It's Elementary? Let's Play Rock, Paper, Scissors: Civil Procedure, Property, Contracts, and Torts During First-Year Law School Orientation

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Abstract

Civil Procedure, Property, Contracts, and Torts are all standard first-year doctrinal law school courses. They provide law students with a solid legal foundation and expose them to American rule-based and precedent-based law.

The first year of law school is also often a student's first introduction to these legal subjects. First-year law students often fail to realize how the material taught in each of these classes complements what they are learning in the other classes. Students focus on learning the material and professors focus on transmitting the information in a comprehensible manner.

First-year orientation can be an opportunity to introduce doctrinal material in a creative way to show the pragmatic interrelatedness of the first-year classes. This introduction does not require a complete retooling of the professor's teaching style or semester syllabus. It can be accomplished by relying on traditional teaching techniques such as presenting the first-year students with an

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introduction that highlights how the first-year courses dovetail together. The notion of a preparatory introduction to American law at the beginning of a student's legal studies is also not novel. American law schools have a long tradition of teaching introductory courses. It is time to reintroduce and modernize this practice.

By framing an introductory law discussion in a fun and creative way during orientation, students will be both more willing to proceed on the academic journey and engage early and often with their professors.

The game of Rock, Paper, Scissors ("RPS") is the perfect framing tool: the Rock, Paper, and Scissors relate easily to Civil Procedure, Property Law, Contracts Law, and Torts Law in a creative and innovative way to explain how these subjects coexist. This reimagined introduction to the first-year curriculum allows professors to segue into a discussion of the legal issues that arise in each class through an overarching, interactive hypothetical. RPS demonstrates to students how the law acts as one cohesive entity made up of many individual and connected components.

I. INTRODUCTION

Law school orientation introduces incoming first-year law students to their three-year journey towards a Juris Doctorate degree. Orientation satisfies essential tasks such as taking student pictures, issuing passwords, distributing class schedules, pledging to uphold the Honor Code and Code of Conduct, and easing the newly matriculated students into the world of studying law. Orientation also serves as an opportunity for students to meet their professors and understand their expectations. Students are exposed to the rhythm and pace of case briefing, outline drafting, preparing for class, and understanding the material. This can be quite a daunting experience organized into a few short days.

However, orientation can also be a chance to build a rapport between the students and faculty while providing students the benefit of a big picture explanation of how the body of American law and jurisprudence works as a cohesive and evolving organism. Some law school orientation programs accomplish this aim by offering mini-classes that demonstrate the classroom experience.[1] Other orientation programs invite academic skills faculty to provide initial lessons on class preparation, note taking, and brief writing.[2] What is missing from orientation, regardless of the institution one attends, is an introduction to the broader contextual interplay of the first-year curriculum.

The premise of a preparatory overview of law school subject matter is neither new nor revolutionary. In fact, it merely honors and evolves early law school instruction and curriculum tools. As lawyer

1. *See infra* note 62.
2. *See infra* note 62.

training moved away from apprenticeships towards law schools,[3] courses such as Introduction to Law and, specifically, Elementary Law were offered.[4] The Elementary Law course taught at Stanford University Law School as early as 1893 was an introductory class taught by several professors at once, each an expert in a different legal field, to provide students with an explanation of general principles of the law.[5] This course provided students with an understanding of the general principles of law as a whole and then allowed them to build their general knowledge by taking individualized classes like Civil Procedure, Property, Contracts and Torts.

This article proposes providing first-year students with an Elementary Law introduction during orientation within which they realize how their doctrinal courses build on, complement, and contradict one another.[6] This not only maximizes the orientation experience, but it also helps first-year law students comprehend the logic behind the choice of their fixed class schedule. This opportunity instills in the students an understanding that no law or legal subject exists in a vacuum. Part II of this Article explores and explains the evolution of early law school curriculum from the introduction of the Elementary Law course through advancements under the guidance of the American Bar Association.

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3. For a comprehensive explanation of the history of law schools, see Anthony Freedman & Carolee Houser, *A Brief History of Stanford Law School: Seventy-Fifth Anniversary*, STAN. LAW., https://law.stanford.edu/stanford-lawyer/articles/a-brief-history-of-stanford-law-school-seventy-fifth-anniversary/ (last visited Mar. 26, 2024) (originally published in Volume 3 of the Stanford School of Law Yearbook in 1968). *See also* A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1959, 1977 (2012) ("Christopher Columbus Langdell, . . . Dean of the Harvard Law School[,] . . . [believed that law school classes] should be taught by full-time academics using the case-dialog method more so than as a craft to be learned by apprentices studying at the feet of experienced practitioners. . . . A critical companion to the case method was another Langdellian innovation: the instructional approach used to discuss the cases with students in class known as the Socratic method.").

4. One example of the Elementary Law course was taught as early as 1893 at Stanford University Law School, describing it as "an introductory lecture course given by all the members of the faculty, each dealing in a cursory way with his own subjects." Freedman & Houser, *supra* note 4.

5. *Id.*

6. *See infra* Part III.B.

Part III of the Article first provides an overview of the current state of law school orientation programs, concluding that interjecting small but effective changes would benefit first-year students. The Authors propose to revisit and relaunch the early introductory Elementary Law courses by presenting the material in a condensed and digestible manner during first-year law school orientation.

How can faculty create an understandable discussion and example of this premise straightaway? How can they collaboratively demonstrate the importance of basic legal subject matter interconnectedness? Simple: the straightforward game of Rock, Paper, Scissors ("RPS"). RPS is universally known as a children's game played during elementary school recess and then throughout our lifetime whenever a minor decision must be made. The ordinariness and commonness of the objects make the game promptly intuitive. The rules are simple: rock breaks scissors, paper covers rock, and scissors cut paper. If the rules of RPS were adapted and incorporated into the first-year law school orientation, what would it look like? What if Property, Contracts, and Torts substitute rock, paper, and scissors, respectively, with Civil Procedure standing in for the rules of the game? The results would make complete sense to the players.

Furthermore, by having professors collectively frame the first-year curriculum as RPS during orientation, the incoming first-year "players" already know the rules so they can instead focus on the results of the game. In other words, student players, when determining why rock breaks scissors or paper covers rock, begin to understand why tort law is preferred over contract law in certain litigation scenarios and property law is essential to contract law when the subject matter of a sales contract is real estate. By faculty presenting introductory information in a fun and innovative way, the students and faculty both benefit from early relationship formation and the creation of a fun, dynamic classroom. A RPS structure reassures new students that they can succeed in law school and enjoy it too. This reassurance also quickly dismantles the student's instinct to hyper-focus on the inevitable concerns: *I just need to pass Civil Procedure; I just do not want to get called on in Torts; please just do not fail out first semester*. Thus, Part III of this Article closes by briefly discussing the origins of the RPS game.

Part IV of this Article proposes a sample hypothetical, putting the reimagined rules of RPS to the test. By presenting RPS reimagined

as the first-year curriculum, professors start with an overarching hypothetical demonstrating that the subject matters taught are inextricably intertwined during the incoming law student's orientation. Then the professors may segue into a discussion of the legal issues that arise and demonstrate to students how the law, acting as one cohesive entity made up of many individual components, identifies and resolves the legal issues of the hypothetical. Part V briefly concludes.

II. THE EARLY TRADITION OF TEACHING LAW STUDENTS

Early U.S. legal education consisted of apprentice-based programs and prioritization of the great European legal philosophers such as Montesquieu, the Institutes Justinian, and Blackstone.[7] As law schools were established, they relied on "elaborate lectures on the whole field of law, supported by references to leading cases in reports."[8] Standardized textbooks were later added with "[t]he great aim . . . to acquaint the student with the principles of law in such an order of arrangement and with such reference to their historical development, as would best impress them permanently upon his mind."[9] This approach of supplementary instruction through case law continued for a century[10] until it was largely supplanted by the scientific and Socratic methodology of teaching.[11]

Out of the evolution of instructional best practices and goals arose significant scholarship as American law schools transitioned to institutions, growing in number and size.[12] Debates on best legal

7. *See* Simeon E. Baldwin, *The Study of Elementary Law, The Proper Beginning of a Legal Education*, 13 YALE L.J. 1, 1–2 (1903).

