chapter 3, Jurisdictional Documents in *Kawasaki Motors Corp. v. Edgerton*, *id.* at 229-40; Appendix to Chapter 5, Sample Pleadings from Three Jurisdictions, *id.* at 356-65 (New York: *Palsgraf v. Long Island R.R.*; Texas: *Pennzoil Co. v. Texaco Inc.*; and California: Pre-Printed Products Liability Complaint Form); Appendix to § 9.02: Summary Judgment Documents in *Browne v. Smith*, *id.* at 634-42.

40. *See, e.g.*, § 2.05, Improving Our System of Personal Jurisdiction and Venue: Notes and Questions, Crump Casebook, *supra* note 3, at 148-50; § 3.04, Improving Our Jurisdictional Systems, *id.* at 222-28; § 4.05, Improving the System of Federal-State Choice of Law: Notes and Questions, *id.* at 280-81; § 5.08, Improving the Rules of Pleading: Notes and Questions, *id.* at 354-55; § 7.06, Improving the Discovery Rules: Notes and Questions, *id.* at 575-77; § 8.04, Improving Pretrial Conferences and Case Management: Notes and Questions, *id.* at 612-13; § 9.06, Improving Summary Judgment and Other Non-Trial Disposition Methods: Notes and Questions, *id.* at 650-51; § 10.09, Improving Trial Processes: Notes and Questions, *id.* at 761-63.

41. *See, e.g.*, Crump Casebook, *supra* note 3, at 144-48 (venue in state systems); *id.* at 349-54 (state court pleadings today: stating a "cause of action" under modern rules); *id.* at 356-65 (sample pleadings from three jurisdictions).

42. Problems are sprinkled throughout the text. *See, e.g.*, Problem A on jurisdiction, Crump Casebook, *supra* note 3, at 87-88. The authors' philosophy concerning the casebook problems is set forth in the Preface:

For the most part, the problems in earlier chapters are simple (often, in fact, we have put suggested answers in the book). In this difficult course, it happens all too often that a complex problem is not as helpful to the real goal of student understanding as a simpler one that clearly illustrates the application of the principles the student has learned. In later chapters, some of the problems are more difficult, but we have remained faithful to the idea that problems should be within the abilities of students who have read and understood the materials.

Id. at vi. This philosophy is consistent with the authors' overarching philosophy of rendering civil procedure "user friendly." *See infra* text accompanying notes 49-77.

43. *See* Crump Casebook, *supra* note 3, at vi.

tized an entire subject and helped trivialize other pedagogical purposes of first year law school.

Thus, this is a well-intentioned but questionable endeavor. The concept of this casebook is fine, and many of its special features are deserving of emulation. Noteworthy is the supplementation of traditional casebook analysis with real-life litigation documents.⁴⁴ Many procedure teachers enhance the course with sample pleadings, motions, and other litigation documents, and, therefore, a text that integrates these materials is a welcome addition to the existing literature. Similarly, the incorporation of comparative state statutory provisions helps to correct the overwhelming federal perspective inherent in first-year procedure courses and to remind students that differences exist between federal and state practice.⁴⁵

Commendably, the authors have attempted to provide some larger perspective on procedural issues. They accomplish this by tacking onto each chapter a segment entitled "Improving the System," which is aimed at "Introducing Theoretical Issues at the Cutting Edge of the Law."⁴⁶ The authors explain:

We would not be content, however, with introducing the student to current practice. A good lawyer needs to be able to grow with the law. In fact, he or she needs to think ahead of the current state of the law. . . . Our experience indicates that this method encourages deeper thought about the purposes of the Rules of Civil Procedure.⁴⁷

Unfortunately, more often than not, the commentaries consist of fuzzy attempts to raise consciousness, leaving one to speculate about the level of theoretical discussion engendered by these "Improving the System" notes.⁴⁸

The major criticism of the text, however, goes to the overarching pedagogical approach to the course materials:

44. See *supra* note 39; cf. P. Simon, *The Anatomy of a Lawsuit* (1984) (hypothetical lawsuit developed through sample pleadings and motions).

