

A Populist Manifesto for Learning the Law

Eric E. Johnson

Introduction


The profession of teaching law is infused with the idea that we must be careful to not make learning the law too easy for our students. The prevailing attitude is that students should not take shortcuts in learning, and we, as teachers, should not “spoon feed” them. This is silly. Learning law the hard way is not better, it is just harder.

Let’s take a minute to ask ourselves a few elementary questions the legal academy has rarely paused to consider:

- Why not use textbooks in law school?
- What is wrong with using commercial outlines?
- Couldn’t learning the law be a lot faster and more efficient?

These questions are mumbled in the mind of nearly every first-year law student. So why are we, as members of the legal teaching profession, not asking these questions even now, when the American institution of law school is undertaking a soul-searching program of reform? The law-teaching mainstream is calling for widespread change in how the law is taught. Institutions across the country are revamping curriculums. Yet despite this pandemic of open-mindedness, old ideas are holding fast about the right way and the wrong way for teachers to teach and for students to study.

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In this article, I examine the questions above and conclude that there are intelligent, well-formed arguments for taking a more populist approach to teaching law. The pedagogical view I present in this article can be summed up as three interrelated propositions:

- Law professors should cease to regard as sacrosanct the process of learning law through the reading of judicial opinions.
- Law professors should let go of old taboos about student study-aids and other shortcuts to learning.
- Law professors should strive, insofar as possible, to make learning doctrine easier and less time-consuming.

In its briefest form, my argument is this: We lack good rationales for insisting on more difficult modes of learning, and in the absence of a convincing case to the contrary, we ought to try to make learning the law easier. All things being equal, the easier way is the better way, because the easier we make it to learn, the more we will be able to teach.

Study hours during law school are finite. We should be cognizant of the fact that many of our students study in every spare hour they have. Even then, many go further, stealing time from sleep or family obligations. When we knowingly permit students to flounder in their attempt to grasp elementary pieces of doctrine, we rob from them the time and mental resources that they could profitably use for other learning objectives—whether that is cramming more doctrine into their heads or doing something else, such as amassing professional skills, solving problems as part of an experiential exercise, or gaining insight into theoretical perspectives on the law.

My goal here is not to make the law-school experience easier overall. While some students, depending on their circumstances, are forced to give up too much in pursuit of their law degree, I think that, in general, it is a fine thing for a graduate professional school to be arduous and demanding. Thus, my object is not the addition of leisure time. My object is effectiveness. By making the learning process easier, we could make the law-school years more productive. And if we can, we should.

Obfuscation: A Long-Cherished Value

As readers of this article will know well, the traditional method of teaching and learning in law school eschews using a textbook. By “textbook,” I mean a book that actually endeavors, as its primary mission, to explain its subject matter. Instead, students are assigned a casebook, a compendium of judicial opinions that are roughly ordered by their principal subject matter.

To study using a casebook, students are sent to slog through pages and pages of judge-rendered prose, none of which is written for the purpose of explaining the law to newcomers.¹ Much of the text is difficult to read, as the selected readings are often turbid, ancient, or both. The student compelled to read all this is left to grope around in the muck for bits of hard treasure: nuggets of blackletter law—the plainly stated rules that comprise the bulk of the subject matter the student is seeking to learn.

Having never been assigned any document actually explaining the law, students are left to write their own explanatory texts. The document that typically results is what law students call an “outline.” Compiled from all the pieces of blackletter law sifted from the semester’s morass of judicial opinions, the outline is the missing key to understanding the course material. Once all the reading is done and all the classes attended, by creating the outline, everything is supposed to become brilliantly clear to the student.

This way of teaching and learning traces its origins to Harvard Law School’s iconic professor and dean, Christopher Columbus Langdell, who published his first casebook, for his Contracts course, in 1871.² Langdell’s casebook was at least incidental to, if not entirely bound-up with, Langdell’s other innovation, his Socratic method of classroom instruction. That method involved doing away with explanatory lectures and, instead, using class time to ask students an endless series of questions.³ The dialogue was meant to slowly develop a student’s ability to think like a lawyer.

At the time Langdell introduced his casebook and Socratic system, the other law professors were straight-forwardly lecturing to their classes with the help of assigned textbooks—legal treatises, we call them—that endeavored to explain and demystify the law.⁴ Langdell thought this was folly. In the preface to his 1871 casebook he wrote, “[T]he shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.”⁵

1. I should acknowledge that I have come across occasional judicial opinions that, I suspect, have actually been written by judges with an aim toward inclusion in law-school casebooks. To the extent my intuitions are true, those few anomalies are, I would submit, the exceptions that prove the rule.
2. See Ralph Michael Stein, *The Path of Legal Education From Edward I to Langdell: A History of Insular Reaction*, 57 *Chi.-Kent L. Rev.* 429, 449 (1981).
3. See, e.g., Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 *Iowa L. Rev.* 547, 598 (1997).
4. See Stein *supra*, note 2, at 449.
5. *Id.* (citing to Christopher Columbus Langdell, *A Selection of Cases on the Law of Contracts with References and Citations* (Little, Brown and Co. 1871)).

A second edition of Langdell's casebook contained blackletter-law summaries that he had prepared.⁶ But these were short-lived. Being thought too helpful to students, the summaries were omitted from future editions of Langdell's casebook.⁷

In the following decades, Langdell's mode of instruction spread through the American law-school scene, becoming dominant in the 1920s.⁸ Subsequently, Langdell's Socratic method remained the unquestioned norm—until fairly recently. In the last few decades adherence to Langdell's Socratic method of conducting class has wavered to the point where it is at least something of a relic. And in its purest, strictest form, it is nearly extinct.

Today, at the close of the new millenium's first decade, the legal academy is focused on reforming its own house—the institution of legal education. Upholding tradition for tradition's sake is at an all-time low, and iconoclasm is in vogue. A recently issued report by the Carnegie Foundation⁹ and another by the Clinical Legal Education Association¹⁰ challenge law-school orthodoxy on several fronts. Several law schools have responded by undertaking wholesale restructuring of their curriculums.¹¹

The reformers urge law-degree programs to concentrate on building skills and providing experiential learning, particularly through clinical education. Within the context of the classroom environment, reformers counsel professors to move away from the Socratic method and move toward problem-solving exercises.¹² In particular, critics have decried the emphasis on developing legal analytical skills—the “thinking like a lawyer” that is supposedly the forté of Langdell's method.¹³

But for all that, there has been little discussion of reading materials. That is, despite all the talk of reform, law school seems destined to continue to be centered around that heavy and doleful artifact—the casebook. It is strange that the casebook should emerge so unscathed when the Socratic method—the mode of instruction for which the casebook was invented—is being roundly condemned.

6. See Stein, *supra* note 2, at 450.

7. See *id.*

8. See *id.* at 452; Lawrence M. Friedman, *A History of American Law* 542 (Touchstone 2005).

9. See William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

10. See Roy Stuckey and Others, *Best Practices for Legal Education* (Clinical Legal Education Ass'n 2007).

11. Two schools noted for their recent curricular reform are the University of Dayton School of Law and Harvard Law School. See Lisa A. Kloppenberg, “Lawyer as Problem Solver:” Curricular Innovation at Dayton, 38 U. Tol. L. Rev. 547 (2007); Elena Kagan, HLS Faculty Unanimously Approves First-Year Curricular Reform, Oct. 10, 2006, http://www.law.harvard.edu/news/2006/10/06_curriculum.php (last visited Aug. 17, 2008).

