

# When Torts Met Civil Procedure: A Curricular Coupling

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## I. Introduction

In the iconic movie *When Harry Met Sally*, the main characters live their lives in separate, albeit overlapping, orbits. Content through most of their young adult lives to pursue their separate journeys, they find their mutual fate only when their orbits collide, and they merge their lives. The movie is a he said/she said account; Harry and Sally recall the evolution of their relationship through the lens of perspectives unique to each. The viewer understands the richness of the story only because those perspectives are presented together.

Is there a lesson here for those seeking to improve their law school curriculum? Bringing together different viewpoints is one of the callings and challenges of legal education. We often think of this calling in terms of teaching students how to recognize the different roles and views of the people involved (or excluded) in litigating a case. But law students must also become adept at understanding how various bodies of law interact—supporting, balancing, and even conflicting with each other. Just as the people and institutions involved in litigation bring different values and history to social problems, so too different areas of law bring with them rich historical and policy traditions. As others have noted,<sup>1</sup> teaching students isolated areas of law leaves students unprepared for practice. When we teach students how the separate topics they study in law school fit together, they can better put abstract concepts into practical use and recognize overarching concepts that animate many different areas of the law.

This article describes an attempt to achieve these goals by merging two canonical first-year courses, civil procedure and torts, into an integrated class titled Introduction to Civil Litigation. Our most pressing motivation was concern that students who study civil procedure and torts in isolation develop a skewed, unrealistic view of how law works in the real world. By combining these courses, we hoped to teach students early in their careers to approach problems more like practicing lawyers, who must deal with multiple bodies of

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1. See, e.g., Kris Franklin, *Do We Need Subject Matter-Specific Pedagogies?*, 65 J. LEGAL EDUC. 839, 861 (2016).

law simultaneously. And while the course did yield a higher level of practice readiness, the experience also brought unexpected rewards to both students and faculty. As we developed and refined the course, we discovered that we were not just merging two courses. We were bringing together two different perspectives on how the law functions. We came to believe that more can be gained by viewing torts and civil procedure together than by studying them apart. Like Harry and Sally, torts and civil procedure tell different sides of the same story.

The insights gleaned after four years teaching the merged civil litigation course are potentially useful to faculty teaching torts or civil procedure, whether the instruction is delivered in an integrated or traditional course setting. Part II of the article briefly recounts the odyssey of our decision to merge torts and civil procedure into one integrated course. Part III describes how we used the course to broaden student understanding of foundational doctrines through the interweaving of procedural and substantive law. In Part IV, we discuss how our approach to the course facilitated active, contextual learning and introduced students to both practical applications and bar-type assessments. Finally, Part V lays the groundwork for the future of our noble experiment and offers some suggestions to colleagues in the academy who might consider teaching a similar course or enhancing a stand-alone course.

Kris Franklin's recent piece in the *Journal of Legal Education* calls for law teachers to consider both how their individual courses can best convey the essential concepts that students need to understand about a particular field and more broadly how the course fits within the "gorgeous mosaic" of the law itself.<sup>2</sup> She posits that "each law school class [has] something unique to contribute to the larger enterprise of teaching law students the process of law itself," and suggests that law schools might better capture those contributions by coordinating among courses in the curriculum.<sup>3</sup> Our project begins to answer that call in a concrete, and, we believe, fruitful way.

## II. A Civil Union

Critics in and out of the legal academy have long bemoaned the relative dearth of practical training provided by the traditional Langdellian curriculum, with its emphasis on case studies of appellate opinions and relegation of practical skills to courses often taught by nontenure-track and adjunct faculty.<sup>4</sup>

2. *Id.* at 861. The "gorgeous mosaic" phrase is a reference to New York Mayor David Dinkins's imagery describing cultural integration in the city. See *The Mosaic Thing*, N.Y. TIMES, Jan. 3, 1990, at A18. Professor Franklin intriguingly uses the phrase to describe the richness and complexity of the law as an overarching system that law students need to understand to be fully prepared as attorneys.
3. Franklin, *supra* note 1, at 862 (Professor Franklin notes that "[f]ollowing the principles of intentional design, the more we articulate the ways each of the core academic subjects in law school adds to students' overall learning, the more we can tailor our teaching to accentuate those features." (footnote omitted)).
4. See, e.g., Peggy Cooper Davis, *Slay the Three-Headed Demon!*, 43 HARV. C.R.-C.L. L. REV. 619, 621 (2008).

The ABA's MacCrate Report sounded an alarm that has been repeated many times since its 1992 publication.<sup>5</sup> Legal employers now demand that new hires bring with them better training in the nuts and bolts of law practice.<sup>6</sup> Law schools have responded by including more practical experiences in their curricula and by infusing practice-oriented exercises into foundational courses. Nonetheless, the actual structure of the first-year curriculum has yet to undergo a significant and sustained change.<sup>7</sup> Some schools have added coursework or merged a writing course with a doctrinal subject,<sup>8</sup> but the great majority of first-year students will encounter separate silos of doctrinal content, each subject formally cast as a universe unto itself.

Breaking with the time-honored structure of the first year took a leap of faith. While it seems intuitively true that the silos of first-year courses create an artificial legal world for students, breaking down and merging traditionally distinct courses required a reevaluation of the content of each course. Indeed, we discovered that teaching the integrated courses, particularly because the three of us had long taught one course but not the other, caused us to think very differently about subjects regarding which we had considered ourselves experts.

Most teachers of civil procedure struggle to explain enough of the substantive context of the cases they teach to make the procedural holdings salient to their students. And torts teachers struggle with having to explain the procedural posture of torts cases. We expected that our approach would diminish these problems, and it did, but the lessons we learned went far beyond those limited benefits. We discovered that combining the courses gave students a better, more realistic understanding of the systemic operations of legal institutions.

5. See TASK FORCE ON LAW SCH. AND THE PROFESSION: NARROWING THE GAP, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992); Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744, 761 (2016) (describing the call to action, including the need for “context-based” learning); David B. Oppenheimer, *Using a Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution*, 65 J. LEGAL EDUC. 817, 819 (2016) (“The MacCrate report, the Carnegie report, Best Practices for Legal Education, Transforming the Education of Lawyers, and many articles published here in our peer-reviewed *Journal of Legal Education* and elsewhere encourage us to provide our students with opportunities to simulate or practice lawyering skills.” (footnotes omitted)).
6. See, e.g., Sean Patrick Farrell, *The Lincoln Lawyers: Bypassing Law School on Your Way to the Bar*, N.Y. TIMES, Aug. 3, 2014, at 22; Peter A. Joy, *Law Schools and the Legal Profession: A Way Forward*, 47 AKRON L. REV. 177, 179–80 (2014).
7. See Bartholomew, *supra* note 5, at 760 (“While [law schools] have expanded upper-division offerings to include more practical-skills classes and problem-solving courses, the first-year curriculum (and teaching of that curriculum) has generally changed little.”); Michael B. Mushlin & Lisa Margaret Smith, *The Professor and the Judge: Introducing First-Year Students to the Law in Context*, 63 J. LEGAL EDUC. 460, 462 (2014) (“The first year of law school, and particularly the first semester, with a few notable exceptions, remains unchanged at most schools.” (footnote omitted)).
8. See, e.g., Oppenheimer, *supra* note 5, at 821 n.25 (surveying law schools that combine writing and civil procedure).

