

## NOTE

# LANGDELL AND THE LEVIATHAN: IMPROVING THE FIRST-YEAR LAW SCHOOL CURRICULUM BY INCORPORATING *MOBY-DICK*

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*“And thus there seems a reason in all things, even in law.”*

*“For small erections may be finished by their first architects; grand ones, true ones, ever leave the copestone to posterity . . . . [t]his whole book is but a draught—nay, but the draught of a draught.”*

Herman Melville, *Moby-Dick*

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## INTRODUCTION

Early in Herman Melville’s *Moby-Dick*,<sup>1</sup> key character Queequeg tells a story about adjusting to an unfamiliar environment. In the story, Queequeg recounts an incident that took place during one of his first whaling voyages. As a native of the fictional island of Kokovoko, a land apparently quite remote from “civilization,” Queequeg had never before seen a wheelbarrow. When his ship docked at Sag Harbor, the owners of the ship “lent him [a wheelbarrow] in which to carry his heavy chest to his boarding house.”<sup>2</sup> Not wanting to appear ignorant by asking how to use this unfamiliar tool, Queequeg proceeded to lash the wheelbarrow to his chest and awkwardly carry his load to the boarding house. Queequeg has much in common with first-year law students.

First-year law students also try to navigate their way through a new civilization, fully aware of the awkwardness of their situation but trying not to appear overwhelmed and out of place. Of course, there is a very good reason why first-year law students, the 1Ls, feel out of place. As students begin their law school career, they often have very little experience with either the study or the practice of law. From the perspective of many of these 1Ls, law schools compound the awkwardness of the situation by asking them to negotiate this unfamiliar academic environment using a tool they have never used before: the casebook.

<sup>1</sup> HERMAN MELVILLE, *MOBY-DICK* (Hershel Parker & Harrison Hayford eds., Norton Critical Edition 2d ed. 2002) (1967).

<sup>2</sup> *Id.* at 61.

Law schools do seem to make some effort to ease the transition into the first year by instructing new students about what to look for when reading casebooks (to extend the metaphor, they teach students how to use the wheelbarrow). But too often law schools fail to ask why 1L classes rely almost exclusively on the casebook method (is the wheelbarrow the only appropriate tool?).

Most new law students find very few connections between their prior learning and their experiences in the law school classroom.<sup>3</sup> I remember making one of these rare connections on the second day of my second-semester first-year property law class. I had come to law school after spending a number of years as a high school English teacher.<sup>4</sup> So, early on in my property class, when my casebook mentioned *Moby-Dick* in reference to the rule of capture, I felt like I was back in my comfort zone, back on my island of Kokovoko for the first time in several months.<sup>5</sup> This familiarity led me to engage the material to a greater degree than I had engaged any of my previous assignments.<sup>6</sup>

This Note argues that law schools would produce more engaged, productive students (and consequently more competent attorneys) if they made a more concerted effort to help students make a greater number of these connections and if they helped first-year students to use the analytical tools they have developed during their prior education and their previous life experience. Casebooks, used appropriately by skilled professors, do one thing very well: they teach students the “foreign language” of the judicial opinion; with the guidance of a skilled professor, 1Ls learn the important skill of legal analysis.<sup>7</sup> But by incorporating additional material, such as literature, into the 1L classroom, professors could help students more fully engage the material in the casebook and thereby help students more readily and more

<sup>3</sup> Cf. LAW AND THE LIBERAL ARTS, XXI–XXII (Albert Broderick ed. 1967) (noting the rift between law schools and the rest of academia).

<sup>4</sup> Incidentally, *Moby-Dick*'s narrator Ishmael suggests that he had a similar career before he began whaling. See MELVILLE, *supra* note 1, at 20 (describing how being ordered about “touche[d] [his] “sense of honor” when “just previous to putting your hand into the tar-pot you have been lording it as a country schoolmaster, making the tallest boys stand in awe of you . . .”).

<sup>5</sup> See JESSE DUKEMINIER ET AL., PROPERTY 26 (6th ed. 2006) (describing the rule of capture as presented in the *Moby-Dick* chapter “Fast-Fish and Loose-Fish”).

<sup>6</sup> Though purely anecdotal, the story runs: After I read *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881), an early property case involving the role of custom in the rule of capture, I e-mailed my professor telling her about the link between the case and the novel *Moby-Dick*. I was so impatient and excited about the connection that I sent the e-mail even before I had a chance to read the casebook authors’ notes at the end of the case. As it turned out, one of the notes made the same connection I had. Professor Laura Underkuffler called on me the very next day. It was the most prepared I had been for a “cold call” all year.

<sup>7</sup> See, e.g., THE LAW SCHOOL EXPERIENCE: LAW, LEGAL REASONING, AND LAWYERING 9–11 (Lissa Griffin & Bennett L. Gershman eds. 2000) (presenting a fictional conversation between new and returning law students regarding the case method).

completely develop their legal analysis skills. In addition, professors, with very little additional effort, could use literature to help students develop other skills essential to legal practice.

This Note proposes that professors could improve introductory classes by using literature. The Note uses the example of *Moby-Dick* to demonstrate how a novel can complement the case method in a typical first-year law school course. Using the example of an introductory property course, the Note proposes that using literature to complement the case method would help students gain a more complete understanding of a typical first-year law school course and would better prepare them for the practice of law. Part I explores some of the strengths and weaknesses of the case method. Part II establishes Herman Melville's *Moby-Dick* as an appropriate legal text. Part III demonstrates how a property law professor may use *Moby-Dick* to help first-year students more fully engage in complex legal analysis of seminal texts and cases. Part IV builds upon the analysis in Part III, demonstrating specific ways in which professors can improve 1L property classes by teaching students to read legal texts more creatively. A brief conclusion follows Part IV.

## I

### STRENGTHS AND WEAKNESSES OF THE CASE METHOD

#### A. History

In many ways, the last true revolution in legal pedagogy began in 1870 when Christopher Columbus Langdell arrived at Harvard Law School.<sup>8</sup> Langdell's educational reforms, implemented during his tenure as Dean at Harvard Law, imposed order on a system of American legal education which had previously been "characterized by diverse approaches to learning law."<sup>9</sup> Langdell made many lasting contributions to American legal pedagogy, perhaps chief among them popularizing the case method of studying law. Before Langdell, the dominant method of studying law had been the lecture and textbook method.<sup>10</sup>

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<sup>8</sup> See Kara Abramson, "Art for a Better Life: A New Image of American Legal Education, 2006 BYU EDUC. & L.J. 227, 229.

<sup>9</sup> See *id.* at 229-31. In this brief passage, Abramson discusses, for example, Thomas Jefferson's vision for "a rigorous approach to legal learning that included the study of history and poetry." *Id.* at 229.

<sup>10</sup> See JACOB HENRY LANDMAN, *THE CASE METHOD OF STUDYING LAW: A CRITIQUE* 18 (1930). Landman describes the textbook method as follows: "The student would familiarize himself with the principles of law included in the assignment. The teacher would quiz the student on its content for a part of the succeeding period and then explain, illustrate, and present problems to the class. This method of instruction imparts the law to the student dogmatically as a system of unified, logically arranged principles of unalterable law." *Id.* at 18-19.

The case method is a method of studying law whereby students read a series of related judicial decisions on a certain topic of law. Usually, after students read the series of cases, the professor asks students questions about the cases or otherwise attempts to elicit responses from the class. The professor acts as a guide, helping students distill the rules of law, distinguish facts in seemingly contradictory cases, and, as the saying goes, “think like lawyers.”<sup>11</sup> Though classroom presentation varies from professor to professor, most law school courses (most first-year courses in particular) rely on the case method to a large degree.<sup>12</sup> Though using cases as a part of legal pedagogy has a long history, Langdell was the first to “expect[ ] students to prepare for law lectures [by] relying exclusively on readings of judicial cases.”<sup>13</sup>

Langdell premised his positivist approach to legal studies on the idea that law is a science and that students should approach law as a science, uncovering rules of law by using inductive reasoning.<sup>14</sup> One of the main benefits of the case method over the textbook method is that, as the common law continues to develop, newer cases often eclipse or modify the rules of law that students glean from textbooks.<sup>15</sup> Early proponents of the case method argued that the method had at least two benefits: First, a student is more likely to remember a certain rule of law if that student associates the rule with a landmark case. Second, the case method involves the student in active legal reasoning, as “[t]he study of the cases obtains a kind of practicality for the student which makes him independent, investigative and self-reliant.”<sup>16</sup> Supporters of the case method would argue that the skills the case method teaches continue to serve the lawyer as the law evolves and legal rules change. The case method teaches a way of thinking more than it teaches a body of legal rules.