12. See Stuckey, *supra* note 10, at 144.

13. See, e.g., Sullivan et al., *supra* note 9, at 87-125.

Also largely missing from talk of reform is a discussion of how we teach doctrine or “blackletter” law. Reformers have been concentrating their efforts on the need to teach professional skills and values. The assumption seems to be that we are already excellent at teaching blackletter law.¹⁴ Yet, how could we be? For more than 100 years, we have been following Langdell’s implicit command to make learning doctrine more difficult than it needs to be.

That is perhaps bad enough. But the legal academy has been doing more than merely refraining from making learning the blackletter law easier. Law professors have, for a long time, been actively encouraging students to stay away from study aids that promise to tame the confusion.

Beware the Poisonous Fruit

When I was in law school in the late 1990s, if my professors were not always crystal clear about doctrine, they were certainly clear about their opinion of study aids. One professor spoke of the dangerous temptation of looking up words in *Black’s Law Dictionary*. Another professor nearly blanched when, at a dinner, I disclosed that I had read a Gilbert’s law outline. Both of those professors were veterans of the legal academy—each had received his law degree before I was born. But younger law professors did not seem to have more progressive attitudes. On the first day of an elective class, I asked a newly hired professor if she knew of a commercial outline for the course. She told me that, so far as she knew, there wasn’t one, and if there was, she certainly did not recommend reading it.

I don’t know how many more of my professors would have registered a horrified reaction at my mention of study aids. I finally learned to keep quiet about the subject.

Why are study aids treated by so many professors as if they are intellectual poison? If you think about it, it is quite bizarre. Could it really be possible for a young law student’s brain to be damaged by reading something? I think not. Even at the height of the Cold War, college students were deemed hardy enough to read Karl Marx. There were no mass defections to the Soviet Union as a result. Yet law professors seem to think professional school students will be mentally compromised by reading Steven Emanuel. Very strange.

As Steve Sheppard points out, “Commercial outlines...are little more than student editions of treatises.”¹⁵ That being the case, it is hard to understand how they could be so reviled. The importance of treatises to the modern law, even if not the law school classroom, is unarguable. Treatises have played an important role in organizing the law into discrete topics, and thus informing how all of us—lawyers, judges, and professors—think about it.¹⁶ Nonetheless,

14. In fact, the CLEA report urges law professors to teach less substantive doctrine. See Stuckey, *supra* note 10, at 73–76.

15. Sheppard, *supra* note 3, at 641.

16. See Morton J. Horowitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* 12–13 (Oxford Univ. Press 1992) (discussing the evolution of treatises on

commercial outlines are thought of darkly by the balance of the academy. In a 1995 survey, only 5 percent of law teachers recommended commercial outlines. The other law professors who expressed an opinion either said they ignored commercial outlines or actively discouraged their use.¹⁷

The Bohr Model of the Atom

Clearly, there must be some implicit rationale behind the poisonous-fruit theory of study aids.¹⁸ I see two possibilities. One possibility is that teachers believe there is something valuable in the struggle to learn the law, something that students cannot obtain from spoon-fed answers. The other possibility is that teachers believe that the doctrine contained in study aids is wrong; the true doctrine being only available in the original judicial opinions. Both of these rationales are flawed.

The first rationale is dealt with most easily. Should law students struggle? Yes, I agree with that. Far be it from me to advocate law school being easy. But there is nonetheless a matter of choosing your battles. We need to ask ourselves what struggles we want our students to have. I believe law students should struggle to apply old doctrine to new factual contexts; they should struggle to form persuasive legal arguments; they should struggle to write clear, concise analyses of complex subject matter. And there are many other worthwhile struggles as well. But struggling to find blackletter legal rules in hard-to-read cases? There's little value in that, and making it a principal pursuit of law students is deplorable. Learning blackletter law by flailing around in the dense text of a case is not only a waste of time and mental energy, it is a waste of the case.

The primary point of reading a judicial opinion in law school should not be to separate doctrine from chaff. It is far better for students to read cases at a higher intellectual level, casting a critical eye on the court, questioning the motives of the parties, and learning how the blackletter doctrine works, or doesn't work, in a real context.¹⁹ That kind of high-level reading is made

torts and contracts, explaining how abstract and general categories of doctrine developed; for example, categories based on the facts of the case—banking, physicians, telegraphs—gave way to categories such as intentional torts, negligence, and strict liability).

17. See Sheppard, *supra* note 3, at 642 (reporting that 53 percent ignored student use of commercial outlines and 22 percent discredited them).
18. I made many of the points I make in this section, and, to a lesser extent, in the previous section in similar words, in a post on PrawfsBlawg. See Eric E. Johnson, PrawfsBlawg: Why Do We Counsel Against Commercial Outlines?, March 25, 2008, <http://prawfsblawg.blogs.com/prawfsblawg/2008/03/why-do-we-couns.html> (last visited April 19, 2010).
19. See Eric E. Johnson, Preface, "How To Use Study Guides," in Lindstrom's Summary of Employment Law at iii (2d ed. June Co. Press 2000), and Johnson, *supra* note 18.

possible when students have a framework of doctrinal understanding at the outset.²⁰ But fifth-gear thinking is stymied if students must make a dead start from a position of pure ignorance.

The second possible rationale for the casebook sink-or-swim method—that blackletter law as found in an outline is somehow wrong or incomplete—is the one that I think Langdell himself would probably advance. And I agree with the premise. Blackletter statements of the law, as they appear in commercial outlines, are, in an important sense, wrong. But it does not follow at all that they are not useful.

Do you remember studying chemistry? You probably started with the Bohr model of the atom (Figure 1). The atom, as envisioned by Niels Bohr, has electrons orbiting the nucleus in discrete circular orbits, more or less like planets orbiting the Sun. The Bohr model of the atom is a terrific starting point for learning chemistry. It is also wrong.

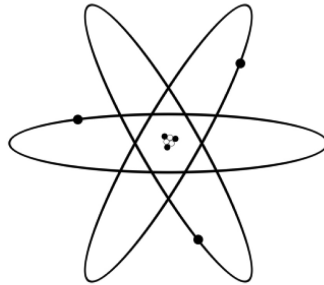


Figure 1: A Bohr model that has become the icon of the nuclear age: an atom of lithium

Later on in chemistry, students learn to think in terms of valence shells, subshells, and electrons that appear as spherical clouds of varying probability (Figure 2). It's an open secret that the Bohr atom is incomplete and deceptive. But it is still useful to beginning students.

20. I have made this point to my students through my syllabi. *See, e.g.*, Eric E. Johnson, Course Guidelines for Patent Law 2006 1, http://www.eejlaw.com/courses/patent_spring_06/materials/course_guidelines.pdf (“Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting, including, for instance, commercial outlines. The more you learn about patent law, the better. Commercial outlines are a great way of gaining a basic understanding of the blackletter law in a subject. That being said, the best time to read a commercial outline or other secondary source is right at the beginning of the semester. That way, you may give yourself a better foundation of knowledge for learning the material presented in the casebook and in class.”).