*A. Developing the Course*

We chose to combine civil procedure with torts in part because many of the major civil procedure cases are based on an underlying tort claim. In practice, this occasional subject-matter overlap provided some convenience in teaching but was not a major benefit. The best part of combining the subjects was the way the accessibility of torts provided familiar ground on which to scaffold less accessible procedural doctrines. The media frequently report on claims of fraud, product defects, and high-profile wrongful-death actions. Most people have experienced a tort, whether litigated or not, in the form of a car accident or defective product. And, thanks to contingency fees in personal-injury cases, tort litigation reaches many who would not otherwise engage the judicial system. Tort lawyers are almost as common on television as criminal lawyers. The prominence of torts in pop culture provides both a familiar entry point and a sharp contrast to the less accessible world of civil procedure.

Some of our colleagues vehemently opposed integrating torts with civil procedure in one course, worried that the course would be more than first-year students could handle. Interestingly, when we spoke with practicing attorneys and second- and third-year law students about the course, they were overwhelmingly positive, saying, “I wish I had learned civil procedure like that.” They felt, in particular, that teaching civil procedure in a vacuum made it too abstract to be useful; they did not understand how important civil procedure was until they tried to use it in a practical setting.

Ultimately, the doubters and the believers were both right—to a degree.<sup>9</sup> Especially in the beginning, students struggled to find continuity as we moved from a torts topic to a civil procedure topic and back again; certainly, for the professors, teaching the integrated course took extra time (partially because there was no ready-made casebook or syllabus).<sup>10</sup> Those students who surmounted these issues were able to better understand the way substantive law and procedural law are necessarily linked. Their depth of knowledge also increased through practical exercises and assessments that required an understanding of both areas of law at once.

At first, we structured the course by teaching a civil procedure topic followed by a congruent torts topic, followed by a practicum that required students to use both areas of law in a single project. We would then study a new set of torts and civil procedure topics, followed by a practicum that attempted to pull together all the topics that we had covered so far in the course. Over time,

9. Student responses to the course varied over four years. In anonymous course evaluations, students often identified civil litigation as their most difficult first-year course. This could suggest that the course was too much for first-year students or that they were challenged and grew to meet expectations. Many also described it as their favorite class. The first year we taught the course, some students commented in surveys that torts and civil procedure should be taught separately. These comments varied in future years. We describe here what seemed to work best based on student feedback and our own impressions.
10. We created a syllabus and a custom casebook (described in more detail below) that combined torts and civil procedure materials from other texts.

we tweaked the order of topics to better leverage synergies and to balance the relative difficulty of the subjects. Also, we refined the practicums, integrated them more into the substantive aspects of the course, and increasingly used the same underlying fact scenarios as simulations to attack topics from different angles.<sup>11</sup> By the third time we taught the course, the torts and procedure topics seemed to fit together naturally.

*B. Unexpected Second Order Effects*

One of the best parts of uniting these courses, for us, was the way it expanded our perspective on the topics we thought we knew. Two of us have taught civil procedure for many years (but not torts) and the third has taught torts for many years (but not civil procedure). To get up to speed, we met regularly to brief each other on the subjects and coordinate teaching approaches.

We realized quickly that as faculty members with focused areas of expertise, we had become unnecessarily and unhealthily siloed. As professors, we know what we know and have explained it enough times that it makes perfect sense to us. In explaining our well-worn topics to a colleague, we discovered that years of teaching had led us to approach the law from very different perspectives. Our own reactions as we ventured outside our academic comfort zones gave us a better appreciation for the challenges students face when attempting to digest these different bodies of law.

For those of us who had taught civil procedure but not torts, for example, the field of torts initially seemed frustratingly squishy. Having taught the historical development of doctrines mainly through United States Supreme Court cases, the proceduralists among us struggled to find coherence in an array of tort cases drawn from many different state courts, each with no obligation to follow the reasoning of other state courts or even that of such influential institutions like the American Law Institute. Also troubling was the lack of a consistent lexicon in torts. Terms like cause in fact, proximate cause, duty, and breach can have different meanings for different courts, and even among different jurists on the same court. And though students must learn well-established tort “elements” in any torts class, those elements are far from distinct. Duty bleeds into breach, breach into causation.<sup>12</sup> Element “creep” matters greatly to the proceduralist, who is keenly aware that the division of

11. We also found that assigning students a practicum before studying a topic helped to focus students’ attention. As with the familiar “treasure hunt” approach, students engaged with material by looking for answers to mock clients’ concrete questions and needs. This, of course, better mimics the practice of law.
12. Of course, from the perspective of a torts professor, the apparent disorder of tort doctrine is what makes it great for teaching legal reasoning. In torts we attempt to find uniform rules across a field of diverse cases, and in the process draw arguments and policy rationales from a deep pool of common-law thought. In torts, there is rarely a “right” answer to a legal question; instead there are but guideposts that can be used to test students’ ability to think critically and recognize unconscious assumptions. Students practice being counselors, identifying strong and weak arguments, as we spin hypotheticals that slightly alter the facts.

decision-making authority between judge and jury varies according to the element.

Those of us who had taught torts but not civil procedure often found the procedure cases simultaneously rigid and indecisive. In studying personal jurisdiction, for example, the cases purport to be asserting a consistent philosophy—due process—yet over time the rules shift and are redefined by the Supreme Court. History eclipses doctrine as the Court circumlocutes prior cases to catch up with social, economic, and philosophical changes in society. Far from the flexibility of the common law, civil procedure demands uniform application of its rules and statutes within all geographies of the federal courts. Additionally, for a torts professor who is used to teaching that legal questions rarely have a “right” answer, it was disorienting to find that, particularly when it comes to codified civil procedure rules, there often *is* a right answer to procedural questions.

We were surprised to find how often our different doctrinal predilections affected how we taught the subjects. The procedure teachers found themselves focusing on decision points and due-process problems that would otherwise receive little attention in a torts course. Those who have spent more time studying common-law claims could not help but question the venerable line of civil procedure cases that propound far-reaching federal policies that sometimes fail to provide individual justice. The collaborative process of creating the course evoked new perspectives, challenged the assumptions we made in teaching our courses, and helped us better understand why students struggle to find connections in these two distinct, yet interconnected areas of law.<sup>13</sup> We found that while there is value in teaching courses in our areas of expertise, broadening our understanding enabled us to deliver a more balanced perspective to students.