Though Langdell’s methods were never without their critics,<sup>17</sup> his vision for legal education won favor across the country and became

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<sup>11</sup> See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 75* (2007) (calling the case-dialogue method the “[s]ignature [p]edagogy” in today’s American law schools).

<sup>12</sup> See Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 593 (1997).

<sup>13</sup> *Id.* at 596 (emphasis omitted).

<sup>14</sup> See LANDMAN, *supra* note 10, at 14.

<sup>15</sup> See *id.* at 19 (“The common law principles and postulates of law were eclipsed by the actual legal decisions. The ‘case’ now governed the Law whether it did or did not comply with the time-honored legal principles.”).

<sup>16</sup> *Id.* at 25–26.

<sup>17</sup> See ABRAMSON, *supra* note 8, at 232 (“Not all law schools embraced the Langdellian method. Some local law schools continued to gear their instruction to passing the state bar, and other law schools, like Columbia and the University of Virginia, voiced concern over the Langdellian method as it gained prominence.” (footnote omitted)).

the “prevailing norm in American legal education” in short order.<sup>18</sup> Though in subsequent years many have attacked Langdell’s vision of law as a stand-alone science,<sup>19</sup> the casebook, accompanied by the so-called Socratic dialogue, continue to be the dominant modes of pedagogy in the American law school, particularly in 1L classes.<sup>20</sup>

## B. What the Case Method Does Well

The survival of the case method in the American legal classroom, especially for 1L classes such as property, is a testament to its effectiveness.<sup>21</sup> As a professional school, one of the primary aims of any law school is to produce effective lawyers who can advise and advocate for their clients. The case method accomplishes this in three interrelated ways: first, the case method teaches students a new language, the language of judicial decision making; second, the case method demonstrates how judges apply abstract laws to real-life conflicts; and third, the case method is a compelling pedagogical tool that helps students retain and apply knowledge.

### 1. *The Case Method Helps Students Learn the Language of Judicial Decision Making*

Like Queequeg in the example in the Introduction to this Note, beginning law students are foreigners in a new world filled with sights and sounds they have never before experienced. First-semester law students reading their first property law case must navigate a world of language likely quite different from the types of language they encountered in their earlier educational endeavors. Even the most heavily edited case contains an incredible number of details, many of which will be relevant to the judicial decision and many which will not.

The case method, particularly when combined with Socratic discussion, teaches law students how to analyze cases, making sense of judicial decisions by breaking them down into their “component parts.”<sup>22</sup> Law students will later use these skills in advising clients, pre-

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<sup>18</sup> *Id.* Among Langdell’s other innovations were the pairing of the case method with the so-called Socratic method of teaching and increasing the length of legal studies from two to three years. *Id.* at 230–32.

<sup>19</sup> See *infra* Part I.C.

<sup>20</sup> See SULLIVAN ET AL., *supra* note 11, at 50–51.

<sup>21</sup> *But cf.* PHILIP C. KISSAM, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* 49 (2003) (“Law faculty are less likely to resist the case method. They have been successful at this method, first as excellent law students and then as teachers.”); Russell L. Weaver, *Langdell’s Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 544 (1991) (suggesting several reasons for the continued use of the case method, including the fact that many professors themselves thrived under it).

<sup>22</sup> See Weaver, *supra* note 21, at 549.

paring arguments for trial, or drafting documents that will meet the relevant legal standard.

## 2. *The Case Method Helps Students Learn to Argue by Analogy*

The case method also teaches students how to argue by analogy. This is often what professors mean when they say that law school teaches students to “think like lawyers.”<sup>23</sup> When a lawyer listens to a client’s story or reads a series of documents acquired during the discovery process, the lawyer must focus on the details that are most relevant to the case; further, the lawyer must analogize the facts of the case at hand to precedential cases. In the words of one of Langdell’s earliest followers, the lawyer must “be able to discriminate between the relevant and irrelevant facts of a case, to draw just distinctions between things apparently similar, and to discover true analogies between things apparently dissimilar.”<sup>24</sup>

By providing law students with a series of interrelated cases, the case method challenges students to discriminate between subtle differences in the facts, particularly those facts that will be relevant to a court’s decision. A student in a property class will be able to analogize the rule of capture in *Ghen v. Rich*,<sup>25</sup> a whaling case, to a related situation in which it was a time-honored custom for game hunters to respect the claims of those who catch wildlife in well-marked traps. The student would be less likely to apply the rule in *Ghen* to a similar circumstance in which there was no such custom to honor other game hunters’ claims. This is because the *Ghen* court found custom a dispositive factor in deciding the case.<sup>26</sup>

Instead of merely reading different laws about the rule of capture, which may vary from jurisdiction to jurisdiction, the case method teaches students how to search for the law in any particular jurisdiction by teaching students to hunt for the relevant aspects of cases. This process helps students learn how to pinpoint subtle differences in case law. This ability to discriminate will prove helpful in the lawyer’s role as advisor, as she will be better able to help clients understand how a particular court is likely to decide a potential case. A careful case-method professor will help students distinguish between facts in a line of cases that will be dispositive to the result, facts that may prove persuasive, and facts unlikely to influence the court’s decision.

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<sup>23</sup> See *id.* at 549, 551–52.

<sup>24</sup> *Id.* at 551 (quoting JAMES BARR AMES, LECTURES ON LEGAL HISTORY 364 (1913)).

<sup>25</sup> 8 F. 159 (D. Mass. 1881).

<sup>26</sup> See *id.* at 161–62.

### 3. *The Case Method Helps Students Learn Because It Is Concrete and Interesting*

Another argument supporting the case method is that since cases involve real people with real problems, the case method is likely to provoke student interest and thus engage them more fully in the learning process.<sup>27</sup> Rather than coming to class merely prepared to parrot a rule of law, students who study under the case method are likely to have some opinion as to whether the rule serves a policy function, whether the rule serves the interest of justice, etc. This is because the student who studies under the case method associates a particular rule of law with an actual controversy.

Moreover, because the facts of the case are often one of the more detailed and compelling aspects of the case, professors can challenge students to explore the limits of a particular law by manipulating or exaggerating the facts via hypothetical questions.<sup>28</sup> The process thereby makes it more likely that students will remember a particular rule, and perhaps more importantly, makes it more likely that a student will understand something of how courts apply a rule, the limits of its application, and the policy reasons that inform the rule.

### C. Criticism of the Case Method

Though Langdell's case method has dominated legal pedagogy for over one hundred years, it has seldom been without its critics.<sup>29</sup> Criticism persists until this day and has led many professors away from the "pure" case method originally espoused by Langdell.<sup>30</sup> Some of the more salient criticisms are first, that the case method tends to overshadow other forms of reading that may be "more complicated, more reflective, more critical and more imaginative,"<sup>31</sup> and second, that the case method presents confusing contradictory decisions that lead students to value objectivity and clarity over justice, and the rule of law over humanity.<sup>32</sup>

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<sup>27</sup> Weaver, *supra* note 21, at 547.

<sup>28</sup> *Id.* at 548.

<sup>29</sup> In fact, many of Langdell's original students left Harvard in response to Langdell's unorthodox methods. See LANDMAN, *supra* note 10, at 20; see also Sheppard, *supra* note 12, at 608 ("The case method immediately roused attention from other universities, although most of it was truly hostile. In 1872 Boston University opened a new law school under the direction of Harvard expatriate Nicholas St. John Green, as a refuge from the 'particularly technical and historical' instruction across the river.").

<sup>30</sup> See, e.g., KISSAM, *supra* note 21, at 38 (describing evolution away from the pure case method); James M. Fischer, *Teaching Remedies Versus Learning Remedies*, 39 BRANDEIS L.J. 575, 582-83 (2001) (discussing some of the advantages of using the "problem method" in order to compensate for some of the weaknesses in the case method).

<sup>31</sup> See KISSAM, *supra* note 21, at 7.

<sup>32</sup> See *id.* at 6-7.



The legal academy should not take these criticisms lightly. Though the case method teaches a particular way of thinking that is useful to lawyers, exclusive reliance on casebooks may teach one way of thinking at the expense of developing other ways of thinking and other modes of expression that are equally important in legal practice. Some scholars find the criticisms of the case method so compelling that they propose a complete overhaul of the first-year law school curriculum.<sup>33</sup> Such an overhaul is neither desirable nor likely to occur. Incorporating the study of literature into 1L classes, however, can help to invigorate and supplement the current first-year curriculum without threatening the many enduring positive attributes of traditional case-method learning.

