ARTICLES

Functionalizing First-Year Legal Education: Toward A New Pedagogical Jurisprudence*

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INTRODUCTION

> A monk asked Joshu, a Chinese Zen Master: "Has a dog a Buddha-nature or not?"
>
> Joshu answered: "Mu."[1]

Many lawyers, law professors, and students believe there are major systemic problems with legal education.[2] There are as many reasons offered to explain this phenomenon as there are commentators who choose to discuss it. The suggestions for improvement are hesitant, often piecemeal—perhaps reflecting a

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[1] " 'Mu' is the negative symbol in Chinese, meaning 'No thing' or 'Nay.' " ZEN FLESH, ZEN BONES 89-90 (Paul Reps ed., 1934). As the comment to the story admonishes, however, "Do not believe [Mu] is the common negative symbol meaning nothing. It is not nothingness, the opposite of existence." *Id.* Rather, Joshu's answer suggests that the question itself is based on purely mental distinctions and constructs that have no basis in reality. As such, the monk's question is at once unanswerable and not worth answering. *See* Williamson B.C. Chang, *Zen, Law and Language: Of Power and Paradigms*, 16 N.M. L. REV. 543, 569 (1986).

This quote illustrates one of the central arguments of this Article: that the structure of first-year legal education focuses students' attention on meaningless distinctions between, for example, Contracts, Property, and Torts. *See infra* notes 5-13 and accompanying text.

[2] A cursory review of the academic literature in this area reveals this fact. *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (1974) (containing critical analysis of development of legal education); DAVID KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (2d ed. 1990) (hereafter THE POLITICS OF LAW); DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF LEGAL HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983); KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1930); ROBERT STEVENS, LAW SCHOOL—LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S (1983) (containing extensive account of various critiques and proposals for improvement of legal system); *A Symposium on Legal Education*, 12 NOVA L. REV. 1 (1987); Mary Ann Glendon, *The Sources of Law in a Changing Legal Order*, 17 CREIGHTON L. REV. 663 (1983-84); Karl Johnson & Ann Scales, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. REV. 433 (1986); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"*, 38 J. LEGAL EDUC. 61 (1988); Symposium, *Women in Legal Education—Pedagogy, Law, Theory and Practice*, 38 J. LEGAL EDUC. 3 (1988); John W. Van Doren, *Private Property: A Study in Incoherence*, 63 U. DET. L. REV. 683, 684-96 (1986) (critiquing traditional property definitions in casebooks and treaties as examples of indeterminacy of property rights in legal system); Cornel West, *Brendan Brown Lecture: Reassessing the Critical Legal Studies Movement*, 34 LOY. L. REV. 265 (1988); K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U. L. REV. 1141 (1985).

cynical attitude toward the possibility for change.[3] Nevertheless, it is significant that the criticism of the current system is so widespread.

Surprisingly, the most salient defect of the current structure of legal education is that it does not adequately prepare the student to practice law. Though law schools proclaim that their mission is to teach each student to "think like a lawyer," legal education does little more than teach college students to think like law students.

In large part, law schools do not teach students modes of analysis and practical skills that will be useful to them as practitioners. Instead, particularly in the first year, they teach formalistic rules and reasoning based on the 120 year-old case law method. This approach, propounded by nineteenth century law professors, relies on case reports and so-called Socratic teaching. Similarly, the basic skills of lawyering—careful research, writing, and oral advocacy—are de-emphasized in the classroom in favor of rule memorization and articulation. Law schools often relegate these legal skills to special programs such as law review, moot court, and clinics.

The curriculum thus developed, abstracted from the reality that lawyers face daily, fails to prepare the student for work as an attorney. Consequently, the newly-graduated attorney is literally unable to practice law on her own. This experience bears a striking resemblance to the experience of the first year of law school, engendering the same feelings of frustration and humiliation. The current curriculum is at once dysfunctional and alienating.

Justice Holmes noted that the life of the common law has not been logic, but experience.[4] Legal education embodies neither.

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[3] A notable exception is David Fraser, *If I Had a Rocket Launcher: Critical Legal Studies as Moral Terrorism*, 41 HASTINGS L.J. 777 (1990) (proposing "moral terrorism" as strategy for adherents of Critical Legal Studies' principles).

Other suggestions for a new structure of the legal system and legal education include the following: Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (analyzing Dr. King's philosophical praxis as possible approach to developing reconstructive jurisprudence in wake of Critical Legal Studies deconstruction of current system); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 68-70 (1988) (outlining proposal for reconstructive feminist jurisprudence). *See infra* notes 78-81 and accompanying text (discussing feminist jurisprudence).

[4] OLIVER W. HOLMES, THE COMMON LAW 1 (1881).

The phenomenology of the current system suggests nothing greater than bureaucratic inertia and administrative indifference. Educators do a disservice to their students, the legal community, and, ultimately, society as a whole by adhering to this outmoded system.

Nowhere is the failure of the current system more obvious—and profound—than in the first-year "private law" courses:[5] Contracts, Torts, and Property. The current system gives these courses the prominent role of introducing students to the legal methodology. They form the core of legal education. Accordingly, the lessons taught in these courses are particularly vital to producing good lawyers.

Unfortunately, the lessons taught in these courses are not the stuff of which good lawyers are made. Based on the nineteenth century model, the courses are taught as doctrinally separate areas of study, each with its peculiar set of black letter rules and exceptions, to be memorized and spouted back at a superficial level on a high-pressure test at the end of the semester. The casebooks break down each area of the course into separate sections, such as formation in Contracts, which consists of such subsections as offer, acceptance, and consideration. They further break down each subsection into its component parts, such as past consideration, moral consideration, and promissory estoppel. Professors then teach the subjects beginning with their most specific components: from the ground up, so to speak.

The result is that the student cannot see the forest for the trees. By focusing on arcane distinctions and the memorization of formal rules, the student has no chance to develop a perspective on any given problem, let alone to discern any overall coherence in the legal system. Much of legal education only teaches students to apply rules to situations within discrete areas of law.

More importantly, the approach taught in law school is the reverse of the approach used by experienced lawyers.[6] A lawyer must be able to analyze situations according to the underlying

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[5] "Private law" courses refers to Contracts, Torts, and Property. The term is used to distinguish these courses from courses such as Constitutional Law. One of the main theses of this Article, however, is that there is no actual separation between public law and private law because public law thoroughly pervades all aspects of private law. *See infra* notes 30-40 and accompanying text. Accordingly, reference to private law courses should be understood to incorporate this reality.

[6] The references throughout this Article to the lawyers approach to

legal principles they present to determine what law to apply. The lawyer further sharpens this initial analysis by research on the issues thus defined. Only after developing and defining the contours of the problems in a given situation does the lawyer begin to analyze its more discrete aspects.

Christopher Columbus Langdell[7] developed the case law method of studying law over one hundred years ago to make the discipline intellectually respectable.[8] Whatever merits Langdell's system held for nineteenth century law professors, it is not viable for today's law teachers or students. This is due in large part to the increased importance of the statutory, administrative, and regulatory influences of the state in the last sixty years.[9] The current system, based on rigid formalism and unrealistic reliance on

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problem solving and law practice in general are based on the authors' experience as attorneys as well as interviews with practicing attorneys.

[7] Christopher Columbus Langdell received his LL.B from Harvard in 1853 and practiced law in New York City until 1870. STEVENS, *supra* note 2, at 44 n.11. From 1870 to 1895, Langdell served as dean of Harvard Law School. *Id.* at 36. Langdell established first- and second-year courses and extended the duration of law school from eighteen months to three years. *Id.* During Langdell's deanship, Harvard became the preeminent law school in the country and law was accepted as an appropriate study for university training. *Id.*

[8] *See id. See also* CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS at vii (1871). Langdell envisioned law as a "science [that] consists of certain principles or doctrines." *Id.* at viii. Langdell's method for delineating these "principles or doctrines" was to "select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of [the law's] essential doctrines . . . ." *Id.* at ix. Moreover, to complete the process of changing legal education from an apprenticeship to an academic endeavor, Langdell sought to replace the practitioner with a professor: "What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or size of cases, not experience, in short, in using law, but experience in learning law." STEVENS, *supra* note 2, at 38.

Gilmore comments on Langdell's choice of Contracts as the starting point in his academic enterprise:

> Perhaps we must, after all, credit Langdell with a degree of genius for his perhaps instinctive choice of a non-existent field as the vehicle for the initial demonstration of the great theory that law is doctrine and nothing but doctrine—pure, absolute, abstract and scientific—a logician's dream of heaven.

GILMORE, *supra* note 2, at 98.

[9] *See infra* notes 14-20 and accompanying text.

common-law principles, is intrinsically unable to reflect the reality of legal practice in the late twentieth century.

The central thesis of this Article is that law schools should replace the current structure, based on the application of rules, with a system that emphasizes the functional analysis of problems. The first step in accomplishing this goal would be to replace the categories which comprise first-year private law courses with a set of underlying principles that cut across these formal distinctions. For example, the study of the rules of Contracts, Property, and Torts would be replaced by the study of the principles of civil obligation, such as Reliance, Status, and Bargain. Restructuring first-year courses along such lines would enable law schools to produce better lawyers.

The Article develops this thesis through an analysis of the first-year private law courses. Part I discusses the impact of the Regulatory State[10] on law in the twentieth century, along with the reaction of the courts and legal academia to this development.[11] Part II discusses the current system's failure to reflect these changes and its concomitant ineffectiveness in training students to function as lawyers in the modern legal system.[12] Part III proposes a new structure for legal education that would more effectively correspond to the realities of practicing law today.[13]

I. From Laissez-Faire to the Regulatory State

Since the turn of the century in America, the state has become increasingly involved in societal relations at all levels.[14] The process began with social reform legislation and intensified with the onset of the New Deal and the rise of the modern Regulatory State.[15] The Regulatory State has enacted legislation and regulations dealing with virtually every aspect of modern societal relations, including labor, consumer transactions, family relations, corporations, partnerships, and taxation.[16]

As Mary Ann Glendon aptly notes, the result of this increased

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10 *See infra* notes 14-40 and accompanying text.

11 *See infra* notes 41-87 and accompanying text.

12 *See infra* notes 88-103 and accompanying text.

13 *See infra* notes 104-176 and accompanying text.

14 Glendon, *supra* note 2, at 666.

15 *Id.* at 666-67. Professor Glendon notes that the state began to "attend systematically to the elementary needs of its disadvantaged citizens." *Id.* at 667.

16 *Id.*

regulation is a legal system with the "legislature triumphant, the judge militant, and the bureaucracy rampant."[17] Legislation has become the preferred, the most "legitimate," means of instituting social welfare.[18] Judicial decisions that do not closely follow black-letter statutes are seen as "judicial legislation" and thus suspect.[19] Bureaucracy implements the legislature's agenda on the massive scale required in this society.

The increased role of the legislature has shifted the sources of law. Whereas case law was the most important source of law in the nineteenth century, the reforms of the Regulatory State have placed legislative and administrative sources on at least an equal par.[20]

The conceptual framework of the laissez-faire system of the

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[17] *Id.* at 683.

[18] *Id.* at 667.

[19] *See infra* Part II.

[20] Glendon, *supra* note 2, at 666-69. Glendon further argues that "traditionally . . . predictability and continuity were afforded by legal rules developed in cases and by the doctrine and practice of stare decisis, while flexibility and growth were furnished by the rules of equity and the techniques for limiting and distinguishing precedent." *Id.* at 684. She continues to argue that "modern statutory law, unlike civil codes, generally is neither stable nor particularly rational (in the sense of being principled or systematic)." *Id.* Glendon blames this lack of rationality on such factors as the power of interest groups and the dispersed authority of the massive administrative and regulatory framework. *Id.* at 669.

It may be somewhat naive to believe that, in spite of lip service, there ever was widespread judicial adherence to stare decisis. This appears even more true after Payne v. Tennessee 111 S. Ct. 2597, 2625 (1991) (Marshall, J., dissenting) (criticizing Courts' "radical reconstruction" of rules for overturning precedent). *See also* Judge Frank's candid comments in Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943). After holding that, under Michigan case law, the parol evidence rule did not apply to the case under the facts as construed by the court, Judge Frank embarked on a six-page critique of the rule:

> Candor compels the admission that, were we enthusiastic devotees of that rule, we might so construe the record as to bring this case within the rule's scope . . . . We thus construe the record [to the contrary] because we do not share defendant's belief that the rule is so beneficent, so promotive of the administration of justice, and so necessary to business stability, that it should be given the widest possible application.

Id. at 644. While stare decisis may not have ever been the stabilizing influence it is purported to be, Glendon is correct in pointing to the destabilizing influence of the multiplicity in sources of law in the modern state. Glendon, *supra* note 2, at 683.

nineteenth century does not reflect and cannot explain the effect of this shift in the sources of law. Unable to operate comfortably within the confines of this outdated system, courts often ignore doctrinal distinctions in reaching decisions while maintaining the facade of formalism in the opinions themselves. The following sections trace the reactions, over the last sixty years, of both courts and legal scholars to the difficulties of operating within the limited parameters of this outmoded conceptual framework.

A. The Individual and the New Status

Sir Henry Maine commented that the "movement of progressive societies has hitherto been the movement *from Status to Contract*."[21] Sir Henry, reflecting no small part of the optimism of his day, was celebrating the "freedom" of individuals to contract openly in a free market economy.[22] Freedom, it was supposed by academics and judges alike, meant a formal grant of the right to contract for anything, and to contract away anything, regardless of the context.[23] The role of the Laissez-Faire State was to act as an enforcement mechanism for private ordering.[24]

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21 SIR HENRY S. MAINE, ANCIENT LAW, ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS at xxvi (1931) (emphasis in original).

22 See Grant Gilmore's comments in Charles D. Kelso, *The 1981 AALS Conference on Teaching Contracts: A Summary and Appraisal*, 32 J. LEGAL EDUC. 616 (1982):

> In earlier days, the concept of freedom to contract, a 19th-century invention, reflected a belief that there would be enough to go around. No society ever felt more confidence about the present and about the inevitability of improvements in the quality of life. . . . Only such a society could have dreamed of the freedom contemplated by the 19th-century liability rules. . . . The depression and World War II marked the end of an era of peace and prosperity. There was need for more regulation, more laws, more government, and more liability. . . . Now we have a system of private law where everyone is liable to everyone else. That fits with the welfare state.

Id. at 641-42. *See also* Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, *in* THE POLITICS OF LAW, *supra* note 2, at 373-74.

23 *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943): "Contract—the language of the cases tells us—is a private affair and not a social institution. The judicial system, therefore, provides only for their interpretation, but the courts cannot make contracts for the parties." *Id.* at 630.

24 *See generally* Feinman & Gabel, *supra* note 22.

The nineteenth century notion of formal freedom to contract ignores the reality that most parties inherently occupy disparate levels of negotiating power.[25] To remedy this disparity between theory and reality, the Regulatory State greatly expanded social legislation and administrative rulemaking.[26] These intrusions on the absolute freedom to contract reflect the realization that "freedom of the individual is not only a question of legal structure, but also a question of economic order."[27]

Under the current legislative regime, the state aids or limits an individual in a particular role based on the individual's relation to the other parties in the transaction. In many situations, legislatively mandated rights and duties are imposed on the parties

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[25] For a detailed analysis of power and knowledge as underlying forces in traditional contract law, see Claire Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985). *See also* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT 56-57 (1980) (discussing how economic, political, social, and legal power combine to affect all contractual relations).

[26] In the area of employment, for example, the introduction of the National Labor Relations Board, National Labor Relations Act, Occupational Safety and Health Agency, social security law, Title VII protections, minimum wage laws, and collective bargaining has altered common-law notions of at-will employment. *See, e.g.*, William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201 (1985). A similar shift in regulatory involvement has occurred in most other areas of social interaction as well. *See* Glendon, *supra* note 2, at 669.