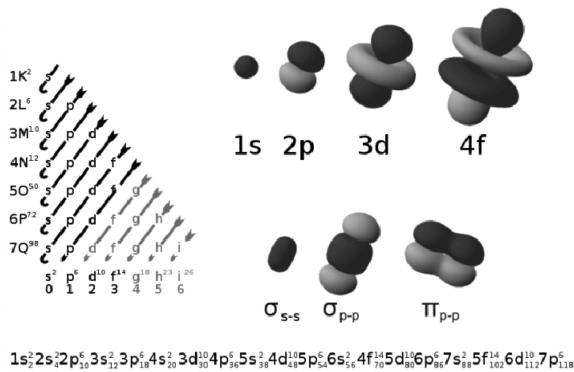


Figure 2: Graphical representations of the electron orbitals in the valence-shell model of the atom. (Illustration by Patricia Fidi.)

Blackletter statements of law are like the Bohr model of the atom. They are inviting, easily comprehended, and, admittedly, not quite accurate. But like the Bohr atom, a compilation of blackletter law in a commercial outline is a ready way to begin learning.

In the end, student-written outlines and commercial outlines have one thing in common. They are both incomplete models of the law. There is, however, one transcendent advantage a commercial outline can always claim over any outline that a student prepares on his or her own. The commercial outline can be reviewed at the *beginning* of a student's studies. Thus, the commercial outline can give a student a framework for approaching the cases.²¹ Armed with some rudimentary understanding, a student can read the cases at a higher intellectual level, looking for the subtleties, the rhetoric, the politics, and the inconsistencies. That is a much more rewarding way for a student to read a case, and we ought to encourage it.

A Defense of the Truly Despised

While I am defending the honor of commercial outlines, let me stop to go one further and, in the best tradition of legal advocacy, offer to mount a defense for a truly friendless object of scorn: the canned case brief.²²

Canned case briefs have an honest role to fill. When I was a student, and even a novice lawyer, I found it helpful to scan the headnotes of a case, or read the syllabus if the case had one, prior to settling down to slog through

21. *See id.*

22. *See, e.g.,* Casenote Legal Briefs Torts Keyed to Courses Using Prosser, Wade and Schwartz's Torts: Cases and Materials Eleventh Edition by Schwartz, Kelly and Partlet (Aspen Publishers 2006). *See also* Aspen Publishers, Casenotes Legal Briefs, <http://www.aspenpublishers.com/casenotes-legal-briefs-law-school/> (last visited Aug. 17, 2009). Steve Sheppard notes that canned case briefs seem to have originated at Harvard. Study aids containing terse case briefs were sold by the Harvard Coop bookstore as far back as the 1890s. *See* Sheppard, *supra* note 3, at 640-41.

the opinion itself. Knowing what the case was about and where it was headed aided my ability to read it—and not only to read it, but read it in a meaningful and deeply analytical way. Canned case briefs, keyed to popular casebooks, can serve precisely this function. And in that way, they offer a considerable service.

These days, when I pick up a case, I find I do not have patience for the headnotes. But at this point, I've read a lot of cases, and I would say that my skill level in reading judicial opinions is advanced. But back in the early days of law school, could a canned case brief have helped me before I sank into the bombastic, disorganized prose of some contracts case from the 1800s? You bet.

Now, nothing I have said above is intended to condone reading canned case briefs in lieu of reading the full cases. But let me do that now: If a student does not have time to do all the case reading before class, then reading canned case briefs might be a fruitful endeavor. Namely, having reviewed a canned case brief might make it easier to follow along with what is happening in class. Obviously, under ideal circumstances, students will read all the assigned material before class. But that doesn't always happen. Students have lives, often families and jobs, and sometimes their studies must be put momentarily aside. If, for instance, despite dealing with a screaming infant and a root canal, some student of mine makes time to read a canned case brief, then, in my opinion, more power to him.

Law Professors as Monopolists

Entirely separate from the reasons I've given above, there is another argument for why it makes no sense for law professors to treat blackletter study aids as if they are poisonous: nearly all professors dole out the same naked bits of doctrine as the study aids; it's just that professors do so in the form of lecture.

Langdell himself would not be amenable to this criticism. He was, at least as he appears in legend, an unwavering "hard Socratic," never stooping to lecture, always insisting that students discover legal truths themselves, guided only by his questioning.

But Langdell is no longer with us. And virtually no contemporary law professor teaches with such strict pedagogical discipline. These days, many professors bring PowerPoint slideshows to class. Others write on the board. All of them, so far as I know, endeavor, at least on occasion, to explain the blackletter law.

So if law professors can explain the blackletter law, why can't a book? I have yet to hear someone articulate a good answer to this question. It seems that law professors desire, on some level, to be the exclusive means by which students can come to understand the law. Students, if they are awash in the subject without textbooks or study aids, must, out of necessity, look to their professor as the one and only source of light in a forbidding sea of darkness.

That kind of narcissism, even if subconscious, may explain in significant part why the academy spurns study aids generally, but it is not a justification.

Aside from ego, there is also, perhaps, fear. What if, in lecture, you say something that is wrong—something that is contradicted by an outside explanatory text? Well, if you assign or even welcome study aids, you run that risk. Of course, even if you don't get something wrong, there is still the considerable chance that certain students may conclude that the treatise author knows more about the subject than you do, at least in some respects. And if students do come to that conclusion, they will, almost certainly, be entirely correct. But where is the shame in that? I make a point of confessing my ignorance when students ask me a question outside of my ken. Doing so not only relieves a lot of stress, it is, I think, the only path to credibility. I remember when I was a student, I saw all of my professors face questions to which they did not know the answer. Some said plainly that they did not know. Others tried to hedge and cover up their lack of knowledge. The fact that I remember the fumbles of professors trying to maintain an aura of invincibility is testament to how ineffective their attempts were.

Resurrecting the Textbook

It is one thing to eliminate our sketchy admonitions to students to stay away from study aids, but I would like to go further. I would like to convince you that most doctrinal law school courses, ideally, should have a textbook assigned along with a casebook.

As I already discussed, early law schools did use textbooks. Joseph Story used treatises as textbooks to learn the law for himself, and he employed them later for teaching as a Harvard Law School professor.²³ Abraham Lincoln learned the law by reading treatises, and he recommended that others do the same.²⁴ But textbooks became passé when Langdell's case method came into fashion.²⁵ In the contemporary era there are scattered examples of teachers assigning treatises as required reading.²⁶ But like bellbottom jeans, textbooks have yet to make a real comeback.