45. The authors tend to describe narratively state statutory provisions and then indicate the significant differences in approach and practice, rather than simply providing the statutes. See *supra* note 41. There is something to be said, however, for having students read and construe statutory material, unmediated by author interpretation. For a different approach to state statutory materials in civil procedure, see J. Cound, J. Friedenthal, A. Miller & J. Sexton, 1987 *Civil Procedure Supplement* 274-81 (1987).

46. See Crump Casebook, *supra* note 3, at v.

47. *Id.*

48. For example, see the following introductory note on "Improving Trial Processes":

(1) *Providing Jury Trial in the Right Cases (and Not in the Wrong Ones?)* Jury trials seem most important in cases in which citizens' perceptions of the balance of interests might diverge from the views of government, and when the issues are related to those in common experience. To the extent that there is constitutional room not to provide a jury, however, it may be appropriate to consider the fact that jury trials are more unpredictable, much more expensive for all concerned, and more likely to produce delay.

Crump Casebook, *supra* note 3, § 10.09, at 761.

A "User Friendly" Book. Above all, we have tried to produce a book that makes the fundamentals easy for the student to grasp. Although Civil Procedure may be the most difficult course in the first-year curriculum (we have no illusions of making it truly simple), we have done our best to make our book 'user friendly.' For example, particularly difficult cases are preceded by notes entitled 'How to Read this Case.' The cases are edited with student comprehension in mind, and explanations of difficult principles are inserted in brackets. In a few instances, difficult cases are preceded by problems designed to prepare the student in advance. Our notes and questions are self-contained; they do not require the student to consult outside sources. Our philosophy is that it is [sic] best for the student to come to class having actually understood the material in the book. The class then does not need to consist solely of helping to get across the basics, and the professor can raise more interesting issues.⁴⁹

This desire to create a "user friendly" casebook results in a caricature of a first-year text. Not only is the book's tone of voice problematic,⁵⁰ but the approach is subtly opposed to the development of critical thinking. Under the guise of user friendliness, the authors offer predigested statements of black letter law,⁵¹ simplified case statements,⁵² and summary outlines of complex doctrines.⁵³ In their efforts to make the "study" of civil procedure as painless as possible, the authors not only narratively describe what the law is, but also helpfully explain what it

49. See Crump Casebook, *supra* note 3, at v-vi.

50. See *infra* text accompanying notes 56-58.

51. See, e.g., "Note on the Standards For Summary Judgment," Crump Casebook, *supra* note 3, at 39. The note in part reads:

Because this procedure dispenses with the need for a trial, the moving party bears a heavy burden. It is not enough for the moving party to show that he is likely to win at trial; he must demonstrate that there are not even any controversies about the facts that could make any difference in the result.

Id.

52. See, e.g., Crump Casebook, *supra* note 3, at 130 (summarizing *Billy v. Ashland Oil Inc.*, 102 F.R.D. 230 (W.D. Pa. 1984)). Although this case is noted and summarized, the summary does not adequately make the point that a plaintiff faces an election of process methods under Fed. R. Civ. P. 4(c)(2)(C), either by state or by federal means. See *id.* Indeed, the section on the mechanics of service of process makes scant mention of the provisions of amended Rule 4. See *id.* at 125-31. Since 1983, the Rule 4 amendments, particularly those to Rules 4(c)(2)(C) and 4(j), have generated a large body of case law and critical commentary. See, e.g., Jarvis & Mellman, *Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure: From Hapless to Hopeless*, 61 St. John's L. Rev. 1 (1986); Mullenix, *The New Federal Express: Mail Service of Process Under Amended Rule 4*, 4 Rev. of Litigation 299 (1985); Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 Va. L. Rev. 1183 (1987). For a casebook with such an awedly practical orientation, this failure to explore the amended Rule 4 provisions is surprising.