### 1. *The Case Method Circumscribes Student Reading*

In *The Discipline of Law Schools*, Philip C. Kissam argues that the “oral culture and the instrumentalist reading and writing habits of law schools tend to subordinate more complicated, more reflective, more critical and more imaginative ways of reading, writing and thinking about law.”<sup>34</sup>

A simple example may help to illustrate Kissam’s idea. Recall the case of *Ghen v. Rich*, which dealt with a dispute over the ownership of a finback whale.<sup>35</sup> The court held that the whaler who shot the whale with a bomb lance was the whale’s rightful owner, rather than the person who found the whale washed up on the shore and sold it at market. The court based its reasoning on the local custom that a whale belonged to the person who originally harpooned it and that the person who found the whale should receive only a finder’s fee.<sup>36</sup>

Discussion of this case in a typical 1L property class is likely to be limited. A professor will likely ask students the usual questions about the facts and the holding of the case. He may ask about how the opinion compares to the opposing viewpoint and about which side has the better reasoning. A professor is much less likely, however, to ask whether the court made the right decision (or the just decision), about the strength of the plaintiff’s claim versus the defendant’s

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<sup>33</sup> See, e.g., Abramson, *supra* note 8, at 228–29 (describing the author’s vision for a law school curriculum in which courses are split into three parts, learning law through the “medium of liberal learning,” discussing the law in its “American context,” and finally exploring law through “practice skills”).

<sup>34</sup> KISSAM, *supra* note 21, at 7.

<sup>35</sup> See 8 F. 159, 159 (D. Mass. 1881).

<sup>36</sup> *Id.* at 160–62.

claim, whether courts should treat custom as law, or why judges should or should not treat custom as law.<sup>37</sup>

Though the first set of questions is certainly important to help the law student understand how to read a judicial opinion, how to analogize the decision to a present case, and how to predict how a court may decide a future case, the second set of questions is equally—or possibly more—important for helping the future attorney argue for a just application of the law or advise clients with a compelling, but perhaps losing, case. The case method largely limits class discussion to only the first set of issues.

The case method is limited because the information in judicial opinions is two steps removed from the actual events that began the dispute. For example, consider the facts of *Ghen*: In late July 1880, Ellis found a whale on the beach. Thinking he had a windfall, he sold the whale to Rich, who shipped off the blubber to be processed. When Ghen, who originally shot the whale with a specially marked lance, discovered that Ellis sold the whale, he sued Rich to recover the profits from the sale. Plaintiff and defendant each thought he had the law on his side, and each told his story to the court. The trial court found for Rich, and Ghen appealed. The appellate court vindicated Ghen's claim and his proposition that the custom of whalers should be the law.<sup>38</sup> Reading an opinion removed from the actual events, casebook readers do not hear Ellis's story, Ghen's story, or Rich's story; they do not hear these parties' emotion or their reasoning; they do not even read their testimony at trial.

The problem with a pure application of the case method is that it overlooks the subjective nature of legal argumentation. In practice lawyers have access to precedential cases, but they reason not from case to case, but from story to case. *Ghen* represents a rule. But Ghen and Rich were real people with a real dispute, and the court in effect broke, or at least extended, a rule to do justice in that dispute. This deviation likely happened because a lawyer heard what was compelling in Ghen's story and argued persuasively for a just result. Law schools can teach students not just what the law is, but also how to make the law work to effectuate a just result. Law schools can also better prepare their students by directing the student's attention to the human story of *Ghen* that the casebook does not tell.

The casebook culture of American law schools encourages hunting for the law and applying the law to the facts in a way that often

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<sup>37</sup> Cf. Daphna Hacker, *Law and Society Jurisprudence*, 96 CORNELL L. REV. 727, 734–40 (2011) (discussing an Israeli legal academy much more willing than its American counterpart to question “what the law should be”).

<sup>38</sup> See *Ghen*, 8 F. at 159–62.

ignores the human struggle that underlies the judicial decision.<sup>39</sup> Even if one were to grant that the *primary* job of the lawyer is to relate the law to a particular set of facts, it remains true that the case method tends to deemphasize the role that humanity plays in other important aspects of lawyering, for example, communicating with, and arguing on behalf of, clients. Though the case method teaches a particular way of thinking that is useful to lawyers, exclusive reliance on casebooks may teach one way of thinking at the expense of developing other ways of thinking and modes of expression that are equally beneficial for lawyers.

## 2. *The Case Method Leads Students to Prefer Clarity over Justice*

Kissam points out another problem with the case method by noting the preponderance of confusing and seemingly contradictory cases that leave students with the idea that “there is no law” and that accordingly lead students to value the objective over the subjective.<sup>40</sup>

Langdell premised his methodology on the positivist notion that law is a science (thus, objective) and that students should study law as such.<sup>41</sup> He therefore chose for his casebooks cases that *got the law right*.<sup>42</sup> Though scholars have largely discredited the idea of law as science,<sup>43</sup> the case method still tends to lead students to hunt for rules and to discount or ignore cases that seem to stray from those rules.<sup>44</sup> However, it is precisely these cases that can show the limits of the law and the weaknesses of a particular rule. It is only by focusing on the subjective aspects of the law, the human side of a case, that law students will truly learn this important aspect of lawyering.

The case method can lead law students to become frustrated with cases that seem to come out wrong, that is, cases in which judges seem to break rules and misapply laws. The Langdellian law-as-science model feeds this frustration because of its search for clarity over justice and for predictability over personality. If law students were to approach cases from a more holistic perspective, however, they would

<sup>39</sup> See KISSAM, *supra* note 21, at 8–9.

<sup>40</sup> *Id.* at 7–9.

<sup>41</sup> See Abramson, *supra* note 8, at 231.

<sup>42</sup> See *id.* at 230 (“Not all legal decisions were fair game in his pedagogic vision, however. Instead, he selected only a few designed to reveal a body of doctrine or illustrate mistaken deviations from the rules.”); *cf.* LANDMAN, *supra* note 10, at 65 (“Most cases are selected by case-book editors because of the correctness and soundness of the tribunal’s opinion.”).

<sup>43</sup> See Abramson, *supra* note 8, at 234 (“Langdell’s justification for using the [case] method . . . has long since been repudiated. The case method’s dominance has been achieved notwithstanding much criticism, which continues even today.” (alteration in original) (quoting Weaver, *supra* note 21, at 545–46)).

<sup>44</sup> *Cf.* KISSAM, *supra* note 21, at 33 (discussing students turning to “treatises, student hornbooks and ‘commercial outlines’” to supplement their casebook reading).

better understand how the law often allows judges flexibility to do justice in a particular case—as in *Ghen v. Rich*.<sup>45</sup>

When I was a high school literature teacher, I had a colleague who told students to “read as a believer.”<sup>46</sup> What he meant by this was that students should hold their cynicism in abeyance when reading a piece of literature in order to look for things that an author does well. It seems that before they come to law school, students want to read cases as believers, thinking that the courts are there to do justice. The traditional case method tends to take students away from this mindset, teaching them that the courts are there to apply rules of law to particular sets of facts. As experienced by a student reading an appellate decision, these facts are often dry, abstracted, and decontextualized.

A better approach would challenge students to not only analyze whether a rule is “rightly applied,” but also to read a case as a believer and ask: If a court seems to apply a rule incorrectly, why did that particular court decide to ignore the rule, or what in the particular facts of a case made the rule unjust or unworkable? Such questions are difficult to ask within the context of the current case method.

#### D. Casebooks in Context

Though this Note takes the position that the advantages of the case method outweigh the criticisms, this Note further argues that some of the advantages of the case method can be enhanced, and some of the criticisms ameliorated, by incorporating literature into the 1L classroom. By highlighting the humanity behind conflicts and using a type of writing with which students are likely more familiar than the judicial opinion, literature can help students explore judicial decisions and the law in a more nuanced way. In addition, literature can help students better see multiple sides of conflicts; this will help them explain the law to clients more effectively and ultimately shape the law in a manner that serves justice.

## II

### *MOBY-DICK* AS A LEGAL TEXT

#### A. Law and Literature

Because of changing attitudes towards Langdell’s law-as-science model, few professors employ Langdell’s methods in the same way

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<sup>45</sup> See *supra* notes 35–39 and accompanying text. The downside to this more subjective approach to the law is the fear that that the law will become too unpredictable and that as the law becomes less objective and predictable, individuals will become less able to order their behavior to conform to the law.

<sup>46</sup> Ron King, a colleague of mine in the English department at St. Thomas Aquinas High School in Dover, New Hampshire, now teaches English and History at Seacoast Academy in North Hampton, New Hampshire.