### **III. Substantive Integration: Leveraging Congruences and Conflicts**

Merging torts and civil procedure compels students to recognize the ways that tort law and civil procedure inevitably intersect in the practice of law. One cannot litigate a torts case without knowledge of court procedures, and court procedures have no meaning without a theory for relief. But beyond this practical connection, the substantive doctrines of tort law often animate the rules and policies that propel civil procedure. We attempted to leverage the inherent practical and doctrinal interactions between these two bodies of law to give the concepts depth. Where the law merges, we helped students find cohesion. Where the law conflicts, we found opportunities to sharpen distinctions.

By expressly noting the places where civil procedure and tort law intersect—and more importantly the interdependence of the two bodies of law—we sought to give students a well-rounded understanding of how the law functions. We

13. On several occasions throughout the semester we held “joint” classes of all of our students and took turns leading the class on a topic on which we had a particular expertise. By doing so, we modeled collaboration and professional respect and civility to our students.

found the most profound pedagogical connections came in teaching four recurring themes: a) the function and challenges of federalism; b) attempts to provide fair limits on a defendant's liability and amenability to suit; c) the importance of the identity of the decision-maker; and d) the impact of procedural posture in evaluating the merits of a case.

*A. Facts, Federalism, and Forum Shopping*

Teaching torts and civil procedure in one course gave us unique opportunities to help students more fully appreciate the practical import of federalism. As students repeatedly encountered tort claims that vary from state to state and due-process mandates that permeate all U.S. courts, they learned to recognize the different functions and powers of the state and federal court systems. In the combined course, we pointed out and tested these distinctions by asking students to explain the impact a case would have on other courts faced with similar facts in different jurisdictions.

Early in the course, students noticed a stylistic difference between torts and civil procedure cases. The foundational civil procedure cases students read in their first year tend to be long and deep, often written by the U.S. Supreme Court, and are thick on policy and thin on facts. Because these cases address rules and concepts that have nationwide implications, the policy considerations often take precedence over the particular dispute that happens to have brought the case to the forum.<sup>14</sup>

As we shifted topics, students found torts cases are often the opposite.<sup>15</sup> Significant shifts in doctrine rarely come through a single case in a single jurisdiction and (unless free speech is involved)<sup>16</sup> do not carry the voice of the U.S. Supreme Court. In torts cases, the facts are the main event; it often seems that the rules are twisted and torn to meet the more immediate demands of local, particularized justice. Courts are free to distinguish similar cases based on small factual differences, or even a mere difference in perspective. Torts jargon is often expressed differently from case to case, requiring students to accept that decisions don't always mean what they say; in some places, a court means "cause in fact" even though it says "proximate cause,"<sup>17</sup> assault and battery are two different torts even though some courts use the terms

14. For a famous example, see *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (plaintiff, who lost his arm by walking on a path next to railroad tracks, had his \$30,000 jury verdict overturned in a deeply philosophical opinion in which the Supreme Court only tangentially recounted the facts).
15. The stylistic differences can frustrate students if they try to read and brief both kinds of cases the same way. We found it helpful to give students guidance in advance on how to approach the cases. Specifically, in torts cases students should be working to synthesize general rules and exceptions that span jurisdictions. In procedure cases, students should be looking for shifts and clarifications as they piece together the historical development of doctrines.
16. See, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).
17. See, e.g., *New York Cent. R.R. v. Grimstad*, 264 F. 334, 335 (2d Cir. 1920); *Haft v. Lone Palm Hotel*, 478 P.2d 465, 468 (Cal. 1970); *Zalazar v. Vercimak*, 633 N.E.2d 1223, 1225 (Ill. App. 1993); *Summers v. Tice*, 199 P.2d. 1, 2 (Cal. 1948).

interchangeably,<sup>18</sup> and “intent” has various meanings depending on which tort is being alleged.<sup>19</sup>

As students encountered these stylistic differences, we drew their attention to an underlying lesson about federalism. The reason torts cases can slide from one voice to another is that the voices belong to separate sovereigns. Because each state is free, in our judicial system, to develop its tort law within very loose constitutional constraints,<sup>20</sup> different states can and do reach wildly different conclusions on similar facts. Yet procedural law, even as applied in state courts, is much more tightly constrained by the federal Constitution. For example, due process, a major theme in first-year procedure, imposes requirements on state sovereigns when they seek to exercise power over tort defendants. Thus, a state court may have the power to choose whether to impose tort liability, but must conform to federal requirements as to whether it can subject a tort defendant to its power in the first place.<sup>21</sup> Understanding this dichotomy is useful to students, practitioners, and faculty alike. Students learn that in both tort and procedural law settings, clients need to be advised to structure their behavior to avoid liability for claims in their home jurisdiction and in jurisdictions that have unfavorable laws. As students repeatedly see the interaction between tort claims that vary from state to state and due-process mandates that permeate all U.S. courts, they more fully appreciate the functions of federalism.

### B. Conquering the Enigmatic “F” Word

In tort law, the word “foreseeable” does far more work than any single word should be expected to do.<sup>22</sup> Torts professors spend considerable time attempting to unwind the mystery of that overused and ill-defined word. We ask what must be foreseeable, to whom it must be foreseeable, and from

18. See, e.g., *Grabowski v. Quigley*, 684 A.2d 610, 615 (Pa. Super. Ct. 1996) (quoting *Smith v. Yohe*, 194 A.2d 167, 174 (Pa. 1963)).
19. See, e.g., PAULA J. MANNING, *TORTS: A CONTEXT AND PRACTICE CASEBOOK*, at 16 (“The required consequence [that must be intended] is different for each of the intentional torts.”).
20. The U.S. Constitution’s constraints on the development of state tort law are very limited. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), on punitive damages.
21. In addition, federal courts are subject to a uniform set of procedural rules, and a majority of state procedural systems model the federal rules.
22. Foreseeability comes up most prominently in discussing proximate cause, but issues of foreseeability lurk within the framework of other tort concepts, such as duty and breach. Famously, *Palsgraf* teaches that the railroad company whose employee helps a passenger onto a train, resulting in a package exploding, owes no duty to a woman standing farther down the platform because she is not a *foreseeable* plaintiff. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). In another famous case, Judge Learned Hand slips “probability” into his cost-benefit analysis of breach, *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), which inevitably morphs into foreseeable likelihood. *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* § 3 (Am. Law Inst. 2010). The Third Restatement of Torts retreats from using “foreseeability” in its test for proximate cause, instead invoking the “risks rule”; but that rule, the Restatement authors note, envelops the foreseeability rule that has long dominated proximate cause analysis. *Id.* at § 29 cmt.

what point in time it should be measured. Because the word is so imprecise, torts professors often challenge students to explain proximate cause without resorting to the “F” word.<sup>23</sup>

In teaching civil litigation, we found that comparing the tort concept of foreseeability with the “foreseeability” necessary for due-process analysis brought both concepts into greater relief. The comparison was helpful in two respects. First, students understood the individual doctrines better when they were required to articulate how the concepts functioned differently. Second, the doctrines made sense to students as they recognized a common-sense policy of fairness to the defendant that underlies “foreseeability” in both arenas.