53. See, e.g., Crump Casebook, *supra* note 3, § 4.02: "The Substance-Procedure Distinction, Note on the Supreme Court's Varying Approaches to the Substance-Procedure Problem," *id.* at 250; § 6.01: "An Overview of the Devices for Joining Multiple Parties or Claims," *id.* at 367-74; § 6.03[B][2]: "Note on Understanding Rule 23," *id.* at 418-19; § 13.01: "Res Judicata: Claim Preclusion," *id.* at 849-50.

means.⁵⁴ At its worst, the text oversimplifies complex legal problems or offers vague and ambiguous descriptions of doctrine.⁵⁵

Some of these criticisms obviously touch on matters of personal taste. The appeal of the text's tone of voice, for example, clearly depends on individual readers' sensibilities. While some students may find the authors' notes a friendly reprieve from sterner texts, many students will find the prefatory comments patronizing and paternalistic.⁵⁶ This is an incessantly chatty casebook. As if students could not discover it for themselves, the authors repeatedly assure its readers that a case that follows is "very difficult" and its facts "extremely complex."⁵⁷ Because

54. See, e.g., the authors' note preceding *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), concerning the rationale and scope of pendent jurisdiction:

Judge-Created Jurisdictional Doctrines. In this situation, federal judges have literally invented a jurisdictional doctrine. The authority to hear the state claim is called 'pendent jurisdiction.' (The word 'pendent' comes from a Latin root meaning "to hang"; the state claim comes into federal court figuratively 'hanging' from the federal claim.) It might seem ironic that the federal courts (which, after all, are so concerned about jurisdiction that they sometimes dismiss after judgment) would go about inventing jurisdiction. But the invention of pendent jurisdiction is justified, in that the disadvantage to the claimant would otherwise be so significant that the choice of a federal forum would be penalized.

Crump Casebook, *supra* note 3, at 201.

55. See, e.g., *id.* at 195-96 (text's treatment of the problem of collusive joinder under 28 U.S.C. § 1359). This summary treatment and the vague case descriptions in Note (2) fail to define or illustrate the issues raised by a large body of case law. The book draws no distinction between cases that seek to create jurisdiction and cases that seek to destroy jurisdiction (technically not encompassed by the statute), nor is there any suggestion of the doctrinal difficulties—indeed, a split among the circuits—raised by *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969). Instead, the issue of collusive joinder is treated in a cursory fashion. Cf. Mullenix, *Creative Manipulation of Federal Jurisdiction: Is There Diversity After Death?*, 70 Cornell L. Rev. 1011 (1985).

56. For example, see the authors' introductory comments concerning "What a 'Civil Procedure' Course is About":

There are several objectives to such a course. First, and most obviously, the course can help you to begin learning how to handle litigation. To do that, you must understand the purpose of each procedural device and the way it fits into the overall scheme of dispute resolution. Secondly, you need a knowledge of civil procedure to understand the subjects taught in your other courses. If a case in your contracts or torts casebook has been decided as it has because the complaint was inadequate or because the evidence does not support the verdict, you can understand the case better by understanding the underlying procedure.

Finally, a procedure course should make you aware of ways in which our system of justice can be improved. Just how should the jurisdiction of various different kinds of courts be defined? How strict, or how flexible, should be our standards for the sufficiency of papers filed with a court? Questions like these involve deeper issues, and the best people to answer them are those who are thoroughly familiar with our procedural system.

Crump Casebook, *supra* note 3, § 1.01, at 1; see also authors' comments at Note 1, *id.* at 77, following *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (clarifying the "[t]wo [i]ssues in *Gray*"); Note 1, *id.* at 111, following *Shaffer v. Heitner*, 433 U.S. 186 (1977) (on "Understanding *Shaffer*: the 'Three-Way Relationship' and the 'Fairness' Test").

57. See, e.g., Crump Casebook, *supra* note 3, at 207 (prefacing *Owen Equipment &*

such descriptions are recited routinely throughout the book, some savvy students quickly will recognize the debasement of these assessments. Other students will be lulled into an unthinking, self-congratulatory posture of having "studied" an extremely difficult subject.