[27] Manfred Rehbinder, *Status, Contract and the Welfare State*, 23 STAN. L. REV. 941, 946 (1971). *See also* Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483:

> Consider first the voluntariness of the assumption of obligation. This notion presumes the capacity to choose, but choice in exchange transactions and relations, as anywhere else, is by its nature pressured, not voluntary: if one does not assume the obligation, one does not get what one wants. . . . The position of everyone—businessman, employee, or any other person—at any given time is a cumulation of prior choices, wise and unwise, all made under varying kinds and amounts of pressure and in a variety of circumstances, along with countless other factors over which they exercised no choice, such as economic recessions. . . . We may or may not want to relieve the overstretched businessman or the unemployed worker who makes onerous arrangements. But our decision depends on the nature and amounts of pressure they are under as well as many other circumstances, not on any concept of "real voluntariness."

Id. at 503-05.

regardless of what bargain they reach.[28] The legal system no longer treats the individual as an abstract person, but as an embodiment of a particular status, such as employee or employer.[29]

During the twentieth century, the movement of American law has been from contract to status.[30] In effect, state entitlements and regulations replace the individual in a given situation with a

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[28] The most common examples of this are laws regulating employment and habitability statutes. In Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943), Judge Frank also suggests that the "objective" approach to contract law more realistically reflects the state's role in determining parties' rights:

> [T]o call the standard "objective" and candidly to confess that the actual intention is not the guiding factor serves desirably to high-light the fact that much of the "law of contracts" has nothing whatever to do with what the parties contemplated but consists of rules—founded on considerations of public policy—by which the courts impose on the contracting parties obligations of which the parties were often unaware; this "objective" perspective discloses that the voluntary act of entering into a contract creates a jural "relation" or "status" much in the same way as does being married or holding a public office.

Id. at 647.

[29] Rehbinder, *supra* note 27, at 951. Rehbinder states that "[t]hese interventions in a state dedicated to a rule of law were only possible on the basis of legal norms; hence . . . completely new fields of jurisprudence developed—for example labor law, social security law, food and drug law, laws on medical care and compulsory education, and anti-trust law." *Id.* at 947. Rehbinder further suggests that these new fields of jurisprudence shift the role of private law from a system tailored to the needs of the upper class to one which serves the needs of all social strata. *Id.* This shift, in turn, requires a reduction in the scope of freedom to contract and unchecked private autonomy. *Id.*

Jay Feinman refers to this process as "functional fragmentation." Jay M. Feinman, *Contract After the Fall*, 39 STAN. L. REV. 1537, 1540 (1987) (reviewing HUGH COLLINS, THE LAW OF CONTRACT (1986)).

[30] *See* Ian R. Macneil, *Values in Contract: Internal and External*, 78 Nw. U. L. REV. 340, 390-91 n.162 (1983). "In short, [pages 346-502 of IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS (2d ed. 1978)] show what scholars of virtually all philosophies and political outlooks . . . seem to recognize: that since the time of Maine the 'progress', i.e. movement, of law in western states has been from contract to status." *Id.*; *see also* Kessler, *supra* note 23: "Nor can we subscribe to the thesis of natural law philosophers that the progress in any society towards freedom is to be measured by the extent to which all political relations can be reduced to contract, 'the perfect form of obligation.'" *Id.* at 641.

status. This is not the feudal notion of Status freezing individuals into one position for all purposes; rather, it is a "New Status" that enables the state to endow an individual with different rights in each of her specific, societal relations.[31]

The notion of Status in the Regulatory State highlights the role of the state in creating and enforcing its laws. Individuals in any transaction have antecedent rights and obligations, which they bring to the transaction. The state explicitly endows certain rights (such as the nondisclaimable warranty of habitability[32]) and obligations (such as strict products liability[33] and the implied covenant of good faith and fair dealing[34]) on a class of citizens to

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[31] *See* Rehbinder, *supra* note 27: "The decisive factors [of status in feudal society] were that the individual was rigidly bound into a hierarchic group and that his rights and obligations were derived from his status in his association group." *Id.* at 942.

In contrast to the feudal notion of Status, the New Status leaves personal relationships between parties, as well as other areas of individuals' lives, untouched. The New Status represents an attempt to remedy the unfairness caused by the disparity of power in formal legal equality (freedom to contract) by creating substantive legal equality through rights entitlement. New Status, unlike Feudal Status, is an attempt to enhance social mobility. *See id.* at 954.

[32] In California, as well as other states, the implied warranty of habitability is nondisclaimable. *See* CAL. CIV. CODE § 1942.1 (West 1985). In Green v. Superior Court, 517 P.2d 1168 (Cal. 1974), the California Supreme Court noted that "public policy requires that landlords generally not be permitted to use their superior bargaining power to negate the warranty of habitability rule." *Id.* at 1174 n.9. "[T]he severe shortage of low and moderate cost housing has left tenants with little bargaining power. . . . [E]ven when defects are apparent the low income tenant frequently has no realistic alternative but to accept such housing with the expectation that the landlord will make the necessary repairs." *Id.* at 1173-74; *see also* Knight v. Hallsthammar, 623 P.2d 268 (Cal. 1981) (holding in part that the warranty is not waived if tenant continues to live in uninhabitable premises after learning of defects).

[33] *See, e.g.*, Brown v. Superior Court, 751 P.2d 470 (Cal. 1988):

> [A] manufacturer should be liable if, in placing a product on the market, it knew the product was to be used without inspection, and it proved to have a defect that caused injury. . . . Strict liability . . . focuses not on the conduct of the manufacturer but on the product itself, and holds the manufacturer liable if the product was defective.

Id. at 474.

[34] *E.g.*, Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 686 P.2d 1158 (Cal. 1984): "It is well settled that, in California, the law implies in *every* contract a covenant of good faith and fair dealing. Broadly stated, that

which the individual belongs.[35]

The traditional legal paradigm, based on the notion of will-based obligation in which the state's role is narrowly circumscribed to enforcing the parties' bargain,[36] does not contemplate this level of direct state intervention. Accordingly, the antecedent or non-will based obligations are viewed as suspect.[37] However, doctrines based on status are no more than explicit examples of the implicit reality: an individual only enjoys such rights as the state recognizes and enforces.[38] The will-based paradigm of the

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covenant requires that neither party do anything which will deprive the other of the benefits of the agreement." *Id.* at 1166 (emphasis in original) (citations omitted).

35 The rights and duties in the above three examples are based on the parties' statuses as tenant, manufacturer, and obligor, without regard to the individuals involved.

36 *See* Feinman & Gabel, *supra* note 22.

37 One way the law reflects this suspicion is the tendency of courts to look first to assent as the basis for liability in a situation. Only if the court cannot find assent to liability will it search for other theories, ending up with implied warranties as a last resort. This hierarchy—from express consent to implied warranty—mirrors the will-based model of the traditional system.

Eric Freyfogle criticizes this process in the context of warranties of lawful use in the sale of property. Eric T. Freyfogle, *Real Estate Sales and the New Implied Warranty of Lawful Use*, 71 CORNELL L. REV. 1 (1985). Freyfogle traces the history of buyer remedies for seller misrepresentations concerning the lawful use of land from caveat emptor, to misrepresentation, to the modification and outright elimination of certain elements of misrepresentation, and finally, to the imposition of a duty to disclose defects. *Id.* at 1-28. As a result of this process, the misrepresentation actions have become the functional equivalent of strict liability. *Id.* at 33-34 n.119. In light of courts' "clear willingness to manipulate tort law so that the results in misrepresentation actions conform with popular values and expectations," *id.* at 38, Freyfogle proposes a solution no court has yet reached: an implied warranty of fitness for use. *Id.* at 32-43.

Much of the judicial hand-wringing over modifying the misrepresentation doctrine to the point that it is really the functional equivalent of strict liability could be eliminated if our legal system were to discard its unfounded bias toward will-based obligation. To the extent that strict liability or an implied warranty is recognized explicitly, the system would also seem to create an atmosphere supportive of greater judicial candor.

38 In this sense, nondisclaimable warranties can be viewed as one end of a continuum of state intervention, with caveat emptor at the other end. It is important to recognize, however, that at either end of the continuum, the court imposes a policy dictated by the state pursuant to some set of values. The continuum only represents the degree to which that imposition is more or less blatant and, correspondingly, more or less "interventionist."

For instance, the nondisclaimable warranty of habitability directly affects

traditional system hides this fact behind formal abstractions of individuals with absolute freedom to contract, subject to limited state meddling in private affairs.[39] Status-based intervention by the state requires us to confront this traditional view of the individual and to replace it with a more accurate characterization: specifically, that individuals in modern, post-industrial society are highly complex players of multiple roles.[40]

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the power balance of the relationship between a landlord and a tenant. The tenant has a right that cannot be taken or given away. This reflects the state's interest in providing a minimum standard of housing, at least for those who can afford housing. *See* Knight v. Hallsthammar, 623 P.2d 268, 272 n.3 (Cal. 1981) (discussing legislative findings relating to public interest in habitable, low-income housing). Another example of this intervention is the imposition of a duty on the seller of property to disclose latent defects. *See supra* note 37. Conversely, compare the comments of the court in Blair v. National Security Ins. Co., 126 F.2d 955 (3d Cir. 1942): "I can buy my neighbor's land for a song, although I know and he doesn't that it is oil bearing. That isn't dishonest, it is 'smart business' and the just reward of my superior individualism." *Id.* at 958.

One of our goals in proposing to restructure first-year legal education is to show that no rules or judgments are value free and that it is neither more nor less legitimate for the state to enforce a private bargain than it is for the state to intervene in the bargaining process.

[39] Peter Linzer argues that the characterization of liability as tort, contract, or property disguises the fact that "society, speaking primarily through the courts, assigns rights and duties based on relationships among people and firms, in light of many factors." Peter Linzer, *The Decline of Assent: At Will Employment as a Case Law Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986).

[40] Status-based intervention forces us to confront another issue as well: state paternalism. *See* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) [hereafter Kronman, *Paternalism*]. Kronman argues that state paternalism can be a positive influence in many situations. *Id.* He analyzes this paternalism and lists three identifiable justifications that involve overlapping, but distinguishable, principles: personal integrity, economic efficiency and distributive justice, and sound judgment. *Id.* at 765.

The personal integrity principle reflects the state's interest in protecting an individual from the undermining of her self-confidence. *Id.* at 774-76. This principle is present in laws against personal peonage and waivers of discharge in bankruptcy. *Id.* The economic efficiency and distributive justice principle underlies doctrines such as the nondisclaimable warranty of habitability. Kronman argues that the nondisclaimable warranty is an economically efficient means of redistributing wealth in society. *Id.* at 770; *see also* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) (arguing that private law norms may legitimately be used to redistribute wealth when other means are likely to be more costly or more

The state mandates rights and duties based on the roles of individuals within society. The common-law tradition, however, has yet to shed the fiction that obligations are based on an individual's free will. Once this fiction is shed, the state's role in dictating individuals' rights can be critically analyzed in both the classroom and the courtroom.

B. Judicial Reaction to the New Order

1. The Changing Role of the Courts

Although individuals have been given extensive entitlements in particular areas, these entitlements are neither thoroughly corrective nor all inclusive. Substantial holes exist in the fabric of the Regulatory State. The role of the common law in the past sixty or so years has been to patch those holes.

In many instances, the existence of the Regulatory State gives rise to the expectation that certain rights should exist in a given situation, even though the legislature and the courts have not yet recognized such rights. In these so-called hard cases, society calls upon the courts to achieve substantive justice by "finding" such rights.[41]

Traditional common-law doctrines facilitate this function reasonably well in the easier cases. The doctrinal system of the common law, however, cannot cope with more difficult situations.[42] The current legal paradigm is conceptually inadequate; it fails to integrate the changing role of the individual and the courts in a rational manner.

2. Eroding the Boundaries of Formal Doctrine: The "Genius" of the Common Law[43]

Courts have responded to this dilemma by modifying the old

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intrusive). The sound judgment principle reflects society's unwillingness to enforce promises based on the impaired judgment of one party. Kronman, *Paternalism*, *supra*, at 786. Restrictions on minors' capacity to contract and consumer "cooling off" periods are two examples of this principle. *Id.* at 786-87.

41 *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (discussing hard cases); *see also supra* note 37 and accompanying text (showing how courts have eroded misrepresentation until it resembles strict liability to achieve substantive justice in land sales transactions).

42 Linzer, *supra* note 39, at 327.

43 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (1965):

> [I]n the context of transfer of intangible property rights, the

system, rather than developing a new conceptual framework. They have accomplished this primarily by borrowing concepts from one doctrinal category of law to further the development of another.[44] This borrowing enables courts to find substantive justice in specific cases.[45] At the same time, the increased borrowing is slowly breaking down the artificial separation of common-

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> conceptual difficulties of contract were overcome by a conceptual borrowing from another developing area of law, that of agency. . . . Thus, by the typically muddle-headed process of thinking known as the genius of the common law, assignments of intangibles were made effective in fact while basic theory still proclaimed them to be legal impossibilities.

Id. at 202.

[44] Courts have also replaced formal rules with less restrictive standards. *See, e.g.*, James Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990):

> In the modern era, across many fields of common lawmaking, including torts and products liability, courts find it marginally easier to replace formal, bright-line rules with informal, vague standards than to replace standards with rules. In this era, bright-line rules are more comfortably formulated in legislatures than in courts. Once a court replaces a rule with a standard, it is more difficult to move back to a rule even if, on the substantive merits, such a return seems called for.

Id. at 514-15. *But see* Jason S. Johnston, *Uncertainty, Chaos and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991) (arguing that law does not evolve, but instead oscillates between formal rules and more informal balancing tests).

[45] In analytical terms, this process is perhaps most clearly explained by Weber's heuristic model. See Glendon, *supra* note 2, at 694-98 for a discussion of Weber's model.

Weber saw classical contract law reasoning as an example of "logical formal reality." *Id.* at 695. That is, the "rights and obligations of individuals are determined in a process which takes into account only the general characteristics of the facts and subjects them to rules, themselves derived through logical generalization from facts." *Id.* (footnote omitted). In Weber's view, case law has moved from logical formal reality to "substantive rationality" and "substantive irrationality." *Id.* at 695.

"Substantive irrationality" is more "individualized justice, in which decisions are [directly] influenced by the particular facts of each case, judged on 'an ethical, emotional or political basis,' rather than according to general norms ['substantive rationality'] . . . ." *Id.* (footnote omitted). In America, this change was largely the contribution of Legal Realism. Conversely, "substantive rationality" is a move "toward decision-making according to principles . . . which are ethical, utilitarian, or political, rather than legal principles derived by generalization or interpretation . . . ." *Id.* at 695-96.

law doctrines.[46]

One example of the development of this process is the law relating to defective housing. The common-law rule is caveat emptor—let the buyer beware.[47] This simple device allocates the entire risk in a real estate transaction to the buyer. Over time, courts have relaxed this harsh doctrine. Courts first found an exception in cases involving the tort of fraud.[48] Later, courts extended the exception by finding an "implied warranty for fitness of use," a concept borrowed from contract.[49] This doctrine only affords limited relief because it requires privity of contract between the buyer and the builder of the house, which is often lacking in mass-produced tract housing.[50] Consequently, in order to avoid the problem of lack of privity, courts sometimes find that the house is a "product" for purposes of consumer protection statutes and impose strict liability on the builders for defects.[51]

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46 Professor Linzer comments, "As each year has passed I have become further convinced that the boundary lines among the basic private law divisions—tort, contract and property—are not very important, and that the most important characteristic of contract, assent, is increasingly irrelevant." Linzer, *supra* note 39, at 325. *See also* GILMORE, *supra* note 2:

> [I]f we choose to follow the alternative route of recovery under theories of quasi-contract or unjust enrichment . . . the absurdity of attempting to preserve the nineteenth century contract-tort dichotomy will have become apparent even to the law professors who write law review articles and books—the academic mind is usually a generation or so behind the judicial mind in catching on to such things.

Id. at 90.

This is not to suggest that all distinctions between common-law categories are artificial or undesirable. For example, the separation between civil remedies and criminal sanctions may be important in protecting a criminal's constitutional rights. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Distinction*, 42 HASTINGS L.J. 1325 (1991).