23. See Stein, *supra* note 2, at 446-47; Sheppard, *supra* note 3, at 553-55.

24. See Stein, *supra* note 2, at 444.

25. See *id.* at 448-53.

26. A former professor of mine, Richard D. Parker at Harvard Law School, actually tried using a treatise after I suggested the approach in an interview I did with him in 1999. (See note 39, *infra*.) For three years, he assigned a hornbook in lieu of a casebook in his Criminal Law class. I'm grateful that he tried the experiment. Unfortunately, though, he reported to me that students didn't like the hornbook reading. There are other examples of professors assigning treatises as well. Steve Sheppard notes that treatises from the Nutshell series have sometimes been assigned. See Sheppard, *supra* note 3, at 641. I recall seeing Entertainment Law in a Nutshell by Sherri L. Burr assigned for a one-credit law-school summer course a few years ago. In addition, Howard Wasserman has assigned treatises as required reading. See Howard Wasserman, Comment to Eric E. Johnson, PrawfsBlawg: Why Do We Counsel Against Commercial Outlines?, Mar. 25, 2008, <http://prawfsblawg.blogs.com/prawfsblawg/2008/03/why-do-we-couns.html> (last visited Aug. 17, 2009). Also, Jeff Lipshaw

As far as I can see, the normative case for why we should continue to avoid textbooks has yet to be made. The original rationale for shunning the textbook has withered away with the erosion of Langdell's strictly Socratic mode of teaching. Today, the reason that law teaching proceeds largely without textbooks appears attributable to inertia.

Let me be clear, I have nothing against the casebook per se. In graduate school especially, it is fully appropriate for students to read original source material. My qualm is with using original source material in a casebook to the exclusion of a well-written textbook.

The most obvious and perhaps best reason to use a textbook is that there is no good reason not to. University classes in nearly all other fields use textbooks. Thus, it makes sense as a starting presumption to regard textbooks as effective and efficient learning tools.

Moreover, a textbook can strongly abet the effectiveness of a casebook by, as I argued above, freeing students to read cases in a more contemplative mode.

Another reason to assign a textbook, besides its function as a primer, is that a textbook supplies context. A good hornbook, for example, supplies a broader view of the law than a selection of case readings. By discussing trends and providing a series of short squibs about a plethora of cases, hornbooks give students a feel for the range of doctrinal permutations that can be found across varying fact patterns and among multiple jurisdictions. The burden shouldered by the textbook also helps free up classroom time for a more in-depth discussion of particularly difficult topics. And perhaps best, in keeping with the cutting edge of pedagogical prescriptions, textbooks do an excellent job laying the groundwork for in-class problem-solving exercises that allow students to apply the concepts they are learning.

In my Torts class, I have assigned a slim paperback treatise as a textbook.²⁷ It works extremely well in my opinion. In my Intellectual Property survey course, I have had great success assigning a thicker book, *Intellectual Property: Examples & Explanations*, by Stephen M. McJohn.²⁸ That book was very much appreciated. One student confided in me—asking not to be quoted—that she actually read unassigned portions of the McJohn book just because it was enjoyable.

recalls that a professor of his, Jack Friedenthal, assigned a treatise, McCormick on Evidence, as the only text. See Jeff Lipshaw, Comment to Jessie Hill, PrawfsBlawg: Is Using a Casebook Ever Justified?, Aug. 15, 2009, <http://prawfsblawg.blogspot.com/prawfsblawg/2009/08/is-using-a-casebook-ever-justified.html> (last visited Aug. 17, 2009).

27. I have generally used John L. Diamond, Lawrence C. Levine & M. Stuart Madden, *Understanding Torts* (3d ed. Matthew Bender & Co. 2007), and I've found it to be excellent. I have also tried Kenneth S. Abraham, *The Forms and Functions of Tort Law* (3d ed. Foundation Press 2007), which, while less comprehensive, excels at providing compelling explanations of basic concepts. Both books were well-received by students.

28. Stephen M. McJohn, *Intellectual Property: Examples & Explanations* (3d ed. Aspen Publishers 2009).

As with cases and other materials I assign, I frequently go through the textbook readings and offer my own notes, emphasizing some passages and being critical of others. I urge students not to regard the textbook as somehow being above reproach. But the perspective and clarity a textbook provides is very welcome. I am confident I will never want to teach Torts or Intellectual Property again without assigning such a book. I urge more professors to try it.

Those Casebook Notes

In the law school environment, there is another, more idiosyncratic, reason for assigning a textbook: It can take the place of casebook notes.

Virtually all casebooks are sprinkled with a sizable helping of notes, questions, and other exegetical matter added by the authors. Often, casebook notes seem to be lifted from the casebook creators' own lecture notes. Sometimes it is clear that considerable thought and work has gone into crafting them. Other times, however, the notes are a mishmash. Either way—well-crafted or kitchen-insinkeredated—notes beg the question of why professors decline to assign a true textbook in the first place.

It is clear that some notes are intended to serve a textbook-like function of distilling and explaining blackletter law. Yet they perform this function inadequately. Coming, as they generally do, after the case for which they are relevant, notes do not give readers a framework of understanding with which to attack the source material.

Of course, sometimes notes do not discuss the case at all. Indeed, notes frequently offer separate points of doctrine that the casebook author deemed important enough to include, but not so worthy that a case was deemed necessary for presenting them. If it is kosher for casebooks to skip cases and substitute these treatise-like notes, then surely a treatise itself will not damage students' minds or destroy the integrity of the course. Thus, good or even mediocre casebook notes bolster the case for assigning a textbook.²⁹

An advantage that a textbook has over even the most well-written notes is organization. When casebook notes are presented as afterthoughts to the case reading, it is often hard to understand how their intended lessons fit into an organized schema of the course's subject matter. A treatise greatly ameliorates this problem because it comes with its own organized, logical internal structure.

29. There are, however, casebook notes that serve merely to frustrate. Included in this unhelpful category are, to my mind, the teaser casebook notes. These notes briefly recount the facts of some other case, one not reproduced in the casebook. The case is often one that appears wildly interesting, with offbeat facts that produce some alluring doctrinal puzzle. The reader is then given the citation to the case, so that the reader can look it up to find out what happened. The effect on the reader is the same kind of vexation visited upon masses of television viewers who are too sleepy to stay up for the late local news. "What delicious sugary snack food can cut your cancer risk in half and help you lose pounds? We'll tell you, at 11." I would be surprised if old-school law teachers, those purists who believe students should struggle with confusing cases as the sole means of learning doctrine, would go so far as to say there is an invaluable learning experience to be found in looking a case up online or in the library, citation already in hand.

Case readings then can be parsed within the framework that the hornbook presents. You can bet that students reliably appreciate being able to clearly see how reading assignments fit with the organization of the course.

The Wypadki: Facilitating a Group Outline

Textbooks and commercial study aids cannot render obsolete a specifically tailored student-written outline for the course. Custom outlines represent a highly valuable synthesis and condensation of course material. But making them is very time consuming. With this in mind, I have created, in my classes, a system designed to enable all enrolled students to produce a single custom-tailored outline that everyone can use, thus minimizing as far as possible the amount of work any particular student must do.

I will describe that system in a moment. But first, let me address the habitual criticism this project faces. The prevailing sentiment among law professors is that students should prepare their own outlines, preferably working alone, or, at the least, in small groups. Students should not, the conventional wisdom goes, simply procure outlines from other students.

I ask: *Why not?* I have posed this question to several law professors. The recurrent response is that the preparation of the outline itself is a crucial intellectual exercise in mastering the material for the course. There is, however, a problem with such an argument: It makes the dubious assumption that there is one best way for all students to study.³⁰ I respect the fact that many of my fellow professors were avid outliners in law school. But that does not mean that outlining is the best study strategy for everyone. I am living proof of the matter.