Similarly, many of the authors' introductory remarks incorporate cloying editorial commentary. For example, the note on "How to Read and Understand *Pennoyer v. Neff*" begins: "The case that follows, *Pennoyer v. Neff*, is a venerable landmark. Some of what it says is no longer the law today. But it would be unthinkable not to include it in this book, because it provides such wonderful insight into the basis of our jurisdictional concepts."⁵⁸

For the authors, user friendliness also entails simplified statements of the law, case summaries, and outlines of complex doctrines. The text does not encourage students to explore the concepts of general and specific jurisdiction; rather, the authors supply tidy black letter definitions.⁵⁹ *Asahi Metal Industry Co. v. Superior Court*,⁶⁰ the Supreme Court's most recent in-depth analysis of state long arm jurisdiction, is reduced to a two-paragraph description that characterizes the case as a "purposeful availment" decision.⁶¹ While technically not incorrect—very little in the

Erection Co. v. Kroger, 437 U.S. 365 (1978), with: "Students sometimes find the following case to be factually complicated."); Crump Casebook, *supra* note 3, at 382 (prefacing *Barab v. Menford*, 98 F.R.D. 455 (E.D. Pa. 1983), with: "The case that follows, *Barab v. Menford*, is short but moderately complex. You should have the following thoughts in mind when you read it."); Crump Casebook, *supra* note 3, at 392 (prefacing *Provident Traders Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), with: "The next case is one of the most difficult cases in this book"); Crump Casebook, *supra* note 3, at 399 (prefacing *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir.), *cert. denied*, 469 U.S. 1019 (1984), with "The case that follows is moderately complex").

The comments following *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), communicate a similar message:

Confusion. Students often find § 1441(c) confusing. They are not the only ones with that opinion. See *Harper v. Sonnabend*, 182 F. Supp. 594, 595 [(S.D.N.Y. 1960)] ("it is not an exaggeration to say that at least on the surface the field luxuriates in a riotous uncertainty"). There is a legitimate question whether the policy served by § 1441(c) in the comparatively rare case to which it is applicable justifies the confusion it generates.

Crump Casebook, *supra* note 3, at 221.

58. Crump Casebook, *supra* note 3, at 58; see, e.g., *id.* at 15 ("*Strawbridge v. Curtiss* is a venerable old case, decided by one of this nation's most famous chief justices, and the principle that it enunciates is still good law today."); *id.* at 272 (on *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943): "In this famous federal common law case . . ."); Crump Casebook, *supra* note 3, at 248-49 (on *Erie*: "(4) *Why Law Professors Love Erie*. . . The *Erie* decision, for all its faults, has seemed clearly right to generations of lawyers. It is a case, like *International Shoe*, that you will remember the rest of your life; and it is a case to be savored and enjoyed.").

59. See Crump Casebook, *supra* note 3, at 71 & 73 (two short paragraph descriptions); cf. Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988) (extensive examination of the judicial breakdown in distinction between concepts of general and specific jurisdiction).

60. 107 S. Ct. 1026 (1987).

61. See Crump Casebook, *supra* note 3, at 97. The opinion closely relies on the lan-

text could be subject to such harsh criticism—this neat summary treatment deprives students of the opportunity to examine the Court's most recent full-fledged treatment of jurisdiction in a challenging, international context.⁶² If *Asahi* represents just another purposeful availment case, why note it at all? What is missing here is attention to doctrinal development as well as nuanced study of decisional law.