47 *See* Margaret A. Morgan, Note, *When the Walls Come Tumbling Down—Theories of Recovery for Defective Housing*, 56 ST. JOHN'S L. REV. 671 (1982).

48 *Id.* at 686.

49 *Id.* at 687-88.

50 *Id.* at 687-91.

51 *Id.* at 682-710; *see also* 27 ATLA L. REP. 199 (1984) (reporting cases extending implied warranty of fitness in absence of privity and finding house "product" for purposes of strict liability). Because of the ad hoc nature of this enterprise, courts often use strikingly different doctrinal language to reach substantially similar results. For example, some courts render the decision for the buyer under the rubric of an implied warranty of habitability rather than strict liability. *See, e.g.*, Conyers v. Molloy, 364

The law of at-will employment provides another example of how courts apply formally separate doctrines to reach identical results. The rule of at-will employment is that an employer is free to discharge an employee at any time for any reason, or for no reason, because the employee is free to quit at any time.[52] This rule relies on the fictional characterization of employment as a contract freely bargained between two parties that defines the entire universe of rights between them forever.[53] Society is increasingly unwilling to accept the traditional notion that employers and employees enjoy equal power to contract in employment relations and that an employer can fire an employee for no reason, regardless of the length of employment or the quality of work. The problem for the employee is that there is no legislatively mandated recognition of any such entitlement in at-will employment situations.[54]

In *Perry v. Sindermann*,[55] however, the Supreme Court spoke of a property interest in re-employment by finding that the employee had an entitlement based largely on the employee's term of service.[56] In *Chamberlain v. Bissel Inc.*,[57] a federal district court found that a long-term employment relationship imposed a "greater

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N.E.2d 986 (Ill. App. Ct. 1977) ("construing away" attempted disclaimer as well).

52 Linzer, *supra* note 39, at 336.

53 *See* MACNEIL, *supra* note 25, at 47-50. MacNeil criticizes the current contracts paradigm (which he refers to as "neoclassical contract law") for attempting to include all choices—conscious and unconscious—into instantaneous consent. *Id.* at 49. MacNeil argues that the "bounded rationality" of individuals, based on our natural limitations, coupled with the limited amount of information available about the future, places restrictions on consent. *Id.* at 49-50. He further argues that consent should only be important as a triggering mechanism:

> [E]quating consent to the full scope of complex planning is downright silly. The new employee of IBM, for example, is from the moment of hiring (if not before) subject to a great array of plans respecting myriad aspects of his life. He is aware only of a few salient points; to these he consents; the rest he takes on faith
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> . . . .

Id. at 50. For an extended discussion of courts' responses to the at-will employee situation, *see* Linzer, *supra* note 39; *see also* Mauk, *supra* note 26.

54 Similarly, the at-will employment situation generally does not fit into the traditional categories of contracts, torts, or property. *See* Linzer, *supra* note 39, at 374-75.

55 408 U.S. 593 (1972).

56 *Id.* at 601-02.

57 547 F. Supp. 1067 (W.D. Mich. 1982).

degree of care" on the part of the employer in the termination process, thus finding a cause of action for negligence when the employer's acts failed to meet this higher standard in discharging the employee.[58] Yet another district court ruled that an implied-in-fact contract existed between the employer and the employee, such that the employee could only be discharged for good cause.[59]

Each of these cases represents a situation in which the court imposed rights and obligations on the parties after recognizing the substantive inequality of their bargaining positions based on each party's status as employer or employee.[60] This is considerably more realistic than the harsh nineteenth century presumption that each party had absolute freedom to contract for specific rights.[61]

The three cases share a common thread—justifiable reliance on the part of the employee that the employer could not discharge her for just any reason or for no reason at all.[62] Further, each court based this justifiable reliance in part on longevity of service.

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58 *Id.* at 1079.

59 Foley v. Community Oil Co., 64 F.R.D. 561, 563 (D.N.H. 1974).

60 Linzer states in this regard, "To me, the relation between the employer and employee must itself be the justification for finding job rights in the employees. The other justifications are usually fictions . . . ." Linzer, *supra* note 39, at 396.

61 *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

62 It is this same reliance principle which Grant Gilmore's *The Death of Contract* identifies as breaking down contract's basis in bargained-for-exchange, creating duties whose breach could, as he points out, also sound in tort. Reliance has been, to Gilmore, a prime mover in the movement toward "contort," a generalized theory of civil obligation. GILMORE, *supra* note 2, at 90.

Whenever reliance will naturally occur in a situation, such as with a buyer of potentially dangerous consumer goods, individual reliance is unnecessary for a cause of action. It is replaced by strict liability. In her status as a consumer of this good, the customer has in fact a property right in a safe product.

Today, the common-law tort of strict liability encompasses, and in many ways supersedes, the more restrictive remedies of warranty law under the Uniform Commercial Code. *See* Morris G. Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RESERVE L. REV. 5 (1965) (arguing that statutory contract remedy for defective products should not be subsumed by emerging common-law tort remedy); *see also* Morgan, Note, *supra* note 47, at 681 ("To the extent that the provisions of the Uniform Commercial Code have been perceived to be

Even though courts are more willing now to abandon the fiction of an individual's complete freedom in all transactions, the above examples show that courts have not abandoned the outdated paradigm shaped by that fiction.[63] The continuing influence of the nineteenth century model requires court opinions to ignore the underlying connective principle, Reliance, in favor of a formalistic doctrine sounding in tort, contract, or property.[64]

As one commentator notes, "Why must the legal mind look so desperately for an exclusive pigeonhole? Has not the time come to recognize that the business of the law is to determine liability between people and not to place their claims in pigeonholes?"[65] This continued pigeonholing finds its roots in legal education and inhibits progress toward a substantively rational legal system.

A substantively rational system would encourage courts to be more consistent in treating the three cases above as based on the Reliance principle. No longer would the issue be framed as

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inconsistent with or restrictive of the consumer's remedy, the Code largely has been disregarded.").

Furthermore, courts sometimes extend strict liability to establish liability for defective housing by holding in effect that a new house is a consumer product. *See supra* notes 47-51 and accompanying text. What we are really talking about in all these cases is the justifiable reliance of the consumer or homebuyer on the greater knowledge and skill of the seller or builder.

[63] It is also significant that not all courts are willing to discard the traditional at-will employment rule. *See* Linzer, supra note 39, at 368 n.217. Moreover, even courts that have modified the traditional rule are not willing to accept certain doctrines. For example, in Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988), the California Supreme Court rejected tortious breach of an implied covenant of good faith and fair dealing as a theory of recovery in employment relations. *Id.* at 401.

Linzer distinguishes cases that allow this tort remedy from cases such as Perry v. Sindermann, 408 U.S. 593 (1972); the *Perry*-type cases are based on the parties' conduct, while the implied warranty is imposed by law. Linzer, *supra* note 39, at 384. The language in *Foley*, however, suggests that the court's primary concern was that the measure of damages available under tort remedies exceeded those available under traditional contract remedies. *See Foley*, 765 P.2d at 398-99. As Linzer notes in a different context, the other justifications appear to be fictions. *See supra* note 60.

[64] Significantly, the California Supreme Court in *Foley* found solace in invoking the "well grounded" distinction between tort and contract in the common law. *Foley*, 765 P.2d at 389. Again, this "distinction" appears to be no more than a limiting of the amount of damages available to an aggrieved plaintiff based on the court's characterization of the employment relationship as a "contract."

[65] Shanker, *supra* note 62, at 36.

whether the act constitutes a tort or a breach of implied contract. The substantive issue would then shift to whether individualized reliance is required at all or whether the state dictates that reliance is simply assumed for a whole category of such persons, as in the case of continued employment for civil service workers. If individualized reliance is required, the court must ascertain whether the employee's reliance was reasonable, based on the facts of that case.[66] Addressing the Reliance principle directly focuses the inquiry on the nature of the relationship between employer and employee and the state's role in regulating that relationship.

C. *The Reaction of Legal Academia to the Regulatory State*

Like the courts, legal academics have perpetuated the artificial distinctions of the nineteenth century paradigm. Their first reaction to active state involvement in law-making was Legal Realism.[67] Although it apparently undercut the arid conceptualism of late nineteenth century common-law lawyers, this "movement" was in a real sense conservative. It allowed law teachers and lawyers schooled in the common-law tradition to cope with the age of statutes and regulations without developing a new and more appropriate vocabulary.

Realists such as Llewllynn, Corbin, Yntema, and Sturgis developed a particularistic, intuitive way of looking at law. Using what Llewllynn called "situation sense,"[68] with concentration on

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[66] For example, in *Foley*, 765 P.2d 393, the court specifically held that the employer-employee relationship was distinguishable from the insurer-insured relationship, which creates a higher standard of care. *Id.* at 395. In other words, the employee could not reasonably rely on a higher standard of care being imposed on the employer. Conversely, the relationship between the parties gave rise to an implied-in-fact contract limiting the employer's right to discharge the employee arbitrarily—a reasonable reliance on the employee's part. *Id.* at 398.

[67] Judge Posner gives a simple definition of Legal Realism: "the use of policy analysis in legal reasoning." Richard Posner, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 326 (1988) (comparing Formalism to Realism). Another commentator describes Legal Realism as "the most important and original American jurisprudential movement of the first half of the twentieth century . . . ." N.E.H. Hull, *Some Realism About the Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921, 922. *See generally* John H. Schlegel, *American Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979) (giving historical overview of movement).

[68] "Situation sense" includes the facts in a case "in their context and at

Corbin's "operative facts,"[69] the Realists in fact preserved the old common-law rules in narrower contexts. One commentator describes the movement as follows:

> Its skepticism about legal abstraction permitted lawyers to proceed in good conscience with infinite variations on traditional forms of professional talk . . . . So long as one could talk about particular contracts without paying explicit fealty to the ideal of Free Contract, property, without Private Property, fault, without Fault, the profession might survive the political crisis with its basic discursive equipment intact.[70]

This adaptation was flawed. It allowed lawyers to ignore a systemic analysis of the new law.[71] This systemic analysis would have focused on the principles that led the nation to embrace state involvement in the first place. Thus, when Realist Morris Cohen illuminated the breakdown of the public law-private law distinction in the field of property, he pointed out that private property

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the same time in their pressure for a satisfying work result, coupled with whatever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with and to judge with." KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60 (1960) (discussing appellate courts and how appellate judges decide cases).

69 Professor Corbin explains that making a contract involves a chronological series of facts and events, including offers, counter-offers, acceptance, and performance or nonperformance. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 623, at 2 (2d ed. 1960). "Any of these acts or events may affect the action of the courts in a given case. If they do affect it, they are legally operative facts and help to create new legal relations." *Id.* at 3. Professor Corbin concludes that an attorney who advises a party to a contract on the "legal operation" of the contract must know about these subsequently occurring acts and events and the conduct of the courts and must be able to predict that conduct for the benefit of the client. *Id.*

70 BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 17 (1984).

71 *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 87 (1977):

> [T]he revolution may have been merely a palace revolution, not much more than a changing of the guard. My own thought has come to be that the adepts of the new jurisprudence—Legal Realists or whatever they should be called—no more proposed to abandon the basic tenets of Langdellian jurisprudence than the Protestant reformers of the fifteenth and sixteenth centuries proposed to abandon the basic tenets of Christian theology. These were the ideas that "law is a science" and that there is such a thing as "the one true rule of law."
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> At the hands of the Realists, the slogan "law is a science" became "law is a social science."

Id. (footnote omitted).

was only such property as the state would protect.[72] He did not take the additional step of analyzing the creation of new forms of property by legislative and administrative lawmakers. Such analysis would await Charles Reich's "New Property" formulation in 1964.[73] Though important, Reich's insights were hardly systemic and have since been limited.[74]

After World War II, the state became increasingly involved in the contracts, torts, and property areas without any consistent or normative analysis of the basis for this involvement. Reflecting this reality, post-war law teaching in these fields still consists of a cross between Formalist and Realist common-law analysis of appellate cases, coupled with loose talk about notions like "public policy," "unconscionability," and "unequal bargaining power." Many of these concepts stem not from the common law, but from those very statutes and regulations that we still lack the framework to analyze.

This morass eventually led disaffected law teachers to form Critical Legal Studies.[75] In a series of law review articles, some of them profound, Critical Scholars dissected traditional doctrine, finding it essentially incoherent.[76] Though often called Neo-

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72 Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

73 Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

74 *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (holding evidentiary hearing not required prior to termination of Social Security disability benefits). The checkered course of new property law is summarized in SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 1017-19 (1987). Kurtz and Hovenkamp note, however, that many statutes now enshrine new property due process protections in their own provisions. The authors make particular reference to the Housing and Community Development Act of 1974 (codified in scattered sections of 5, 12, 20, 31, 40, 42, and 49 U.S.C.).

75 The focal concerns of this movement, consisting largely of law professors who went to law school amidst the *sturm und drang* of the late 1960's and early 1970's, can be found in THE POLITICS OF LAW, *supra* note 2. Some of its major proponents are Gerald Frug, Duncan Kennedy, and Morton Horwitz at Harvard; Claire Dalton at Northeastern; Mark Tushnet at Georgetown; John Schlegel at SUNY-Buffalo; and Peter Gabel at New School of Law in San Francisco. *See generally A Symposium of Critical Legal Studies*, 34 AM. U. L. REV. 927 (1985); John H. Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

76 *See* Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990); Paul Brest, *State Action and Liberal Theory: A Case Note of* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982); Alan D. Freeman, *Legitimizing Racial*

Realist, the Critical Scholars' attack was both more systemic and more pessimistic than that of their intellectual forebears.[77] Groups such as the "Fem-Crits"[78] and their sympathizers[79] exhibit more of the pragmatism of the Realists. These scholars argue, for example, that traditional rights analysis, while flawed, has won significant victories for marginalized groups in society and should continue to be used until some better system is developed.[80]

Discrimination Through Antidiscrimination Law: A Critical View of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 306-18 (1984); Duncan Kennedy, *Critical Labor Law Theory; A Comment*, 4 INDUS. REL. L.J. 503 (1981); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Mark Tushnet, *supra* note 75, at 1381; Van Doren, *supra* note 2.

77 Some scholars have attacked Critical Legal Studies and other "deconstructionists" as nihilistic. *See, e.g.*, Cook, *supra* note 3, at 990-91 n.21; Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 236 (1984). For a discussion of the relationship between Critical Legal Studies and Realism, see Cook, *supra* note 3, at 988; Mark Tushnet, *Critical Legal Studies: An Introduction to its Origin and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982).

78 The reference to "Fem-Crits" is an attempt, albeit imperfect, to categorize a range of critical scholarship by women that in some degree uses the same intellectual methodology as Critical Legal Scholars while condemning their largely white, male, Euro-centric orientation. This grouping is for ease of reference and is not intended to tokenize or marginalize the differences among women scholars. *See* Deborah L. Rhode, *The "Woman's Point of View,"* 38 J. LEGAL EDUC. 39 (1988). Nor is it intended to further marginalize other aspects of women's experience. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

79 Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 522 (1984); *see also* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

80 *See* Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983); Patricia J. Williams,

Recently, some Feminist[81] and Critical Race Theorists[82] have gone beyond both Realist pragmatism and Critical Legal Studies deconstruction to discuss reconstruction of the legal system.[83] These contributions provide hope that critical scholarship has cleared the way for a new legal methodology that will correct at least some of the shortcomings and injustices of the traditional system.[84]

D. Legal Education and Normal Science:[85] The Costs of Mopping Up

While the practice of law has evolved considerably during this

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Alchemical Notes: Reconstructing Ideals From Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

81 For a discussion of feminist critical theories, see Rhode, *supra* note 78; *see also* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987); West, *supra* note 3.

82 For a discussion of minority scholars' criticisms of Critical Legal Studies, see Cook, *supra* note 3, at 986. *See also* Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

For a criticism of the treatment of minority scholarship in legal academia, see Alex M. Johnson, Jr., *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 STAN. L. REV. 99 (1990) (replying to Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989)); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, L. A. DAILY J., May 25, 1990, at 38; Mari J. Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed Up Ground*, L. A. DAILY J., May 25, 1990, at 47 [hereafter *Planting Seeds*].