8. *Id.* at 3.

9. *Id.*

10. *Id.*

11. Spencer, *supra* note 4, at 1959.

12. *See* ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 137 (1953); Eugene E. Clark, *Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, (Illinois: American Bar Association 1992)*, 4 LEGAL EDUC. REV. 1, 5 (1993). *See generally* AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979); Spencer, *supra* note 4.

teaching practices began in the late 1700s.[13] Those debates continue today, largely focusing on how to strike a balance between a scientific or doctrinal focus and experiential emphasis.[14] Many agree though that "[t]aking the need for reform of some kind to be necessary, the first step in the reform process should be a thorough consideration of what brought us to this point and why our schools take the approach to

13. Spencer, *supra* note 4, at 1960 (citations omitted). "In its most damning critique, the ABA committee concluded its observations with the following analysis:

> The defects of the present method may be summed up, we think, in one very familiar antithesis: they do not educate, they only instruct. They aim only to heap up in the student's mind a great mass of legal "points"—rules, definitions, etc.— but they do not fashion these into a system, nor even do they give him the faculty of constructing for himself such a system. The mutual influences of different rules, the construction of legal relations and institutions, the processes by which the law is constantly developing and assuming new phases, are neglected, or, rather, positively ignored. He is supplied with an abundance of crude material, but not taught to use it. In office study, the daily participation in actual business gave the student at least some empiric training. He learned to use his acquisitions as an apprentice learns to use the tools of his trade . . . .

We see in this critique charges that could be leveled against law school education today. An instruction in legal 'rules' dominates; a comprehensive legal education that synthesizes different areas of the law, teaches how to establish and maintain legal relationships or entities, and studies the processes—legislative, administrative, collaborative, and judicial—by which the law and legal relations are shaped is still 'neglected' or 'ignored' in law schools today. The charge that the student 'is supplied with an abundance of crude material, but not taught to use it' is as true today as it was then at those schools that do not require extensive practical skills training or experience before graduation. Indeed, it can still be said of some law faculty that they do not 'seem ever to recognize the need' to offer training that approximates what students miss by not going through an apprenticeship experience. The key difference between now and then is that the saving grace for the Committee—'that the training thus omitted may be supplied in the early years of practice'—no longer accurately characterizes the opportunities facing most law school graduates today, given the increasing unwillingness of legal employers to foot the costs of basic training for new lawyers and the reality that many law graduates do not obtain work with employers who have the time, ability, or resources to support such training." *Id.* at 1984–85.

14. *See generally* John H. Schlegal, *Between the Harvard Founders and the American Realists: The Professionalism of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985).

legal training that they do."[15] Thus, if reform and evolution are constants and seemingly inevitable, before we can propose a new course forward, we must understand how we arrived at our current destination—or approach to the current law school first-year curriculum. Only then can we appreciate where we have evolved from and seriously consider reinstituting revised early teaching practices.

A. Law School First-Year Curriculum

The traditional first-year law curriculum, Civil Procedure, Property, Contracts, and Torts, can be traced back to "the first established law school, the Litchfield Law School," which was founded in 1784.[16] There, the curriculum "covered all of Anglo-American private law with no special attention given to the law of any one state or to areas of public law"[17] and eventually evolved "to include topics such as master and servant, bailments, and real property."[18] As more law schools were incorporated into universities, the law degree program evolved[19] with course work focusing on "constitutional law, American jurisprudence, English common law, equity, pleading, evidence, bailments, insurance, bills and notes, partnerships, domestic relations, conflict of laws, sales, and real property."[20] "The common law focus of the first-year curriculum is an inheritance from Langdell, who believed that the common law was the core feature of the American legal system, representing a coherent set of enduring

15. Spencer, *supra* note 4, at 1960.

16. *Id.* at 1966–67.

17. *Id.* at 1967.

18. *Id.*

19. *Id.* at 1969 (citing 1 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 218 (1908)) ("The schools were not offering the three-year degree of today but rather offered one- to two-year courses of study consisting of lectures and readings of treatises in the areas of law considered important at the time . . . .").

20. *Id.* Following the opening of Litchfield Law School, schools and students alike were "[a]ided greatly by Blackstone's *Commentaries*, which taught early American lawyers the continuity, the unity, and the reason of the Common Law," which ultimately laid the foundation for how future law classes would be structured. *Id.* at 1965.

principles that transcended politics and provided a rational guide for human behavior."[21]

Each of these common law areas correlate with distinct subject matters taught in law schools today. The "pleading" area easily translates to Civil Procedure; "sales" translates to contract law; "real property" needs no translation; and the "common law" encompasses tort law. Eventually, William Callyhan Robinson, a professor at Catholic University of America, wrote the *Elementary Law* textbook in 1896.[22] *Elementary Law* served as a guidebook for young law students and ultimately law practitioners.[23] *Elementary Law* was a voluminous tome covering subjects such as Property Rights, Title to Estates in Personal Property, Of Title by Contract: Essentials of a Contract, Private Wrongs, and The Procedure in Actions in the Courts of Common Law.[24] Each of these subjects finds a modern companion in the first-year curriculum: Civil Procedure, Property, Contracts, and Torts. Throughout the 1800s and early 1900s, legal scholars,

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21. *Id.* at 2021 n.298 (citing Edward Rubin, *What's Wrong with Langdell's Method and What to Do About It*, 60 VAND. L. REV. 609, 624, 626 (2007)).

22. William Callyhan Robinson was "an instructor at Yale Law School from 1869 until 1872, when he was made a professor" and subsequently became Dean in 1893. Frederick H. Jackson, *William C. Robinson and the Early Years of the Catholic University of America*, 1 CATH. U. L. REV. 58, 59 (1951). Robinson moved to the Catholic University of America to lead the School of Social Sciences in 1895. *Id.* at 60. He went on to serve as the Dean of the Columbus School of Law at the Catholic University of America. *Id.* He wrote numerous textbooks including, but not limited to, NOTES ON ELEMENTARY LAW (1896), FORENSIC ORATORY (1893), and ELEMENTS OF AMERICAN JURISPRUDENCE (1900). *See id.* at 59.

23. WILLIAM C. ROBINSON, ELEMENTARY LAW, at vii (2d ed. 1910) ("To fit him to discharge these duties he needs an accurate and fairly extensive knowledge of the general rules and doctrine which constitute the great body of law; a special familiarity with those departments of law which govern the commercial transactions of the day; and a practical training in those forms and methods of procedure which it will be his daily duty to employ."). This is the second edition with the first being published in 1896, although the author states in the Preface that "this new edition of a work which, in one form or another, has been in use among law students for the past forty years." *Id.*

24. *Id.* at xi–xix (referencing Book I, Chapter II at 32–40; Book I, Chapter II, Section III at 154–96; Book II at 224–65; and Book II, Chapter II at 238–49 respectively).

professors, and deans continued to discuss the need to provide useful instruction and practical training within the law school curriculum.[25]

B. Subsequent Evolution, Review and Recommendations

Law school curriculum review and uniformity further evolved with the creation of the American Bar Association in 1878 and its commissioned reports.[26] The American Bar Association assumed the mandate of overseeing the administration of law schools and their curriculum.[27] Law schools, at that time, offered "roughly the same basic set of first-year doctrinal courses—featuring traditional common law subjects—and legal research and writing instruction, followed by electives that offer doctrinal, skills, or professional/clinical instruction at the election of the student, culminating with a major writing requirement of some kind."[28] The first-year courses included Civil Procedure, Property, Contracts, Torts, and Criminal Law.[29]

During the 1903 ABA Annual Conference, Simeon E. Baldwin[30] summed up his vision of changes in legal education by noting "three great events" including[31] the 1870 publication by Professor Langdell of Harvard of the first casebook prepared solely for

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25. *Course of Legal Study* was a volume encompassing Elementary Law principles, explaining subjects such as Feudal Law, the Common Law, Municipal Law, American Law, and Roman or Civil Law. *See generally* DAVID HOFFMAN, COURSE OF LEGAL STUDY (1846).