Langdell envisioned in the late nineteenth century.<sup>47</sup> Likewise, subsequent casebook authors have adapted and expanded Landgell's stripped-down casebook which presented only appellate cases and the briefest of introductory material.<sup>48</sup> Today's casebooks often provide a several-page overview of each new concept, excerpts from law review articles, philosophical treatises, small capsule summaries of related cases, photographs relating to the cases, etc.<sup>49</sup>

The so-called "law and literature" movement represents one way in which legal scholars have branched out from purely case-centered analysis. James B. White's 1973 seminal law and literature book *The Legal Imagination* calls on students (and legal scholars) to explore, among other topics, legal issues presented in literary texts.<sup>50</sup> But today's law classrooms tend to confine literature to passing references in introductory casebooks or to elective courses.<sup>51</sup> Such limited use marginalizes law and literature and fails to grasp the potential that literature has to help law students, particularly 1Ls, understand the human side of law—an aspect of law likely to be crucial to their future law practice.

## B. *Moby-Dick* in the Law School Classroom

Law and literature can reach its potential for helping students to appreciate the subjective, human aspects of law only when it becomes an integral part of the 1L classroom. It is during the first year of law school that students develop the lens through which they will view all of the cases they will study in the future. This Note proposes that one way of helping students learn to consider and evaluate the human aspects of law is through sustained and continued exposure to Herman Melville's novel *Moby-Dick* in 1L property courses. Reading selected chapters of *Moby-Dick* and incorporating the novel into classroom discussion can yield great pedagogical returns on a minimal investment of professor and student time.

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<sup>47</sup> See Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28 (1996) (reporting results of a survey finding that 370 of 383 law professors used some version of the Socratic method in first-year courses).

<sup>48</sup> See, e.g., Abramson, *supra* note 8, at 233 (describing Karl Llewellyn's reformed casebook that "supplement[ed] legal decisions with other sources that informed the law").

<sup>49</sup> See, e.g., DUKEMINIER ET AL., *supra* note 5, at xi–xxiii. This table of contents gives some idea of the types of texts included in a modern casebook as well as the relative number of pages dedicated to each.

<sup>50</sup> See generally JAMES B. WHITE, *THE LEGAL IMAGINATION*, at xxi–xxiii (1973) (framing legal issues around a series of literary passages followed by questions and writing assignments related to legal topics).

<sup>51</sup> See, e.g., DUKEMINIER ET AL., *supra* note 5, at 26 (containing one such "passing reference").

### C. *Moby-Dick* as Law

Scholars consider Melville's posthumously published novella *Billy Budd: Sailor* to be "a seminal text of the law and literature movement."<sup>52</sup> *Billy Budd* addresses issues of injustice rather overtly. The title character, a young sailor, is impressed from a merchant vessel called the *Rights of Man* onto a warship named the *Bellipotent*, moving from an environment that respects civil liberties to one in which the honest and loyal Budd's freedom is subject to the whim of an envious master-at-arms who has the ear of a captain anxious for signs of mutiny.<sup>53</sup> Many scholars have viewed the unfairness of Budd's trial as an apt metaphor for an American legal system in which formalistic rules, rather than simple morality, sometimes hold sway.<sup>54</sup>

Though legal scholars have seemingly paid less attention to Melville's masterwork, *Moby-Dick*, the novel is perhaps even better suited to law school classroom discussion. *Moby-Dick* has two distinct advantages over *Billy Budd* for use in the law school classroom: it is familiar and it is flexible. Because *Moby-Dick* is part of the literary canon, even students who have not read *Moby-Dick* will likely be somewhat familiar with the novel's subject matter. In addition, the breadth of material covered in the novel makes it suitable for a variety of discussions.<sup>55</sup> Its digressive narrative structure makes it particularly amenable to single-chapter reading assignments because reading one chapter is not necessarily a prerequisite for understanding the next. A law professor can conceivably assign a legally focused three-page chapter as a manageable and highly relevant addition to a longer casebook reading assignment.

A law professor need not search long to find elements of *Moby-Dick* relevant to legal study. The novel incorporates both the form of legal argumentation and the subject matter of legal analysis. For example, Melville quite overtly mimics legal reasoning in the chapter "The Advocate," in which the narrator Ishmael argues that whaling is a respectable profession.<sup>56</sup> Similarly, in the chapter "Fast-Fish and Loose-Fish," Ishmael analogizes a dispute over the ownership of a whale to an English court proceeding involving adultery, arguing that

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<sup>52</sup> See, e.g., James McBride, *Revisiting a Seminal Text of the Law & Literature Movement: A Girardian Reading of Herman Melville's Billy Budd, Sailor*, 3 MARGINS 285 (2003).

<sup>53</sup> *Id.* at 286.

<sup>54</sup> See *id.* at 288.

<sup>55</sup> Professor Tamara R. Piety, for example, uses "Fast-Fish and Loose-Fish" as an exemplar of legal reasoning in her 1L Civil Procedure classes. See Tamara R. Piety, *Something Fishy: Why I Make My Students Read Fast-Fish and Loose-Fish*, 29 VT. L. REV. 33 (2004).

<sup>56</sup> Through this style of argumentation, Melville implicitly accords the legal profession the respect he desires for the profession of whaling. See MELVILLE, *supra* note 1, at 97-101.

all of law can be summarized in two simple rules observed by the whaling profession.<sup>57</sup>

#### D. *Moby-Dick* as Property Law

*Moby-Dick* is particularly well suited for discussion in a property class, specifically because of the novel's extensive treatment of property issues. And although property rights is perhaps one of the most contentious areas of law, casebooks can often do little more than present the issues in an abstracted, anesthetized manner. Because *Moby-Dick* dramatizes intensely human struggles over property, studying the novel in conjunction with the typical property casebook would help students appreciate the perspectives and the arguments of their future clients and would aid students in preparing to advocate for those future clients' interests.

Melville addresses property issues in *Moby-Dick* in a variety of contexts, including marriage, labor, and ownership. After their first night together, for example, Queequeg splits his money evenly with Ishmael because of his belief that they are "married."<sup>58</sup> And the first time that Queequeg and Ishmael set foot on the *Pequod*, Ishmael engages in haggling over how much he should be paid and then jumps into a lengthy discussion of how whalers are paid a percentage of the ship's profits.<sup>59</sup> Furthermore, the climax of the novel is in essence a dispute over who owns the surface of the sea. Though *Moby-Dick* and Ahab seem to be the major combatants, Ishmael winds up in possession. At the very least, he has received what may be termed an easement from *Moby-Dick* and from the sharks who "glided by as if with padlocks on their mouths."<sup>60</sup>

From the earliest pages of the novel until the final chapter, Melville weaves property issues into *Moby-Dick*. Because the reader associates property issues with the characters involved, law students who study portions of *Moby-Dick* in conjunction with their property casebooks are more likely to appreciate the human, subjective aspects of property disputes than students who approach property conflicts using a casebook alone. For example, students whose study includes the novel will be able to discuss more fully the significance of communal property in marriage, what it means to own a share in a business versus being a salaried employee, how property relates to self-image, and the relationship between landowners and tenants or the government and private landowners.

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<sup>57</sup> See MELVILLE, *supra* note 1, at 308 ("I. A Fast-Fish belongs to the party fast to it. II. A Loose-Fish is fair game for anybody who can soonest catch it.").

<sup>58</sup> *Id.* at 56.

<sup>59</sup> *Id.* at 75–76.

<sup>60</sup> See *id.* at 427.

## III

USING *MOBY-DICK* TO FOSTER MORE COMPLEX APPROACHES  
TO READING CASE LAW

Though the case method teaches students to navigate the language of appellate opinions, it may do so at the expense of teaching students to fully engage in legal analysis.<sup>61</sup> In particular, in a first-year property class, students are likely to glean technical rules and concepts from the early English cases and theoretical texts most often included in casebooks. The student may well believe the concepts to be archaic, extreme, and disconnected from modern property issues. Instead, by presenting selections from *Moby-Dick* together with the casebook material, a professor can help students analogize the perhaps more immediate and more highly developed conflicts among the novel's characters to the development of modern property laws.<sup>62</sup> The novel can help students see property laws at work; it can help them apply those rules to later cases by giving a sort of "life," often lacking in abstract appellate decisions, to a property conflict. Students are then more likely to understand the basic human struggles that underlie other property disputes that they will analyze throughout the course. This will help them understand—better than if they relied only on the traditional case method—why a court reached a certain decision in a particular case. This Part explores how selected excerpts from *Moby-Dick* lend intellectual resonance to two concepts that beginning law students may otherwise not fully engage: the fee simple absolute and Locke's labor theory.

A. The Fee Simple Absolute and *Pile v. Pedrick*

Most property casebooks present the concept of private ownership in the introductory portions of the text as both extreme and decontextualized. Blackstone's oft-cited definition of private property

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<sup>61</sup> See KISSAM, *supra* note 21, at 7.