83 *See* Cook, *supra* note 3; *Planting Seeds*, *supra* note 82, at 51-52 (discussing outside materials author uses to augment casebooks).

84 *See, e.g.*, Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984):

> [T]he absence of determinacy, objectivity, and neutrality does not condemn us to indifference or arbitrariness, nor make it ridiculous to ask, or impossible to answer, the question of what we should do or how we should live. The lack of a rational foundation to legal reasoning does not prevent us from developing passionate moral and political commitments. On the contrary, it liberates us to embrace them.

Id. at 8.

85 "Normal science" is a term used by Thomas Kuhn in *The Structure of Scientific Revolutions*:

> Mopping up operations are what engage most scientists throughout their careers. They constitute what I am here calling

century, its conceptual framework has failed to keep pace with this evolution. The legal paradigm is still based on the fiction that the law is a rational system operating in a formally consistent fashion. The structure of first-year legal education is largely responsible for this misconception.

Law schools should be leading the revolution against obsolete legal doctrine. Unfortunately, law schools are primarily engaged in teaching the "normal science" of law, not the advancement of the legal profession.[86] Most law schools have not taken the same steps as the courts to change the old system, leaving students con-

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> normal science. Closely examined, whether historically or in the contemporary library, that enterprise seems an attempt to force nature into the preformed and relatively inflexible box that the paradigm supplies. No part of the aim of normal science is to call forth new sorts of phenomena; indeed, those that will not fit the box are often not seen at all. Nor do scientists normally aim to invent new theories, and they are often intolerant of those invented by others. Instead, normal-scientific research is directed to the articulation of those phenomena and theories that the paradigm already supplies.

Thomas S. Kuhn, *The Structure of Scientific Revolutions*, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE (Otto Neurath ed., 1962). Professor Chang states that "[l]aw schools are committed to the 'normal science' of law and are thus uninterested in challenges to the ongoing paradigm." Chang, *supra* note 1, at 572 n.110.

[86] *See* Chang, *supra* note 1, at 572; *supra* note 85; *see also* Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991) (arguing for introduction of courses in law school concerning structure of firms and practice of law):

> As matters stand, we send our students into the maw of a profit-making business without any knowledge of its ideology and lifestyle. Law firms view our graduates as potential profit centers whose initial purpose is to provide the firm with every last dollar that can be squeezed out of their carcasses. The students' resultant disillusionment and despair can only reflect poorly on the education they have received from us. . . . Perhaps if we educate students about the profession of law they will reject the rampant commercialism that is contaminating the profession. With real knowledge of what awaits them (and, after all, isn't knowledge power?), our students may decide in favor of justice and professionalism.

Id. at 1260.

But see Georgetown University Law Center, Report of the Committee on Curriculum Reform (1991) (unpublished report) (documenting far-reaching changes in first-year curriculum begun with fall 1991 classes). The report states, "Georgetown students need to understand that the old doctrinal boundaries between torts, contracts, and property have broken down . . . ."

ceptually unprepared for the challenge of practice as an attorney. Moreover, students taught to think along these traditional lines have helped to perpetuate the system far beyond the point when it should, by all accounts, have been abandoned.

In addition to undermining the separateness of traditional categories, the courts' use of one doctrine to modify another moves the system from the logical formal reality of Langdell's construct to the substantive justice associated with judicial legislation. Both systems have inherent values as well as defects. Logical formal rationality arguably minimizes the state's role in transactions, but chiefly protects the interests of the economically powerful. Substantive rationality, while achieving justice in specific cases, to some extent promotes state paternalism.' This movement from formal rationality toward substantive rationality begs the question: How do we find the right balance between formal and substantive justice? Further, how do we move toward rational (principled) substantive justice, and away from the ad hoc nature of substantive irrationality?[87]

The first step toward a healthy balance between substantive and formal justice is an analytical system capable of reflecting actual societal behavior and expectations, as opposed to those posited by a legal logic abstracted from reality. This system must be able to articulate the use of principles like Reliance and Status regardless of their common-law overlay. Where better to start this process than by restructuring the linchpin of legal education: the first-year courses of Property, Contracts, and Torts?

II. The Current Structure of First-Year Legal Education and Its Relation to Practice

A. The Failure of the System

As outlined above, the legal system has undergone nothing short of a revolution since Langdell's day. Large-scale legislative intervention by the Regulatory State has replaced the common

Id. at 5. This and other attempted changes in the first-year curriculum will be analyzed in the sequel to this Article.

[87] Glendon argues that, in reality, "modern western legal systems appear to be seeking simultaneously . . . the predictability and protection from [the state] that are associated with formal justice and the refined sense of individual fairness and protection from the economic power of the stronger that are associated with substantive justice." Glendon, *supra* note 2, at 698. For a discussion of state paternalism, see *supra* note 40.

law as the primary source of law. The role of the state in defining rights has become more pronounced as legislative reforms expose the fictional nature of a will-based system of liability. Courts are increasingly willing to ignore the arbitrary distinctions of formal doctrines in favor of the substantive reality of the principles underlying the doctrines. We are finally beginning to live without the fiction of "objectivity" as the basis of legitimacy for our legal system.

In light of these changes, it is perhaps time to reflect on a fundamental proposition: What does it mean to "think like a lawyer?" We submit that, to the extent the current system does not integrate these changes, law schools fail to prepare students to think like lawyers do in practice. The consequences are profound.[88]

The first-year courses of Property, Torts, and Contracts introduce students to legal methodology. As such, these courses are the primary vehicle for the immense volume of misinformation taught to students throughout their law school careers. The lessons students learn in these courses are harmful for a number of reasons.

First, by teaching the private law courses as distinct, formal

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88 While the focus of this Article is to show how law schools fail to teach students to think like a lawyer, Professor Johnson identifies another important consequence of the widening gap between law school and law practice: the frustration and disillusionment of recent law school graduates with law practice. Johnson, *supra* note 86, at 1231.

> [T]he increasing distance between legal education and the legal profession raises new questions about the balance as the gulf between education and practice manifests itself in disillusioned attorneys who are leaving their jobs, and even the profession, in droves.
>
> The implications of this disillusionment are alarming. The best and brightest will continue to attend law school because a legal degree is flexible and attractive in our increasingly complex, litigious society. However, if they are not interested solely in making money, they may leave practice to become writers, actors, anthropologists, or musicians. The impact on the expanding profession and practice of law will be devastating. Who will be left? The least and dumbest, along with those of the best and brightest who seek only economic success? If legal practice does not begin to match students' expectations, the profession may suffer a "brain drain" of catastrophic proportions.

Id. at 1248-49.

doctrines with little or no relation to one another, legal education facilitates an artificial approach to problem solving. For instance, assume the following fact situation involving professional liability to third parties:

> A creditor of a corporation is suing the corporation's accountants for producing inaccurate audits. The creditor relied on these audits in extending credit to the corporation, which is now bankrupt.

Suppose the student is asked whether the accountants can be held liable to the creditor. If the class is Torts, the student will probably discuss negligence and the foreseeability of harm to the creditor,[89] or the Restatement of Torts test.[90] If the course is

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[89] *See* International Mortgage Co. v. John P. Butler Accountancy Corp., 223 Cal. Rptr. 218, 227 (Cal. Ct. App. 1986) (holding independent auditor owes duty of care to reasonably foreseeable plaintiffs who rely on negligently prepared, unqualified audited financial statements); *see also* H. Rosenblum, Inc. v. Adler, 461 A.2d 138, 155 (N.J. 1983) (stating that inserting audit in economic stream causes defendants to be responsible for careless misrepresentations to parties who justifiably relied on expert opinions); Citizens State Bank v. Timm, Schmidt & Co., 335 N.W.2d 361, 366 (Wis. 1983) ("Liability will be imposed on these accountants for the foreseeable injuries resulting from their negligent acts unless, under the facts of the case, as a matter of policy to be decided by the court, recovery is denied on grounds of policy.").

[90] RESTATEMENT (SECOND) OF TORTS § 552 (1976):

> *Information Negligently Supplied for the Guidance of Others*
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary losses caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance on it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Contracts, the discussion will involve privity of contract,[91] or perhaps the third party beneficiary doctrine.[92] In either case, the student is really discussing only discrete facets of the larger issues that traditional doctrine has forced into the category of torts or contracts.

Rather than discussing the issue of professional liability to third parties, the student is taught to discuss contracts or torts using professional liability as an example. This emphasis on false academic distinctions prevents the student from gaining a coherent picture of how privity of contract and foreseeability of harm are in reality two related doctrines concerning Duty. Thus, the emphasis on academic distinctions creates an unnecessary hurdle to becoming an effective lawyer.

Second, by focusing on the formalism of the law within each separate category, courses discourage rigorous discussion of the

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Id.; see, e.g., Badische v. Caylor, 825 F.2d 339 (11th Cir. 1987) (discussing two-step inquiry based on Restatement test adopted by Georgia Supreme Court).

[91] *See, e.g.*, Gordon v. Etue, Wardlaw & Co., 511 So. 2d 384, 389 (Fla. Ct. App. 1987) ("Florida law denies relief for a breach of due care by an accountant to third parties who are not in privity [of contract] with that accountant, even though the reliance by the third parties is known or anticipated."), *disapproved by* First Florida Bank v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990).

[92] *See, e.g.*, Investment Corp. of Florida v. Buchman, 208 So. 2d 291, 295 (Fla. Ct. App. 1968) (rejecting plaintiff's argument that defendants should be held liable under theory which "could be categorized under present day concepts of third party beneficiary" doctrine), *disapproved by* First Florida Bank v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990); *see also* Credit Alliance Corp. v. Arthur Andersen & Co., 483 N.E.2d 110 (N.Y. 1985). In *Credit Alliance*, the court describes the test as a negligence test. Essentially, however, the court adopts a third party beneficiary test:

> Before accountants may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports, certain prerequisites must be satisfied:
>
> (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes;
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> (2) in furtherance of which a known party or parties was intended to rely; and
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> (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.

Id. at 118.

values behind the laws and any critical assessment of their validity. The student is taught to discard her intuitive notions of justice in order to learn the "objective" rules and reasoning, which she is told are the only "legitimate" bases for law.[93] The student also learns to emphasize process over result.[94] The student trying to discover whether privity exists between the accountant and the creditor on a Contracts exam seldom feels free to ask why the accountants are not liable to all parties who are foreseeably harmed by their conduct. Indeed, courts deciding the issue of accountant liability to third parties openly discuss what they feel to be the appropriate scope of duty, but then feel obliged to stuff the problem into the corresponding pigeonhole: contracts, if the

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[93] For instance, students learn to put aside their initial rejection of the rule that a champion swimmer has no duty to save a drowning person if there is no special relationship between them. They are taught to replace any moral judgment regarding the validity of the rule for the more scholarly task of ascertaining whether there is in fact no such relationship. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988). Professor Bender makes the following observation:

> Each year that I teach torts I watch again as a majority of my students initially find this legal "no duty" rule reprehensible. After the rationale is explained and the students become immersed in the "reasoned" analysis, and after they take the distanced, objective posture informed by liberalism's concern for autonomy and liberty, many come to accept the legal rule that intuitively had seemed so wrong to them. They are taught to reject their emotions, instincts, and ethics, and to view accidents and tragedies abstractly, removed from their social and particularized contexts, and to apply instead rationally-derived universal principles and a vision of human nature as atomistic, self-interested, and as free from constraint as possible.

Id. at 33.

[94] *See* Chang, *supra* note 1, at 547:

> [U]tilitarian balancing replaces normative notions of good. In light of the inability to squarely resolve and address fundamental ethical problems, the legal paradigm purports to resolve such issues by "balancing," which is assertedly neutral. The paradigm conveys an implicit message that the characterization of interests to be weighed and the act of balancing are objective tasks. Supposedly the results of such balancing would be replicated if performed by any reasonable person. Part of the core of the paradigm is that the world would be perfectly run if left to reasonable men applying "neutral" principles.

Id.; *see also* Van Doren, *supra* note 2, at 684 (critiquing liberal legal system's failure to "deliver on the promise of its theorists to produce an objective determination of [property] rights").

duty is limited, and torts, if it is expansive.[95] Further, it is the fit within the pigeonhole that the teacher often emphasizes in class. Instead, law schools should better train students to understand that underlying policies drive the decision, despite the formalistic look of the opinion.

Third, most casebooks used in these courses strongly reflect late nineteenth century individualistic notions of will-based obligation, which are largely anomalous in the late twentieth century Regulatory State. This structure creates a false hierarchy of standards for liability. Thus, when a court seeks to find substantive justice in a developing area of law, it is more likely to "find" an intentional basis for liability, such as a contract doctrine, before resorting to foreseeability or strict liability.[96] Only toward the end of casebooks do the editors typically use cases in which the

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[95] For example, the court in *International Mortgage Co. v. John P. Butler Accountancy Corp.* noted that tort liability should be determined only by foreseeability. 223 Cal. Rptr. 218, 227 (Cal. Ct. App. 1986). The court refused to accept the idea that, absent duty, a person may be as negligent as they choose:

> "Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the [California] Civil Code, no such exception should be made unless clearly supported by public policy."

Id. (citations omitted) (quoting Rowland v. Christian, 443 P.2d 561 (Cal. 1968)).

This approach starkly contrasts the approach advocated by Justice Cardozo in Ultramares Corp. v. Touche, Niven & Co., 174 N.E. 441 (N.Y. 1931), which is still influential today. Cardozo states, "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* at 444. Cardozo's solution was to require strict privity of contract to impose liability. *Id.*

[96] *See supra* note 37 and accompanying text. In the area of labor law, Linzer argues that "[t]he 'rhetoric of contract' has dominated [employment] relationships mostly because it is difficult to explain where the rights and duties came from if not from contract." Linzer, *supra* note 39, at 327. Conversely, in the context of consumer protection, Gilmore notes that "[w]e see an almost instinctive choice of tort over contract as the principle of liability in a rapidly developing field." GILMORE, *supra* note 2, at 93. Gilmore suggests that courts adopted a tort doctrine to overcome the inherent limitations of the contract remedies for breach of warranty. *Id.* at 94.

court adopts nonconsensual bases for liability.[97]

Moreover, this fictional hierarchy masks the fact that, in all cases, liability is state-imposed. Liability only exists when the state is willing to enforce it. Adherence to will-based obligation in the casebooks de-emphasizes the state's role in defining parties' rights and obligations in transactions.[98] For instance, the Florida Supreme Court recently changed the law regarding accountant liability to third parties.[99] The law literally changed overnight from requiring strict privity of contract (no liability to third parties) to adoption of the Restatement test (liability to a limited class of third parties).[100] When this change is picked up by casebook editors, it will no doubt be treated in a note posi-

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97 *See infra* note 141 and accompanying text.

98 Gregory Alexander comments on the effect of this reliance on will-based obligation in the context of running covenants:

> The standard explanation used to reconcile running covenants with individual freedom is that a legal system that holds a subsequent owner to a promise made by a predecessor is in fact enforcing private intentions. This intentionalist model necessitates assuming that the person who succeeded to the promisor's estate has assented to the obligation even though he may never have expressed his consent. . . . [However,] if in social reality actors pervasively experience choicelessness in conditions of nominal freedom, then entitlement assignments justified by the principle of individual autonomy appear arbitrary. . . . There *are* intractable conflicts among our visions of the proper ordering of society and societal relationships. . . . [S]ettled legal practices are not settlements of fundamental political and social controversies; the claim that they are is just another attempt to trump some opposed normative claim and entrench a particular set of power relationships.

Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 889-905 (1988).