26. *See* Erwin N. Griswold, *Legal Education: 1878–1978*, 64 A.B.A. J. 1051, 1051, 1054 (1978).

27. *Id.* at 1052.

28. Spencer, *supra* note 4, at 2020–21.

29. *Id.* at 2021 n.297 (citing Sec. of Legal Educ. & Admission to the Bar, Am. B. Ass'n, *A Survey of Law School Curricula* 25 (2004)). *See generally* George M. Joseph, *Orientation: A Survey and Proposal*, 11 J. LEGAL EDUC. 517, 518 (1958) ("Change is the keyword—with perhaps a wee, small, parenthetical: (for change's sake). As in everything else, there are tides in legal education. Nothing ever seems to get settled, except for Torts, Contracts, and Property, the first-year curriculum . . . .").

30. Simeon E. Baldwin was an American jurist and law professor at Yale Law School and one of the founders of the American Bar Association. *See* Baldwin, *supra* note 8, at 3.

31. *Id.*

use in law school instruction.[32] This landmark publication combined with Professor Langdell's casebook style of law school instruction shifted the educational focus from elementary-level discussions on law in general, with the various subjects combined and concentrated, to interpretation, study, and predictability of judicial precedent. This shift contributed to the decline and eventual disappearance of the emphasis on the primacy of introductory or Elementary Law.[33] However, by 1913, the American Bar Association Committee on Legal Education and Admissions to the Bar continued debating the efficiency of law school instruction.[34] The Committee commissioned the "Carnegie Foundation for the Advancement of Teaching to undertake an investigation of legal education in the United States."[35] The result was the Redlich Report: an endorsement of the case law method with "a caveat and a critique. The caveat was that the case method was appropriate for the study of Anglo-American law because such law—at that time—was largely unwritten, common law."[36] Redlich's critique of the case law method noted that "[t]he result of this is that the students never obtain a general picture of the law as a whole."[37]

Additionally, Redlich proposed:

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32. *Id.* at 4 (citations omitted) (arguing for "1. The creation of a committee on legal education, representing the whole American bar, and its report on that subject to the American Bar Association in 1879, urging a more scholarly and thorough training for the profession. 2. The extension of the term of study required for a bachelor's degree, in two law schools, to three years, and the offer in another, which still adhered to the two years term, of two years more of advanced study for bachelors of law, leading to the degree of Doctor of Civil Law.").

33. *Id.* at 5 (citation omitted) ("A prominent advocate of the case-book system said last year in a public address that whatever time students might devote to the study of elementary law was worse than wasted; that no knowledge was gained by it on which they could rely; and that the information acquired, if any, was necessarily superficial and misleading.").

34. *Id.* at 10.

35. Spencer, *supra* note 4, at 1987.

36. *Id.* at 1990 n.157 (quoting JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS 35 (1914) ("[T]he fundamental reason for this success [of the case method] is to be found in the present condition of American law, and within this especially in the unshaken authority of the common law.")).

37. *Id.*

> [A]s an introduction to the entire curriculum, care should be taken to introduce to the students, in elementary fashion, [the] fundamental concepts and legal ideas that are common to all divisions of the common law. . . . Beginners in American law schools should be given a Propädeutik, or preparatory course, which in a simple yet scientific manner shall set forth the elements of the common law; shall furnish, that is to say, a comprehensive view of the permanent underlying concepts, forms and principles, not forgetting the elementary postulates of law and legal relationships in general . . . [e]very department into which American law is divided, whether as common law or equity, employs certain common elementary ideas and fundamental legal concepts which the student ought to be made to understand before he is introduced into the difficult analysis of cases.[38]

Redlich argued that the advantage of such an introduction gave students a baseline understanding of the basics of the law and terminology that would help them more efficiently grasp individual concepts and the greater legal picture of American jurisprudence. Redlich preferred an "Institutes-course" functioning as a general entry to law school that "should occupy three or four weeks of the first third or half of the opening year."[39] His Institutes-course would follow a casebook and lecture format.[40] Serving as the roots to these Institutes-courses, Redlich's recommendation harkens back to and gives renewed credibility to the prior Elementary Law courses.

Harvard Law School seemingly agreed with the need to provide a contextual introduction, offering an introductory to law course in 1915 under Dean Ezra Ripley Thayer, who noted,

> one of the difficulties of the first-year law student is his tendency to entertain a view of the law as a mysterious

38. Simeon E. Baldwin, *Education for the Bar in the United States*, 9 AM. POL. SCI. REV. 437, 439 (1915).

39. *Id.* at 441.

40. *Id.* at 442.

> collection of disjointed materials placed in water-tight compartments. On entering . . . Law School[,] he is apt to regard contracts and torts, for example, as related to each other in no more intimate way than [mathematics] and literature appeared to be related in his [undergraduate] days.[41]

Around this time, law school administrators and professors also recognized that students entering law school were underprepared for the teaching style and critical thinking skills needed to be successful. While many viewed the Elementary Law course as a guiding light on the path to what lay ahead, not everyone agreed with its usefulness and efficiency.

As is normal in any evolving system, preference for an introductory course waned once again. Professor Joseph H. Beale[42] excoriated the course stating that it was ineffective and backward, his justification for its discontinuation included an intriguing argument; it was "beginning at the wrong end . . . an effort to do for the student a work he must do for himself. If it makes any impression upon his mind, it is by getting him used to elementary methods of work in what should be serious scientific study."[43] Whether Beale was persuasive in the demise of the Elementary Law course, it did in fact lose favor in law school curriculum and gave way to the "sink-or-swim school of

41. *Id.* at 14 (citation omitted); *see also* Harlan F. Stone, *Dr. Redlich on the Case Method in American University Law Schools*, 1 WASH. U. L. REV. 111, 114 (1916) ("[T]here should be an introductory lecture course on the fundamentals of law at the very beginning of the course of law study in the American law school . . . ."). Additionally, Columbia University School of Law offered an introductory course known as Elements or Institutes of Law, as early as 1907. *Id.* at 116.

42. Professor Beale graduated from law school in 1887. *Professor Beale, Law Expert, Dies*, HARV. CRIMSON (Jan. 22, 1943), https://www.thecrimson.com/article/1943/1/22/professor-beale-law-expert-dies-pjoseph/. Three years later he began his career as a professor at both Harvard School of Law and as the first Dean of the Chicago University Law School. *Id.* For an explanation of Beale's approach to teaching in legal education, see Joseph H. Beale, *The Place of Professional Education in the Universities*, 9 UNIV. REC. 41 (1904); Joseph H. Beale, *The Necessity for a Study of Legal System*, *in* AALS PROCEEDINGS. 31 (1914).

43. Joseph, *supra* note 30, at 519 (quoting JOSEPH H. BEALE, ASSOCIATION OF AMERICAN LAW SCHOOLS HANDBOOK 48–49 (1902)).

thought," allowing blame for poor student performance to fall on lack of preparation in undergraduate programs.[44] By 1958, many pondered whether this blame shifting was fair and whether law schools, if they continued the sink-or-swim tradition should "let the student get a glimpse at least of what sort of fluid he was drowning in."[45]

While debate over teaching philosophies continued, the growing body of law school courses eventually hastened the demise of Elementary Law and introductory courses. However, revival of this concept is not hopeless as incorporation into existing orientation programs would serve as a new-again wholistic explanatory approach to incoming students in modern society. By 1959, Professor George M. Joseph specifically pinned his solution for improving legal education to the introduction of an orientation program:

> Orientation is a quarter-horse, bred to do a particular job over a short course, preliminary to the feature event, in which Introduction to Law runs with Contracts, Torts, and Property. . . . The project: to assist the entering law student to get in hand earlier the techniques, the insights, and the attitudes to prepare him to be a better student we all hope to find come examination time.[46]

Survey evidence supports its likely success as most questioned law schools were open to the idea of an orientation program in some form or another. Combining teaching substance with procedural learning theories focuses on the individual "students and how they receive and integrate the knowledge, information, and material being communicated."[47] Most professors assume that their teaching style will connect to all of their students and influence their learning. "Yet, more and more educators are characterizing students as 'three dimensional' learners who have disparate propensities for learning."[48]

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44. *Id.*

45. *Id.*

46. *Id.* at 522.

47. Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 4 (1996) (citing BERNICE MCCARTHY, THE 4MAT SYSTEM: TEACHING THE LEARNING STYLES WITH RIGHT/LEFT MODE TECHNIQUES (1980)).

48. *Id.*

Thus, in accepting the view of the three-dimensional student, a multi-dimensional approach to orientation as to law school seems an obvious choice.

Professor Joseph's list of the top ten "integral parts" of a successful orientation program is crucial in understanding how to effectively reach students during orientation.[49] Most orientation programs begin with addressing the first integral part: "to impart meaningfully the difference between undifferentiated undergraduate education and law training."[50] However, the third integral part "to provide some necessary information framework for effective understanding of law and law study," is arguably the most important and elusive. How can we meet all of these goals in such a short amount of time without overwhelming the new students?

The answer is elementary: borrow from the past and incorporate the roots of Elementary Law, continuing to progress and embrace the outlines of proposed orientation processes while including a multi-dimensional approach. Successful orientation programs should accomplish several goals while emphasizing differing teaching techniques and acknowledging that "[l]earning theory is essential to pedagogy. If teaching is seen as what people learn, then effective

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49. These top ten integral parts which comprise a successful orientation program are:

> (1) to impart meaningfully the difference between undifferentiated undergraduate education and law training; (2) to introduce students to the basic predispositions within which they will be trained; (3) to provide some necessary information framework for effective understanding of law and law study; (4) to explain the techniques used to handle efficiently the work load and learning process; (5) to give students an unpressured opportunity to practice techniques; (6) to allow a preview of classroom machinery; (7) to dispel some of the bugaboos of examinations and grading before terror clouds vision; (8) to permit chance for the faculty to observe the students, as individuals, so that troublesome conditions which may be present might be discovered and attended to; (9) to establish maximal conditions of a psychological sort, so that the educational process can proceed with a minimum of impediment; and (10) to save everyone's time.

Joseph, *supra* note 30, at 530–31.

50. *Id.* at 530.

delivery is paramount," particularly to achieve a successful orientation.[51]

III. WHAT IS LAW SCHOOL ORIENTATION?

A. Undergraduate Orientation versus Law School Orientation

Entering law school is a different experience than entering undergraduate college. The students are older, the expectations are higher, and the methods of instruction are different from what incoming students are accustomed to. Even law school orientation has gone through an evolution from the early days "[p]rior to the late 1930s [when] schools seldom provided students with any introduction to the legal education they were about to undertake."[52] However, in 1950, Professor Austin Wakeman Scott stated: "The method used until comparatively recently by most law schools in teaching first-year law students has been to plunge the new students head-long into the simultaneous study of a number of regular first-year courses . . . ."[53]

Orientation acts as a bridge from undergraduate college or the workforce into law school. In his treatise *Orientation: A Survey and Proposal*, Professor Joseph advocated for law school to "begin a week earlier for first-year students, for the purpose of letting them in on a few secrets of what they are about and how to do it."[54] The aims of orientation were to set forth the requirements and expectations of law school while easing newly matriculated students into the rhythm and requirements of a jurisprudence degree. One stark difference between undergraduate orientation and law school orientation that is often mentioned is the serious tone of law school orientation with less focus on socialization and instead more on quickly acquiring the necessary skills for success. However, a modern, well-structured law school orientation does not have to be intimidating; a balance can and should

51. Friedland, *supra* note 48, at 3.

52. Steven Friedland, *Blues and the Abstract Truth: Law School Orientation and Legal Education*, 6 J. PRO. LEGAL EDUC. 87, 87 (1988) [hereinafter *Blues and the Abstract Truth*]; *see also* Joseph, *supra* note 30.

53. *Id.* (quoting A. Scott, 2 J. LEGAL EDUC. 545–46 (1950) (reviewing W. FRYER & C. BENSON, CASES AND MATERIALS ON THE LEGAL SYSTEM (1949))).

54. Joseph, *supra* note 30, at 522. Joseph then provided an overview of the orientation programs as of 1958 for twenty-one law schools. *Id.* at 523–30.

be struck between informative, instructional, and reassuring goals.[55] One author noted their personal perspective on these differences, stating:

> Law school orientation was nothing like undergraduate orientation, which was primarily social in nature, and by design, serving as an extended icebreaker between members of the entering class. Law school orientation was something entirely different, focused on establishing and explaining the school's high expectations for the entering class. It was also reassuring, and I was impressed with the wide-ranging support network and resources the law school provided. It felt very user-friendly, and that was a relief. Through faculty presentations and participation in mock classes, my sense that I would be able to succeed in law school was renewed.[56]

Other current and former students have provided similar anecdotal reflections.[57] One common sentiment amongst students seems to be feeling like a fish out of water; or possibly more appropriately like swimming in Jell-O. Students know how to swim but have never had to do so in anything but water. They must quickly

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55. *See Blues and the Abstract Truth*, *supra* note 53, at 87 & n.8–9 (citing Joseph, *supra* note 30) ("[O]rientations differ appreciably in scope and content. In some schools, the emotional socialisation [sic] of new students (the blues), and the academic rigors of case analysis (the abstract truth) play little or no rule.").

56. Lukas M. Horowitz, *Law School Lesson #1: You Can't Wing It*, N.Y. STATE BAR ASS'N. J., Oct. 2016, at 20.

57. *See, e.g.*, Steven M. Cohen, *Law Made Simple*, 80 U. DET. MERCY L. REV. 471, 471 (2003) ("I was informed that, unlike my experience during college, as a law student I would be presented with areas of study that were complex, sophisticated, and sublime. It was explained to me that the law deals with the ordering of society and concerns itself with the complexity of human relations. By the way, I noticed immediately that the intelligentsia of Penn Law spoke of 'the law' and not 'law.' It was as if to them the law was far more than statutes and codes and legislation and cases and so on. Rather, the law was a grand edifice, a great social construct with mystical and mythic qualities. In any event, sitting through lecture after lecture that first week, I was made to understand that, simply stated, this was really complicated stuff.").

understand how to use known strokes to keep afloat while retraining their muscle memory to succeed in this new substance. Thus, understandably, law school orientation differs from undergraduate orientation.

While all law schools offer some type of orientation for incoming students, there is no one-size-fits-all orientation model. A survey on orientation models revealed that all respondent law schools offered an orientation program, though not all programs were alike in duration and content.[58] Out of 103 responding schools that held first-year orientation,

> [f]orty-seven percent held "minimalist" orientations that were primarily student run. . . . Twenty-nine percent have "moderate" programmes which divide teaching responsibilities between faculty and students and centre the subject matter on the social or emotional component of law school. The remaining twenty-four percent of schools have "faculty-run academic" programmes taught primarily by faculty members who emphasise academic concepts involving legal doctrine.[59]

Thus, basic orientation program structures and duration exist. Divergent aspects of orientation programs include a focus on legal writing and research, case briefing, and icebreaker or socialization opportunities.[60] Several surveyed schools even held mock classes or trials.[61]

However, key similarities also are present: the introduction, to varying degrees, to both the American legal system and case briefing.[62]

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58. *Blues and the Abstract Truth*, *supra* note 53, at 87.

59. *Id.*

60. *Id.* at 88.

61. *Id.* ("At the University of Colorado, the three day orientation programmer includes a movie on legal history [and] a mock law school class. . . . The University of Idaho's programme is similar in respect to its duration and content. Its faculty-run programme also includes information about jury selection and the trial process.").

62. For example, all law schools in Georgia include a series of keynote speaker events and group discussions on professionalism during orientation. *See* Avarita L. Hanson, *2013 Law School Orientation Program*, 19 GA. BAR J., October 2013, at 57–

Nova Law Center, the sponsor of the aforementioned survey, followed the trend of offering instruction on the American legal system with "[d]emonstrations of a direct and cross examination and other aspects of the trial or pre-trial process" carried out by faculty assuming various roles.[63] At the conclusion of Nova Law Center's orientation, feedback was solicited from both students and faculty where "[t]he faculty response was overwhelmingly positive."[64] The student response also revealed significant positive feedback in terms of "breaking the ice" and the "emotional benefits . . . [of orientation having] greater importance than the academic provided by the course."[65]

If orientation serves several purposes, including easing incoming students' anxiety and stress, current successful orientation program models can be found. Orientation can also set a foundation for the students upon which to build their legal knowledge and success is seen in the legal writing and case-briefing skills. However, other than a comparative discussion of civil and criminal law,[66] none of the respondents in the Nova Law School questionnaire provided an integrated lesson on first-year classes.