Again, in their efforts to render civil procedure user friendly, the authors often predigest cases for students, or supply outlines of difficult doctrines. The book's treatment of *Provident Tradesmens Bank & Trust Co. v. Patterson*⁶³ typifies these pedagogical devices. Immediately preceding this case, the authors include their ever-helpful note, "How to Read the Case."⁶⁴ This is introduced by the following student encouragement: "The next case is one of the most difficult cases in this book. You need to keep Rules 19(a)-(b) firmly in mind as you read it. Furthermore the case is factually very complicated."⁶⁵ Having thus been reassured that the casebook authors and other professors know exactly how hard the case is, the text follows with more user friendly assistance:

A Synopsis. In its simplest outline, the *Provident Tradesmens* case results in a holding that an absent individual, named Dutcher, is a "person needed for just adjudication." It is not "feasible" to join him at this point. The court determines, however, that the judgment can be upheld under the four-factor "equity and good conscience" test. The reasons for each of these holdings are complicated, however.⁶⁶

Lest the message that *Provident Tradesmens* is a very complicated case be lost on slower students, the authors next provide a simplified plot

guage of *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985), holding that the substantial connection between the defendant and the forum state "must come about by an action of the defendant purposefully directed toward the forum State." *Asahi*, 107 S. Ct. 1026, 1033 (emphasis in original). The Court in *Asahi* went on to note in the same paragraph, however, that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.*

62. *Id.* at 1031-35. The Court's decision clearly relies heavily on doctrinal refinements articulated by the Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Rather than apply a unitary "purposeful availment" analysis, the Court indicated that the reasonableness of state court jurisdiction must be evaluated by considering a variety of factors:

We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Asahi, 107 S. Ct. at 1033-34 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

63. 390 U.S. 102 (1968); see Crump Casebook, *supra* note 3, at 392-98.

64. See Crump Casebook, *supra* note 3, at 392.

65. *Id.*

66. *Id.*

summary of the facts. This is set forth in four easy steps to comprehension; literally, the authors' simplified version of the facts is set forth in paragraphs denoted "Step 1," "Step 2," "Step 3," and "Step 4."⁶⁷ Having been led through this process, students are now ready to read the actual case.

Similarly, the authors use the outline-the-doctrine approach to smooth over various rough edges of the course. The book's treatment of *Erie Railroad v. Tompkins*⁶⁸ no doubt will raise a few eyebrows. Following its excerpt from the *Erie* decision, the text offers a note on "The Substance-Procedure Distinction."⁶⁹ The authors again strike their best "we're all in this together" tone:

A Confusing Area of Civil Procedure. The deceptive simplicity of the *Erie* holding contrasts sharply with the confusion in the cases that interpret it. Remember: The court follows state substantive law and federal procedural law. The confusion has arisen primarily when the Supreme Court has tried to tell the difference. The distinction is almost metaphysical, and the Court has contributed to the difficulty by inventing new tests without overruling old ones.⁷⁰

The student's resolve is thus fortified in the knowledge that the complexities of the *Erie* doctrine are "metaphysical." By this point, students will have come to expect their authors to simplify such complexity, and these expectations are not disappointed. Thus, the text sets forth: "*The Approaches.* It may be a good idea to sketch some of the approaches in advance, together with the cases in which you will see them at work."⁷¹ Students are then served up a five-approach *Erie* crib sheet⁷²—a nice, tidy laundry list of buzzwords and phrases that first-year students love and law professors hate. In advance of reading the *Erie* cases contextually,

67. *Id.*

68. 304 U.S. 64 (1938); see Crump Casebook, *supra* note 3, at 241-49. Again, the *Erie* doctrine is introduced in a cute, down-home fashion: "*Tompkins' Suit Against the Erie Railroad. Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which overruled *Swift v. Tyson*, is by far the most celebrated American choice-of-law case The story is wonderfully told by Irving Younger, in Younger, *What Happened in Erie*, 56 Texas L. Rev. 1011 (1978)." Crump Casebook, *supra* note 3, at 241.