99 First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990) (adopting *Restatement (Second) of Torts* test).

100 *First Florida Bank*, 558 So. 2d at 15 (overruling the lower court and disapproving four prior decisions based on strict privity of contract): " 'We conclude that the standard set forth in the Restatement (Second) of Torts § 552 (1977) represents the soundest approach to accountants' liability for negligent misrepresentation. It constitutes a middle ground between the restrictive *Ultramares* approach advocated by defendants and the expansive "reasonably foreseeable" approach advanced by plaintiffs.' " *Id.* (quoting Raritan River Steel Co. v. Cherry, Bekaert & Holland, 367 S.E.2d 609, 617 (N.C. 1988)); *cf.* Chang, *supra* note 1, at 556-64 (discussing the implications of a decision apparently overruling established law concerning ownership of water in Hawaiian streams).

tioned after more traditional cases, rather than as an up-front assertion of the underlying principle now governing such situations.[101]

Finally, most of these casebooks focus on the development of common-law doctrines. Consequently, they fail to treat adequately statutory and administrative sources of law. We can think of no reason that the development of a common-law doctrine is any more instructive of how law is made than the judicial construction of a statute.[102] The importance of these other sources of law must be made clearer in law schools.

B. The Course in Civil Obligation

Given the system's inability to adequately prepare students for work in the modern legal profession, it is imperative that we discard it in favor of a new construct. We propose to replace the current system with a conceptual framework that breaks down the outmoded boundaries carved out in the nineteenth century around the areas of substantive law. This process would begin with the fundamental areas of property, contracts, and torts. Under this proposed system, students would learn the same material without the needless redundancy and intellectual straightjacketing produced by arbitrary categories. Moreover, students would learn in such a way as to become less alienated, more intuitive decision-makers.

Although there is much work yet to do, we believe that law schools would better prepare students for the practice of law by taking a functional approach to the first-year private law subjects. In order to accomplish this goal, we suggest, after others, replacing the traditional private law courses with a single mega-course called "Civil Obligation."[103] Part III of this Article outlines our

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101 The leading case cited by the textbooks will probably continue to be Ultramares Corp. v. Touche, Niven & Co., 174 N.E. 441 (N.Y. 1931). *See supra* note 95. Accordingly, students will be taught that strict privity is the "rule" and the modifications will be exceptions to the rule, further delaying development of the law.

102 One example of an area of statutory construction engendering a great volume of case law is the field of insurance law.

For a discussion of the downplayed role of statutory law in casebooks, see *infra* note 141 and accompanying text.

103 *See* GILMORE, *supra* note 2, at 94: "Let us assume arguendo, that it is the fate of contract to be swallowed up by tort (or both of them to be swallowed up in a generalized theory of civil obligation)." *Id.*; *see also* Jay M. Feinman, *Change in Law Schools*, 16 N.M. L. REV. 505 (1986) (discussing a

proposal for the structure of this course.

III. A New Structure for First-Year Legal Education: A Modest Proposal[104]

The academic approach to learning law abstracts its application to practice and emphasizes legal rules based on outmoded normative values. In essence, Holmes in the *Common Law* identified this process as putting new wine in old bottles.[105] It is high time to manufacture new bottles.

Law professors and the lawyers they train would do better by discarding the obsolete formal categories of private law courses in favor of the organizing principles that integrate statutory and administrative lawmaking with common-law doctrines. This integration is already unconsciously underway in law practice, but these organizing principles must be consciously articulated to be fully effective.[106] This must begin in the legal academy. Lawyers

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mega-course he taught in "Civil Obligation"); Linzer, *supra* note 39, at 424-26 (suggesting that traditional private law distinctions should have no substantive impact and should be replaced by a single category of "private law").

104 Jonathan Swift, *A MODEST PROPOSAL For Preventing the Children of poor People in Ireland, from being a Burden to their Parents or Country; and for making them beneficial to the Publick*, *in* The Writings of Jonathan Swift 502 (Robert A. Greenberg & William B. Piper eds., 1973) (1729) In *A Modest Proposal*, Swift satirically suggests that Irish babies be used as food for the English. Swift's choice of title is ironic; in reality the proposal he makes is hardly modest. The title, and the "proposal," are meant to shock the reader into an awareness of the English's horrible treatment of the Irish.

105 *See* Holmes, *supra* note 4, at 5.

106 One example of how law practice is restructuring doctrine along functional lines is the project on servitudes for the new Restatement of Property. The reporter for the servitudes project, Professor Susan French, advocates abandonment of the outdated, formalistic system based on distinctions among easements, real covenants, and equitable servitudes, in favor of functional categories such as creation, validity, interpretation, succession, modification, termination, and enforcement. *See* Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplifications*, 73 Cornell L. Rev. 928 (1988) (containing a tentative outline of how servitudes doctrine would be restructured); Susan F. French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.C. Davis L. Rev. 1213 (1988). *See generally* Symposium, 55 S. Cal. L. Rev. 1177 (1982).

Servitudes law is presently a doctrinal nightmare for first-year students and teachers. *See* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. Cal. L. Rev. 1261 n.1 (1982) (quoting

trained in a new functional type of discourse that cuts across the

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author's favorite "derogatory epithets" on servitudes law); *see also* Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1179, 1179-82 (1982) (briefly outlining the servitudes doctrines as we have done below).

For instance, students are required to know the following:

(1) An easement is the right of one person to go on the land of another and make limited use thereof; it attaches to land, not the estate. It can be created by conveyance (subject to the Statute of Frauds), prescription (either pure or lost grant), implication (quasi-easement, necessity, or based on the totality of the circumstances), estoppel, or irrevocable license. Affirmative easements are generally enforceable. Negative easements are more limited (traditionally, only four were allowed—light, air, support, and water). In the United States, negative servitudes are obsolete due to the equitable servitudes doctrine (with a separate set of rules). An easement must be appurtenant, unless it is in the United States and the benefit is for a commercial purpose or economic benefit. An easement can be terminated by release, abandonment, misuse, or merger (but not by changed circumstances; however, an equitable servitude can be terminated by changed circumstances);

(2) A real covenant is a promise that runs with the land. It is usually an affirmative duty and is enforceable at law (not equity). Unlike easements, real covenants attach to the estate (like a bird on a wagon), and an adverse possessor is not bound. It can only be created in writing (subject to the Statute of Frauds) and must meet additional requirements in order to run: form and intent, touch and concern, horizontal privity, and vertical privity (or verticality for the benefit to run). It can be terminated by release (although there is a trend toward applying the changed circumstances doctrine to real covenants);

(3) Equitable servitudes are agreements concerning restrictions on the use of land. Unlike real covenants, they are enforceable in equity (and therefore require notice instead of privity); they attach to the land (not the estate) and apply to both real and personal property (unlike easements or real covenants). They can be created by written agreement, estoppel, or implied reciprocal servitude. In England, they only run if they are a negative burden, or in the United States if the benefit is appurtenant. Further requirements must be met in order for equitable servitudes to run: form and intent (which may be implied if the servitude touches and concerns the land or from a general development plan), touch and concern, notice (which replaces horizontal privity), and verticality. They may be terminated by release, judicial declaration, or changed circumstances. *See id.*

With all of this in mind, along with other doctrines and definitions, it is not surprising that students cannot "see the forest for the trees." Professor French's proposal is a welcome step toward reshaping the doctrinal structure of the law to become both formally rational and functional.

A further step would be to take the restructured model of servitudes and compare it to contract doctrine to see how the two fields are functionally related. Professor French's proposed structure goes far in facilitating this exercise, though doctrinal purists would no doubt resist this analogy. *See,*

case, statute, and administrative law of torts, contracts, and property will be far better prepared for the realities of modern law practice.[107]

The proposed course in Civil Obligation initially contemplates two major changes in the traditional teaching method. First, the course would be based on organizing principles such as Reliance and Status, instead of the doctrines of torts, contracts, and property.[108] Second, the casebooks would be restructured, and in the interim, the current casebooks would be used in a radically different manner.[109] These changes would go far in training students in the functional discourse previously mentioned.

A. Functionalism in Law Teaching: Replacing Formalistic Categories with Organizing Principles

The functionalism proposed in this Article presents several difficulties in its application to law teaching. First, the principles selected to show that different doctrines serving the same purpose are functionally similar must have sufficient play in them not

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e.g., Reichman, *supra*, at 1236 (arguing that servitudes are "property interests" and that "dated theories viewing servitudes as merely a branch of contract law should be disregarded").

[107] For a discussion of the efficacy of one new type of functional discourse, see comments by Gilmore in Kelso, *supra* note 22:

> Economic analysis has not been much help. Its technique is to take an oversimplified or idealized version of a common-law rule, transform it into a model, and then in terms of the model create graphs and mathematical rules. A platitude is not inspired simply by being said in a tragic tone of voice. Simplified models are not improved by symbols. What we need is an economic-analysis nonproliferation treaty.

Id. at 642. Bruce Ackerman has identified law and economics as a type of new "lawspeak" aimed at performing this integrative function in the Regulatory State; ultimately, however, he is dissatisfied with its lack of explanatory power. *See generally* ACKERMAN, *supra* note 70. While Ackerman is correct in seeing the need for new integrative principles, we feel these can be found in the more traditional vocabulary of lawyers. We would organize legal instruction not around the principles associated with "economic man," but around principles like Reliance, Status, and Bargain that have long been associated with "legal man."

[108] The Reliance principle, for instance, provides striking examples in the field of long-term employment relations. Though employment cases often speak in terms of the traditional common-law categories, the examples above show that the Reliance principle was at work in them all. *See supra* notes 52-60 and accompanying text.

[109] *See infra* notes 159-75 and accompanying text.

to create an intellectual straightjacket for students, as does the excessive rule-differentiation of the Langdellians. Students should also be taught that principles, such as the ones we outline here, may themselves change over time.

Second, the principles used must be chosen at a useful level of generality. Thus, one approach to teaching Civil Obligation would be to analyze principles at a high level of generality—Fairness and Justice for example—and to attempt to apply them to specific situations. A more effective approach would be first to analyze problems using principles at a middle-range of generality, such as Reliance and Duty, and then to ask whether the results of this inquiry reflect principles such as Fairness.

At present, the middle-range principle of Reliance finds expression in Contracts as promissory estoppel, in Torts as implied consent, and in Property as adverse possession and prescriptive easement. Similarly, the principle of Excuse appears in Contracts as impossibility and frustration, in Torts as supervening cause in the negligence chain, and in Property as termination of servitudes due to changed circumstances and termination of real estate contracts because of an "Act of God." Finally, liability based on Status (the imposition of substantive fairness) may appear in Contracts or Property as implied warranty and in Torts as strict or vicarious liability.

The first-year course in Civil Obligation, which replaces Contracts, Property, and Torts, could be organized around such middle-level principles, rather than the traditional sub-categories from the three common-law courses. In addition to treating this body of learning more coherently, this new super-course would better prepare students for the world of practice, where clients' cases do not appear with labels on them reading simply "tort" or "contract".

It will also take less time than teaching the three customary courses, avoiding needless duplication. If, for example, fifteen credits were usually allotted to the three courses over two semesters, this might be cut to nine, freeing up six credits for public law courses such as administrative, labor, tax, or international law. These courses are desperately needed by first-year students both as an antidote to an overload of common-law subjects and as an introduction to law in the Regulatory State. And of course the common-law courses themselves, when taught in the functional mode, would emphasize that the principles being used underlie statutory and regulatory law as well as case law.

But to return to a problem mentioned earlier, how will these principles be used so as to create more than a renamed, formalistic enterprise? Will they be billed as explaining all of civil obligation and applied rigidly and didactically to each case? The following sections suggest how to avoid this result.

B. The Course in Civil Obligation

1. In General

Civil obligation involves three basic principles: it is usually reliance-based, status-based, or bargained-for, or is based on some combination of the three.[110] All forms of civil obligation also have an "escape hatch" based on excuse because of circumstances misunderstood or circumstances that change over the course of the relationship of the parties.[111] This section focuses

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[110] Bargained-for liability is decreasing in importance relative to the other two forms. In fact, Patrick Atiyah suggests it exists now only in the relatively rare situations in which we enforce purely executory contracts, without substantial reliance by the aggrieved party. PATRICK S. ATIYAH, ESSAYS ON CONTRACT, 30 (1988). Obligations based on voluntary or assumed obligations of the parties to each other are being replaced by obligations to society as a whole, whether based on actual reliance of the aggrieved party or on the societally-mandated status of that party relative to the other party. Thus, the *relationship* between the parties, either at the liability-creating moment they interact or over a period of time, has become far more important than what the parties agree upon.

Interacting with these phenomena is the increasing importance of statutes and regulations, which by necessity must deal with general categories of interactions between parties rather than the details of discrete transactions governed by judge-made law. As outlined in detail above, the increase of liability based on legislation and regulation necessarily implicates status. *See supra* notes 26-35 and accompanying text. These forces have decreased the importance of bargain-based liability in relation to the other two bases. Since bargain would be a relatively minor part of the new course, we do not propose to discuss it here. *But see* CHARLES FRIED, CONTRACTS AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

[111] Once civil obligation arises, or otherwise would arise, the law allows escape from liability if circumstances are not what the parties thought they were—or indeed, if circumstances change. Because of its broad and complex scope, the notion of changed circumstances, which allows escape from civil liability that would otherwise be imposed, requires an article of its own. The easiest way to envision changed circumstances at this stage is to think of the earthquake, fire, or hurricane when there is no insurance coverage and the risk is not allocated between the parties. Such an event may absolve a carrier from liability to a shipper, an owner of a servient

on the primary principles that determine civil obligation in the late twentieth century: Status and Reliance. Discussing each in at least some degree of detail should give the reader some examples of how the new Civil Obligation course might be taught.

2. The Status Principle

Status refers to the legal consequences imposed on parties on the basis of their position in society or their relationship to one another as defined by the state. The former basis for liability can be referred to as "Pure" Status. The second basis, which focuses on the relation between the parties, can be referred to as "Duty."[112]

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estate from the burden of a destroyed right of way, or a prospective tortfeasor from liability because it constitutes an intervening cause in the negligence chain. By focusing on what constitutes changed circumstances across the entire field of civil liability, the course can ignore the common-law labels and discuss what is at work in all such situations: the allocation of the risk of unexpected loss.

[112] Though it is increasingly common for Status to act alone in creating civil obligation, it also may interact with either Reliance or Bargain in producing such obligation.

One area of the typical Property course impacts Status, but is not the same as Status and is not really relevant to Bargain or Reliance. This is a group of common-law doctrines that, for want of a better term, we will call "pure property" doctrines. These include estates, future interests, perpetuities, and concurrent estates.

In each doctrine, rights or obligations attach by definition to the interest involved. An estate held by A and B either is or is not a joint tenancy, depending on whether or not it fits the definition. Likewise, an estate either is or is not a fee simple. Finally, an interest either is or is not a contingent remainder and either does or does not violate the rule against perpetuities. This ancient core of common-law property defines the characteristics of the various economic interests upon which the principles of private law act.

Though pure property rules would not be taught in the Reliance or Bargain section of the course, it should be recognized that they may form part of the Status of an actor in a given situation; for example, part of the Status of a residential lessee involves the property interests she holds. Although Pure Status itself may produce rights and obligations (e.g., strict liability situations), more often it is the interaction between Reliance (or Bargain) and Status that produces civil liability. Thus, while pure property rules should be left to the Status section of the course, it should at all times be recognized in teaching Reliance (or Bargain) that pure property rules may have a bearing on the outcome of a given situation in those sections of the course.

a. Pure Status

Suppose the following fact situation:

> Employee A jumps up on a machine that is still running in the factory of Employer B. A falls into the workings of the machine, mangling her leg.

A's status as an employee of B, injured in the course of employment, entitles A to workers' compensation regardless of A's contributory negligence and regardless of the terms of the employment contract.

Or suppose this situation:

> Buyer B contracts with Seller S to purchase real estate. Before B moves onto the premises or takes the deed, the property is destroyed by fire.

Under the Uniform Purchaser & Vendor Risk Act,[113] S must bear this risk; at common law, B is responsible.[114] In either case, the party's status, not what the party does, determines liability.

Finally, suppose this situation:

> Urban residential landlord A owns a building. The building's roof falls in, injuring Tenant B and rendering B's unit uninhabitable.