When I did my own outline, the work proved tedious and very time-consuming. My end product was a show-shined work of art—well-written, exquisitely organized, and formatted beautifully on the page. But, alas, in the process of making it, I learned precious little substance. As I came to find out, I learned much better walking around my small apartment—someone else's outline in hand—vigorously talking to myself. Having a brisk dialogue with myself about the material was probably a good way to convince overhearing neighbors that I was a little weird. But talking out loud, and also marking up, annotating, and highlighting someone else's outline, was the best way for me to learn.

There is another reason to be suspicious of outlining as an indispensable learning tool: It has not caught on outside of law school. It seems pretty clear that outlining has evolved in law school as a practical necessity caused by the lack of a textbook. In the older-style Socratic classrooms, the lack of any organized synthesis imparted by the professor also played a part, no doubt,

30. It is well-worn wisdom in the education field that students learn in different ways. *See, e.g.,* Arthur W. Chickering & Zelda F. Gamson, *Seven Principles for Good Practice in Undergraduate Education*, 39 *Am. Ass'n for Higher Ed. Bull.* 3 (1987).

in the student-outline's ascendancy. But if we broaden our view, looking at higher education as a whole, we can see what a singular burden it is to make a student write his or her own textbook for nearly every class.

Outlining is best viewed as a historical artifact, the ritualized production of which is helpful to many. But absent some strong empirical evidence, I think we should hesitate in expecting it from our students or imposing it on them.

Thus we come to what I think is a funny irony of the law-and-economics movement. For all the time spent in class pondering whether rules of substantive law are economically efficient, the legal academy seems not to care at all about the economic efficiency of law-school learning. Perhaps we should.

With community-wide benefit in mind—what economists would call “net social welfare”—I have constructed a particular system of encouraging the production of a group outline. With the aim of giving it a quick and catchy label, I've dubbed the scheme “wypadki.” As the word is Polish for “accident,” the name “wypadki” made particular sense for Torts, the first course in which I tried it. But the label has universal application if thought of as a recursive portmanteau: *Why prepare an individual outline when you can use a wypadki?*

How the wypadki works requires explanation both on a technological level and on an economic level.

Technologically, the wypadki is enabled by a wiki software package hosted on the law school's servers. The software that I use is MediaWiki, the same as that used for Wikipedia, the wildly successful collaborative online encyclopedia that is written and edited by its readership. As with Wikipedia, students using the wypadki are able to log on and add to, edit, or delete from the evolving document.

Economically, the wypadki is powered through mechanisms that provide incentives and accountability. My final exams are administered on a closed-book basis, except that students are provided with a printed copy of the wypadki.³¹ Thus, students have an inducement to populate the wypadki with content. In sum, the students are essentially offered a bargain, whereby they can bring any materials they wish to the exam so long as they are shared with the rest of the class. As a social incentive to do good work, and as a disincentive to sabotage the document, there is accountability for all contributions. The history-keeping function of the wiki software records the name of the student responsible for each edit, addition, or deletion. To maintain accountability, the document is protected so that it can only be edited by students registered in the class, who use their real names as logons. The overall effect of the wypadki is the production of positive economic externalities—one student's work, undertaken for self-interested motives, pays dividends enjoyed by all of the other students.

31. In response to student comments, I now also allow students to bring with them to the exam a single sheet of paper on which they may put, front and back, any individualized notes they wish to have with them in the exam. The availability of these individual sheets does not seem to have undermined the usefulness of the wypadki.

But wait a minute, you might say, doesn't this allow slackers to take a free ride on other people's work? It does. And this, as I see it, is one of the wypedki's most charming features. In economists' terms, a "free-rider problem" arises when people refrain from engaging in some socially beneficial pursuit because those people anticipate that others will be able to derive a benefit without putting forth any of their own effort or investment.³² The *problem* in the free-rider problem is not the free-loading, it is the fact that people are dissuaded from engaging in the socially useful activity. The wypedki does not suffer a free-rider problem because students contribute despite the potential for others to take a free ride. The fact that some students do not contribute at all, yet obtain a benefit from the wypedki, is an economic bonus.

The wypedki likely would suffer a free-rider problem, and fail to be populated with content, but for the fact that the exam is closed-book except for the wypedki.³³ The architects of any given wypedki are those most familiar with the document. Moreover, contributors benefit from the fact that the document is rendered to their specifications. In the end, contributors get more out of sharing than they would from withholding.

I am not alone in using wikis in a law course. Beth Simone Noveck at New York Law School has provided a wiki to her students.³⁴ She suggests having the students take turns writing and posting class notes to the wiki, and she rewards good work by exporting "best of" postings to a public source.³⁵ She sees the wiki as a collaborative learning experience for the class.

In my view, while the collaborative learning experience is felicitous, the more important function of the wypedki is in serving as a labor-saving device—a utilitarian tool that maximizes social welfare. For me, it's not an end in itself, but a means to an end.

I have done the wypedki in eleven classes now. It has been reasonably consistent in creating well-written and instructive outlines. You can see the results yourself—the wypedki documents are publicly available online.³⁶

Beginning with the Ball

The wypedki represents an approach focused on a course's endpoint, offering a more efficient way for students to synthesize the information in a course and "bring it all together." Now I want to move to a discussion of how

32. Note that I am simplifying. A better, more complete definition would be: the phenomenon of underproduction of public goods and associated positive externalities because of a lack of returns to actors that would produce those goods.

33. *But see supra* note 31.

34. *See* Beth Simone Noveck, *Wikipedia and the Future of Legal Education*, 57 *J. Legal Educ.* 3, 8 (2007).

35. *See id.*

36. Links to various wypedki sites may be found at <http://cejlaw.com/wypedki/> (last visited April 18, 2010). This webpage contains links to wypedkis for my classes as well as wypedkis for classes taught by Kit Johnson.

courses ought to begin, and how students perceive the way in which professors allow courses to unfold. How do students view the pedagogical approach of law professors? They sum it up in a refrain:

“Professors hide the ball.”

We ought not brush off this sentiment. I am sure that few professors intentionally and knowingly hide the ball. But the students have a point. The fact is, Langdell’s case method does hide the ball. It was designed that way. It was precisely because he wished to hide the ball that Langdell removed the blackletter law summaries from his casebook.

What is the ball? The ball is the blackletter law. When students say “she’s hiding the ball,” they do not mean that the professor is hiding the most important lessons of the course or the secret to being a great lawyer. Certainly, blackletter law is not that secret. We can stipulate that it takes far more than knowledge of the blackletter law to be a lawyer. But that is what students perceive to be hidden, and they have non-trivial reasons for being upset. It is, after all, the blackletter law that students will need as the foundation for being able to frame an answer to an issue-spotter hypothetical on a final exam. Blackletter law is also what they will need more than anything else for the bar exam.

There can be no doubt that law professors expect students to learn the blackletter law. Yet we are so coy about teaching it.