<sup>62</sup> Here it may be useful to mention that using *Moby-Dick* is only one of many ways that a professor could supplement the case method. Modern casebooks almost always contain sections similar to the "Notes and Questions" sections contained in the Dukeminier text. See DUKEMINIER ET AL., *supra* note 5, at 45–50 (following early cases and authoritative texts on the rule of capture with hypothetical situations, questions, extensions, and references about how the rules regarding the acquisition of resources would be different under various property theories). Professor Abramson suggests incorporating more hands-on legal experiences into the law school curriculum. See Abramson, *supra* note 8, at 283–84. My own property professor, Laura Underkuffler, frequently linked leading cases with newspaper clippings exploring contemporary property law issues. Professors can help students engage the law in a variety of ways, and is likely to be more successful when they find a way of doing so that is within their own comfort level and area of expertise. One advantage of using literature in the law school classroom is that students have likely developed a lexicon for discussing literature during their high school and undergraduate courses. Students should be familiar with the process of applying the conflicts of fictional characters to other contexts.



is one example: “[property is] that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>63</sup> Similarly, most casebooks present the fee simple absolute, the most common estate in land, as giving the estate holder (owner) a great deal of power to control property: the fee simple absolute “cannot be divested nor will it end if any event happens in the future.”<sup>64</sup>

Additionally, early cases—often read in the beginning of a first-year property course—such as *Pile v. Pedrick*<sup>65</sup> demonstrate how courts may go to extreme, even harsh, lengths to preserve private property rights. The *Pile* court decided that a property owner had to move an entire structure because one wall inadvertently encroached on another property owner’s land by less than two inches. Moreover, the court held that the offending landowner could not trespass on the other’s land to take down the wall of the encroaching structure.<sup>66</sup>

Because of their focus on extreme cases such as *Pile*, first-year law students may view their casebooks as disconnected from the present state of the law. Casebooks tend to focus on what the law has been and on how the law has evolved but pay little attention to why the law is what it is today or what the law should be.<sup>67</sup> If a professor, however, incorporates a brief selection from *Moby-Dick* into an early exploration of private property and the fee simple absolute, students will be better able to understand why individual property rights are so important and why early legal thinkers and courts—such as that in *Pile*—went to such great lengths to protect those rights. More importantly, the students will likely begin to craft more sophisticated arguments as to why courts should (or how they reasonably could) take a more moderate view. They will be better able to anticipate why later courts mitigate the seeming harshness of *Pile* and other similar decisions. Ultimately, law students may be able to better understand and argue for the rights of their clients at an earlier stage of their career.

Melville’s three-page chapter “Fast-Fish and Loose-Fish” may be particularly useful in helping students understand the concept of the fee simple absolute as it relates to a property dispute.<sup>68</sup> The chapter presents the rules by which whalers determine who owns a particular whale. Melville describes that a boat or ship possesses a whale “when [the whale] is connected with an occupied ship or boat, by any me-

63 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

64 DUKEMINIER ET AL., *supra* note 5, at 206.

65 31 A. 646 (Pa. 1895).

66 *See id.* at 646–47.

67 *But cf.* Robin West, *A Reply to Pierre*, 97 GEO. L.J. 865, 868–69 (2009) (suggesting that legal scholarship can do more than mirror and report the law; it can actually be a thought leader affecting the course of the law).

68 *See* MELVILLE, *supra* note 1, at 307–10.

dium at all controllable by the occupant or occupants . . . [or] when it bears a waif[ ] or any other recognized symbol of possession.”<sup>69</sup>

This brief chapter perfectly complements cases like *Pile* because it identifies why the law (both the law of whaling and the more highly developed common law that first-year law students study) goes to such great lengths to protect property rights. Melville describes the injustice that the law of whaling attempts to remedy: “after a weary and perilous chase and capture of a whale, the [whale’s] body may get loose from the ship . . . and drifting far away to leeward, be retaken by a second whaler, who, in a calm, snugly tows it alongside without risk of life or line.”<sup>70</sup> Absent other considerations, then, the law in *Moby-Dick*, as well as in the cases in a property casebook, will protect the rights of those that have expended effort (either actually or constructively) in acquiring property.

By presenting these three pages to a property class, a professor gives a great deal of context to the early cases and scholarly writing and can, by asking a few simple questions, help students to understand the policy reasons for creating and maintaining absolute rules of private ownership. “Fast-Fish and Loose-Fish” teaches the law student that property law protects private property through clear, simple rules. These rules encourage industry by rewarding the party that creates wealth. A property professor may well ask regarding *Pile* as well as “Fast-Fish and Loose-Fish” why property law is hesitant to award partial ownership. A full class of students is likely to find that, in *Pile*, this would have the potential to incentivize parties to annex property through dishonesty and that in “Fast-Fish and Loose-Fish” such a policy would have the potential to create impossibly complicated laws and impractical or unmanageable litigation.

Of course, property law is not this simple. “Fast-Fish and Loose-Fish,” however, also provides a way for property professors to help their students anticipate some of the later cases that will complicate the clear view of ownership set forth in cases like *Pile*.<sup>71</sup> Specifically, at various junctures in the chapter, Melville’s narrator subverts the simplicity of the legal code.<sup>72</sup> Immediately upon describing that there are two simple laws of whaling, for example, Ishmael begins to explore ambiguities in the definitions of terms and concludes: “what plays the mischief with this masterly code is the admirable brevity of it, which necessitates a vast volume of commentaries to expound it.”<sup>73</sup>

<sup>69</sup> See *id.* at 308. For more on Melville’s “symbol of possession” see *id.* at 308–09.

<sup>70</sup> See *id.* at 308.

<sup>71</sup> For example, casebooks are likely to complicate the issue of possession by including cases on adverse possession such as *Van Valkenburgh v. Lutz*, 106 N.E.2d 28 (N.Y. 1952), and cases on takings such as *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>72</sup> See Piety, *supra* note 55, at 40.

<sup>73</sup> MELVILLE, *supra* note 1, at 308.

Thus, when considered along with a case like *Pile*, “Fast-Fish and Loose-Fish” not only helps students to begin to understand the foundations of property rights, but it also models the type of reasoning that will help them to question the limits of those rights. Melville’s chapter is both brief and complex; it presents a law, suggests rationale for the law, discusses how that law has been applied in different contexts, and questions the limits of that law. In short, the chapter models the very type of reasoning law students should be doing.

B. Locke, “Mixing One’s Labor with a Thing,” Ahab, and the Whale

Langdell’s original casebooks contained little more than excerpted portions of appellate decisions.<sup>74</sup> This type of casebook may have been very effective in teaching students how to “discover” the law by reading judicial opinions. Modern casebooks, perhaps taking into account some of the deficiencies of Langdell’s approach, are more likely to have a nearly 1:1 split between legal decisions and other related material.<sup>75</sup> Though this supplementary material serves to give some context to the judicial opinions contained in casebooks, it may do little to actually mitigate the weaknesses in the case method because the supplementary material may be tangential, highly technical, or because professors may not assign it, or may assign it and not discuss it. Using *Moby-Dick* in conjunction with this supplementary material, however, can help students better understand how the principles contained in portions of legal treatises can apply to realistic legal disputes. The novel can help students apply the abstract principles contained in those texts without significantly impacting student reading loads or class time available to discuss cases.

A student reading the first chapter of the Dukeminier property casebook need not read far before encountering an example of the ways in which casebooks typically use supplementary material. The very first chapter contains a brief excerpt from John Locke’s “labor theory” of property<sup>76</sup> as well as an exploration of how Locke’s ownership concept of “mixing [one’s] labor with [a thing]” relates to the early case of *Johnson v. M’Intosh*.<sup>77</sup> Locke’s theory serves as an impor-

<sup>74</sup> See LANDMAN, *supra* note 10, at 68 (“For the convenience of the students, Langdell prepared case-books for them . . . . The cases are excerpts from the reports, with the extraneous matter deleted, well classified, and annotated by the editor.”).

<sup>75</sup> See, e.g., DUKEMINIER ET AL., *supra* note 5, at 3–17. “Acquisition by Discovery,” this first section of the text, is fairly typical in that it pairs approximately seven pages of the case *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), with approximately eight pages of “Notes and Questions” including excerpts from law review articles, summaries of related cases, and the reprint of a picture of Chief Justice John Marshall in which the Chief Justice manages to look both stern and welcoming at the same time.

<sup>76</sup> DUKEMINIER ET AL., *supra* note 5, at 14.