After students had been challenged with the “F” word in studying negligence or products liability, we returned to the question in personal jurisdiction. A good starting point is the following passage from *World-Wide Volkswagen Corp. v. Woodson*, a staple of civil procedure courses:

Yet “foreseeability” alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.

. . . .

. . . This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled [sic] into court there.<sup>24</sup>

Parsing the Supreme Court’s language provides an opportunity to compare the tort conception of foreseeability with “the kind of foreseeability that is critical to due process analysis.”<sup>25</sup> In both contexts, courts are attempting to identify fair limits on the burden that an imperfect judicial system places upon defendants. Yet in each context, foreseeability serves a different master. The examples the Court gives in *World-Wide* of situations in which personal jurisdiction is absent make good hypotheticals to test whether students understand proximate cause:

If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there . . . ; a Wisconsin seller of a defective automobile jack could be haled [sic] before a distant court for damage caused in New Jersey . . . ; or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there . . .<sup>26</sup>

One can easily come up with hypotheticals that illustrate the reverse: situations in which due process is satisfied and proximate cause prevents

23. We intend this to mean “foreseeability,” though other words may come to mind in the stress of the moment.

24. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

25. *Id.* at 295, 297.

26. *Id.* at 296 (citations omitted).

liability.<sup>27</sup> To push the distinction, one can ask students what a defendant can do to avoid being subject to personal jurisdiction in another state. Then ask what, if anything, that same defendant could do to avoid having plaintiff's damages fall within the limits of proximate cause. Students begin to see the difference between voluntary acts that make something "foreseeable" in the civil procedure context and the more abstract foreseeable harm that attaches when a defendant takes a negligent act. The "F" word is too ephemeral by itself to answer proximate-cause or minimum-contacts questions, but comparing its use in the two areas of law helps students see what is at stake beneath the language.<sup>28</sup> More broadly, this comparison illustrates an important phenomenon that students must grasp in order to succeed at lawyering—learning to distinguish when and how words do actual analytical work.<sup>29</sup>

The discussion in both areas of law resonates with students as they see a common concern for fairness: A defendant should usually not be held liable for things beyond the defendant's control. In personal jurisdiction, this means that one cannot be brought to a forum unless one has voluntarily done something to create a reasonable expectation of being haled into that court. In tort law—particularly negligence—this means that a defendant cannot be liable for harms that reach beyond what she should reasonably expect from the risks she has voluntarily taken. Exceptions and exigencies temper the doctrine in both areas of law, but between these is a concern that any student can relate to if she has felt the anxiety of being named as a defendant in a lawsuit.<sup>30</sup>

27. For example, due process is satisfied by "general jurisdiction" over a defendant, which for corporate defendants lies (at least) in their states of incorporation and principal places of business; yet liability for that defendant may not lie if the plaintiff or the injury is not foreseeable.
28. A third form of foreseeability comes up in cases on *respondeat superior*. Arguably, this kind of foreseeability draws together concepts from both torts and civil procedure. See, e.g., *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171-72 (2d Cir. 1968) (quoting 2 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* 1376-78 (1956)) ("[W]hat is reasonably foreseeable in this context . . . is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence . . . . The foresight that should impel the prudent man to take precautions is not the same measure as that by which he should perceive the harm likely to flow from his long-run activity in spite of all reasonable precautions on his own part . . . . The employer should be held to expect risks, to the public also, which arise 'out of and in the course of' his employment of labor. ").
29. First-year law students desperately need to be pushed beyond the cloak of language. Many of them have learned as undergraduates to digest and regurgitate terminology without challenging the meaning of the words. Disentangling and distinguishing foreseeability in different settings helps students engage in critical thinking.
30. The concept also surfaces as a choice-of-law issue. Larry Kramer and others describe this phenomenon as the Constitution protecting citizens from unfair surprise. See generally HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT, *CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS* (9th ed. 2013).

*C. Reasonable People Acting Unreasonably*

Questions about objectivity and reasonableness make for great discussions in torts and civil procedure courses. The combined course gave these issues greater depth. By applying the reasonable person test (of torts) to decisions the judge must make in dispositive motions before a jury verdict, we pushed students to become more cognizant of the importance of the identity (and potential biases) of the decision-maker. In addition, as students learned to recognize the difference between questions of law and questions of fact, they started to notice how often in the canonical torts cases jury questions are decided, for better or worse, by a judge.

We teach students that, in theory, the reasonable person is a reflection of what a community realistically (or perhaps wishfully) expects of its citizens. In practice, however, the reasonable person inevitably absorbs some of the presumptions and prejudices of the dominant culture. A related inconsistency arises when students learn about a renewed motion for judgment as a matter of law (JML). Students who seem to identify with juries more than judges are appalled that the rules allow a judge to overturn a jury verdict if the judge determines that no “reasonable” jury could have reached the verdict that the jury just reached. The practical import of these doctrines can be brought together with a series of questions: How can a judge know that no “reasonable” jury could reach such a result? Does the “reasonable jury” reflect the same qualities of the reasonable person in torts? Does the question of “reasonableness” serve the same community-values function in both contexts?

A good place to raise these questions is when torts damages are discussed within the context of juries, JML, and new trials. We have found success in having students put damages analysis into practice by taking on the role of a juror and, later, a judge. This exercise (discussed in greater detail below) gives students a more complete picture of how the civil justice system functions than they would have if torts and civil procedure were separate courses. The procedural rules for JML and new trial are more meaningful when students themselves have already come to a decision on the merits and must decide whether a different conclusion still qualifies as reasonable. Students are able to appreciate that these procedural devices diminish the right to jury trial. This, in turn, can lead to a fruitful discussion of the powerful potential effects of race, gender, and other factors on what counts as reasonable.<sup>31</sup> At the same time, students are able to see the challenge juries face when attempting to apportion damages and come up with a proper verdict.

*D. Keeping Score*

By the time law students are sitting anxiously in their seats on the first day of law school, they are already tainted with the assumption that litigation ends

31. See Laura Gaston Dooley, Essay, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1994) (connecting the diminution of civil jury power through devices like JMLs to the increasing diversification of civil juries in terms of gender and race).

when one side wins and the other side loses.<sup>32</sup> Students must learn to recognize the significant yet sometimes subtle meaning of procedural posture. We found that we could more effectively emphasize the importance of procedural posture when students were studying civil procedure and torts in tandem.

From a merely practical standpoint, it is helpful for a professor teaching a torts case to know how far the students have delved into the stages of litigation. When we ask, “What is the procedural posture of this case?”, we know how far we can push students to explain whether the court assumed certain facts to be true for the sake of the motion, or whether those facts have been determined to be true by a fact-finder, or whether they are still in dispute. The holding of a case changes meaning when placed in procedural context. From here, one can spin hypotheticals that test the extent of precedent.