Thirty years after the Nova questionnaire, the issue of organizing a successful orientation program was addressed by Valerie J. Munson in her article, *Orienting the Disoriented: The Design and Implementation of an Optimal Law School Orientation Program*.[67] Munson noted that the needs of incoming students have not changed: introductions to cases briefing, legal writing, the American legal system, a mock class, and an opportunity for socialization are must-haves at orientation.[68] While a mock class should "introduce them

58. The Georgia Professionalism components of law school orientation is overseen by the Georgia State Bar Association Committee on Professionalism. *Id.* at 57.

63. *Blues and the Abstract Truth*, *supra* note 53, at 89.

64. *Id.* at 91.

65. *Id.* at 92. However, it should be noted that the students stated that the case-briefing skills training was the most useful academic instructions. *Id.*

66. *Id.* at 89 (Day 1 of the Nova orientation provides a discussion of the civil and criminal case stages).

67. Valerie J. Munson, *Orienting the Disoriented: The Design and Implementation of an Optimal Law School Orientation Program*, 44 W. ST. U. L. REV. 73 (2017). Munson states that the article "largely describes the orientation program adopted by Southern Illinois University School of Law in the fall of 2016." *Id.* at 74 n.5.

68. *Id.* at 74.

during orientation to what lies ahead[,]" no suggestion is proposed that weaves the first-year curriculum together with the necessary discussion of the American legal system.[69]

B. Proposed Improvements in Orientation

More than one orientation study has equated the process to *The Wizard of Oz*.[70] While others have used the film to highlight the "Dorothy, isn't in Kansas anymore" feeling of uncertainty upon the start of law school, the characters of the Tin Man, Lion, Scarecrow, and Toto are just as useful.[71] Dorothy was never truly alone on her journey; it was only with the combined help of her companions that she achieved her success to go home. If Dorothy were a law student, each companion could easily be substituted with her Civil Procedure, Property, Contracts, and Torts law professors. Each of these professors plays a role in a law student's success.

Paula Lustbader stresses the importance of creating context by "provid[ing] syntactical, substantive, and pedagogical context to help students give meaning to what they learn and how they learn in law school."[72] Focusing specifically on the substantive benefits of orientation, a clear explanation of not only how the law works as a unified body but also how law classes are taught gives incoming students a solid foundation to start their law school career.[73] By "creat[ing] context using a variety of vehicles such as a complex case or simple exercise," professors can reach new students in a low-stress,

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69. *Id.* at 81.

70. *See, e.g.*, Paula Lustbader, *You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly over the Rainbow*, 47 WASHBURN L.J. 327, 327 (2008) (equivocating that "[l]aw school is like Oz"); Munson, *supra* note 68, at 73 (likening law school orientation to "Dorothy's experience landing in Oz").

71. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

72. Lustbader, *supra* note 71, at 335, 332–33 ("Effective orientation design involves obtaining institutional support and commitment, articulating the institutional mission, identifying and connecting existing initiatives, assessing student needs, developing program assessment tools, determining program goals and content, designing the format/structure, and a willingness to experiment and be persistent.").

73. *Id.* at 345 (citing Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 326 (1997)) ("The substantive context includes the policy and overall structure of the doctrinal courses in the first year.").

collaborative manner while simultaneously setting students up for success.[74] Whatever exercise the law school chooses may then evolve to meet all the students' needs.[75]

Orientation programs "can also facilitate students' development of expert substantive schemata. Professors in the first-year curriculum should provide an overview of the course, including an overview of the major policy considerations."[76] During orientation, the professors might do the following exercise:

> [C]onnect the expert schema to something similar in students' lives. . . . [For example, a Civil Procedure professor] could relate Civil Procedure to having a party. [The professor] could use a *simple hypothetical* that raises the major issues in the doctrinal area. They could plan to cover a discrete and short doctrinal area within the first two weeks of class, then give a sample question, and debrief a sample analysis and answer. By providing the basic underlying policy themes and roadmaps of the major substantive categories in each particular course, all linked to the underlying structure of "elements of a claim," orientation can give students a structure and a starting point to facilitate their mastery of complex concepts.[77]

Agreeing with the premise that orientation faculty need to give students substantive context, the true difficulty is identifying the exercise vehicle. It must be sophisticated enough to engage the students and pique their interest while being simple enough that students do not become overwhelmed with rules and information. While the exercise may focus on a doctrinal area, can it easily be expanded to include all of the first-year doctrinal subjects without becoming overwhelming or ineffective? In other words, can revisiting and revising the historical Elementary Law course into an abbreviated engaging orientation program benefit current law students? The answer is yes.

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74. *Id.* at 346–47.

75. *Id.* at 348.

76. *Id.*

77. *Id.* (emphasis added).

Using an intuitive vehicle, such as one that is nearly universally familiar, is the easy solution. Games serve many purposes in orientation: they can provide context, be fun icebreakers, and allow for socialization between new students. Professor Ann C. Juliano advocates for using board games in her initial Civil Procedure classes. She notes that Civil Procedure students are immediately confronted with new abstract vocabulary and need an opportunity to understand the rules of the game before they can start playing.[78] Professor Ana Maria Merico-Stephens admits that "Civil Procedure is not the most spellbinding course in the first-year curriculum."[79] She counters this potential lackluster enthusiasm for her course's subject matter with a game that "integrate[s] subject matter review . . . to offer students a glimpse of what [is] expected of them on the final exam [and to] stimulate . . . thought and cooperation all in the context of self-directed feedback[, which] add[s] a dash of fun to the course materials."[80]

Can the game framework that is used in initial first-year classes be exported to orientation and used in a more expansive role? Can we take a common game that will give students substantive context, anxiety relief, socialization, and a 360-degree elementary overview of how all of their first-year classes work in collaboration and conjunction? Again, the answer is yes.

C. Rock Paper Scissors Game

Most adults cannot remember a time when they did not know the ubiquitous rules or play the RPS game.[81] It has somehow seeped

78. Ann C. Juliano, *The Games We Play*, 63 ST. LOUIS U. L.J. 453, 462 (2019).

79. Ana Maria Merico-Stephens & Aaron F. Arnold, *One Proposed Tool for Learning, Playing, and Reducing Anxiety in Civil Procedure*, 47 ST. LOUIS U. L.J. 59, 49 (2003).

80. *Id.* at 60.

81. The World Rock Paper Scissors Association is entirely devoted to tracing the origins, inventor, and diffusion of the game. *The History of Rock Paper Scissors*, WORLD ROCK PAPER SCISSORS ASS'N (Aug. 8, 2021), https://wrpsa.com/the-official-history-of-rock-paper-scissors/. "The first known mention of RPS was in the Chinese book 'Wuzazu,' written by Xie Zhaozhi during the Ming Dynasty. Xie [wrote] that the game . . . date[d] back to the Han dynasty (206 B.C. – 220 A.D.)." *Id.* The game has alternatively been traced back to "a tomb-wall painting at the Beni Hasan burial site in Middle Egypt (dated to around 2000 B.C.E.)." Katharine Schwab, *A Cultural History of Rock-Paper-Scissors: How the Ancient Game Went from Playground*

into our lives and consciousness where it has simply always existed. But the game itself had to originate somewhere and there must be some unique aspect of the game that justifies its permanence and pervasiveness. Possibly, the "simple game resonates with people around the world, thanks to its nostalgic quality, easy gameplay, and history of transcending cultural barriers."[82] Possibly RPS resonates simply because it is an elementary game with simple rules, random and fair outcomes, and no special equipment necessary.