<sup>77</sup> See *id.* at 14–15 (discussing *Johnson*, 21 U.S. 543).

tant concept that underlies the development of property law. The Dukeminier text discusses the deficiencies of different versions of Locke's theory, discusses the theory in the context of another nineteenth-century case,<sup>78</sup> and then goes on to explore how Locke's theory influenced the evolution of Native American property rights in the early republic.<sup>79</sup> Though this historical background may be interesting, reading selections from *Moby-Dick* may better help show the vitality of Locke's theory and demonstrate why it continues to influence laws in modern courts.

One very simple way that law professors could help students understand and question Locke's labor theory is by exploring, again, the "Fast-Fish and Loose-Fish" chapter. In the chapter, the narrator discusses the law of whaling whereby a whale becomes the possession of any ship to which it is fastened or by which it is marked, provided that that ship demonstrates its "ability at any time to take it alongside, as well as [its] intention so to do."<sup>80</sup> Since this whaling "law" seems to mirror Locke's labor-mixing theory, it provides a concrete way for students to explore the theory. At the same time, because the chapter is unconnected to any actual case law, it allows students to consider the theory in a somewhat more abstract and philosophical context. In a way, considering the chapter along with the early case law combines some of the best aspects of using the case method and of studying legal treatises.

A property professor could begin exploring Locke's theory through "Fast-Fish and Loose-Fish" by asking whether the whaling law seems to follow Locke's labor theory and whether the law seems to be just. Students are likely to answer in the affirmative to these questions. But, as both Melville and law professors know, "what plays the mischief with this masterly code is the admirable brevity of it, which necessitates a vast volume of commentaries to expound it."<sup>81</sup> And law professors can raise objections to the "law," (and thus Locke's theory) that will help students anticipate their study of cases in which the law must depart from, or expound upon, simple labor theory.

A thorough exploration of the chapter in relation to Locke may include many questions relevant to other aspects of a first-year property course. For example, a professor may ask whether a person who has previously established ownership of a piece of property needs to express their desire to keep that property, anticipating supersession theory and the concept of adverse possession. Further, a professor may wish to ask what purpose it serves for society to grant ownership

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78 See *id.* (discussing *Haslem v. Lockwood*, 37 Conn. 500 (1871)).

79 See *id.* at 14–16.

80 See MELVILLE, *supra* note 1, at 308.

81 *Id.*

to a party who can physically overcome or capture a natural resource such as a whale. Such a question may become a springboard for a discussion of other theories of property, raising the issue of private property versus collective property versus common property. A professor may link the chapter to the “tragedy of the commons”<sup>82</sup> (and modern fishing limits) by asking if there should be any limit to the number of whales one ship can capture.<sup>83</sup>

Because *Moby-Dick* is both concerned with the law and at the same time disconnected with any actual case law, it provides an ideal medium whereby beginning property law students can explore legal theories. Students are free to explore the underpinnings of property law and question what the law is (and what the law should be) outside of the context of case law (which tends to lead students to search for what the law is).

Discussing “Fast-Fish and Loose-Fish” in the context of Locke’s labor theory will likely have the effect that casebook authors and professors aimed at when they decided to include Locke’s theory in a property casebook in the first place. The brief chapter can successfully supplement Locke because students are likely familiar with discussing philosophical ideas through novels, because students should find the subject matter of the chapter interesting, and because the reading assignment is accessible in content and manageable in length. Guided by the right questions from their professor, property students who read “Fast-Fish and Loose-Fish” together with a brief excerpt regarding Locke’s labor theory early in the semester will better anticipate, question, and appreciate the complexity of property law when they read subsequent cases. This is because students will associate Locke’s theory, as well as alternatives to that theory with a memorable, relevant departure from the casebook into *Moby-Dick*.

### C. The Functions of a Property Theory

Viewing these early philosophical readings through the lens of *Moby-Dick*, a professor can more easily explore why different views have held sway at different points in time. Students who read later course materials now will have a greater perspective as to why different parties to a case may believe they are justified in claiming particular property rights.

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<sup>82</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968) (discussing a system of property that incentivizes each individual to maximize his short-term consumption of resources to the ultimate detriment of the community).

<sup>83</sup> *But see* MELVILLE, *supra* note 1, at 353–54 (concluding that whales will never become extinct).

## IV

USING *MOBY-DICK* AS A SUBJECTIVE COUNTERWEIGHT TO THE  
CASE METHOD

Studying *Moby-Dick* in conjunction with a property casebook will help the first-year law student to better appreciate the conflicts and basic tenets that underlie the subject. This Part explores specific ways in which studying selected chapters of *Moby-Dick* can add to the case method by helping students understand and navigate some important tensions that underlie property law.

By using the novel during the earliest stages of a property course, a professor can both capitalize on some of the advantages of the case method and moderate some of its deficiencies. For example, the case method is said to aid in student understanding by helping students to remember rules because of their relationship to interesting case-specific facts.<sup>84</sup> However, this “advantage” may work better in theory than in practice because most of an appellate decision is far removed from the facts of the case and the arguments of the parties.<sup>85</sup> If students are able to relate the conflicts experienced by characters in *Moby-Dick* to central conflicts in property law, those students will more likely be able to articulate and analyze those conflicts.

Professors can also use *Moby-Dick* to overcome some of the weaknesses in the case method.<sup>86</sup> This Part will demonstrate how professors can use *Moby-Dick* as a way to counterbalance the law-as-science focus of the traditional case method by helping students understand why courts may use subjective considerations to stray from, or to distinguish, an established rule of law in a particular case. Because students will relate abstracted legal conflicts to the more palpable struggles of the novel’s characters, they will read cases more creatively, will be better able to relate to both sides of a legal struggle, and ultimately, will be better able to understand and advocate for both sides of a legal argument.

#### A. Teaching Law Students to Value the Subjective Through “The Doubloon”

Melville’s chapter “The Doubloon”<sup>87</sup> presents a series of monologues in which the *Pequod*’s officers and sailors look at a gold doubloon that Captain Ahab has nailed to the ship’s mast. Ahab previously promised the doubloon to the first man who “raises” the white

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<sup>84</sup> See *supra* text accompanying notes 27–28.

<sup>85</sup> See *supra* Part I.C.

<sup>86</sup> For a good discussion of some of the weaknesses in the case method, see KISSAM, *supra* note 21, at 3–15.

<sup>87</sup> See MELVILLE, *supra* note 1, at 331–35.

whale.<sup>88</sup> As each man passes the coin, he “sees” something different in it.

The Ecuadorian doubloon contains a number of markings; most pointedly, it depicts three mountain peaks and the signs of the zodiac.<sup>89</sup> Various crew members interpret these markings in myriad ways. For example, Captain Ahab finds the coin emblematic of his struggle against a world in which men are “[b]orn in throes . . . live in pains and die in pangs.”<sup>90</sup> Ahab’s Chief Mate, Starbuck, on the other hand, believes that the markings represent an ever-present god protecting the world even during times of darkness. Other observers find their own meanings in the doubloon: Third Mate Flask sees the doubloon as nothing more than a means to buy 960 cigars, whereas cabin boy Pip uses the doubloon to prophesy the ship’s destruction.<sup>91</sup>

By having students read this five-page chapter in the early days of a property course, a professor can help students to view every other case they will read during the semester in a more nuanced way. “The Doubloon” complements the case method because whereas the case method helps students answer how the law treats a certain conflict and how the law reaches its decision, the chapter highlights the importance of asking how the parties believe the law should handle that conflict. The reading sets a tone for the course by demanding that students do more than find a rule and consider whether the court correctly applies that rule.

Because of its potency, “The Doubloon” could actually become a touchstone in a property class. Whenever a class becomes too focused on one way of seeing a conflict, the professor could pull the class back, remind the class of the chapter, and ask them to view the conflict through the perspective of the other party. This addition of one short reading assignment goes a long way toward answering Kissam’s objection that the case method teaches students to value the objective over the subjective.<sup>92</sup> In effect, understanding the subjective aspect of the law will allow students at the very beginning of their legal careers to begin asking more than merely *what the law is* and *how to apply that law to a particular set of facts*. Understanding the subjective as well as the objective side of a legal issue will help future lawyers to advise

<sup>88</sup> *Id.* at 138.

<sup>89</sup> Ishmael describes the evocative markings on the coin as “[z]oned by [the letters REPUBLICA DEL ECUADOR: QUITO] you saw the likeness of the Andes’ summits; from one a flame; a tower on another; on the third a crowing cock; while arching over all was a segment of the partitioned zodiac, the signs all marked with their usual cabalistics, and the keystone sun entering the equinoctial point at Libra.” *Id.* at 332.