Of course, students start reading torts cases before they fully understand the significance of procedural posture. It is necessarily an iterative process. One advantage of putting torts and civil procedure together, we have found, is that we can revisit procedural milestones again and again through the semester, digging deeper into the meaning of the torts cases as students better understand the stages of litigation. The many perspectives that bring meaning to a case—from the different views of the parties to the policies underlying the legal doctrine—are harmonized as students better understand the parameters of the motion that led to the court’s decision.

We also explain to students that in civil litigation the quintessential skill of a lawyer is not the ability to make brilliant arguments but the ability to critically analyze the strength of a client’s case.<sup>33</sup> Because the great majority of cases settle, litigators must make decisions about how far to go in litigation based upon what they believe to be the merits of their case. Most torts litigation and negotiation occurs in the shadow of the possibility of jury trial,<sup>34</sup> based upon assumptions about how the law might be interpreted in a given situation, which facts can be proven, and how a decision-maker is likely to react to the competing stories that the parties present. In this complex landscape of facts, precedent, forum preferences, and unknown variables, students need to understand how the procedural posture affects the merits of a claim.

32. This is, of course, wrong on many levels. From a therapeutic justice perspective, a case may result in no winners or only winners, depending on how litigation affects the parties. From an economic and business perspective, victory must be calculated as the least costly resolution, taking into account litigation costs and business reputation losses, as well as any damages award. Finally, from a procedural perspective, the significance of a ruling depends largely on the litigation stage at which the court rendered its opinion. Thus, for example, when a defendant’s motion to dismiss is denied, this is only a small “win” for the plaintiff; the plaintiff may still lose on summary judgment or at trial. If the defendant’s motion to dismiss is granted, on the other hand, the impact is greater.

33. See STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 33-35 (4th ed. 2011).

34. See Jeffrey Abramson, *Second-Order Diversity Revisited*, 55 WM. & MARY L. REV. 738, 776-77 (2014).

#### IV. Pedagogic Integration: More Pain, More Gain

In addition to the significant theoretical congruences involved in integrating torts and civil procedure, we found the pedagogic techniques we implemented yielded benefits that were profound and systematic enough to warrant finding ways to overcome the challenges. Some of the resulting benefits we encountered are intrinsic to (or, at a minimum, easier to implement in) a course that combines torts and civil procedure. Others are not necessarily tied to integration, but serve to stimulate student comprehension and help students grow as independent, self-assessing learners.

As many legal education reformers have noted, “[t]here is substantial literature establishing that providing students with context effectively promotes learning, as do active learning techniques and opportunities for formative assessment.”<sup>35</sup> As Professor Oppenheimer states, “Whether through simulation or clinical practice, our colleagues who study learning theory repeatedly urge us to use practical skills, context, and active learning as a method of teaching the essential intellectual and cognitive skills described by Shultz and Zedeck: analysis and reasoning, creativity and innovation, problem-solving, and practical judgment.”<sup>36</sup>

The most immediate benefit of using torts to teach procedure is that it brings civil procedure into a realm that is more familiar and accessible to first-year students. This makes possible active, context-based learning that is both deeper in analysis and more practical in application. We reinforced this context-based learning by using frequent essay and multiple-choice formative assessments, as well as practice-based exercises.

##### A. Silos Just Aren't Sexy

As Professor Ho and colleagues have reminded us, “Studies show that students are better able to learn and master concepts that they learn in context, especially when learning in an integrated experience that mimics the professional experience.”<sup>37</sup> One reason context improves comprehension is that it makes the material more interesting and accessible.<sup>38</sup>

Teaching civil procedure in the context of torts helps students overcome the bewilderment that naturally occurs in a course that is in many ways alien to the common experience of most first-year students.<sup>39</sup> To add to the challenge,

35. See, e.g., Cynthia Ho, Angela Upchurch & Susan Gilles, *An Active-Learning Approach to Teaching Tough Topics: Personal Jurisdiction as an Example*, 65 J. LEGAL EDUC. 772, 780 (2016).

36. Oppenheimer, *supra* note 5, at 820.

37. Ho, Upchurch & Gilles, *supra* note 35, at 780 (footnote omitted).

38. Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 56-57 (2001).

39. Oppenheimer, *supra* note 5, at 817. (“Two big sources of student frustration [with civil procedure] are (1) their inability to view the course materials in a context that makes them seem real, and (2) our failure to engage them through active learning.”); see also Ho, Upchurch & Gilles, *supra* note 35, at 777 (“The entire course of civil procedure is unusual

many of the substantive law claims at issue in civil procedure cases invoke topics reserved for second- or third-year study (e.g., securities regulation, employment discrimination, and qualified immunity). Even the minimal—yet necessary—attention to the divergent substantive contexts of these cases can cause confusion and divert focus.

Teaching in context also helps the learner because it situates the subject in a realm where the learner can more immediately and realistically practice applying the subject.<sup>40</sup> Neatly packaging areas of law into separate courses results in at least two assumptions: first, that legal problems will fall into only one of these areas and not the others; and second, that clients will somehow be able to identify for the lawyer what area of law is at issue (by saying, for example, “I have a products liability claim”). In reality, clients frequently seek assistance with problems that defy immediate categorization and often more than one type of law is involved. Moreover, civil procedure questions rarely show up on their own, and substantive torts issues require procedural action to obtain relief. By placing the two subjects in a context that more accurately tracks the way the subjects arise in the practice of law—that is, with substantive and procedural law necessarily intertwined—students can envision and put into practice the fundamental concepts of tort litigation.

We also aided students in understanding how legal analysis operates in real-life lawsuits through a combination of discussing cases in the news, administering combination torts/civil procedure essay questions stemming from the same fact pattern, requiring the drafting of mock litigation documents using torts scenarios, and taking time in class to raise torts aspects of civil procedure cases and civil procedure aspects of torts cases. These activities helped overcome some students’ misconception that civil procedure involved only court documents and thus could not be tested in essay form, and the more widespread struggle with distinguishing between the analysis of torts problems (which tend to require an element-by-element inquiry) and civil procedure problems (which often require an open-ended, step-by-step approach).<sup>41</sup> To address students’ struggles with analytical differences

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in that it focuses on processes and not events, things or relationships. It is difficult for students to visualize a process—especially when they have never participated in that process or observed others engaged in it.”).

40. See Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 317 (1994) (“The more a student becomes embedded in context as a legal worker, the more she wrestles enactively with the problematic events of the context, the more she subjects herself to the multiple forces of legal actors—clients, colleagues, opponents, supervisors, support staff, judges, or legislators—the more she . . . functions within particular legal institutions and ‘behavior settings’—law offices, courts, bar associations, legislative bodies, and administrative agencies—the more she struggle [sic] to construct a comprehensible story about her new way of life, the more mature, measured, and effective her education and her practice is likely to become.”).