The RPS game has also been extensively studied by modern social scientists looking at response trends, biases, psychology, decision-making models, and usefulness in problem-solving and conflict resolution.[83] Thus, because RPS has such a wide audience and has been useful in other areas of research and study, it can likely be employed as a teaching device during a law school orientation to

Decision-Maker to an Internet Phenomenon, ATLANTIC (Dec. 23, 2015), https://www.theatlantic.com/entertainment/archive/2015/12/how-rock-paper-scissors-went-viral/418455/. However, most research shows that the game made its way to Japan from China, where it continued to evolve between the 17th and 19th centuries, from an animal-based game to the current rock, paper, scissors game. *The History of Rock Paper Scissors*, *supra*. Thus, the Japanese game of *janken* or *jankenpon* is often referred to as the closest ancestor to modern-day RPS. The Japanese game spread in popularity and was described in a French children's magazine in 1927. *Id.* *The English Times* described a similar game called "zhot," three years earlier in 1924. *Id.* In 1932, a New York Times article introduced the game to American readers. *Id.* *See generally* Hashi, *Japan's Most Dangerous Game: Rock, Paper, Scissors*, TOFUGU (July 6, 2012), https://www.tofugu.com/japan/janken/ (explaining the game of *janken*).

82. Schwab, *supra* note 83.

83. *See* Zhijian Wang et al., *Social Cycling and Conditional Responses in the Rock-Paper-Scissors Game*, SCI. REPS., July 25, 2014, at 1, https://www.nature.com/articles/srep05830 (discussing the conditional responses and benefits of playing RPS); Neil Farber, *The Surprising Psychology of Rock-Paper-Scissors*, PSYCH. TODAY (Apr. 26, 2015), https://www.psychologytoday.com/us/blog/the-blame-game/201504/the-surprising-psychology-rock-paper-scissors (discussing the conditional responses and the psychological strategies involved in RPS); Jacqueline Howard, *Rock-Paper-Scissors Reveals Sneaky Formula for Winning the Game*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/rock-paper-scissors_n_5255288 (discussing the conditional responses involved in RPS). *See generally* Bryan C. McCannon, *Rock Paper Scissors*, 92 J. ECON. 67 (2007) (explaining the role player bias has in RPS and the use of RPS to resolve conflicts).

provide new students with a contextual understanding of first-year courses.

With each first-year course, a corresponding RPS concept would directly apply. Civil Procedure, as the body of rules governing civil litigation, makes an easy intuitive transition to the rules of the RPS game. Rock best parallels Property because property law, specifically real property law, focuses on the rights attached to land and its appurtenances, i.e., rocks. Paper easily corresponds to contract law because contract law best practices advocate for an express contract that is memorialized in writing. Scissors, as dangerous tools that can cut you if not careful, are best equated with tort law because tort law encompasses acts and omissions that result in an injury that may vest personal liability.

IV. PLAYING THE GAME, SEEING THE BIG PICTURE

The idea of using RPS in a legal context is not entirely without precedent. RPS has been used to support decisions,[84] make scholarly arguments,[85] and argue persuasively in litigation. Judges have been

84. In 2005, Takashi Hashiyama, a Japanese art collector, decided to entrust an art auction house to sell his valuable art collection. *See* Carol Vogel, *Rock, Paper, Payoff: Child's Play Wins Auction House an Art Sale*, N.Y. TIMES (Apr. 29, 2005), https://www.nytimes.com/2005/04/29/arts/design/rock-paper-payoff-childs-play-wins-auction-house-an-art-sale.html. The collector advised the two auction houses: Christie's and Sotheby's to play the Japanese form of RPS, *janken*, to determine which auction house would host the businessman's sale; Christie's won. *Id.*

85. RPS is used as a negative framing tool for the argument that the law of child relocation in parental custody cases is flawed and left to chance. *See, e.g.*, W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation*, 45 FAM. CT. REV. 193, 193 (2007) ("[T]here is no evidence that our decisions in [child relocation] cases result in an outcome that is any better for the child than if the parents did rock-paper-scissors."). RPS is proposed in a tongue-in-cheek suggestion for breaking corporate deadlocks and triggering a buyout. Thomas E. Rutledge, *Rock, Paper, Scissors, Lizard, Spock and Other Innovation Dispute-Resolution Mechanisms*, 20 J. PASSTHROUGH ENTITIES 55, 58 (2017). The author also cheekily suggests "trial by combat." *Id.* While not an entirely "scholarly" argument, RPS was invoked in the charming graduation commencement address by Michael A. Mogill wherein he compared the rock to the new graduates' use of their legal education, the paper to the "importance of maintaining perspective and placing events and ideas in context", and the scissors to a tool for alleviating embarrassment and the

afforded the flexibility to use RPS for unique resolutions. For example, one judge stated that "[i]f counsel cannot agree on a neutral site, they shall meet on the front steps of the . . . [c]ourthouse . . . At that time and location, counsel shall engage in one (1) game of 'rock, paper, scissors.'"[86] If judges can be creative, law professors should be afforded the same license. During orientation, the mere introduction of the RPS game will likely intrigue the new law students. Thereafter, the first-year law professors can tap into their creative and fun nature and introduce a hypothetical that suits them. Thereafter, each professor breaks down the hypothetical, identifying the relevant legal issues and explaining how they relate, complement, and conflict with the other first-year subjects.

Let's try it out.

A. Hypothetical Fact Pattern

Greenacre Farm is located in Chucktown, America. On the farm, crops of beets and corn are grown. The farm has a farmhouse, several barns, sheds, and a silo. Equipment necessary for farming activities such as tractors, combines, and irrigation systems are all present at the farm. The farm also has a thriving goat breeding business with over 500 goats and a greenhouse where daisies are grown and sold.

There is often a lot of activity at Greenacre Farm. People come and go, work on the farm, visit the farm to buy the beets, corn, goat milk, to pick the daisies, or to play with the baby goats. The farm is the center of life in Chucktown, America.

Ace Dooley is a first-year law student who visits the farm on his day off. While there, he witnesses several interesting events. He watches a slick city lawyer approach the farm foreman and offer to buy the farm. The foreman states he only works at the farm, he doesn't own

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inevitable fumble in a young lawyers career. Michael A. Mogill, *Rock, Paper, Scissor . . . Loot*, 2 NEV. L.J. F. 1, 4–6 (2017).

86. Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co., No. 6:05-CV1430ORL31JGG, 2006 WL 1562246, at *1 (M.D. Fla. June 6, 2006) (addressing the parties' lawyers failure to reach an agreement on where to hold a deposition and referring to the presiding judge for a resolution); *see also* Dennis J. Wall, *Rock, Paper, Scissors*, 17 EXPERIENCE 9, 9–11 (2017) (discussing *Avista* and providing a series of professional considerations to avoid a similar outcome for other lawyers).

it. When the lawyer asks who does, the foreman says, "That's a good question."

Meanwhile, several merchant grocery store owners from neighboring states are interested in buying some of the produce and all the flowers grown at the farm. They would like to source their beet and corn requirements from Greenacre. Ace Dooley listens intently to the discussions between the merchants and the foreman and realizes that no agreement can be made because the parties do not have all the information they need. The merchants simply drop off signed purchase orders with the farm foreman. Are contracts formed? If so, can they even be enforced?

Later that day, Ace is strolling along the cornfield when he sees a farm employee driving a tractor and lose control of the equipment and run over a visitor. The out-of-state visitor is gravely injured. The farm foreman, on behalf of the farm, purchased the tractor on the telephone only two days prior and had not read the terms and conditions attached to the contract nor had he read the instruction manual. When he purchased the tractor, the manufacturer verbally told him that the tractor came with no warranty of fitness. The equipment was poorly designed and manufactured and only included an emergency handbrake that could be employed if the driver was outside of the tractor cab. Do any of these facts even matter? Are they important for purposes of contract law, tort law, property law, or civil procedure?

The runaway tractor also made a hole in the fencing around the farm. Thereafter, half of the goats escape from the farm through the broken fence and enter a neighboring farm. They proceed to quickly eat all the baled hay and destroy a small vegetable garden. The remaining half of the goats stay in their paddock because they are lured towards a shiny orange iridescent powder that has blown into their paddock from the same neighboring farm. The orange powder turns out to be a highly toxic radioactive material that was improperly stored on the neighboring farm.