69. Crump Casebook, *supra* note 3, at 250.

70. *Id.*

71. *Id.*

72. See *id.* The proffered approaches are: (1) outcome determination; (2) "absolute" outcome determination; (3) interest balancing; (4) deference to a controlling federal rule; and (5) the policies-of-*Erie* approach. See *id.*; cf. K. Clermont, Civil Procedure 218-32 (West: Black Letter Series, 1982); M. Cohn, H. Rossen, D. Schaefer & W. Sogg, Civil Procedure 79-100 (Smith's Review Series 2d ed. 1985); J. Friedenthal & A. Miller, Sum & Substance of Civil Procedure 77-85 (2d ed. 1979); Redish, Federal Jurisdiction 171-82 (West: Black Letter Series, 1985).

For some other examples of the text's "overview" summaries, see Crump Casebook, *supra* note 3, § 6.01, at 367-74: "An Overview of the Devices for Joining Multiple Parties or Claims;" *id.*, § 9.02, at 618: "Summary Judgment and Other Devices for Deciding a Case 'As a Matter of Law,'" and, *id.*, § 7.01, at 473-85: "The Objectives, Policies and Planning of Discovery."

ally, students are given a handy, pat outline (a Rosetta stone?) of *Erie* doctrine. No confusing nuances here.

The objections to the casebook's approach are varied. First, it does not challenge students to think independently. While it may be desirable to offer background or context for cases, this text may offer too much, causing one to yearn for the good old days of unadulterated case reports, *sans* notes, comments, materials, or author intrusion. Under those circumstances, students had to struggle with the case itself, legal warts and all. There is something to be said for this struggle: it hones skills of comprehension, analysis, and critical evaluation. This is not to argue in favor of senseless student suffering, but there may be some substance to the currently popular adage "no pain, no gain."

Second, this casebook not only fails to challenge students to think independently, but it often tells them *what* to think. While this is done in the spirit of reassuring helpfulness, it denies students the opportunity to assess the relative difficulty or complexity of cases and issues. If some fact situation is problematic, as in *Provident Tradesmens*, the authors break down the facts into understandable tidbits. If the law is complex or obscure, the authors supply an outline of the concepts.⁷³

Third, the text's subliminal message about the complexity of law is very troubling. Students are advised repeatedly that virtually everything they are reading is complex; they are not allowed to arrive independently at this conclusion. It is difficult to guess the import of this. If the purpose is to make first-year students feel good, then this text imparts to them a false confidence in their ability to grapple with complex legal materials. Beyond this pedagogical objection, however, the authors sometimes employ a disturbing, dismissive attitude towards untidy legal problems. For example, the authors summarize *Erie* doctrine thus:

An Analogy. The will-o'-the-wisp distinction between substance and procedure calls for an analogy. In an elementary physics class, students would be introduced to two apparently inconsistent theories about the phenomenon that we know as light. The "particle" theory describes light as particles called photons. This theory is useful to describe some characteristics of light. The "wave" theory instead sees light as electromagnetic waves, and it is useful in describing other phenomena (e.g., color). Which theory is the "correct" one? The answer is that both of them are, and yet neither is. In an attempt to describe a unique property of the universe, the physicists have invented crude models. It is not surprising that no single model fits all cases. And so it is with the substance-procedure distinction. The *Erie* doctrine is a complex idea, and it cannot be fully described by any single formula.⁷⁴

The purpose of this analogy is to reiterate the theme of complexity in relation to the *Erie* doctrine. The message, however, is that there are no correct answers, or, alternatively, many correct answers, and that *Erie*

73. For example, see the discussion of *Erie*, *supra* notes 68-72 and accompanying text.

74. Crump Casebook, *supra* note 3, at 250.

doctrine can be described in many different ways. Of course, this is vaguely correct, but it ignores the fact that there is an accepted *Erie* analysis, and that federal courts consistently recognize this methodology in their opinions.⁷⁵ Students, then, have an easy out: instead of rigorous analysis, they may substitute their understanding that the *Erie* doctrine is complex, but that all answers are equally acceptable. After all, as the authors so pertinently query, "Which theory is the 'correct' one?"⁷⁶

Perhaps it is a petty cavil to suggest at this point that even the "Problems" in this text are user friendly. The selection of a problem for review yielded the following "What color is George Washington's white horse?" question:

PROBLEM D

APPLYING THE FEDERAL VENUE STATUTES. Plaintiff A, a resident of San Francisco (in the Northern District of California), has been injured in an automobile collision occurring in Los Angeles (within the Central District of California), as a result of the careless operations of a car driven by Defendant B, a resident of the Boston Division of the District of Massachusetts.