Students’ frustration with ball-hiding is nothing new. A student who attended Langdell’s very first Langdell-method class later recalled the reaction among his classmates:

What do we care whether [a certain student] agrees with the case, or what [another student] thinks of the dissenting opinion? What we want to know is: What’s the *Law*?³⁷

As Langdell’s method has now persisted in some form for over a century, so has students’ sense of mystification. Irked law students continue to ask the same question in the same words.³⁸

The shame of the whole Langdellian hiding-of-the-ball is that it has the perverse effect of elevating blackletter law to some lofty, undeserved status. If we hide the ball, students will inevitably come to view the ball as something intensely valuable. When we are not entirely upfront about what the blackletter law is, and when we discourage students from finding it laid bare for them in study aids, then the natural consequence is for students to regard the blackletter law as the ultimate prize. That outcome is tragic. It is like a chemistry class that had the Bohr model of the atom as its endpoint.

37. See Samuel F. Batchelder, Christopher C. Langdell, 18 *Green Bag* 437, 440 (1906) (emphasis in original).

38. As a member of the Harvard Law School class of 2000, I can personally attest that virtually identical words were uttered by students at Harvard as late as my 1L year, 1997–1998.

Chronologically, if class proceeds in the traditional Langdellian-case-method mode, the blackletter law is the last thing students learn. By using their own case briefs and class notes to construct their own outline, students finally get, at the end of the semester, a document that sets out the plain rules of doctrine.

This is utterly backward.

Learning blackletter law should not be the endpoint of a course; it should be the beginning. Students are far better served by being given the blackletter law upfront, spooned to them—with sugar even. Once the blackletter law is laid out, the rest of the semester can be spent on achieving a deeper understanding of the subject matter.³⁹

I have structured my Torts and Intellectual Property classes in exactly this way. I begin the courses with a blackletter overview. It takes a few days. Using a skeletal outline I've done myself in the form of an interactive mindmap on a computer, I lecture about the naked doctrine. Over these days, we do not read any cases. In fact, there is no assigned reading, although I do encourage students to read the abbreviated 20- to 30-page "capsule summary" of a commercial outline.

As it turns out, if you forgo reading and discussing cases, it is amazing how quickly you can make progress in teaching blackletter law. Within a couple of weeks, my Torts class learns the intentional torts, their defenses, the elements of negligence, the most significant negligence defenses, the doctrine of strict liability, and more. Thus, before even reading the first case, my Torts students already know enough to correctly answer a slew of multi-state bar-examination questions. They know, for instance, that there is no general affirmative duty to rescue, and they know the principal exceptions. They are already well on their way to being able to meaningfully work through hypothetical legal problems. And I know this, because after my blackletter review, I give the students a multiple-choice midterm exam. They do well.

39. I suggested this to Professor Richard D. Parker in 1999 in an interview for a student newspaper. Parker responded that a colleague had proposed something similar years before; Parker, for his part, said, "I don't buy it. I don't think it's a two-stage process, understanding the law. I think it's a one long-stage process. It's not a matter of grasping the black letter and then evaluating it or seeing its ambiguities. I think right from the start you have to see... its fogginess, its fluidity, and its conflictedness." See Eric Johnson, Prof. Parker Invites Our Impolite Questions, We Oblige, *The Backbencher*, Feb. 1999, at 3. Parker went on to say that he finds some amount of fogginess in law school "liberating and empowering." I think fogginess can be helpful in this way—and it often was in Parker's Criminal Law class, which I was lucky enough to take in my first semester of law school. Indeed, Parker was one of my favorite teachers, and the deliberate-fogginess approach worked brilliantly in his class. He was able to take us into the fog without getting us lost in it. As a general matter, however, I think that when students enter the fog, they ought to do so on account of their own volition, rather than being placed there by design.

Learning blackletter doctrine in this manner is, in fact, so fast and easy, it almost seems scandalous. It prompts one to ask the question, if you can teach all of torts blackletter doctrine in a couple of weeks, how can law school possibly last all of three years?

That is a fair question. For a reality check, it behooves us to recall that American law school lasts three years precisely because Christopher Columbus Langdell wanted it that way. Before Langdell was appointed dean, it was possible for a student to earn a Harvard law degree in just one year.⁴⁰ But Dean Langdell extended the program to two years, and then later to three.⁴¹ The rest of American law schools followed his lead. It doesn't take much of a skeptic to see the connection here: The person who revolutionized learning the law—to make the process more difficult—also revolutionized the law school degree plan—to make it take longer to graduate.

After I have taught my students the blackletter law in Torts or Intellectual Property, I do not, of course, excuse class for the remainder of the semester. At this point, we start over, and we work through the doctrine again, but this time with a casebook. Reading cases after having learned the doctrine is not boring—to the contrary, it makes the case readings much more interesting and rewarding.

In sum, having a shortcut to learning blackletter law is not intellectually confining. Far from it. It is liberating.⁴² One important way in which this mode is intellectually freeing is that when we start reading cases, students are already prepared to make connections across disparate fields of doctrine. For example, in Torts, after the blackletter overview, we can talk meaningfully about the resemblance between *res ipsa loquitur* and strict liability. We also can compare the limitations on negligence posed by the duty-of-care element and the doctrine of proximate causation. We can likewise see how custom-defined duty of care in malpractice cases is conceptually similar to negligence per se. And on and on.

Best of all, learning the blackletter law, students are encouraged to develop a healthy skepticism of the kind of bare assertions of legal doctrine that can be found in an outline or treatise. Reading cases allows us to poke and pull at our blackletter outline, finding its manipulable elasticities and uncovering its beguiling oversimplifications.

In short, I believe the best cure for the perceived evils of commercial outlines and learning shortcuts is to embrace them right at the beginning, and then spend the rest of the semester demanding that students reach beyond.

40. See Stein, *supra* note 2, at 449.

41. See *id.*

42. Cf. Parker's comments, regarding "liberating," *supra* note 39.

Reading Cases Without Reading Judicial Opinions

As I said above, I do not view the hurry-up blackletter overview as a replacement for reading cases. Cases serve as examples of the law in play, and they provide a basis for classroom discussion and intellectual investigation. But if we no longer rely on judicial opinions as sources of blackletter law, then an exciting opportunity opens up. We can reduce our diet of judicial opinions and then boldly substitute other kinds of readings—briefs, trial transcripts, narrative accounts, and more. To be clear, I am not proposing that we get rid of cases. Cases are where the rubber meets the road. Learning the law without constant reference to cases is a parched and sad prospect. I am merely urging at least occasional use of different sorts of documents as vehicles for presenting cases.

A beginning law student has hardly an inkling of it, but a practicing lawyer knows it well: A published court opinion is but a tiny slice of the whole case. The real case, as it were, involves many more legal quandaries and factual puzzles, and beneath the summation treatment by the court, there is a world of interesting characters and emotional drama. We should expose students to this bigger world as much as possible, because our law students are, quite naturally, excited about becoming lawyers. The shame of judicial opinions is that they give scant insight into the work-a-day world of lawyering. These other documents, on the other hand, can shed penetrating light on the practice.