41. For example, in evaluating a claim for negligence, students must analyze each element of the claim—duty, breach, cause in fact, proximate cause, and damages. In contrast, when analyzing subject matter jurisdiction, the student should start with federal question

we provided structural guides for essay question analysis after completing course coverage of those topics. In addition, after administering our bar-type essay formative assessments (discussed below), we provided the students with very detailed rubrics (transparently revealing our expectations about how to address both torts and civil procedure topics), reviewed the basic rubric in class (as well as individually, on request), and required those who earned less than a “passing” score to re-take the exam. We also subsequently put a model answer on reserve in the library for students to check out and review. The combination of this time and attention to proper and appropriate analysis for topics in each subject generally yielded a substantially higher understanding of both the substance and the appropriate analytical structure. In fact, calling out the distinctions between element-by-element and step-by-step analysis actually strengthened the ability of students to do both.

Putting torts and procedure in context also seemed to discourage attitudinal barriers to student engagement. To their detriment, students tend to make blanket decisions about not liking or understanding a whole body of law—based primarily on their experience in a particular course. Taking a meta approach to civil procedure and torts illustrates that both topics concern representing clients to seek relief (or defend against it). And understanding strategic consequences of both procedural and tort liability theory choices broadens students’ perspectives. The world of civil litigation is deep and wide, and while some concepts may be more accessible than others, viewing the system as a whole helps students see it more realistically, making them less likely to simply decide that they don’t like (or understand) an entire first-year law topic. Avoiding such generalizations also leads to fewer self-defeating attitudes when choosing upper-level courses, studying for the bar exam, and making career decisions.

### B. Skin in the Game

The research is clear that “[s]tudents’ ability to learn is promoted by active rather than passive learning.”<sup>42</sup> Active learning is defined as “students taking an active, more self-directed role in the learning process.”<sup>43</sup> As Professor Lustbader notes, “[h]elping students ‘own’ the concepts not only is necessary as part of the cognitive process. It is essential in helping students resolve dissonances of culture and values, cope with emotionally charged situations, and feel a sense of inclusion.”<sup>44</sup>

We found that the synergy of teaching torts and civil procedure in one course made it easier to create realistic situations that evoke active learning than if they

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jurisdiction and proceed to diversity and supplemental jurisdiction only if federal question is not satisfied.

42. Ho, Upchurch & Gilles, *supra* note 35, at 782.

43. *Id.*

44. Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 408 (1998).

were taught separately. Many civil procedure teachers have reported success having students learn through simulated litigation,<sup>45</sup> and one of us has used this approach for many years. This technique is effective in large part because it transports students from being outside observers of the law to being active participants in the subject matter. As students become personally invested in the outcome of the litigation, they engage more deeply with the materials. Adding substantive tort doctrines into the simulation makes the exercise much deeper and more practical: Students are not just thinking strategically about the procedural tools and requirements; they are also scrutinizing the merits of the underlying tort claims.

We used two recurring hypotheticals as simulations, one to introduce students to the nuts and bolts of asserting a claim, and the other to work strategically through the stages of a lawsuit as teams. The first simulation was based upon a strange case in which a woman allegedly died as a result of a defective grocery bag.<sup>46</sup> We introduced the facts of this simulation when studying products liability in the first semester of the course. Later in the semester (after covering pleading), we assigned the students to draft a complaint based on the fact pattern. This tested the students' understanding of products liability law as well as their ability to find and apply the local rules for drafting, filing, and serving pleadings. More profoundly, the project provided a concrete illustration of the dilemma litigators face in attempting to meet the "Twiqbal" pleading standard.<sup>47</sup> This pleading standard, which is mystifying in the abstract and challenging in practice, becomes more comprehensible when students apply it to a familiar substantive area of law.<sup>48</sup> After students filed their complaints, we had students switch to the role of the defendant and draft an answer to a randomly assigned complaint authored by one of their colleagues. They learned how to draft an answer, as well as how to evaluate the strength of potential affirmative defenses we had studied.<sup>49</sup>

The next semester, we returned to the same fact scenario as we addressed negligence, *respondeat superior*, and joinder. After adding more facts (purportedly

45. See Oppenheimer, *supra* note 5, at 821-28.

46. The fact scenario is derived from Amended Complaint, *Freis v. Wal-Mart Stores, Inc.*, No. 13-cv-268 (D. Neb. Apr. 4, 2014), ECF No. 47, 2014 WL 1496287. In that case, plaintiff alleged that his wife was injured when her Walmart grocery bag broke and the contents (including a large LaChoy can) fell on her right foot. The injury became infected, and after several attempts to treat the infection, the woman died. *Id.* Our simulation renames the plaintiff, adds a number of facts, and relocates the incident. Therefore, we did not have students review the pleadings from *Freis*.

47. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

48. See Bartholomew, *supra* note 5 at 765-70, for another practical method for teaching this standard.

49. Students who struggle with the difference between a defense and an affirmative defense in torts are helped by a pleading drafting exercise: The complaint asserts the prima facie case while the answer first affirms or denies the prima facie case and then—usually in a separate section—alleges facts supporting affirmative defenses.

learned in discovery), we assigned the students to draft a motion to amend the complaint from the first term to name additional defendants and assert claims based upon negligence and *respondeat superior*. This exercise required both a review of the pleading and motion standards covered in the first semester and the ability to distinguish between the elements of products liability and negligence. For many students who had struggled with one or more of these topics, drafting these documents (and the feedback they received on them) provided new clarity. And being required to succinctly and persuasively use the facts to plead the elements of negligence gave structure to a tort that often seems overwhelmingly complex and wide-ranging.

The second simulation we used was a negligence case based on a simple car accident. We placed students in small teams (or “firms”), assigned each to represent the plaintiff or defendant, and had them take the case from initial disclosures through discovery and to settlement negotiations near the eve of trial. Each team was given a copy of the complaint and answer, as well as a confidential set of documents, which ultimately forced them to evaluate the merits of their claims and make strategic decisions about how to craft and respond to discovery requests.<sup>50</sup> The mock lawsuit yielded a number of pedagogical benefits, but chief among them was the way it taught the functional import of legal doctrines. Civil procedure professors and litigators are fascinated by the use of strategy in litigating a case. Students, however, rarely get to this level of enjoyment because they are so enmeshed in learning what often seems to them arcane procedural rules. But by assigning the students to “litigate” a mock negligence lawsuit (as well as other practical exercises combining torts and civil procedure), our students were able to appreciate the kinds of strategic choices and risks litigators encounter. For example, when we covered in class a topic as putatively “boring” as the work product doctrine, our students were fully engaged, since they knew it would matter in terms of which documents they could withhold from the opposing party when responding to discovery requests. Giving students the opportunity to behave as real-life litigators (who can appreciate both the procedural and substantive aspects of the case) during their first year of study energized them and enhanced their understanding and appreciation of the higher levels of procedural practice.