<sup>90</sup> *See id.* at 333.

<sup>91</sup> Other observers include Second Mate Stubb, a wise old Manx sailor, harpooner Queequeg, and Ahab’s enigmatic confidant Fedallah. *See id.* at 333–35.

<sup>92</sup> *See supra* notes 39–46 and accompanying text.

clients (even if that advice involves telling a client that even though you understand her perspective, these are the reasons why that client's potential case would almost certainly not win in court), advocate for those clients, create contracts that will serve both the short-term and long-term goals of their clients,<sup>93</sup> and ultimately perhaps play a role in fashioning laws that are more just and inclusive.

This final point has particular importance in the area of property law where courts must often decide not between right and wrong but between competing claims of rights. It is perhaps most relevant in the context of one of the most contentious and unsettled areas of property law: takings.<sup>94</sup> For example, in the takings context, often the government and the individual both possess claims over a piece of property. A court must decide which claim is better—that of the individual landowner or that of society as a whole as represented by the government's interest in the property. Here, there is no bright-line rule, no absolute test. Sensitivity to both sides of a legal issue helps courts create tests that balance equities and reach just results. Understanding the subjective aspects of a legal issue (or a particular legal dispute) is essential to the process of balancing equities. The case method alone does not do a good job of teaching law students to view legal issues subjectively. A brief stand-alone chapter such as “The Doubloon” can aid in this process because of its clarity and because of its applicability to almost any legal issue.

## B. Characters, Conflicts, and Why “Property is Different”

Disputes over property can be more intense and more emotional than disputes in other areas of law.<sup>95</sup> To advise, advocate for, and draft contracts for their clients, lawyers must understand the needs and motivations of those clients. One of the main weaknesses of the traditional case method is that it tends to subordinate the subjective concerns of parties to a dispute in favor of an “objective” application of law to facts.<sup>96</sup> Conversely, one of the greatest strengths of novels is that they often focus on the subjective emotions of characters. By studying the depictions of selected property-related issues in *Moby-Dick* along with the reactions of the novel's characters to those issues, the

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<sup>93</sup> In order to do this, of course, the lawyer needs to understand the goals of his client and of all other parties to the potential contract.

<sup>94</sup> See generally Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny,"* 59 ALA. L. REV. 561, 561–64 (2008) (discussing the controversy surrounding the landmark takings case *Kelo v. City of New London*, 545 U.S. 469 (2005)).

<sup>95</sup> See David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 652 (2010) (discussing the unusually impassioned response across the political spectrum to the Supreme Court's *Kelo* decision).

<sup>96</sup> See KISSAM, *supra* note 21, at 7.



beginning law student can better understand and appreciate a party's point of view and thus better serve the needs of their future clients.

*Moby-Dick* illustrates several ways in which people tend to view property. By reading a few very brief passages in the novel in conjunction with the casebook, beginning property law students can gain a better appreciation of the concepts of (1) property as personal value, (2) property as a zero-sum game, (3) property as transcendence, and (4) property as power and control.

### 1. *Property as Personal Value*

One of the reasons property disputes can be so contentious is that that people can conflate property with self-worth. To effectively advise a client, a lawyer must understand how self-worth relates to property disputes. One way in which law professors can address this issue and help their students bring this subjective perspective to the study of their property casebook is to incorporate a discussion of Melville's chapter "The Ship" into a class early in the semester.<sup>97</sup> Moreover, the professor may also use the chapter to discuss related aspects of property law.<sup>98</sup>

In "The Ship," Ishmael narrates the system by which a ship's owners pay whalers: "I was already aware that in the whaling business they paid no wages; but all hands, including the captain, received certain shares of the profits called *lays*, and that these lays were proportioned to the degree of importance pertaining to the respective duties of the ship's company."<sup>99</sup> Ishmael bristles when one of the ship's owners offers him the 777th "lay" (or 1/777th of the ship's net profits). Toward the end of the chapter, after a tortured and humorous good-cop/bad-cop routine by the ship's ancient owners, Ishmael finally agrees to the 300th lay.<sup>100</sup>

Perhaps most significant to the beginning law student is Ishmael's interior monologue relating his own valuation of his worth to the whaling enterprise. Though he claims that he is "quite content if the world is ready to board and lodge" him, Ishmael seems to put a great deal of stock in how much the ship's owners pay him for his ser-

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<sup>97</sup> See MELVILLE, *supra* note 1, at 68–79. Though "The Ship" is somewhat longer than some of the other passages I describe in this Note, students are unlikely to balk at the length of the chapter not only because the characters are entertaining (retired Captains Bildad and Peleg, for example, offer humorous caricatures of old seamen as well as an interesting critique of the intersection of religion and commerce), but also because it is still very short compared to most law school assignments. A professor pressed for time may choose to have students read the approximately two-page section in which Ishmael discusses his compensation with the ship's owners. See *id.*

<sup>98</sup> See discussion *infra* Part IV.B.2.

<sup>99</sup> MELVILLE, *supra* note 1, at 75.

<sup>100</sup> See *id.* at 75–77.

vices.<sup>101</sup> Ishmael weighs his abilities gained as a crewmember of a merchant vessel against his inexperience at whaling, concluding that “the 275th lay would be the fair thing” but further speculating that the ship’s owners may be willing to pay him 1/200th of the ship’s net profit because he “was of a broad-shouldered make.”<sup>102</sup>

A professor may choose to analogize, either in hypothetical fashion or through references to specific cases throughout the semester, Ishmael’s attitudes with the attitudes of parties to a particular property dispute. Though the property itself may be insignificant (much as the difference between the 300th and the 275th lay likely means little in terms of actual compensation), parties will likely find property significant not for its economic value but for what they think the property says about them. This basic idea, presented at the beginning of the semester, can frame how students think about property disputes in a way that the pure case method often fails to do. Students who also view cases through this lens are more able to see the human aspects of the law, which may eventually be important for advising a client, telling the client’s story to a fact finder, or more immediately, understanding why a certain case may not seem to follow an established “rule of law.”

## 2. *Property as a Zero-Sum Game*

Property professors could also use the *Moby-Dick* chapter “The Ship” in a first-year course to introduce the idea that property disputes are often a zero-sum game. That is to say, often, for one person to gain property, another person must lose property. This concept has important public policy implications, as policymakers must decide how to allocate limited resources and courts must decide disputes in a manner that serves both the law and justice.

When debating how much to pay Ishmael, Captain Peleg proposes to his co-owner, Captain Bildad, that the ship pay Ishmael the 300th lay. Acknowledging Peleg’s generous heart (though this may be more gamesmanship than anything else), Bildad reminds Peleg to “consider the duty thou owest to the other owners of this ship—widows and orphans, many of them—and that if we too abundantly reward the labors of this young man, we may be taking the bread from those widows and those orphans.”<sup>103</sup> Much as this short exchange has

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<sup>101</sup> See *id.* at 75.

<sup>102</sup> *Id.* at 75–76. Similarly, Captains Peleg and Bildad discuss Ishmael’s personal qualities when deciding how much they should pay the aspiring whaler. See *id.* at 75–76. The captains offer Ishmael’s friend Queequeg the nineteenth lay after Queequeg demonstrates his proficiency at accurately throwing a harpoon. See *id.* at 84–85.

<sup>103</sup> *Id.* at 76–77.

many implications for the novel,<sup>104</sup> the exchange provides a framework through which one can view many of the disputes students will encounter in the property classroom throughout the year.

Bildad's statement can help to focus students on the proposition that there is more to property disputes than sanitized, analytical appellate opinions in which judges weigh objective, decontextualized evidence. Instead, in every property dispute, at least two parties believe they deserve a certain piece of property (for example, the hardworking sailor and the orphan). Often each seems to have a valid claim under the law, and judges must grapple with how to navigate those claims. When a case seems to be very one-sided, professors could ask the class to question, having discussed this passage with their class early in the semester, who is the orphan here and who is the sailor. This analogy would not only help to humanize the cases in any given casebook, but also would help students appreciate the complexity of the case and the impossibility and impracticality of applying law to facts in a stereotypically Langdellian "scientific" way.

### 3. *Property as Transcendence*

In many ways, a property class could read the entire novel *Moby-Dick* as one big dispute over property. The whale had claimed dominion over the sea through his previous encounter with Captain Ahab, and the Captain spends the entire voyage trying to regain the property he once saw as his. By asking the question "why is this property so important to Ahab?," the property class comes closer to understanding what is at the heart of many of the property disputes they will encounter in the class and later in practice.

