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Current Issues in Constitutional Litigation

A Context and Practice Casebook

Second Edition

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To Tom, Kate, and Charlie, with love,
and in memory of Jack Lee Young (1981–2013)
—Sarah Ricks, Philadelphia, Pennsylvania

To Howard, Joanna, and Karen, with love
—Evelyn Tenenbaum, Albany, New York

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Foreword to Second Edition by Rebecca E. Zietlow

Professor Ricks and Professor Tenenbaum's Current Issues in Constitutional Litigation is an excellent, innovative textbook. It is both a comprehensive treatment of the substantive material and an effective tool for teaching practical skills to law students. As law students increasingly demand practical skills courses, some professors fear that they will be required to sacrifice coverage of substantive law. This textbook shows that it is not necessary to make such a choice. The innovative means in which the material is presented motivates students to learn the substantive law in even greater scope and depth than a conventional lecture class. The material is presented through appellate decisions, jury instructions, and other sources that practicing lawyers use. This material is accessible to students, and it more closely resembles the practice of law than the conventional presentation of only Supreme Court cases. The book also presents contextual information, which enables students to understand the issues covered in a sophisticated fashion. Students become engaged in the subjects presented, and this also motivates them to learn more.

The strongest aspect of Current Issues in Constitutional Litigation is the inclusion of simulation exercises. The students enjoy the exercises and take on the responsibility of teaching the material to other students as they engage in the simulations. Thus the students take ownership of the learning process, and have a great time as well. Many of my students have told me that they wish that there were more classes like this one in law school. I agree.

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January 2015

What's Past Is Prologue: Foreword to Second Edition by Aderson Bellegarde François[1]

In the winter of 1907, Albert Martin Kales, an 1899 graduate of Harvard Law School and professor at Northwestern University Law School, published an article in the Harvard Law Review titled "The Next Step in the Evolution of the Casebook."[2] In it, Professor Kales argued that "the comparative merits of the casebook and the text-book methods of teaching law are no longer an issue in legal education," that casebooks "have driven the text-book out of existence as a means of education," and that the time had come to ask "what is to be the next step in their evolution?"[3] In Professor Kales' view, for all of their virtues, casebooks had one fatal flaw: by focusing exclusively on important English and national cases they did not afford sufficient flexibility to the law teacher who wished to instruct students on how the law of local jurisdictions fits into the national scheme.

In the spring of 2007, Professor Matthew Bodie published an article in the *Journal of Legal Education* titled "The Future of the Casebook: An Argument for an Open-Source Approach."[4] In it, Professor Bodie argued that "ever since Christopher Langdell devised the first compilation to teach his students using the case method, law professors have relied on casebooks to provide the substantive basis for their courses," that "the casebook is, quite simply, the written centerpiece of legal education," but that "despite its privileged position, the casebook as we know it is probably on its way to extinction."[5] In Professor Bodie's view, for all of their virtues, the fatal flaw of most casebooks is that, by relying on a fixed set of bound cases they do not afford law teachers sufficient flexibility to customize the materials in the book to fit their teaching styles, the demands of their courses, and the needs of their students.

At the time Professor Kales published his call for the next evolutionary step in the development of the casebook, the case method had been in widespread use for barely thirty-five years,[6] there were only sixty-one published casebooks in circulation,[7] and it would be at least another year before West Publishing company established a national casebook market with the launch of the American Casebook Series.[8] In the intervening century be-

1. A version of this essay was published in The Law Teacher (Fall 2011) at 26.
2. Albert Martin Kales, *The Next Step in the Evolution of the Casebook*, 2 Harv. L. Rev. 92 (1907).
3. *Id.*
4. Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. Legal Educ. 10 (2007).
5. *Id.*
6. Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 Vill. L. Rev. 517, 520–21 (1991).
7. Douglas W. Lind, *An Economic Analysis of Early Casebook Publishing*, 96 Law Libr. J. 95, 103–04 (2004).
8. *Id.* at 107.

tween Professor Kales' call for its evolution and Professor Bodie's warning of its extinction, the casebook has been in a near constant state of change. Indeed, a year after he first distributed the introductory bound collection of cases to his Harvard students, Langdell himself began to edit it, not only adding and expunging cases but also eventually including commentaries that had been absent in the very first iterations of the book.[9] It sometimes seems as though the casebook has been in a constant state of flux ever since.