### *C. Show Me the Money*

Beyond full simulations, we looked for bridges that reinforced concepts in one area of law while moving into a different area. These often arose when

50. We also gave them copies of some charts from Professor Woodley’s book on litigation in federal court. ANN E. WOODLEY, *LITIGATING IN FEDERAL COURT: A GUIDE TO THE RULES* (2d ed. 2014), pp. 62, 66–69, 82, 31–140, 159, 161. The students participated in discovery (initial disclosures, interrogatories, and requests for production of documents), we conducted live depositions of the plaintiff and defendant during class (with the professors acting as counsel and volunteer students playing the roles of the parties), and then they engaged in settlement negotiations.

discussing the procedural posture of a tort case.<sup>51</sup> Having directly addressed dispositive motions and the varying burdens, we were able to add teaching moments in real time. While coverage concerns prevented full discussions of civil procedure issues in every torts case (and vice versa), we strategically used this technique of looping back to previously covered procedural topics and foreshadowing those yet to come.<sup>52</sup> For example, after studying summary judgment, we paused during the coverage of a tort issue raised by summary judgment to explore the procedural context and compare it with other procedural mechanisms. Students were able to recognize that the procedural context and the decision-maker could have a significant impact on the results.

The most fruitful exercises, however, were ones that brought together torts and civil procedure concepts that are intrinsically linked in practice. The study of juries, JML, and new trials, for example, has greater meaning when placed in the context of tort damages, including comparative fault. Using the famous McDonald's hot coffee case, which tends to evoke strong opinions and challenge popular misconceptions,<sup>53</sup> we had the students work through each of these procedural mechanisms by moving between playing the role of the jury and the role of the judge.

First, after discussing comparative fault and the various types of damages, we put the students into groups that functioned as juries, and had them deliberate on the apportionment of liability among the parties. Students were required to reach a verdict on the percentage of fault attributable to each party. Then, after debriefing the first jury experience and polling students for their various verdicts, we gave the them a (partially fictional) breakdown of the harms plaintiff suffered and a second verdict form that required students to assess the appropriate compensation for the plaintiff's various harms—including medical expenses, pain and suffering, and lost wages. After the juries deliberated, we once again polled the class and debriefed the way students calculated

51. Early in the course, we used an active-learning exercise to introduce the stages of litigation. We put the class in groups and gave each group a set of strips of paper—each of which had a litigation stage typed on it—and had the groups race to put the strips of paper in the proper order (and be able to explain why). Particularly for kinesthetic learners, this exercise was enlightening, and it formed the foundation for later discussions about the procedural posture of each case.
52. This is consistent with the “spiral curriculum” approach. See Maranville, *supra* note 38, at 61–62; Paul Maharg, *Professional Legal Education in Scotland*, 20 GA. ST. U. L. REV. 947, 960 (2004).
53. *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994), *vacated sub nom.*, *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419 (N.M. Dist. Ct. Nov. 28, 1994), 1994 WL 16777704. This case, in which Liebeck claimed McDonald's sold coffee that was far too hot, became famous during tort reform campaigns in the 1990s. See, e.g., John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1053 n.148 (2005). The case was later the subject of a documentary film. *HOT COFFEE* (HBO 2013). The facts of the case—and the court's remittitur reducing the punitive damages to under \$500,000—often come as a surprise to students. See Grant H. Morris, *Teaching with Emotion: Enriching the Educational Experience of First-Year Law Students*, 47 SAN DIEGO L. REV. 465, 511–12 (2010).

the damages—always an enlightening perspective into how jury verdicts can diverge.<sup>54</sup>

Next, we had the students play the role of a judge. We gave them examples of various (fictional) verdicts on the hot coffee case—some self-contradicting, some clearly one-sided, and some that fell more toward the center. We had them assume that a party had moved for a renewed JML or, in the alternative, for a new trial. For each verdict, the student judges had to decide whether to let the verdict stand as is, grant a renewed motion for JML, or grant a new trial. As students explained their rulings, they were able to see where their ideas of reasonableness on the underlying tort diverged from or merged with others in the class. Procedural devices like JML and new trial look different when “reasonableness” is revealed as an unknown quality. Adding to this, students saw that the amount of damages (as well as apportionment of fault) can vary drastically based upon the decision-maker. As students experienced the practical interaction of torts and procedure, they better appreciated the subtle and often conflicting roles of the lawyers, the decision-makers, and the rule of law.

#### *D. Bar Prep, Issue Spotting, and True Grit*

One risk of moving back and forth between two areas of law is that students will have a lapse in concentration and thereby miss the transition from one subject to the next. To decrease the risk of this—and as part of a general desire to infuse bar-style assessments into our teaching—we gave students frequent bar-style assessments, some of which were graded and others that were purely formative.

During both semesters, we gave students several practice multiple-choice and essay questions, weekly multiple-choice quizzes, midterm and final exams, and separate bar essay quizzes taken under timed conditions. The bar quizzes were modeled after the Uniform Bar Exam Multistate Essay Examination (MEE) questions. We graded each bar essay using a detailed rubric that included both individual points (with comments) and an overall MEE score (using the bar exam grading scale of 1-6). After completing the grading, we provided each student with his or her completed rubric, and reviewed the quiz in class. While the rubric did not include the answers, it was a transparent model of the order and type of analysis we were seeking. In order to “pass” a bar quiz, students had to earn an MEE score of at least a 3.<sup>55</sup> If a student earned a 3 or higher the first time she took the essay quiz, we bumped up her score by 0.5—in order to encourage students to put all of their effort into the first attempt. Students who did not pass initially had to re-take the same quiz

54. We also tinkered with the structure of the juries for this exercise. Size matters (or does it?): Does a twelve-person jury function differently than a six-person jury? What happens when you switch from unanimity to a supermajority rule for decision-making?
55. It is our understanding that in order to pass the MEE, bar takers must earn a combination of 3s and 4s on their essays. Presentation by former Arizona Supreme Court Justice Rebecca A. Berch.

at a later date, again under exam-like conditions, having had the benefit of reviewing their completed grading rubric. The highest score a student could get on a re-take was a 3.

The integration of two subjects in our assessments honed analytical skills in a way that we hope will aid our students both on the bar exam and in practice. Through assessments, discussions, and exercises, the broad scope of the course pushed students to master contextual issue spotting. Since we usually did not identify the subject areas of these questions in advance, the students were forced to identify whether torts or civil procedure was being tested before drilling down into analysis. We taught them to next identify the particular subtopic being tested, and then to apply an IRAC analysis (for both multiple-choice and essay questions). This critical bar examination skill of identifying the subject being tested was thus introduced in the first year, rather than the typical model of waiting until the third year or postgraduate bar prep. In addition, since most substantive law questions are raised through a specific procedural device, and most procedural questions will have to be introduced in the context of some type of substantive law, the ability to determine the area of law at issue is key to bar exam success. With this type of expertise, students are less likely to be distracted by the phrase “summary judgment” when the question is really about an intentional tort, or, conversely, by a substantive law background discussion when the pertinent issue actually involves procedure. In addition, this higher-level issue-spotting skill is of great value in law practice when more than one area of law applies to a client’s problem.