Despite a lease disclaiming all implied warranties and despite any contributory negligence by B, A is liable for B's injury and B is not liable for rent until the unit is made habitable.

In each of the above situations, and in numerous others, society imposes rights and duties on the respective parties on the basis of their respective statuses within that society, regardless of any interactions that may have occurred between them.[115] These are cases of civil obligation based on Pure Status and need to be stressed at the outset of the course. In this way, the student confronts ab initio the fact that the state assigns liability in certain cases when society determines that holders of an inferior status need societal protection and holders of a superior status are better able to bear the risk of loss. The most readily recognizable

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[113] Unif. Vendor and Purchaser Risk Act § 1,14 U.L.A. 471 (1990).

[114] John E. Macy, Annotation, *Vendor and Purchaser: Risk of Loss by Casualty Pending Contract for Conveyance* 64 A.L.R. 2d 444 (1953).

[115] Most often today, such assignment of rights and obligations is done by statute and regulation, rather than by common law. Sometimes, however, common-law principles, such as the "substantive unconscionability" of contract terms, are used by courts to fill statutory and regulatory gaps.

doctrines in the Status area today are strict liability and nondisclaimable implied warranty. Doctrines that incorporate the notion of Pure Status are now separated into Torts, Contracts, and Property courses, while little effort is made to show how the same principle is at work in each. Mary Ann Glendon suggests that one way to remedy this problem would be to teach labor law in the first year.[116] In addition to being heavily regulated, labor law crosses over the three private law subjects. This would also seem to have the benefit of being more relevant to students' experience than most of the fact situations listed above.[117]

b. Duty

The principle of Duty mirrors Status on a smaller scale and incorporates the other bases for liability—Reliance and Bargain. Currently, Duty is taught as separate doctrines within each private law course. In Contracts, Duty between parties to a transaction is analyzed in detail through a number of doctrines based on Bargain and Reliance, such as privity of contract and the third party beneficiary doctrine. In Torts, Duty runs the gamut from no duty under any circumstances (absolute privilege) to duty in all circum-

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[116] Glendon, *supra* note 2:

> With the proper materials, [labor law] could introduce the beginning student to all of the interacting components of the American legal system. The collective bargaining relationship affords the opportunity to look at private ordering, negotiation, arbitration, mediation, and the role of an important intermediate group in our society. The functioning of the National Labor Relations Board and its relation with the federal courts provides an excellent introduction to the administrative process. In addition, the field is a museum of important and interesting statutory interpretation problems, arising both under legislation which reinforces the collective bargaining process and that which, like Title VII, displaces it. It is also the setting for a number of historic constitutional law decisions and an excellent point of entry into the complexities of federal-state relationships. Recent state court treatment of the individual employment at-will contract furnishes material for a classic study in case law evolution. . . . Finally, opinions, assumptions, and values are apt to become explicit rather quickly in such a course, opening a window to the moral and political issues that are often ignored in legal discourse.

Id. at 693.

[117] *Id.* (noting labor law is likely to immediately engage first-year law students' interest).

stances (strict liability). In Property, Duty largely mirrors concepts of Duty in Torts and Contracts: fiduciary duties and the duty to disclose latent defects are two examples.

The current structure teaches students to view these doctrines as distinct sets of rules that are more or less unrelated to one another and to apply them without regard to the relations between the parties involved in the transaction. Students are taught the elements of each doctrine at different points throughout the first year, and coursework focuses on whether the elements have been established in a given case. Little effort is made to tie the Duty doctrines of Contracts with those of Torts, for example.

A functional approach to the subject of Duty would be to list the various degrees and types of Duty and understand the policy advanced by each. After students grasp this overview of the function of Duty, they could learn to apply it in more discrete situations.[118] Duty might be arranged from absolute duty to absolute nonexistence of duty as follows: strict liability, fiduciary duty, foreseeability of harm, duty to disclose, third party beneficiary, privity of contract, limited privilege, and absolute privilege.

Once the relative scope of Duty under each of the general categories is determined, the more discrete application of each type of duty could then be taught. For instance, professors could demonstrate the application of strict liability in various sub-categories, such as products liability, housing defects, and ultrahazardous activities. Each sub-category could then be bro-

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118 Moreover, a functional approach to Duty would also facilitate discussion of the problematic aspects of the concept of Duty in our legal system. Duty reinforces a self-other opposition in our law, creating a conflict between the rights possessed by the self and the duty of the other. Feminist legal scholars have questioned this view of the law and have suggested alternative approaches. *See, e.g.*, Bender, *supra* note 93, at 27 ("Whitbeck proposes a feminist ontology that relies on a self-other *relation* rather than a self-other opposition, and an ethic that focuses on responsibilities rather than rights.").

In addition, the notion of the relationship between the parties in a commercial transaction is becoming increasingly important. *See* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375 (1990) (discussing importance of nonlegal sanctions, for example using desire to maintain reputation and profitable relationships to regulate commercial transactions); Mark P. Gergen, *Liability for Mistake in Contract Formation*, 64 S. CAL. L. REV. 1 (1990) (arguing for extension of liability for mistakes in precontractual negotiations).

ken down into its elements.[119] This method of organization would facilitate an overview of the policy advanced by courts and legislatures in establishing the scope of Duty in any given situation. It would also focus the inquiry on the relationship between the parties and away from the mechanical application of rules to facts.

For example, consider the following situation:

> The directors of a corporation sign the corporation's financial statements pursuant to federal securities law. The financial statements are erroneous, but the directors relied on representations from the corporation's outside accountants that the statements were accurate. A bank lends money to the corporation partially on the basis of these financial statements. The corporation subsequently files for bankruptcy protection, and the bank loses its investment.

Based on this fact situation, the student is asked whether the directors are liable to the bank for supplying false financial information. The question, ultimately, is whether the directors owed a duty to the bank to supply it with accurate financial information.

Under statutory law in some jurisdictions, a director has a virtually absolute privilege against liability to creditors when the director acts in her capacity as director.[120] Conversely, a director may be held liable in her personal capacity for harm caused to another by her tortious conduct, even though the action taken is on behalf of the corporation and regardless of statutory privilege.[121] In

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[119] Again, the problematic aspects of linearly reducing Duty into formal categories and elements would be open to discussion. *See, e.g.*, G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 N.W. L. REV. 1198 (1988). Professor Shell traces the recent trend of courts to decide commercial contract disputes on the basis of general standards set forth in Federal Trade Commission and RICO statutes (at the state and federal level), as opposed to traditional contract and tort doctrines. This enables courts to reflect the "broad social concern that market participants live up to a higher ethical standard than that required by the common law." *Id.* at 1202. On another level, it would appear to obviate the formalistic exercise of characterizing facts to meet specific elements for certain doctrines, such as privity of contract.

[120] These statutes are commonly referred to as the business judgment rule. *See, e.g.*, CAL. CORP. CODE § 309 (West 1990); DEL. CODE ANN. tit. 8 § 141 (1990).

[121] *See, e.g.*, Frances T. v. Village Green Owners' Assn., 723 P.2d 573 (Cal. 1986):

> This statutory standard of care, commonly referred to as the "business judgment rule," applies to parties (particularly share-

small corporations, the creditor may require a promissory note executed by the president of the corporation (who is most likely the 100% shareholder) in her personal capacity.

Consequently, the director's duty is dictated by statute or common law and that duty is further based on the status of the director in society and in relation to the creditor. While corporations law is beyond the scope of the basic courses discussed in this Article, director liability is based on the same basic principle introduced in these courses—Duty.

To make the transition from the notion that Duty is defined only in relation to torts, contracts, or property to the crosscutting required in corporations law, students must be taught to recognize the core principle at work.[122] This process would be facilitated by an approach that starts with an overview of Duty and then focuses on the more discrete aspects of Duty in different contexts.

3. The Reliance Principle

Reliance, like Status and Duty, cuts across the traditional boundaries of contracts, torts, and property. For example, suppose the following fact situation:

> A and B agree orally on April 1 that A will deliver the deed to Blackacre and the house thereon on June 1 for a price of $100,000. B pays A $10,000 as a deposit; A does not cash the check. On April 30, B duly notifies her landlord that she is terminating the lease on May 31 and the landlord relets the premises. B appears at the Blackacre house on June 1 with a moving van full of her effects, ready to pay the $90,000 balance, take the deed, and assume occupancy. A, who has found a buyer willing

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> holders and creditors) to whom the directors owe a fiduciary obligation. It does not abrogate the common law duty . . . to refrain from conduct that imposes an unreasonable risk of injury on third parties. . . . [T]he corporate fiction . . . was never intended to insulate officers from liability for their own tortious conduct.

Id. at 582-83; *see also* United States Liability Ins. Co. v. Haidinger-Hayes, Inc., 463 P.2d 770 (Cal. 1970).

[122] Another example of the same principle at work in two superficially different fields is the notion of excuse in contract and discharge of obligation in bankruptcy. *See* Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 STAN. L. REV. 99, 101-02 (1990) (arguing that "bankruptcy law teaches us that contract excuse should incorporate a more communal view, and contract law suggests that bankruptcy discharge should better contemplate individual contract expectancies").

> to pay more, refuses to deed the property. A tenders back a $10,000 check, which B refuses.

Currently, a first-year student might encounter this fact situation in each of the three traditional private law courses: in the promissory estoppel section of Contracts; in the misrepresentation section of Torts; and in the conveyancing section of Property. This is needless redundancy.

Moreover, the experienced practitioner will, we submit, think that the reliance of B may make A liable before she thinks of the traditional common-law categories and the requirements of the relevant doctrine in each category. The Reliance principle can work to confer liability on these facts, whether the cause of action is based on promissory estoppel (contracts), misrepresentation (torts), or the fact that reliance takes an oral purchase and sale agreement out of the real property provision of the Statute of Frauds (property).

The Reliance principle in such situations emerges as either a sufficient source of liability itself or a necessary element of a broader claim. To serve as a focus of law study, the principle must be stated broadly enough to be meaningful in both of these ways; so viewed, it can serve as a flexible tool rather than a straightjacket for learning the law. We would suggest a definition for Reliance similar to the one that follows:

> An actor may recover for detriment sustained as a result of the actor's reasonable change of position due to conduct exhibited by any other actor in a direct or indirect relationship, regardless of the rules of law that might otherwise block such liability.

By exploring various private law fact situations with this principle as a guide, the law student will be learning to think functionally. By doing so in law school, she will not have to unlearn the nineteenth century categorization of the current law school curriculum once she begins to practice law. Identifying such a common thread for liability will enable her to guide the decisionmaker directly to the meat of her position, even if she must still frame her pleadings under the traditional categories. Moreover, because she has first centered her thinking on the crosscutting principle, she will be quicker to perceive which of these traditional categories must be pled.

If legal education accepts this way of thinking about the law, the lawyer will eventually not have to learn the traditional categories at all. She will be able, for example, simply to plead "Reliance."

Grant Gilmore asserted in the 1970's that we were already at the point where "any detriment reasonably incurred by a plaintiff in reliance upon a defendant's assurances must be recompensed."[123] If, as he concludes, the legal system fully realizes this fact, "there is no longer any viable distinction between liability in contract and liability in tort."[124]

Here is another example:

> Agent for supermarket chain A assures B that the start-up costs for a franchise will be a given figure and that B needs to do certain things before being granted a franchise. A and B continue their business conversations over a period of time, during which B sells her prior business, moves her family, and purchases an option on a building site, all at the suggestion of A. With all this done, A then asks B for monies in excess of the sum already quoted.

Such a fact situation has been found to present an action based on promissory estoppel.[125] In addition, it might plausibly support an action for negligent interference with prospective economic advantage.[126] And, of course, the economic interest produced by the justified reliance of B may be called a property interest.[127]

Or suppose the following situation:

> B has been granted the franchise above, but the franchise is, by its terms, terminable at will. A cancels the franchise agreement 30 days after it is signed and after B has started business.

Since promissory estoppel is not generally available to a party like B, who has already entered a contract, a contract action by B will have to be based on the terms of the agreement itself. Because of B's reliance, courts often imply the term that the franchise cannot be terminated until a reasonable time has elapsed.[128] In the Regulatory State, a statute often mandates this

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123 GILMORE, *supra* note 2, at 88.

124 *Id.*

125 *See* Hoffman v. Red Owl Stores Inc., 133 N.W.2d 267 (Wis. 1965).

126 This tort action is limited to instances when the risk of harm is foreseeable and closely connected with defendant's conduct. *See, e.g.*, J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979).

127 *See* Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

128 *See* Ernest Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellation*, 1967 DUKE L.J. 465, 479-83; Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 363-64 (1969).

result.[129] It should also be noted that, however categorized, the liability here is based on tort notions of foreseeable harm and protects a property interest of the franchisee. Generally, however, courts have not allowed the action to sound in tort unless the wrong exists independently of the contract. Though it can be based on a contractual right, the wrong complained of cannot be solely a violation of the contractual provision.[130] This is where the idea of foreseeable harm comes in; it allows recovery in tort.

Consider the following situation involving foreseeable reliance:

> Owner O and Contractor C make a contract that requires C to have all the construction done on a building in sixty days, allowing ten days thereafter for painting; thus, the entire job is to be completed in seventy days. Time is of the essence. The same day, C hires Subcontractor S to do the painting. S is shown a copy of the agreement between O and C and readies S's employees to perform the subcontract in sixty days. Three days later, S is offered another painting job during the ten-day period specified in the original job and refuses it, citing the commitment to C. The same day, S accepts a similar job to begin seventy-one days after the O-C agreement. O fails to ready the job site on time and C's construction is completed seventy days after the date of the agreement.

In the above situation, S's foreseeable reliance on the timing of the O-C agreement may allow S to sue O for the loss of profit during the ten-day period. This is true whether the suit is based on the O-C contract or on the other job offered to S and even though S is not in privity with O. S can be seen as a third party beneficiary of this contract or as the obligee of a duty in tort that O owed to S. Statutes, as well as the common law, may protect S's right in this situation.[131] S's right can also be characterized as

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129 A number of franchise regulation statutes are collected in E. ALLEN FARNSWORTH & WILLIAM YOUNG, CASES AND MATERIALS ON CONTRACTS 438-40 (4th ed. 1988).

130 Gellhorn, *supra* note 128, at 483.

131 *See* Thomas G. Snavely Co. v. Brown Constr. Co., 239 N.E.2d 759 (Ohio 1969) (holding subcontractor has action against owner for causing delay in performance of subcontractor's contract with contractor). This case suggests a "deviation from consensual liability and toward nonconsensual tort-like liability." Orna S. Paglin, *Criteria for Recognition of Third Party Beneficiaries' Rights*, 24 NEW ENG. L. REV. 63, 88 (1989). *See also* Forte Brothers, Inc. v. National Amusements Inc., 525 A.2d 1301 (R.I. 1987); Bacco Constr. Co. v. American Colloid Co., 384 N.W.2d 427 (Mich. 1986). For a discussion of the statutes recognizing third-party actions, see FARNSWORTH & YOUNG, *supra* note 129, at 889.

a restitutionary right to intangible property.[132]

Finally, suppose the following situation:

> A, a patron of a self-service parking garage, parks her car and takes a TV set out of the car, placing it in the trunk in plain view of two uniformed garage employees. The attendants are on duty for non-self-service customers; however, their job description contains the provision that they control all the parking and tend to the security of all of the cars. A had been informed of these provisions. The TV set is stolen.

In this situation, the garage may be termed A's implied bailee, entitling A to reasonable care to protect A's property.[133] A's reasonable reliance produces the garage's duty; A is entitled to recover,[134] whether we conceive of the action as sounding in tort, contract, or property.

Obviously, the foregoing are merely illustrative of the many situations that one would posit in teaching the Reliance section of the Civil Obligation course. Each has the virtue of crosscutting all three of the basic subjects. Often, however, such broad coverage of the three areas will not be possible in a single example.