Perhaps the reason law teachers seem to be endlessly tinkering with the format of the casebook is that, as a teaching tool, the casebook is not terribly well suited for the case method. Strictly understood, the case method rests on the idea that the goal of law teaching is not to impart legal knowledge but to introduce legal reasoning. As Professor Peggy Cooper Davis recently showed, while it has long been the accepted view that Langdell's case method is overly rigid and formalistic in its insistence that law is a science and that legal reasoning, when subjected to scientific methods, can lead to the right answers, there is, in fact, nothing in Langdell's published works, letters and other collected papers that supports the claim that he was concerned about imparting knowledge so that students arrived at the right answers.[10] Rather, the case method and its accompanying Socratic dialogue was first and foremost an attempt at "giving students the chance to learn in the way that psychologists increasingly say that both children and adults learn best: by working collaboratively and at the growing edge of their abilities — at times sharing and applying collaborators' knowledge and methods, at times gaining new knowledge and developing new methods."[11] The problem is that a relatively short time after the case method was widely adopted, casebook authors increasingly began to organize and format their volumes to achieve maximum coverage of particular legal subjects.[12] That transformation of the casebook into a tool for coverage was based on a failure to recognize that, in Langdell's view, "science or not, law poses hard questions that can't be, or at least haven't been, resolved with certainty." As such, "the notion that the courses offered should include everything a student need know, that he need consider or will consider that is not gone over in class, is a mistaken one."[13]

Of all the non-core upper-level law school courses, perhaps none is as prone to the mistaken notion that "courses should include everything students need to know," and none is as ill-equipped to keep that dubious promise than the typical civil rights course. I speak from personal experience, being both the supervising attorney for the Civil Rights Clinic at Howard University School of Law and a professor of several upper-level civil rights and constitutional law seminars.

So, it is particularly heartening to now have a casebook from Professor Sarah Ricks and her collaborator Professor Evelyn Tenenbaum that offers a vision of civil rights litigation teaching, not as a survey of the body of constitutional provisions, judicial decisions, legislative enactments, and regulatory regimes that make up federal civil rights law, but as a meditation on whether and how Congress, the courts, and American society have kept or broken faith with the constitutional ideal of respect for human rights and equality. Using mostly– though not exclusively — prison and police litigation, focusing on selected legislation, cases, briefs, and social developments, and relying on a set of interlocking questions and problems for discussion, Professor Ricks demonstrates that, particularly when

9. Steve Shepard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 Iowa L. Rev. 547, 600–01 (1997).
10. Peggy Cooper Davis, *Desegregating Legal Education*, 26 Ga. St. L. Rev. 1271, 1281 (2010).
11. *Id.* at 1289
12. *See generally*, Shepard, *Casebooks, Commentaries*, 82 Iowa L. Rev. 547.
13. Roscoe Pound, *Book Review*, 4 Ill. L. Rev.150 (1909).

it comes to civil rights litigation, "law professors should worry less about details and ramifications, and should concentrate more on method, technique, vocabulary, approach, arts, and the other things that go to make up a lawyer who will be adequately qualified to dig into problems,—for the most part, problems the details of which we could not possibly teach him now no matter how hard we tried."[14]

Professor Ricks' decision to use civil rights law to teach the fundamental indeterminacy of legal reasoning and the intellectual versatility of legal practice is perhaps best demonstrated not just by the relatively small number of cases she has culled from the vast body of civil rights precedent, but by her decision to place federal district and circuit court rather than Supreme Court opinions at the center of her book. Indeed, it is no exaggeration to suggest that Supreme Court precedent is the least important feature of the book. This choice is made abundantly clear in the introductory chapter on § 1983, more than two-thirds of which Ricks devotes to a discussion of the social milieu of the Reconstruction Era, the rise of the Ku Klux Klan, and first-hand testimony of victims of Klan violence. Only after providing this background does Ricks make any mention of the Supreme Court's decision of *Monroe v. Pape*,[15] which is credited with reviving § 1983 as a viable civil rights tool after it had fallen into disuse following the Supreme Court's evisceration of the Reconstruction civil rights statues of 1866, 1870, 1871, and 1875.

Where one would normally expect a recapitulation of Supreme Court precedent, Professor Ricks offers attorneys' interviews and briefs as a way of making evident the indispensible role advocates play in the development of civil rights law. The relegation of the Supreme Court as a distant overseer is, like so many decisions in this beautifully written book, an attempt to take back the casebook to its true origins: as a tool to teach not knowledge but reasoning, not details but techniques, not doctrine but method.