Aside from the benefits of frequent feedback and opportunities for self-assessment, the number of assessments and their scoring also aimed to develop student “grit.” Although defined in various ways in research and in Hollywood, grit is essentially the ability to persevere when faced with setbacks and challenges.<sup>56</sup> Thus, “[g]rit entails working strenuously toward challenges, maintaining effort and interest over years despite failure, adversity, and plateaus in progress.”<sup>57</sup> Research suggests that grit is sometimes more important than IQ for high achievement.<sup>58</sup> By requiring students to re-take essay quizzes that scored below passing, we encouraged students to push through the inevitable failures of law school and reengage hard subjects. Students were encouraged to review their essays with the professors and TAs until they learned how to self-assess their essays. Although not all students reached this goal, we did notice markedly better structural integrity on the final essay exams, as well as on the other hypotheticals and exercises during the course. Finally, we also allowed students to “earn back” missed points on their weekly multiple-choice quizzes by answering a certain portion of practice multiple-choice question

56. See generally Angela L. Duckworth, Christopher Peterson, Michael D. Matthews & Dennis R. Kelly, *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY & SOC. PSYCHOL. 1087, 1087-88 (2007).

57. *Id.* at 1088.

58. *Id.* at 1089; see also generally ANGELA DUCKWORTH, *GRIT: THE POWER OF PASSION AND PERSEVERANCE* (2016).

quizzes correctly. This encouraged them to do more practice questions than they otherwise would have on their own and to take them seriously.

#### *E. Too Big to Fail*

An unexpected benefit of the course was that the number of credits allotted to it (five per semester), and the fact that we spent so much time in class with our students, heightened the level of attention students paid to the course. In fact, the course almost had a “homeroom” feel to it, and we got to know our students very well. We also had the time and the opportunity to create more links between topics covered in contiguous classes. On the down side, because of the high number of credits, the grades in this course had a disproportionate impact on students’ first-year grade point averages—and thus their ability to achieve or retain a particular class rank, retain their scholarships, and remain in good academic standing. Although the final grade in each course was based on many factors (and not just a single final exam), its disproportionate impact is still a concern. One possible solution to this problem is to award four credits for the substantive portion of the course and one credit for the “practicum” portion.

Finally, another area of both opportunity and challenge was that we had to create materials to teach this course. Since we wanted to avoid students having to purchase two separate casebooks, we created a custom casebook through Aspen’s Custom Publishing Series (quickly combining materials from other texts).<sup>59</sup> While putting parts of multiple casebooks together in the same text—with minimal editing—served our purposes starting out, the course would work better and be less demanding of faculty if we had more nuanced materials.

### **V. The Future of Civil Litigation: To Form a More Perfect Union**

If anything here has piqued your interest, we urge those of you willing and able to jump fully into the innovation of a combined course, with its potentialities and risks, to take the leap. But the good news is that even for teachers who are unconvinced that such an approach is preferable, or constrained by the curricular structures of their institutions, many of the benefits described above can be realized without formal integration of the courses. Indeed, one of the most pleasurable and exciting consequences of our journey has been coordinating closely with colleagues and learning from one another. In a law school whose first-year curriculum follows the traditional model, torts and civil procedure professors can work together to include readings and exercises

59. INTRODUCTION TO CIVIL LITIGATION PRACTICE I (Laura G. Dooley & Brigham A. Fordham eds. 2014) (including excerpts from STEPHEN C. YEAZELL, CIVIL PROCEDURE (8th ed. 2012); WARD FARNSWORTH & MARK F. GRADY, TORTS: CASES AND QUESTIONS (2d ed. 2009); Krieger & Neumann, *supra* note 33; JAMES A. HENDERSON, JR., ET AL., THE TORTS PROCESS (7th ed. 2007); ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS (3d ed. 2010); INTRODUCTION TO CIVIL LITIGATION PRACTICE II (Laura G. Dooley & Brigham A. Fordham eds., 2d ed. 2015) (containing excerpts from the above-mentioned Farnsworth and Yeazell texts, as well as unpublished materials from one of the authors of this article, Brigham Fordham).

in their respective courses that serve to cross-pollinate the learning process and lead to the benefits we have witnessed. And even a lone wolf can use many of these ideas in a traditional torts or procedure course to help deepen students' understanding in ways that improve both bar preparation and practice.

The marriage of torts and civil procedure works (to the extent it does work) because of the connections and comparisons that naturally manifest in litigating a torts case. To emulate and teach this, we have used a mix of materials from torts and civil procedure casebooks, exercises that we have developed ourselves, and pleadings from litigated cases. Our decision to use a custom casebook was to some degree borne of a limited time frame to structure the course, and of our desire to ensure that our new structure would not undercut our students' exposure to all the key coverage they should rightly expect from their first-year torts and civil procedure courses. We routinely supplemented the materials in the custom casebook, which borrowed materials from traditional casebooks in wide use in the academy, with exercises and questions that we produced or that were available in the public domain via bar examiners' websites and the like.

This, as might be imagined, turned out to be a lot of work, and led to some challenges. We have contemplated what would improve the course: a casebook that integrates torts and civil procedure from page one. This book would deliberately infuse adult learning theory by focusing on context-based, active learning and frequent formative assessment. It would, for example, introduce civil litigation as a body of law that is both strategic and doctrinal, ordered by processes and doctrines that derive from our federal system of government. It would gather cases that—either in one opinion or through case history—teach compatible torts and civil procedure topics using the same fact pattern. And it would include problems and exercises that help students connect past topics to new ones as they complete activities pulled directly from contemporary law practice.

Would such a casebook find a wider audience? Legal publishers would be understandably hesitant to support a book that is made for such a nontraditional course. While there may be some ways around this market challenge, it reflects a larger problem facing legal education: Dramatic shifts in the law school curriculum are easy to imagine but hard to execute. Particularly when attempting to rethink the first year, we are, to some extent, held hostage by history. The myriad casebooks are keyed to the standard first-year courses; students tend to expect the usual courses and their venerable casebooks; and the small, uncertain market to teach radically different courses creates a powerful disincentive for faculty to invest time in developing such courses. The tail of tradition wags the curricular dog.

For us, the answer to this market failure is blind persistence and (perhaps unfounded) optimism. We started our noble experiment in the hope that we could better prepare our students for the practice of law. We found, to our delight, that it also made us better professors. This happy consequence was not inevitable. Simply combining two traditional subjects without thoughtful

integration would no doubt have been less work, but also would have done little to open our own eyes to the pedagogic possibilities. Significantly, we were pushed to look beyond our individual ways of thinking about the legal universe to embrace a broader perspective. Of course, the experiment is ongoing. We invite you to join us in our efforts to make law school a more realistic and deeper experience for today's law student.