The reasons for this require some explication. First, since nearly all contracts involve an exchange of tangible or intangible personalty or real estate for something else, most contracts may fairly be said to be about exchanges of property, at least on one side. In fact, it might also be said that contract rights, once created, are likewise property rights. Tort law, however, is often based on injuries to the person; thus many tortious situations will not involve traditional property rights.[135] Nevertheless, many of these personal injury situations will arise from implied or express contractual relations, or at least will involve reform elements of contract law such as implied warranty, promissory estoppel, or restitution.

Thus, some examples in the course may involve only contract and property elements[136] and some only tort and contract ele-

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132 Anthony J. Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule, in* A CONTRACTS ANTHOLOGY 274, 287 (Peter Linzer ed., 1989).

133 *See* Parking Management Inc. v. Gilder, 343 A.2d 51 (D.C. Cir. 1975).

134 *Id.* at 54; *see also* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 66-67, 83-86, (2d ed. 1988) (discussing bailments).

135 Some property rights are involved in traditional tort categories, such as trespass and conversion. Further, some torts may involve intangible property like reputation.

136 An excellent example of such a case is Sullivan v. Rooney, 533 N.E.2d

ments. A few may involve only one of the traditional categories. Still, centering class discussion around the principles is a far more efficient and effective way of teaching those situations in which civil obligation is imposed than the rule-based method we now utilize.

4. Critiquing the Casebooks: The Second Step to Functional Teaching

The second fundamental change to the traditional curriculum would involve major reworking of the casebooks used in the first year.[137] Most casebooks in Contracts, Property, and Torts exhibit the same overall structure. They start with what are perceived to be fundamental concepts: offer, acceptance, and consideration in Contracts;[138] intentional torts in Torts;[139] and

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1372 (Mass. 1989). In this case, a cohabiting woman relied on an oral promise by her male counterpart to make her a one-half owner of a house. *Id.* at 1373. The court held that this reliance entitled her to such ownership on a theory of constructive trust. *Id.* at 1374.

[137] We do not question the necessity of constructing a model for legal education to help law students learn. Rather, we are critical of the current law school paradigm, which teaches students to view legal doctrines in isolation from one another and from modern society. A necessary step in restructuring first-year courses, therefore, is to confront the role of casebooks in presenting the obsolete paradigm upon which first-year courses are based.

[138] *See* JOHN CALAMARI ET AL., CASES AND PROBLEMS ON CONTRACTS (2d ed. 1989); CHARLES L. KNAPP & NATHAN CRYSTAL, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (2d ed. 1987); EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW (3d ed. 1984). The first two casebooks also contain introductory sections before launching into the traditional contract dogma.

Some casebooks vary this order by discussing the bases for liability (usually beginning with consideration) before offer and acceptance. *See* E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS (4th ed. 1988); DANIEL W. FESSLER & PIERRE R. LOISEAUX, CONTRACTS: MORALITY, ECONOMICS AND THE MARKETPLACE—CASES AND MATERIALS (1982); LON FULLER & MELVIN EISENBERG, BASIC CONTRACT LAW (5th ed. 1990); FREIDRICH KESSLER ET AL., CONTRACTS: CASES AND MATERIALS, (3d ed. 1986); ARTHUR ROSETT, CONTRACT LAW AND ITS APPLICATION (4th ed. 1988); ROBERT SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE (1987).

Others begin with remedies and then move to offer, acceptance, and consideration. *See* THOMAS CRANDALL & DOUGLAS WHALEY, CASES, PROBLEMS AND MATERIALS ON CONTRACTS (1987); JOHN P. DAWSON ET AL., CASES AND COMMENT ON CONTRACTS (5th ed. 1987); JOHN JACKSON & LEE

ownership and possession in Property.[140] From this start, they progress through other topics in a more or less random order and end up either with miscellaneous categories, which many professors may never get to by the end of the course, or state regulations and restrictions.[141]

There is, however, no a priori reason to start off the courses

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BOLLINGER, CONTRACT LAW IN MODERN SOCIETY: CASES AND MATERIALS (2d ed. 1980); IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS (2d ed. 1978).

In spite of these variations, all of these casebooks emphasize the dominance of the bargain theory of liability in the law of contracts, even where they are openly critical of the theory.

[139] *See* GEORGE E. CHRISTIE & JAMES E. MEEKS, CASES AND MATERIALS ON THE LAW OF TORTS (2d ed. 1990); DAN B. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY (1985); RICHARD EPSTEIN ET AL., CASES AND MATERIALS ON TORTS (4th ed. 1984); PAGE KEETON ET AL., CASES AND MATERIALS ON TORT AND ACCIDENT LAW (2d ed. 1989); JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, THE TORTS PROCESS (3d ed. 1988); RICHARD A. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS (1982); WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS (8th ed. 1988); DAVID ROBINSON ET AL., CASES AND MATERIALS ON TORTS (1989).

[140] *See* OLIN BROWDER ET AL., BASIC PROPERTY LAW (5th ed. 1989); A. JAMES CASNER & W. BARTON LEACH, CASES AND TEXT ON PROPERTY (3d ed. 1984); CHARLES DONAHUE, JR. ET AL., CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION (1983); DUKEMINIER & KRIER, *supra* note 134; CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY & LAW (2d ed. 1985). Other authors place ownership and possession as the second major topic. *See* JON BRUCE ET AL., CASES AND MATERIALS ON MODERN PROPERTY LAW (2d ed. 1989); JOHN CRIBBETT ET AL., CASES AND MATERIALS ON PROPERTY (6th ed. 1990).

Two authors take a distinct approach to the topic. Professor Rabin discusses the right of exclusion briefly before moving on to landlord-tenant law. EDWARD H. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW (2d ed. 1982). Professor Chused introduces notions of property as a cultural institution by discussing topics such as the right to publicity, personhood, and property. RICHARD CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY (1988). Professor Chused then continues to discuss the history of property in America primarily through the context of its effect on traditionally disempowered groups such as the Native Americans, African Americans, Women, and Religious Communities.

[141] In the Contracts casebooks, these topics tend to be the third party beneficiary doctrines and assignment. A notable exception is Professor Rosett's casebook, which dedicates the last three chapters to the specific areas of sales of goods, professional services contracts, and construction contracts. Rosett, *supra* note 138. This structure suggests the functional organization of the law that Gilmore argues existed prior to Langdell's time. *See* GILMORE, *supra* note 2, at 10-12. However, even Professor Rossett places

with these concepts or to proceed in this pattern. In fact, this method of organization prevents law schools from teaching students the skills they need to be able to function as practicing lawyers in the modern system.[142] The following sections illustrate the damage caused by adherence to this structure.

a. An Argument for Context

Casebooks traditionally trace the development of a particular line of cases over time. A simple example of this is the third party beneficiary doctrine. Contracts casebooks almost invariably start with *Lawrence v. Fox*[143] and end with cases somewhere in the 1970s or 1980s.[144] Similarly, Property casebooks almost uniformly introduce the various servitudes doctrines through nineteenth century cases and trace them to their application in subdivision housing developments.[145]

This approach to teaching law is noncontextual; it abstracts doctrines and their development from the societal context in which they operate. It suggests that doctrinal development is formal, distant, and inevitable, and hides the fact that doctrines evolve within the context of broader principles, which in turn are continually being reshaped by society.[146] Teaching this way rein-

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the third party beneficiary and assignment chapters at the end of his discussion of general contract doctrines. Rosett, *supra* note 138.

Torts casebooks end on different subjects. Most seem to relegate "non-common law," i.e., statutory, compensation systems and torts involving economic harm to the back of the book. *See supra* note 139. Similarly, as noted above, most Property casebooks end with chapters on government regulation of land use. *See also* PAUL GOLDSTEIN, REAL PROPERTY (1984). Professors Rabin and Cribbett end with sections concerning the transfer of land. *See supra* note 140.

142 This structure also causes undue confusion in the relation of different doctrines within each area of law. For instance, doctrines or statutes that relate to subjects at the beginning of the text are often put at the end, with no seeming justification other than the fact that these doctrines or laws are relatively new developments.

143 20 N.Y. 268 (1859).

144 *See* KESSLER ET AL., *supra* note 138, at 1333; FESSLER & LOISEAUX, *supra* note 138, at 768.

145 It appears to be de rigueur to introduce equitable servitudes with *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (1848).

146 *See* Alfred S. Konefsky & John H. Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833 (1982):

> Intellectual movements, large-scale political events, debates on social issues, theoretical musings, and ideology warrant no

forces the notion that the law exists "out there" somewhere, and lawyers, students, and professors can have little impact on its development.[147]

This formal view of the law is part of the abstraction sought by Langdell in developing the case law method.[148] Once the princi-

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> mention in a law school history for they apparently have no significant influence on the teaching of law at most schools. To the extent they are discussed at all in the law school classroom, they are kept within a framework that prevents fundamental analysis and criticism. By ignoring all but the pursuit of the narrowest conception of the law, law school historians reveal their own ideology. They do not have to scream from the rooftops, "Social context is irrelevant." All they need do is sing Boola Boola and exit stage left.

Id. at 841.

[147] *See* Chang, *supra* note 1, at 565. By "out there," Professor Chang is referring to the view that the law is in the statutes, the case reporters, and the actions of judges. *Id.* at 565 n.86. He argues that these sources are only "evidence" of the law, in much the same way that tracks in a proton chamber are evidence of protons and not the protons themselves. *Id.* at 556 n.50.

The traditional legal paradigm through which we determine what the law is in any given situation perpetuates the fiction that law is based on experimentally verifiable, neutral principles, further abstracting law from the individual and reifying the false distinctions posited as law. Once we see that law is a mental construct, that the definitions and legal significance we place on terms such as Property, or even Reliance or Status, are created out of experience, we realize that the law is "in here." *See* Van Doren, *supra* note 2, at 683. This post-shift realization both empowers and challenges individuals to redefine the legal paradigm "in a manner consistent with the best humanitarian values." *See* Chang, *supra* note 1, at 571-72.

[148] *See supra* notes 7-8 and accompanying text. Casebooks reflect the textbooks used by the natural sciences, which Langdell sought to emulate:

> Textbooks thus begin by truncating the scientist's sense of his discipline's history and then proceed to supply a substitute for what they have eliminated. Characteristically, textbooks of science contain just a bit of history, either in an introductory chapter or, more often, in scattered references to the great heros of an earlier age. From such references both students and professionals come to feel like participants in a long standing historical tradition. . . . More historical detail, whether of science's present or of its past, or more responsibility to the historical details that are presented, could only give artificial status to human idiosyncracy, error, and confusion. Why dignify what science's best and most persistent efforts have made it possible to discard?

Kuhn, *supra* note 85, at 136-37.

ples of law are discovered, the case law method teaches students simply to apply these principles to the facts at issue to reach the correct result.[149] Law is thus placed not only outside of society, but somewhere above it—rational and objective.[150]

A more accurate approach would analyze laws within the context of the society in which they exist.[151] Today, law should be taught in the context of the principles we have identified as present in the Regulatory State in post-industrial decline: a state governing a society characterized by political scandal and powerful interest groups; a population subjected to thousands of new products every year; a citizenry distrustful of lawyers; reactionary politicians more concerned about votes than constitutional law; increasing violence; broken down and descaled social services for the disempowered; environmental disasters; and all of the other painful realities of modern life.[152]

Law students should not be lulled into thinking they are learning relevant law by studying ancient cases concerning individuals unknown to us both in time and circumstance. Nor should they be told they are learning to think like a lawyer by studying cases decided under obsolete common-law principles. We need to

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[149] Langdell rejected cases that did not fit into his model as wrongly decided or as useless for any purpose of systematic study. *See* GILMORE, *supra* note 2, at 13.

[150] *See supra* note 93 and accompanying text.

[151] Conversely, the history of a doctrine may stress this very point. For example, Professor Chused's textbook on Property introduces the concept of property ownership by discussing the ownership of slaves as property in America. *See* CHUSED, *supra* note 140, at 161-250. This is a powerful lesson in the indeterminacy of law as well as the oppression of certain groups under our Constitution. It is also a striking example of how the author's choice of cases to demonstrate a doctrine can affect our way of viewing the legitimacy of that doctrine. Compare the example above to the case used by almost every other textbook author to introduce the same subject, Pierson v. Post, 3 Cai. R. 175 (1805) (N.Y. Sup Ct.) (two aristocrats fighting for possession of a fox carcass). *See, e.g.*, DUKEMINIER & KRIER, *supra* note 134, at 15.

[152] See Gilmore's comments in Kelso, *supra* note 22:

> [T]he rebirth of contracts is an accomplished fact. It makes no difference that it has been reborn as "contort." This rebirth of contracts as contort reflects a need for stability in the later stages of an industrial society beset with the economic, social and political dislocations of this unhappy century. Exactly how it will evolve is not clear. . . . [H]owever, . . . we are not going back to the no-liability rules of the 19th century.

Id. at 642.

teach law in the context of modern society in order to place law at the heart of each student's experience, as the practice of law must necessarily be. Once this is accomplished, a true understanding of the legal system can begin.

b. Laissez-Faire Versus the Regulatory State

Coupled with the tendency to teach the development of doctrine independently from society is the practice of beginning casebooks with doctrines in which the interactions, rights, and obligations of individuals appear to occur free from government control.[153] Conversely, government regulation and policy almost uniformly come much later in the casebooks, seemingly as an afterthought.[154] For example, individual ordering of property rights is emphasized long before eminent domain and zoning; offer, acceptance, and consideration are taught long before governmental regulation of unequal bargaining power through doctrines such as unconscionability and the implied warranties.[155]

As a result, the political role of the court is de-emphasized at the beginning of the year. The court's role is seen as one of merely enforcing positive law, which generally means enforcing either the subjective or objective intent of the parties. This complements a general inattention to statutes and regulations.

Consequently, when students start learning doctrines that involve more blatant exercises of government involvement, such as impossibility in Contracts or products liability in Torts, they are often taught to view that involvement as outside intervention on private autonomy.[156] In this way, private ordering and public

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153 This is largely a result of teaching the intentional doctrines first: the bargain principle in Contracts, the intentional torts in Torts, and possession and ownership in Property. It is also partially a result of the historical structure of casebooks, which start off with cases decided in the heyday of laissez-faire individualism.

154 One example is the placing of statutory reforms at the end of property and torts casebooks. *See supra* note 141 and accompanying text.

155 Casebooks do not strictly adhere to this progression from liability based on intentional acts to more interventionist doctrines. As noted earlier, Contracts casebooks place the assignment and third party beneficiary doctrines at the end of the book even though these doctrines are based on the intent of the parties (allowing the rights under the contract to inure to a third party). *See supra* note 141 and accompanying text. Similarly, many Torts casebooks place doctrines relating to interference with business relationships at the end even though such interference is intentional. *Id.*

156 *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE

interest are put in opposition to each other, creating the false distinction between private ordering and state-imposed liability.[157] Students are thus led to view the state's involvement in legal relations as suspect, if not completely illegitimate.[158] As shown above, this polarization presents an inaccurate picture of how the legal system operates.

In sum, casebooks perpetuate the most harmful legal fictions of Langdell's celebrated experiment: that law is a logical, objective science which can be taught by a formal application of set rules to a given situation and that the state's role is limited to the enforcement of private bargains.

c. Restructuring the Casebooks: A Heuristic Exercise

The course in Civil Obligation is an attempt to free us intellectually from these harmful legal fictions. The first-year curriculum should teach students a functional, as opposed to doctrinal, approach to problem solving. Such a curriculum would emphasize the similarity of the principles common to Property, Contracts, and Torts, the increasing importance of statutory and administrative law in the modern state, and the role of the state in determining rights.

A step toward this goal might be to restructure existing casebooks by teaching them roughly in reverse order.[159] Reversing the order of the casebooks is an exercise in perspective, a heuristic device to allow us to rethink the structure of legal education. This simple maneuver allows students, and teachers, to reexamine the doctrinal bases for imposing liability; it also exposes the values informing the system.

POWER OF EMINENT DOMAIN (1985): "[T]he eminent domain clause and parallel clauses of the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, worker's compensation laws, transfer payments and progressive taxation." *Id.* at x.