A brief exchange between Captain Ahab and Chief Mate Starbuck helps to illustrate the nature of Ahab's quest.<sup>105</sup> Students need only a brief introduction to understand the context: All of the members of the crew have signed on to capture as many whales as possible as quickly as possible. This, of course, was the usual plan of whaling vessels as it would yield the greatest profit for each crew member while requiring the smallest investment of time. Instead of following this usual plan, Captain Ahab calls the entire crew to the ship and tells

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<sup>104</sup> For example, in my high school literature class we would likely discuss Captains Bildad and Peleg as comic characters and discuss the effect of comedy throughout the novel, whether Bildad and Peleg are forthright or disingenuous in this exchange, the interaction between religion and commerce, etc. This Note argues, however, that the best use of *Moby-Dick* in the first-year property classroom should be limited and focused. By reading short passages from the novel and discussing them in reference to specific areas of law—and by referencing them as they reappear throughout the semester—property professors can offer students a touchstone of humanity to remind students that every case they study is about real people.

<sup>105</sup> See MELVILLE, *supra* note 1, at 139–40.

them that the plan on this voyage is that the ship will hunt only Moby-Dick, the great white whale that had bitten off Ahab's leg on a previous voyage.<sup>106</sup>

After this unusual revelation, Starbuck approaches his captain, saying: "I came here to hunt whales, not my commander's vengeance. How many barrels will thy vengeance yield thee[?] . . . [I]t will not fetch thee much in our Nantucket market."<sup>107</sup> Ahab's strange and impassioned response bespeaks a not uncommon view of property and one in sharp contrast Starbuck's more pragmatic, logical approach. Ahab responds: "All visible objects, man, are but as pasteboard masks. But in each event—in the living act, the undoubted deed—there, some unknown but still reasoning thing puts forth the mouldings of its features from behind the unreasoning mask. If man will strike, strike through the mask!"<sup>108</sup> Ahab's quest to overcome Moby-Dick, to change him into a possession, does not have to do with profit or even simple vengeance; it has to do with control.

Property disputes are significant to those involved in the same way that capturing the white whale is important to Ahab, who needed to reestablish his perceived dominion over the sea. People are mortal and, like Ahab, have little control over other things in the world save those that property law allows them to say are "theirs." Beginning property students will encounter this impulse in at least two situations in which property law seems to recognize immortality. First, the fee simple absolute is said to be perpetual in time.<sup>109</sup> Second, estate laws allow persons to determine how to dispose of their property after their death. Similarly, a professor is likely to present the Rule Against Perpetuities (a rather notorious doctrine among 1Ls) as a compromise by which property law allows an individual to control the disposition of his property for a time after his death before ultimately granting unfettered rights to that individual's property to the living.<sup>110</sup>

This perspective on property, and its association with the obsessive Captain Ahab, can again help students understand the passion that infuses many property disputes. Private property rights grant citizens more control over their property than they have over almost any-

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<sup>106</sup> *Id.* at 138–39. If the property professor chooses to read the entire chapter with the class, the class could also discuss issues relating to the role of who in a society should have the power to determine property rights. On the ship, Ahab has the ability to affect the profits of each crew member, in effect, the worth of their property (equity) rights in the ship's voyage. This chapter illustrates that, though Ahab's hold on this power is uneasy (he relies on the cooperation of his crew), the system on board the ship allows him a great degree of control.

<sup>107</sup> *See id.* at 139.

<sup>108</sup> *Id.* at 140.

<sup>109</sup> *See* DUKEMINIER ET AL., *supra* note 5, at 181.

<sup>110</sup> *See id.* at 244–45. The fee tail grants even more control to the decedent. *See id.* at 186–87.

thing else in their lives. It is axiomatic that people will fight hard for their property rights because if they do not control their property, they control very little.

#### 4. *Property as Power and Control*

Melville raises many of the interesting issues associated with takings law in the brief chapter “Heads or Tails.”<sup>111</sup> In the chapter, Ishmael narrates the story of a conflict between a group of mariners who had found a beached whale and the Lord Warden who claims the whale (worth approximately £150) for the Crown. By presenting this chapter to a property class, professors can help their students anticipate and understand issues of power and control surrounding property law.

The most pointed part of the chapter occurs when the poor sailors, dreaming of how they will spend the money they earn with their wives and friends, encounter “a very learned and most Christian and charitable gentleman, with a copy of Blackstone under his arm.”<sup>112</sup> The conversation between the sailors and this gentleman presents a conflict central to takings law. The sailors question:

“But the duke had nothing to do with taking this fish . . . . We have been at great trouble, and peril, and some expense, and is all that to go to the Duke’s benefit; we getting nothing at all for our pains but our blisters?”

[The Lord Warden then answers:] “It is his.”<sup>113</sup>

Ishmael heightens the reader’s sense of the injustice of the situation by explaining that the Sovereign claims ownership of whales as “royal fish,” so that the head belongs to the king and the tail belongs to the queen. Consequently, because a whale is only head and tail, nothing from a “royal fish” belongs to those who captured it.<sup>114</sup> Ishmael further explains that the awarding of the tail to the queen is based on the mistaken belief that a certain type of whalebone “used in ladies’ bodices” may be found in the whale’s tail.<sup>115</sup>

If a property professor were to present this chapter to students, either early in the class or immediately before reading casebook selections about takings law, that professor would likely be better able to help students engage issues of takings law than if they relied on the casebook alone. For instance, the professor could ask students if the situation described in the chapter seemed unjust. In addition, the professor may ask what could be done to make the situation more just,

111 See MELVILLE, *supra* note 1, at 310–12.

112 *Id.* at 311 (footnote omitted).

113 *Id.*

114 *Id.* at 312.

115 *Id.*

whether a government is ever justified in taking all of a piece of property, what kind of justification is necessary, whether there should be any category of property to which the government could rightly lay claim, on what authority the government should be able to levy taxes, whether there should be a different standard for property taxes and income taxes, whether the government should have to compensate citizens when taking property, whether the reason for taking the property should matter, whether there should be a different rule for real property, etc.

After having explored this chapter of *Moby-Dick*, students will not only ask whether the current takings law was correctly applied in a certain case, as the Langdellian method would have them do. Students will also have the tools to question what takings law *should* be and what seems just from the point of view of both the government and property owners. This dual perspective is particularly important in an area of law such as takings, which continues to be in a state of flux.<sup>116</sup>

#### CONCLUSION

The case method is perhaps very effective at doing what it does: helping law students master the foreign language of the legal opinion, helping them learn to apply the law to facts and analogize between cases. These are important skills for a lawyer to have. However, overreliance on the casebook method fails to help law students develop other skills that are also important in the practice of law, namely, un-

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<sup>116</sup> Professors who choose to explore takings to a greater extent by using *Moby-Dick* in their property classes will likely find the novel rich with metaphors. For example, Ahab's speech to his crew during which he introduces the idea that they are going to hunt Moby-Dick—rather than seek to find as much oil as possible—may be analogized to a situation in which the government asserts its will to take the property of its citizens without appropriate justification, since the transaction seems only to serve the interests of the more powerful party with no benefit to the community at large.

Further, professors may analogize the *Kelo* decision to the ultimate conflict between Ahab and Moby-Dick. Professors could compare the government position to the role that Moby-Dick (the stronger party) plays in the climax of the novel. In so doing, they humanize the conflict in a way that the case alone does not (especially as presented in the casebooks as merely the judicial opinion). Both the government and the whale have the power to dispossess the weaker party (the home owners and the crew of the *Pequod*, respectively), but at what cost? What negative residual effects should the courts be willing to sanction (through their flexible test) in order to balance the claims of the government over those of the individual land owner? Are land owners all like Ahab in that they are acting unreasonably, and to what extent should the courts protect our right to be like Ahab?

This final example seems to demand a more thorough familiarity with the novel than many of the other examples in this Note. This may preclude its use in any class other than a class dedicated to law and literature. In this Note, I have tried to focus on short passages from the novel that allow property professors to explore property concepts more concretely and more creatively than they would have been able to otherwise.

derstanding the human, subjective side of conflicts. Perhaps just as important, if the law is to develop to accommodate changing times, or change to better serve the public, law students must learn to question the interests served by particular laws and argue for more just interpretations and applications of the law. By humanizing the law through targeted use of literature in the 1L classroom, students learn, early in their legal careers, that the second set of skills can and should coexist with the first.

Law schools do a very good job of teaching first-year law students how to use the wheelbarrow that Melville's Queequeg struggled with. By the end of 1L year, a law student understands how to read a case and how to relate a particular law to a particular set of facts. In short, the student is no longer a lay person; the student is beginning to think like a lawyer. By widening the base of what law schools teach and by implicating different skills, however, we can do better; we can move toward creating a foundation that is a little less wobbly than the current wheelbarrow method.