Using other documents besides judicial opinions is not new. Others have used and encouraged the use of such materials.⁴³ But despite such experimentation, the legal academy tends to treat such materials as supplements to judicial opinions rather than as substitutes for them. But if we make use of a textbook as the backbone of the course, rather than using a casebook for that role, then we can assign different sorts of materials *in lieu of* judicial opinions. That is, we can begin to think of judicial opinions as one way among many of presenting a case to students.

43. For example, the CLEA encourages the use of other materials such as books and movies to present actual cases, particularly for the purpose of presenting problem-solving exercises. See Stuckey, *supra* note 10, at 144.

For three years now, in my Torts class, I have been assigning portions of John Edwards's book *Four Trials*.⁴⁴ As most readers are aware, before he became famous as a Democratic senator and candidate for national office, Edwards was a supremely successful personal-injury attorney in North Carolina. Each chapter in his book contains his personal narrative account of a case, and the text is steeped in the human dimension of litigation practice. Although the book was not written to teach doctrine, it does discuss real legal issues—standard of care, remittitur, the threshold for punitive damages, what counts as a design defect, and more—all presented within the rich context of the apprehension, loathing, greed, and, most impressively, the compassion that is part of torts as it exists in real life.

As is the case with any judicial opinion, Edwards's narrative gives us a view of the judge's thinking about tort law. But with Edwards's book we see the judge from the utterly different viewpoint of the counsel's table. From there, we see how the law interacts with strategy, rhetoric, and jury dynamics. In the end, Edwards's book imparts a vivid picture of tort law that no court-written opinion could ever hope to provide.

I do not assign Edwards's stories in addition to cases. I have taken cases out of my syllabus and put these stories in instead. Edwards's stories are quite incomplete in their treatment of legal doctrine. But judicial opinions are incomplete in their own ways, too.

44. John Edwards with John Auchard, *Four Trials* (Simon & Schuster 2004). If you are interested in assigning the book or part of it, here are the cases, the specific pages at which they are discussed (to cut around Edwards's autobiographical material), and the doctrinal areas for which they can be assigned: *Sawyer v. St. Joseph's Hospital*, 17-48 (medical malpractice, settlement dynamics, professional standard of care); *Campbell v. Pitt County Memorial Hospital*, 51-113 (medical malpractice, informed consent, remittitur); *Howard v. Collins & Aikman Corp.*, 131-159 (breach of duty, compensatory damages, punitive damages); *Lakey v. Sta-Rite Industries*, 178-230 (products liability). These page references are keyed to the 2004 paperback edition, ISBN-13: 978-0743272049. I wrote previously about using Edwards' book on *PrawfsBlawg*. See Eric E. Johnson, *PrawfsBlawg: Beyond the Traditional Syllabus: Using Narrative To Teach Torts*, October 16, 2008, <http://prawfsblawg.blogs.com/prawfsblawg/2008/10/beyond-the-trad.html> (last visited Aug. 20, 2009).

My students have been extremely enthusiastic about the Edwards readings.⁴⁵ The reaction the first year was so favorable, the next year I trimmed enough cases from the syllabus to make room for assigning the movie *A Civil Action*⁴⁶ and several briefs from the underlying litigation, *Anderson v. Cryovac*.⁴⁷

The *Anderson* lawsuit, for those unfamiliar with it, was a toxic-tort case against industrial operators who had allegedly dumped carcinogenic waste on the ground, polluting a groundwater source for Woburn, Massachusetts and leading eventually to a leukemia cluster. Three of the briefs from the case that I have assigned argue the issue of how to bifurcate (or polyfurcate) trial.⁴⁸ The legal doctrine *du jour* is actual causation, and the briefs, considered together, gave the law as sharp a treatment as might be expected out of a judicial opinion. But because the documents are lawyer-crafted argument, they give students a wholly different and enticing view. By reading briefs, students see the sort of work-product they will shortly be expected to produce. And in class, we are able to deconstruct the attorneys' tactics and wordsmithing. As with a judicial opinion, we get a view of the judge, but the briefs give us a perspective that is inside-out. We are reading what the judge reads, and thus we are compelled to see things as they appear from the bench.

Assigning the movie alongside the briefs gives the class the long view. We confront squarely the human suffering that our justice system is meant to address. More than that, we are shown, with painful clarity, how slow and draining litigation can be. The film also sheds special light on the element of actual causation—but not as blackletter law. Instead, the film shows what the

45. The virtually universal positive reaction among my students to the Edwards readings was, I thought, quite remarkable considering his public record. One would expect roughly half of students would be turned off by Edwards's politics. Even among those sympathetic with his politics, Edwards's image can be expected to lack considerable luster thanks to his well-publicized extramarital affair with a campaign staffer, pursued even as his wife continued to battle an incurable form of breast cancer. See Howard Kurtz & Lois Romano, Edwards Admits to Affair, Denies Fathering Child, Wash. Post, Aug. 9, 2008, at A01; Korva Coleman, John And Elizabeth Edwards Separate, The Two-Way, NPR's New Blog, Jan. 27, 2010, http://www.npr.org/blogs/thetwo-way/2010/01/john_elizabeth_edwards_split_d.html (last visited April 20, 2010).
46. *A Civil Action* (Touchstone Pictures 1998). The book on which the movie is based is truly wonderful. See Jonathan Harr, *A Civil Action* (Vintage 1996). But without editing, it requires a significant investment of time to read. Thus, I opted for the movie. The book and movie could be used in a Civil Procedure course as well.
47. Civ. A. No. 82-1672-S.
48. Plaintiffs' Trial Plan: A Modified Test Case, available at http://www.eejlaw.com/c/Anderson_v_Cryovac_plaintiffs_trial_plan_011586b.pdf (last visited July 21, 2009); Defendant Beatrice Food Co.'s Memorandum Concerning Trial of Dispositive Issues, available at http://www.eejlaw.com/c/Anderson_v_Cryovac_Beatrice_trial_plan.pdf (last visited July 21, 2009); Defendant W.R. Grace & Co.'s Supplemental Memorandum in Support of Motion for Separate Trials on Liability and Damages, available at http://www.eejlaw.com/c/Anderson_v_Cryovac_Grace_trial_plan.pdf (last visited July 21, 2009). Note that there is a database of materials from the Anderson case maintained by Florida State University College of Law's library: <http://www.law.fsu.edu/library/coursesources/beatrice/index.html>. Most of the materials I have on this case are from FSU's repository.

prima facie element of actual causation means in real life: We see the financial turmoil of a small contingency-fee plaintiffs' firm foundering under the burden of trying to prove causation in such a complex case. The expert medical witnesses, the geology experts, the soil testing, the endless depositions of the families, and, above all, the mountains of paper that must be reviewed—it is all a very real part of the actual causation requirement, and it is insight you can scarcely get from a judicial opinion.