As Ace Dooley is making his way to the parking lot, he notices that the pathway to the lot is covered in shiny smooth river rocks. They are quite slippery, and Ace must carefully walk to avoid slipping and falling. Finally, Ace recognizes the city lawyer from earlier in the day speaking with a young man. The young man, Dewey Cheatum, states that he is the owner of Greenacre Farm and that he is interested in selling the farm. He explains that he has lived on the farm his entire

life and acted as the caretaker of his uncle for the last five years of his life. He states that each morning when he brought his uncle his breakfast, the uncle greeted him with, "It's lovely to still be alive. I am so thankful to have you here on the farm with me looking after both the business and my well-being. I know when I am gone, and you have taken over the farm, it will be in good hands." In fact, the goat farm and daisy greenhouse were built by Dewey Cheatum while he was living and working on the farm. Dewey Cheatum invested all his life savings into these improvements assuming that they would increase the value of the farm when he inherits it. Dewey Cheatum asks the city lawyer for an immediate good faith payment of $5,000. He explains that his uncle, the owner of the farm, has just passed away, and he wants to sell the farm before his siblings can get involved. If the lawyer is willing to write him a check, Dewey Cheatum is willing to shake his hand and make the sale "official."

Finally, as Ace is getting in his car, he hears terrible screams coming from the goat paddock. He walks back to investigate and overhears a farm employee state that several goats are glowing an eerie neon orange and have lost all of their fur and teeth. They are decidedly not cute anymore.

Ace thinks to himself: "What an interesting place to spend the day."

B. The Rules to the Game: Civil Procedure

"Wanna play?" Well, if that was it, if that was the extent of the invitation, you'd be hard-pressed to sign up many folks. Play *what* exactly?

The first ever *homo sapien* dispute resolution event is, obviously, lost to history. But extrapolating off observations from the animal kingdom, we can imagine how it sorted out. It was almost certainly violent, and likely fatal.[87] After a time, evolving civilizations

87. Scholars are seemingly of two minds on the point—some interpret Paleolithic paintings found in French caves as depicting spear battles some 25,000 years ago, while others find archaeological hints for believing that human warfare did not arrive until migrating culture clashes about 12,000 years ago. *See* R. Brian Ferguson, *War Is Not Part of Human Nature*, SCI. AM. (Sept. 1, 2018), https://www.scientificamerican.com/article/war-is-not-part-of-human-nature/. Either way, violent human conflict resolution has been with us for millennia. *Id.*

came to appreciate just how disruptive and inefficient this bloody model of dispute resolution truly was, and thus began humankind's never-ending search for a replacement.

At base, every tenable dispute resolution model begins with consent—either from the disputants themselves or from those with the power to compel the participation of the disputants. That consent, in turn, requires an incentive. What would motivate someone to trade a spear for a judge? To be honest, there is some selfish appeal to a rigged system. Weighted dice or a two-headed coin could ensure a "correct" outcome, so long as the dice or coin is yours. But that approach becomes exponentially less attractive when we lose control of the dice and the coins. Remember the peanut butter and jelly sandwich cutting rule from grammar school? Sure, you wield the knife, but I get to pick which sliced half to choose.

If rigging cannot be made to work reliably in our favor, we then tend to pursue an anti-rigged system and do so with the zeal of a champion. To induce us, that anti-rigged system must offer enough to coax us to surrender our spear and abandon assured and certain victory. Every model capable of that level of inducement will have to be perceived by the participants as genuinely anti-rigged and truly fair. So, where does that perception of resolution fairness come from? What makes a resolution method not just fair, but so perceptively fair that we are knowingly, willingly prepared to sign up for a system that exposes us to a meaningful chance of losing?

1. Understanding the Basics and Interplay with Civil Procedure

Rules. Therein lies the keystone in any resolution method capable of being perceived as fair. Knowing the rules that will govern a contest establishes uniformity, which reduces the opportunity for decisionmaker bias. That knowledge creates predictability, which engenders confidence in the process. Rules promote a perception of legitimacy in the resulting outcomes, which fosters community

stability.[88] Together, all of this tends to ensure that the resolution will be respected and enforced, even if begrudgingly.[89]

To be sure, not just any old "rule" is effective. To work, rules must be clear.[90] They must be specific, tailored, and not exorbitant.[91]

88. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–66 (1992) ("The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. . . . Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.").

89. In *the Steel Seizure Case*, the U.S. Supreme Court considered whether the sitting President of the United States possessed the constitutional authority to seize steel mills during a strike. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (also known as the "*Steel Seizure Case*"). The Court ruled he did not, and President Truman immediately complied. *See* WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 94 (1987) ("One is tempted to wonder in how many countries who loudly proclaim that they have written constitutions would a harassed chief executive have so promptly carried out the adverse mandate of the nation's high court.").

90. In the criminal context, the void-for-vagueness constitutional doctrine is emblematic of this obligation. *See, e.g.*, Connally v. Gen. Const. Co., 269 U.S. 385, 393 (1926) ("The dividing line between what is lawful and unlawful cannot be left to conjecture. . . . The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.").

91. *Cf.* Emory Washburn, *The Court of Star Chamber*, 12 AM. L. REV. 21, 21 (1877) ("Few things are more intimately associated with the despotism of the times of the Tudors and the Stuarts, in the history of England, than the name and transactions of the *Star Chamber Court*. It has become a generic term to denote a system of arbitrary measures, where the forms of judicial proceedings are made the means of perpetrating acts of injustice, or of consummating schemes of oppression and wrong."). *See also* Ullmann v. United States, 350 U.S. 422, 428 (1956) (explaining that the constitutional privilege against self-incrimination was "aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber;" since the Founders "had much experience with a tendency in human nature to abuse power").

Rules must be structurally evenhanded[92] and they must be conveyed and understood.[93]

Until the mid-1930s, the rules governing civil practice in the nation's federal courts were anything but uniform. That, in fact, was the whole point. For decades, Congress's goal had been to ensure that federal civil procedure would conform, "as near as may be," to those procedures then prevailing in the state in which the federal court sat.[94] This design meant that the rules of practice that applied in the state courthouses in Ohio would be followed also by the federal courthouses in Ohio. But their design also led to the unsettling reality that federal procedures in Ohio courts might differ (sometimes markedly) from those applied by federal courts in Kansas, federal courts in Florida, and federal courts in New York. Which federal court a litigant filed in, then, could make a world of practical difference in how a case was litigated.

That federal justice could differ so impactfully among the United States' courts triggered the drafting of the Federal Rules of Civil Procedure. Here, the drafters embarked on a bold strategy. Afforded the chance to prepare a new set of procedures to govern civil litigation in every federal courthouse from sea to sea, the drafters took the opportunity to be reformers as well. Indeed, the first Federal Rule of Civil Procedure enshrined that point and its underlying objective—to craft a set of procedures committed to the "just, speedy, and inexpensive determination" of every federal civil case.[95] A heady aspiration, to be sure.

But reform they did. Technical forms and intricate language were gone (and we know that because the Rules said so).[96] Pleadings

92. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (stating that whether law "regulates even-handedly to effectuate a legitimate local public interest" is a threshold requirement for Commerce Clause validity).

93. *See, e.g.*, Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (noting that although "[t]he fundamental requisite of due process of law is the opportunity to be heard," such a right "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest").

94. *See* CONFORMITY ACT OF 1872, ch. 255, § 5, 17 Stat. 196, 197 (1872).

95. FED. R. CIV. P. 1 advisory committee's note to 2015 amendment.

96. *See* FED. R. CIV. P. 8(d)(1) ("No technical form is required."); FED. R. CIV. P. 8(a)–(b) (requiring allegations to be plead in "short and plain" language).

were to be viewed not as a game of gotcha, but with the transcendent objective "to do justice,"[97] fixing—rather than dismissing—missteps was to be the new order of the day.[98] Defaulting a litigant was still allowed, but only after repeated, substantive delinquencies.[99] An opportunity for robust, freewheeling information exchange was codified to help lawyers prepare their cases and to reduce the risk of trial-by-ambush.[100] Most of the ancient writs coveted by earlier generations were replaced with austerity.[101] Since their promulgation in 1938, the Federal Rules of Civil Procedure have been amended forty times (and counting). Ergo, while perfection may elude human hands, the quest for it does not.