Of course, Professor Ricks' casebook is not the first or the only one to supplement cases with historical materials, scholarly discussions, workbook problems, or even practice documents. Many, if not most, casebooks nowadays do the same thing in one fashion or another. However, in many casebooks, these supplemental materials are yet another means of increasing coverage of the substantive doctrinal law students need to know—the idea being that, to fully cover, say, federal employment discrimination law, it is necessary for students to know the historical circumstances of the passage of Title VII of Civil Rights Act of 1964. What makes Professor Ricks' casebook different in an important respect is that the historical and practice materials are not there to supplement coverage of doctrine but to provide a structure for students to address "the complex and contradictory interplay of a formalistic deference to authority and an indeterminacy that allows the law to respond to notions of justice and efficiency."[16]

My years of serving both as a civil rights clinician and a doctrinal professor of constitutional law have taught me that the most difficult issues students encounter are almost never about doctrine. Rather, far more challenging are questions such as: How do you choose between advancing a new theory of a claim, knowing you will likely face a skeptical, if not hostile, judicial audience, or rehearsing the more conventional argument that does nothing to advance the law? How do you rhetorically frame your case in a way that the court is predisposed to understand, accept and respect, while at the same time telling a story that rings true to a client who spent years trying to just get someone to listen? Why, if we

14. Erwin Griswold, *Some Thoughts About Legal Education Today*, in Frontiers in Law and Legal Education 77 (1961).

15. 365 U.S. 167 (1961).

16. Davis, *Desegregating Legal Education*, 26 Ga. St. L. Rev. at 1289.

are being honest, do so many pro bono civil rights litigants seem at first (or even second) blush a little mentally disturbed? Did the psychological pressure of spending years fighting a losing battle against social forces bent on destroying them eventually extract a psychic cost now made manifest through their unshakable conviction that their pro bono attorney is secretly conspiring against them? Or is the fact that they took on the fight in the first place itself evidence of a less than fully developed sense of self-preservation because most of us supposedly rational folks would not be so quick to tilt at the windmills of the system by, say, trying, as did James Meredith, to singlehandedly racially integrate the University of Mississippi? Or is it really us advocates, ever the products of the legal status quo even while challenging it, who are afflicted with a skewed perspective for being too quick to reduce every question of justice and fairness into a legal issue?

No Supreme Court case I am aware of holds the answer to these questions. But, without explicitly framing her book as a historical and cultural critique of American civil rights law, Professor Ricks has, in fact, offered a trenchant account of how civil rights law is a catalogue of public morality and a registry of social consciousness; how any civil rights doctrine, whether significant or minor, whether honored or abused, reveals something about the people who adopted it and the ideas they profess to hold dear; and how civil rights litigation is not merely (or indeed mainly) a contest over the technical requirements of judicial, legislative and administrative rules but a reflection of American society's ideas of justice, fairness, power, equality and democracy.

But above all this: Professor Ricks has managed to accomplish in this textbook, with prose at once clearheaded and lyrical, in a format at once straightforward and complex, and with materials at once conventional and unexpected, the difficult and seemingly contradictory task of pointing the way to the future of the casebook while at the same time proving herself a true intellectual heir to Langdell's original vision of the case method.

Aderson Bellegarde François
Professor of Law and Supervising Attorney
Howard University School of Law Civil Rights Clinic
Washington, DC January 2015

Foreword to Second Edition by Michael P. O'Connor

Current Issues in Constitutional Litigation: A Context and Practice Casebook is far and away the best book available today to teach, and for your students to learn, constitutional litigation. Before using this text, I had used several other books to teach civil rights litigation courses. None of the other texts compared favorably with that produced by Ricks and Tenenbaum. The cases are well chosen and go beyond the standard Supreme Court offerings, providing students with examples of how the law is interpreted and developed by litigators in the lower courts.

But the additional materials are what make this text stand apart as a "Context and Practice Casebook." The law practice simulations allow students to access this material in a manner that bridges the divide between doctrinal and clinical education, while the supplemental materials permit professors to engage students with various learning modalities.

No book I have used has been so uniformly praised by my students (100% favorable ratings). The interviews, background reports and excerpts of briefs allow students to grasp the critical development of both the law and the litigation strategies used by practitioners to shape the law in the trenches.