* * *

(1) *Venue in Diversity Cases.* Identify the three places of proper venue for a diversity action by A against B. [Note: Section 1391(a) of the venue provisions governs; it designates the places where "all plaintiffs or all defendants reside, or in which the claim arose."]⁷⁷

You, too, can feel good about civil procedure.

FINAL OBSERVATIONS

Thus, the Crump casebook's overarching conception bodes a return to an older, more genteel pedagogy. From this perspective, "the law" is some received body of principles to be studied, learned, mastered, and recited for the bar. The introduction of the Socratic method of case study ended that era. Socratic teaching demonstrates that memorization of black letter law is unavailing to help distinguish hard cases. It recognizes that the law is manifested in cases that often are untidy, inconsistent, and incorrect—that the law is not a fixed universe, but a body of principles evolving in the light of ever-changing circumstances, experiences, and values.

Socratic methodology does not just teach the law. It teaches future

75. See *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067-71 (11th Cir.) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2239 (1988).

76. See Crump Casebook, *supra* note 3, at 250.

77. *Id.* at 138-39. This problem was selected randomly by flipping open the text to the first problem fortuitously encountered. The problem is accompanied by an illustrative diagram. See *id.* at 139 (Figure 2B: Illustration of Venue Problem (No. 2C)). In fairness, the authors subsequently develop eight increasingly complex venue problems arising from the basic litigation premise. See *id.* at 139-40. The answer to Problem D, by the way, is: the Northern District of California, the Central District of California, or the Boston Division of the District of Massachusetts.

lawyers how to think about the law. The Crump casebook teaches the law—but who will teach its students to think?⁷⁸

78. For a stimulating discussion of trends in modern casebooks, see D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. Legal Educ. 461 (1987). Professor D'Amato observes:

But casebooks have evolved along the lines of becoming easier and easier for the 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.

Just from a quantitative point of view, the amount of space devoted to cases is steadily decreasing, while the space devoted to explaining what the cases stand for is increasing. Cases are whittled down into snippets of cases in order to make more room for authors' "notes" and "comments." While some authors retain a vestige of the old "questions" sections, they actually proceed to answer their own questions, saving the students the mental strain. Why present unsolved problems for the students in a casebook?—that would only cause the students [a]nxiety and hurt sales.

Id. at 485.

Professor D'Amato also recognizes the historical drift of casebooks:

By the late 1950s, casebooks had shifted in this "modern" direction. The way to get a feel for what the really old turn-of-the-century casebooks were like is to look them up in a law library that has not discarded them. One's first impression is that they seem extraordinarily primitive. They hardly have any notes at all. Cases are not excerpted very much; there is little sign that the editors have done their work or earned their keep. More than that, the cases do not seem quite to fit the chapter headings and subheadings! It appears that the compilers of those casebooks were rather lazy, not taking the care that editors take these days to select cases precisely and then hack them down so that the language remaining supports the exact proposition of law that the editor has in mind.

A second look is needed. The "old" casebooks resemble the research that an attorney does in practice. A practicing attorney, looking up cases in a general area, will never find a nicely edited group of cases illustrating a precise rule; rather, some cases will be on point and others off point, either confirming a rule or disconfirming it, distinguishing each other or failing to recognize contrary precedent. The practicing attorney must then do a tremendous mental job of filing and sorting those cases not just according to their decisional rules but also according to their facts, to what the parties were trying to achieve, and to their procedural history. The modern casebook editor does all of this work in preparing the casebook, leaving none of it for the student to do. By doing more and more editorial work, modern casebook compilers are in fact doing less and less for the teaching process. In 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.

Id. at 485-86.