157 *See, e.g.*, Cohen, *supra* note 72.

158 *Cf. supra* note 156.

159 It would not make sense to simply reverse the order of the casebooks. Rather, we suggest restructuring them along a continuum ranging from state intervention (obligation in the absence or in spite of the intent of the parties) to intentional acts. This would necessitate some reshuffling. For instance, assignments and the third party beneficiary doctrine would be joined at the end of the course with offer and acceptance, and fraud and intentional interference with business relations would be joined with other intentional torts.

For example, one might start a Property casebook with zoning and eminent domain, rather than with notions of possession and ownership. Similarly, Contracts could begin with implied warranties, reliance, and unconscionability, rather than with offer, acceptance, and consideration. Torts might begin with strict liability, as opposed to intentional torts.

A reversed approach would facilitate a functional understanding of how the three areas of private law interrelate on at least two levels. First, doctrinal distinctions between property, contracts, and torts are much less distinct at the end of current casebooks, reflecting a similarity of structure and doctrine that is less obvious in the beginning of the books.[160] Current casebooks begin by emphasizing the distinctions; reversing the order would give students a more integrated overview of the system.[161] Second,

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[160] Again, this use of the terms "end" and "beginning" refers to the order in which casebooks are generally structured—from liability based on intent to state-imposed liability. *See supra* notes 153-55 and accompanying text.

At the imposition end of this continuum are the doctrines of quasi-contract and reliance in contracts, strict liability in torts, and eminent domain and zoning in property. The role of the government in requiring a decedent's estate to pay a surgeon even though the decedent did not assent to treatment (quasi-contract), or in awarding damages for actions that led a party to expect to be awarded a franchise based on another's acts (reliance), is similar to the government's absolute right to restrict land use (zoning), or to impose liability on a party for any damage regardless of fault (strict liability), or even based solely on status (market share liability). That is, all members in society operate in a system in which government intervention is pervasive. All transactions take place within this context, not in some fictional state of personal autonomy that the government later invades.

Conversely, it is much more difficult to see how bargained-for exchange is similar to battery, or to the law of finders. Moreover, the formal structure of the doctrines based on intent are virtual labyrinths of definitions, distinctions, applications, and exceptions. The memorization required to analyze one of these areas further discourages an overview of the interactions among the various areas of law.

[161] Certain distinctions may be germane to certain doctrines. *See supra* note 112 (discussing "pure property" doctrines). We feel, however, that these doctrines should be taught at the end of the year, once the student has a grasp of the structure of the law. Probably the best example of what we envision is the law of future interests. Future interests have virtually no overlapping qualities with Contracts, Torts, or any other course. Moreover, lawyers may not even be expected to know it in certain states. *See, e.g.*, Lucas v. Hamm, 364 P.2d 685 (Cal. 1961) (refusing to find attorney negligent for violating the rule against perpetuities because of the rule's complexity). *But see* Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867

reversing the order would facilitate an appreciation of the active role of the state in determining liability. The doctrines taught later in the casebooks reflect more direct state intervention, while the first doctrines, based on intentional conduct, reinforce the notion of the state as the passive enforcer of private bargains.[162]

Some immediate effects might be anticipated. First, students would begin courses with a realistic view of how these fields of law operate in the twentieth century, rather than as seen through the peculiar lens of late nineteenth century capitalism.[163] For instance, students would realize early on that property is what the government says it is or will allow it to be, not something that individuals acquire and protect for themselves in a state of nature.[164] Similarly, students would realize that contracting by

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(1986) (noting that *Lucas* has been criticized as "an embarassment to the profession"). With the increasing specialization of law practice, it may well be that only trusts and estates lawyers need to know the complex details of future interests. Yet it appears in every Property casebook. It would seem appropriate that future interests be relegated to the end of the course to be memorized in time for the final exam and promptly forgotten until it must be rememorized for the bar exam.

162 *See supra* notes 21-24 and accompanying text.

163 *See supra* note 152.

164 *See, e.g.*, Richard R. B. Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135 (1963):

> I have reviewed in the past few pages some 20 aspects of the law in which the absoluteness of property rights has been rejected because of the basic proposition that one cannot use what he owns in a fashion harmful to the community of which he is a part. The rule against perpetuities, unpermitted restraints on alienation, illegal uses of the bait of wealth to dominate the lives of other people, formalities prerequisite to an effective deed or will—all . . . stemming from the preservation of the public welfare. . . . [E]asements by necessity, the law of nuisance, the division of the benefits of water, regulations as to sanitation and sewerage, building codes, the maintenance of at least a minimum of morality, soil conservation, over grazing, timber control, zoning, planning, blight prevention, housing adequacy, and the protection of those short in bargaining power, such as renters and borrowers, are aspects of our legal background in which progressively property rights have been trimmed for the protection of society.

Id. at 148-49.

For a discussion of the failure of Property casebooks to offer a coherent justification for our current system relating to property, *see* Van Doren, *supra* note 2: "The legal dialogue concerning private property in the United States is composed of indeterminate and incoherent verbiage that impairs

private parties operates only within the bounds set by the government as to what contracts it is willing to enforce. Students would also realize that individuals and business entities owe duties to the public irrespective of their conduct and will be strictly liable if such duties are breached.[165]

Second, classroom discussion would focus from the beginning on the conceptual underpinnings of government involvement, including fundamental principles such as Fairness and Justice. Doctrinal differences would be taught, but with students already aware of the overall pattern into which these differences fit.[166] The casebooks in Civil Obligation would thus start with broad ordering principles emphasizing the underlying similarities, rather than the differences, of torts, property, and contracts. The books would help establish the societal framework for individual transactions, stressing community values expressed through the law, rather than private ordering based on the market.[167]

Third, this approach would enable students to view the relationship of private and public interests as integrated, not dualistic. For example, a student who learns about eminent domain before landlord-tenant law (and rent control) will presumably have less trouble understanding the nature of state involvement in what otherwise might seem purely private relations than one who learns these subjects in their traditional order.[168] Admit-

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legitimacy. . . . The basic problem we are left with is the systemic problem that particular cases often are resolved in privileging of those who already hold wealth and power." *Id.* at 700-01.

165 For an in-depth study of recent decisions concerning products liability, see Henderson & Eisenberg, *supra* note 44. Henderson and Eisenberg present anecdotal and empirical evidence that courts are increasingly placing significant limitations on plaintiffs' rights to recover damages in tort for product-related injuries. *Id.*

166 *See supra* note 161.

167 Ian MacNeil has done extensive work in developing a rational system to facilitate this enterprise of developing a theory of contractual relations. *See generally* MACNEIL, *supra* note 25; MacNeil, *supra* note 27; *see also* Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465.

168 It is no less political for the government to take land, with or without monetary compensation, than it is for a court to award the fox carcass to the individual who found it first. *See supra* note 151. Both actions involve value choices, and it is absurd to think that one is intrinsically more legitimate than the other.

Nevertheless, the order in which one learns these doctrines affects one's understanding of how the legal system operates. We feel that if a student first is exposed to doctrines that demonstrate the most blatant exercises of

tedly, subjects taught in this way run against the American myths of aboriginal, individual property rights and completely private, contractual ordering.[169] But it might be a healthy thing for American law schools to teach first-year law students the reality of how law in the Regulatory State is formed.

This new approach would be welcomed by the American law student. Imagine studying law like most other subjects: by trying to understand what gives it some coherence rather than by emphasizing its chaos through the memorization of countless discrete rules. Students might lose that sense of disconnectedness of their discipline which produces profound alienation.[170]

Further, restructuring casebooks in this way would make the

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government power, such as eminent domain and zoning, then the use of government power to enact and enforce rent control ordinances will not be seen as an aberrational use of power. That is, the student will be less likely to see the government as encroaching on the landlord's absolute freedom of action with regard to her property than the student would under the individualistic notions of laissez-faire. Rather, the student would recognize that the government shapes and defines property rights on the basis of specific political and social policies, as it always has.

With this in mind, classroom discussion could focus on the problematic nature of the political values the court is applying in a particular situation. Moreover, when the class reaches the intent-based doctrines, such as the rule of finders, the student would also see the political nature of these doctrines.

169 *See supra* note 164 and accompanying text.

170 To some extent, the structure of first-year law school is intentionally alienating. The legal paradigm is based on the notion that the process is more important than the result. Thus, students are required to relinquish their pre-law school notions of indefinable terms such as "truth" or "justice" in order to adopt the "neutral" approach to problem solving based on "reasoned" analysis. *See* Chang, *supra* note 1.

Professor Chang argues that the alienating methods used in law school are necessary to coerce the "resistant" law student:

> What is "reasonable" . . . depends on one's starting place in society. Any non-privileged member of society generally has greater difficulty adopting the paradigm. Thus, for the resistant, law uses Zenlike methods.
>
> In law and Zen, resistance is broken down by putting the student in a "double bind" where she is never allowed to be "correct." . . . In law, each answer is met by further questions, or a change in the facts of the hypothetical. For the law student, any resort to other paradigms, such as "feelings," experience," "cross-cultural examples" or "empirical data" are quickly invalidated. . . . Thus, the three primary methods of effecting the paradigm conversion in Zen and legal education are deprivation

law school experience more relevant to the practice of law. Thinking like a lawyer is not, in its truest sense, learning how to emphasize doctrinal differences. The very best legal arguments *are* functional: showing the judge and jury that doctrine A from torts (e.g., strict liability) and doctrine B from contracts (e.g., implied warranty) actually serve the same purpose (e.g., protecting the consumer from unfairness because of her inferior status).[171] This realization obviates, for example, the need to try to find an implied warranty when none is allowed in a particular jurisdiction and the defendant is liable for the same harm under strict liability.[172] Instead, the student, not pigeonholed into either a torts or contracts way of viewing the problem, focuses on the real principle—fairness based on justifiable reliance—and then probes the cases to discover what form the decisions have given it.

Late nineteenth century law from the viewpoint of law professors should not be the starting place for modern-day law students. Government sets the limits of individual action and enfranchises certain individuals and organizations by attempting to develop coherent policies and limits on private ordering. Cutting across property, torts, and contracts categories would emphasize this reality in our classes.[173]

> and denial of access to the old paradigm, total immersion in the new paradigm and the calculated use of confusion.

Chang, *supra* note 1, at 547-49.

Llewellyn commented on the result of this process in the context of contracts:

> Puzzled, befogged, adrift in the strange words and technique of cases, with only our sane feeling of what was decent for a compass, we felt the warm sun suddenly, we knew we were arriving, we knew that we too could "think like a lawyer": That was when we learned to down the seasickness as A revoked when B was almost up the flag-pole. Within the first October, we had achieved a technical glee in justifying the judgment then for A; and succulent memory lingers, of the way our dumber brethren were pilloried as Laymen still.

Karl N. Llewellyn, *On Our Case Law of Contract: Offer and Acceptance*, 48 YALE L.J. 1, 32 (1938).

[171] *See supra* note 115 and accompanying text (discussing role of status in society's assignment of rights and duties).

[172] *See, e.g.*, Iverson v. Solsbery, 641 P.2d 314 (Colo. Ct. App. 1982).

[173] Thus, if the broad principle of Fairness dictates that builders should build roofs that do not fall in within ten years, we could emphasize the middle-level principles, such as Status and Reliance, that underlie this

Currently, students and professors waste time differentiating legal doctrines by distinguishing between torts, contracts, and property, even when no meaningful distinctions exist. Courts are increasingly willing to blur, and in some instances ignore, the distinctions.[174] Perhaps a corresponding functional approach to teaching law could begin with the suggested changes in using traditional casebooks.

d. Using Existing Casebooks to Teach a Functional Approach

As indicated above, existing casebooks might be taught in reverse order or even reorganized to emphasize at the outset the framework of societal norms and regulations in which individuals act and operate. Teaching would then move from this framework to the law created within it by the actors themselves. However, this would leave mostly appellate cases as a teaching tool. The use of appellate cases as the primary means of teaching law is counterproductive for several reasons. First, such cases are presently edited to make them largely contracts, property, or torts cases, according to the subject being taught. Second, appellate cases have suggested "answers" by judges to the problems they present. What would suit our approach better is a true problem method of the sort employed in major business schools: a series of hypothetical problems cutting across the spectrum of private law to which the students may apply principles such as Reliance, Status, and Bargain. Accordingly, we must begin to develop such textbooks.

In the interim, professors could use appellate cases in traditional casebooks by asking students to read the facts only and then to apply the principles. If, for example, the case were from a Contracts casebook, the instructor could delineate solutions to the problems presented that are now categorized as sounding in property or tort. If the instructor desired, the opinion of the court could be used as an example of one approach to the problem presented by the facts; the students could be asked to identify which principles underlay the court's reasoning. One problem with this, of course, is that judges often shape facts in a way that makes their solutions most plausible. Instructors should try to

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principle, not the doctrinal differences between implied warranty and strict liability.

[174] *See, e.g.*, Sullivan v. Rooney, 533 N.E.2d 1372 (Mass. 1989). For a discussion of *Sullivan*, see *supra* note 136.

counteract this tendency in their classes, pointing out alternative ways a set of facts could be read.

The main reason such changes would be necessary is that the emphasis in the Civil Obligation course would be situational, not doctrinal. The goal would be to present students with situations simulating those confronted in actual practice, as is done in Edward Rabin's property casebook.[175] Just as they are on final exams today, students would be asked to confront these situations as the primary problem-solvers. They would be encouraged to apply the principles they have learned to these situations, along with what they have learned from their prior educational and life experiences. Thus, students would not find themselves confined by the opinions of courts, striving endlessly to get them into a pattern of law that may not really exist. Simultaneously, they would realize that their own knowledge base is important to solving these problems, at least when filtered through the legal principles they have been taught. This would empower the students and greatly aid their learning.

The principles utilized in the course should have a degree of elasticity. They are meant to be tools and guides, rather than dictates. The focus of learning would thus be on analysis of problems, rather than on rote recitation of potentially applicable rules and issues stated in terms of these rules. This approach would better prepare students for the realities of practice than does traditional pedagogy.

Legal education has generally sanctioned a single level of inquiry: looking at the rule in the context of a narrowly defined set of policy considerations such as efficiency, predictability, flexibility, and fairness. To change this narrow focus effectively, at least two other levels of inquiry should augment the functional approach. These can provide the student with a more complete framework for analysis.

The first level of inquiry is a discussion about the parties and the effects of the litigation on them; the second is a broad, informed discussion of the social, political, and philosophical influences present,[176] using new languages of law such as Critical Theory and Law and Economics. Emphasis can thereby be placed on the context of the problem and the parties' responsibilities

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175 RABIN, *supra* note 140.

176 *See, e.g.*, Menkel-Meadow, *supra* note 2, at 68.

within it, instead of relegating policy discussions to a colloquy over rights theory and abstract justice.

Using the above discussion as a guide, law teachers can begin to construct a modern, functional substitute for Property, Contracts, and Torts. This substitute, the first-year course called Civil Obligation, would consist of segments based on principles such as Reliance, Status, Duty, Bargain, and Excuse Due to Changed Circumstances. Though traditional casebooks can be used as suggested above, work should also begin on writing new "problem" books in Civil Obligation—ones not bearing the restricting labels of Property, Contracts, and Torts.

CONCLUSION

This Article gives an overview of the major problems we have identified in first-year legal education and provides suggestions for remedying those problems. We contemplate a second article that would discuss the institutional realities of such changes and deal with practical problems in the design, teaching, and evaluation of the new curriculum.

It is our hope to bring legal education closer to legal practice by removing some of its more artificial constructs: specifically, the case law method, the largely irrational division of private law courses, and outdated teaching materials. We feel that this would improve the student's experience both in school and in the profession. As students and new lawyers become trained in functional discourse, the law may also lose some of its excess mystification and more closely reflect its actual place in current society. Society and the structure of law have changed a great deal in the last 120 years. Law schools should reflect this fact in a modern, functionalized first-year curriculum, which lays the groundwork for similar advances in the curriculum as a whole.