Current Issues in Constitutional Litigation engages students across the spectrum, from those taking the class because it fits their schedules to those who intend to pursue careers in civil rights litigation. It is that rare casebook that can help you make a difference in your students' career choices and, ultimately, their lives. It helps you to bring alive the stories of the people behind these cases, both the litigants and the litigators. By making the litigation real and accessible, students embrace it. Through that embrace, the next generation of civil rights litigators is born, and the struggle to safeguard and expand constitutional protections continues.

Michael P. O'Connor
Visiting Assistant Professor of Law
University of La Verne College of Law
January 2015

Foreword to First Edition by David Rudovsky

This new casebook admirably fills a significant need in the teaching of the complex and dynamic issues in the area of constitutional litigation. For many years, law teachers of this increasingly important topic have either had to generate their own materials or choose among some few standard case books. Now, Professor Ricks has authored a new and quite different casebook that provides far more than the usual cases, comments and questions.

Professor Ricks approaches the constitutional and statutory materials from several perspectives: doctrinal development, legislative responses, litigation decisions, and practical considerations that inform the litigation and decision making in this area. Included in each substantive chapter are the social and political contexts of the constitutional issues, leading Supreme Court and Circuit Court opinions, excerpts from oral arguments on major cases in the Supreme Court, legislative initiatives, expert reports, jury instructions, representative pleadings, and even interviews with leading civil rights litigators. Students are provided with the full range of materials from the files of litigators to the decisions by the courts.

As an example, the chapter on prisoner rights litigation includes the leading cases and the development of controlling doctrine, but also provides a rich mix of materials from litigation files, investigative reports from public interest organizations, and legislative hearings that bear on the major issues. Professor Ricks also provides thoughtful questions and innovative simulations that will encourage students to think through these problems from the perspectives of the lawyers, inmates, prison officials, judges, and legislators.

The world of constitutional litigation is far broader than case law. Professor Ricks has captured the multi-dimensional aspects of this field of law and has produced a casebook that will greatly enhance teaching, learning and practice of constitutional litigation.

David Rudovsky
Kairys, Rudovsky, Messing & Feinberg
University of Pennsylvania Law School
Philadelphia, Pennsylvania
August 2010

Foreword to First Edition by Karen Blum

For years I've been putting together my own materials to teach a course on Police Misconduct Litigation. The course takes a practical approach and gets the students involved in working on real cases with attorneys, from both the plaintiffs' and defense bar, who are experienced in the area of section 1983 litigation. There has been no casebook that provides students with the opportunity to see how all the facets of a case come together.

Sarah Ricks has created an incredibly useful, contextually-based casebook that tells the story of constitutional litigation from many different perspectives. Students go behind the scenes and come to understand litigation from reading not only case law, but from examining briefs, oral arguments, pleadings, and expert opinions.

Chapter Six explores Fourth Amendment standards and police misconduct. The Chapter begins with facts and statistics about a police officer's job, the typical job requirements, salaries, and training. This is important information for students to have when they are reading cases that evaluate the reasonableness of a police officer's conduct. Following the key cases of *Tennessee v. Garner* and *Graham v. Connor*, the Chapter includes sample jury instructions and verdict forms for excessive force cases. An excessive force "dog-bite" case is followed from complaint to verdict, giving the students insight into how multiple claims and defendants may be reduced as the case proceeds, with the ultimate disposition of the case turning on a single issue in a single claim with respect to a single officer. Students are invited to think about the time and expense of litigation and the economic pressures to reject a settlement that would not compensate for the investment of time expended by plaintiff's counsel. The coverage of *Scott v. Harris* includes excerpts from the oral argument and an amicus brief submitted by the National Police Accountability Project. A post-*Scott* Circuit decision provides a window for exploration of how *Scott* is being applied and whether it establishes a "*per se*" rule for the use of deadly force in cases involving motor vehicle chases.

For professors and students who want more from legal education than the unadorned case-method approach can provide, Professor Ricks has compiled a set of materials that brings the case law to life. Teaching and learning about constitutional litigation will be a much richer experience thanks to her efforts.

Karen M. Blum
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Boston, Massachusetts
August 2010

Series Editor's Preface

Welcome to a new type of casebook. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is mhschwartz@ualr.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Michael Hunter Schwartz, Series Designer and Editor
Consultant, Institute for Law Teaching and Learning
Dean and Professor of Law, William H. Bowen School of Law,
University of Arkansas at Little Rock

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