Most recently, I have added as reading the transcript of Gerry Spence's closing argument in the strict-liability action, *Silkwood v. Kerr-McGee*.⁴⁹ The story behind the case was made into a film, *Silkwood*, starring Meryl Streep.⁵⁰ In brief, the facts are these: Karen Silkwood was a laboratory technician at the Kerr-McGee plutonium-processing plant in Oklahoma.⁵¹ Silkwood rankled management as a union leader and a whistle-blower.⁵² She organized workers and compiled documentation of safety lapses at the plant.⁵³ Then, Silkwood ended up being poisoned by radioactive material—plutonium that had somehow escaped the plant facility. Later, Silkwood died in a suspicious one-car accident while she was driving to meet with a reporter for the *New York Times*.⁵⁴

What makes for a powerful movie makes for an amazing closing argument. In the ensuing lawsuit, the plaintiffs had no way of showing how the plutonium wound up outside the secured facility. The Silkwood estate thus faced a problem bringing a cause of action for negligence. Without being able to prove a breach of the duty of care, the plaintiffs would not be able to make out a prima facie case. Enter strict liability. In his closing argument, Spence repeated to the jury a catch phrase that sums up strict liability as well as anything I can think of: "If the lion gets away, Kerr-McGee has to pay."⁵⁵

To the extent judicial opinions continue to fill up most of the places on the syllabus, the presence of a textbook allows professors the flexibility to pull from a much greater breadth of sources than the usual American state and federal courts along with the occasional offering from England.

49. Civ. A. No. 76-0888-Theis. The abridgement I assigned is available at http://www.ejlaw.com/c/Silkwood_v_Kerr-McGee_T10.pdf (last visited April 19, 2010). For a more complete transcript, see Michael S. Lief & H. Mitchell Caldwell, *Ladies and Gentlemen of the Jury: Greatest Closing Arguments in Modern Law* (Scribner 1998).

50. *Silkwood* (20th Century Fox 1983).

51. See Richard Rashke, *The Killing of Karen Silkwood* 9 (Cornell Univ. Press 2000).

52. See *id.* at 4.

53. See *id.*

54. See *id.* at 18–25.

55. See my abridgement, *supra* note 49, at 3.

For two years now, in covering wrongful death, I have had my students read *Benally v. Navajo Nation*,⁵⁶ a case from the District Court of the Navajo Nation.⁵⁷ The opinion concerns tribal law—not federal law or the law of any state. Nonetheless, the case gives us not only a basis for discussing wrongful death, it provides a platform for learning about the tribal courts and tribal law in general. Most students would not get this subject matter outside of an elective course in Indian law, but it is nonetheless valuable knowledge to have for any lawyer dealing with clients in the United States.⁵⁸

For the same reasons I have assigned *Benally*, I have also assigned a case from the Supreme Court of Canada. The case, *Dobson v. Dobson*,⁵⁹ presents a negligence duty-of-care question: whether a mother, as a driver of a car in an accident, owes a duty of care to her own unborn child.⁶⁰ The case was a perfect vehicle for talking about duty-of-care doctrine, and it also opened our eyes to the tort law and legal system of America's northern neighbor. As cross-border business becomes more and more important in the NAFTA era, I think some exposure to Canadian law is clearly of benefit for every lawyer practicing in the United States.

Let me note that this opportunity to reach for non-traditional case readings does not exist equally for all courses. Torts, Contracts, Property, and Criminal Law, for instance, seem particularly suited to it. But I cannot see the approach working the same way for a course like Constitutional Law.⁶¹ The reason it works well in common-law classes is because the cases in such classes are not presented as being controlling law, but merely examples of the law as it is likely

56. *Benally v. Navajo Nation*, 5 Navajo Rptr. 209 (W.R. Dist. Ct. 1986). The edited version of the opinion that I have used in class is available at http://www.ejlaw.com/c/Benally_v_Navajo_Nation_T09.pdf (last visited July 21, 2009). I am grateful to Justice Raymond D. Austin of the University of Arizona Rogers College of Law, who was kind enough to suggest this case as a possibility for using in Torts.

57. I wrote previously about *Benally* and using tribal cases in Torts on PrawfsBlawg. See Eric E. Johnson, PrawfsBlawg: Beyond the Traditional Syllabus: Tribal and Canadian Cases, Oct. 7, 2008, <http://prawfsblawg.blogs.com/prawfsblawg/2008/10/beyond-the-tr-1.html> (last visited Aug. 17, 2009).

58. At the University of North Dakota, I have been lucky to be able to tap Keith Richotte, my faculty colleague and an Indian law scholar, for a guest lecture. That way, the class has learned about tribal jurisprudence from a real pro. Yet it is not necessary to have that kind of help within the institution in order to take advantage of the opportunity to teach about other jurisdictions, as the discussion of *Dobson*, *infra*, illustrates.

59. *Dobson v. Dobson*, [1999] 2 S.C.R. 753 (Can.). An edited version of the opinion is available at http://www.ejlaw.com/c/Dobson_v_Dobson_T09.pdf (last visited July 21, 2009). To find a Canadian case to assign, I reached out to Jennifer L. Schulz of the University of Manitoba Faculty of Law, who was kind enough to suggest *Dobson* and tutor me about some key aspects of Canadian law.

60. I wrote previously about *Dobson* and using Canadian cases in Torts on PrawfsBlawg. See Johnson, *supra* note 57.

61. That is not to say that Constitutional Law classes could not benefit greatly from a bit of comparative attention to constitutions in foreign, tribal, and American state jurisdictions. I think such an endeavor would be quite rewarding.

to be found in many jurisdictions. But if you are teaching the commerce clause in Constitutional Law, I would consider it a bad idea to swap out *U.S. v. Lopez*⁶² for a trial transcript. *U.S. v. Lopez* is not illustrative of commerce-clause doctrine, of course; it is commerce-clause doctrine. Nonetheless, for many courses, there is tremendous opportunity to move beyond the well-traveled road of state and federal judicial opinions.

Conclusion

The American institution of law school has been guilty of a particular sin for more than a century. Law professors have not been engaged in the task of trying to make it easy to learn the law. In fact, we have expended considerable effort trying to make it harder. There can be no justification for this. It squanders students' time and mental energy. The necessary result is increased frustration among students and decreased competence among law-school graduates.

The law teaching profession has allowed inertia and, to some extent, ego to blind us to this reality. Law school should be challenging, but we owe it to our students to provide challenges that are carefully thought out, so they can be maximally rewarding. Unfortunately, the challenge of learning law "the hard way" is a challenge less from design than unquestioning adherence to tradition. Moreover, it is tedium repeated in nearly every class; thus, it is bound to be more busywork than intellectual adventure.

We should not be idle stewards for such systemic waste. In the present rush for reform, we should take a hard look at liberating ourselves from upholding the casebook as law school's central totem.

I have made my argument. Now, let me speak frankly about what ought to come of it: I cannot hope to win everyone to my cause. Nor, to be honest, would I want to. Different people learn in different ways. Because this is true, it will always be a good thing that different teachers teach differently. For instance, I think that in an ideal world, there would be one hard-core Langdellian at every law school. But maybe not much more than one. The problem of Langdellian instruction was that it was presented as the only way to teach law. The one best way to teach never is.

Thus, if there is one argument that I can make that I hope will transcend entrenched philosophical divisions over pedagogy, it is this: Whether everyone agrees with it or not, there is, at least, a solid rationale behind the kind of blackletter-first teaching I advocate. That being the case, antiquated stigmas against blackletter outlines and textbooks should be set far enough aside that a populist approach to teaching finds a welcome place in a pedagogically pluralistic curriculum.

62. *U.S. v. Lopez*, 514 U.S. 549 (1995).