What these drafters appreciated was that procedural rules were not mechanical, dusty minutiae or annoying, idle chores. To the contrary, clear, specific, tailored, evenhanded, and understood rules are the veritable anchors of fairness. They level the playing field. They ensure that every participant in every dispute in every setting is afforded the same: a clear, fixed, and uniform path for pursing their justice.[102]

Maybe that's why RPS has stood the test of time. The game is defined by (and, in truth, is nothing really more than) its rules. For centuries, players have mulled over the very same fist, hand, or fingers decision, mindful of the consequences of that choice. Each holds the promise of victory, defeat, or a tie. Participants know the rules, and

97. *See* FED. R. CIV. P. 8(e) ("Pleadings must be construed so as to do justice.").

98. *See* FED. R. CIV. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."); FED. R. CIV. P. 21 ("Misjoinder of parties is not a ground for dismissing an action.").

99. *See* FED. R. CIV. P. 55 (installing two-step default procedure, and even then, with generous set-aside paths).

100. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (stating discovery rules are "to be accorded a broad and liberal treatment" because "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation" and "reduc[es] the possibility of surprise").

101. *See* FED. R. CIV. P. 60(e) ("Bills and Writs Abolished").

102. A principal author of the Federal Rules of Civil Procedure, Yale Dean (and later an appeals court judge) Charles E. Clark made the point eloquently: "The necessity of procedure in the sense of regularized conduct of litigation is obvious. . . . If there are no rules upon which suitors can depend or rely, they can be trapped or misled, while the favored friends of the tribunal are securing special treatment." Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L. REV. 297, 299 (1938).

that knowledge supplies fairness because all players are treated the same, with an equal shot at success or failure, each enjoying perfect strategic autonomy. It's tough to cheat in rock, paper, scissors. That inherent fairness is why we "wanna play" and have for centuries.

So, where does Civil Procedure fit into an integrated 1L curriculum? It is the binding agent. To paraphrase Obi-Wan Kenobi's explanation of the "force" in *Star Wars*, Civil Procedure is what surrounds the law, penetrates the law, and binds the law together.[103] That's how students learn Civil Procedure best. It cannot be taught as a dry abstraction but must always be contextualized. Every case students read in Contracts is Civil Procedure. Every case in Torts, too. And in Property, and Business Associations, and Constitutional Law, and Wills, Trusts, and Estates, and Administrative Law, etcetera. By teaching procedure in context, not only do the Rules come alive but their intrinsic practicality becomes obvious.

Let's try it out.

2. Applying Civil Procedure to Greenacre

We can start with our gravely injured out-of-stater (because you can generally count on a good, nasty tort to get the students' intellectual juices flowing). Being run over by an out-of-control farm tractor sure is a life setback. Our out-of-stater will search for some accountability. That could take the form of a fist-flying brawl with the tractor driver, somewhere back out by the sprouting daisies, but that momentary satisfaction will soon give way to disappointment. Our out-of-stater needs recompense, not just a sweaty fight—he has medical bills to pay, lost income to recover, and future earning capacity to restore (not to mention a little, or not-so-little, something for the pain and suffering).

So, the out-of-stater begins a lawsuit against the tractor driver. He'll do that by filing a complaint, setting out his plausible tort claim against the driver because, after all, that's what the pleading rules require of him. Where will he file that lawsuit? While it sure might be more convenient for him to file back home, his hometown court's need for personal jurisdiction over the tractor driver will pose a formidable obstacle. Should he file in federal court or in state court (and how does

103. *See* STAR WARS (20th Century Fox 1977) (later renamed STAR WARS EPISODE IV: A NEW HOPE).

one choose)? The tractor driver then needs to be notified that he, now, is a defendant in a lawsuit, and that cannot happen by handing a copy of the complaint to the driver's toddler daughter, his forgetful, octogenarian grandmother, or one of the goats. Service-of-process rules require substantially more.

Assuming the tractor driver finally receives good notice that he is in litigation, he cannot just blindly return to goat-breeding and daisy-growing. He must figure out how to respond to that lawsuit, again because the pleading rules obligate him to do so. That time window is short (how short, and why so short?), and his responding options are several (which to choose?).

From the tractor driver's response to the lawsuit, our gravely injured out-of-stater may learn that the tractor driver, while contrite, is also penniless. But, before all hope of a financial remedy is dashed, the out-of-stater learns from the counter-pleading that the tractor driver tried furiously to keep the vehicle under control, but he just could not locate the poorly positioned handbrake. Ahaa! Another defendant! Who in their right mind sells a tractor without a footbrake? Our gravely injured out-of-stater might not know much about farm equipment design, but that seems pretty indefensible—soon, visions of runaway verdicts begin dancing overhead. The manufacturer's culpability now seemingly apparent, the out-of-towner seeks to morph his one-defendant lawsuit into a two-defendant complaint—an easily accomplished task using the amendment and joinder rules. But will the court have jurisdiction over the manufacturer? Yet another pre-filing inquiry to run down.

There is a lot more yet to be known. Is there a chance for punitive damages here? Is the manufacturer so bereft of consumer empathy that it builds accidents-waiting-to-happen masquerading as tractors? As the discovery stage of this litigation unfolds, the out-of-stater is awash in blueprints and mechanical drawings, design team memos and shipping records, emails, and phone messages. Unfortunately for our out-of-stater, he learns that nearly all of this manufacturer's tractors are equipped with foot-pedal brakes. *Nearly* all. This tractor model was designed for paraplegic users who, sadly, must depend on the use of hand controls only to operate the equipment, and the original owner of this particular tractor was, indeed, an accomplished disabled farmer who used the tractor successfully and uneventfully until he retired. That's when Dewey bought the tractor on

an after-market website, secondhand from its original owner. Hmmm. That did not seem like a helpful development and, lo and behold, a motion for summary judgment arrives just a few days later.

We could go on, but you get the point.

In its true, natural, and practical state, the law is not compartmentalized and does not behave as a typical, Balkanized 1L curriculum might suggest. But the pedagogical alternative is a presentation that involves constant, innumerable detours and asides. That manner of presentation is disorienting and inefficient for any audience. When one considers that the 1L curriculum often involves a student cohort that has little preexisting familiarity with the law and legal principles, such detours and asides would, at best, feel like drinking from the proverbial firehose and, more likely, leave the audience lost and in search of a different sort of "bar."

Reinforcing context is the key from the Civil Procedure perspective. Students need to be reminded in each class of the inescapable connectedness within the tapestry of the law. What this injured plaintiff needs to be made whole is a torts question, but it involves an appreciation for place-of-filing strategy and the obligation of pleading plausibly. The tractor's after-market acquisition involves contract, sales, and UCC questions and implicates joinder and pleading amendments. The glowing orange powder blown into the goat paddock from a careless neighbor's farm raises property law questions, and it implicates entry-onto-land production discovery and expert witness disclosures.

The opportunity for creative integration is rich and boundless. The only real pedagogical choice to invite clear comprehension risks is to treat Civil Procedure as an insular, theoretical topic, hermetically cordoned off from all the other legal disciplines it surrounds (and penetrates and binds). Being mindful of connectedness in teaching Civil Procedure is the recipe for success.

C. Rock Breaks Scissors. Rock Wins: Property Law

In RPS, rock fittingly represents property law. The first question typically asked on the first day of property class: so, what is property? Students discover that this question is deceptively simple when they struggle to formulate an answer. The responses usually

uttered range from: "Well, it's property" to "something you own,"[104] to "I don't know, something you have a right to?"[105] However, the truth of defining what constitutes property is far more complex than law students (and many others) expect. There is no uniform answer to this inquiry.[106]

1. Understanding the Basics and Interplay with Property Law

The notion of property has transformed over time and continues to be an amorphous concept. Jeremy Bentham, an 18th-century English philosopher, described property as "nothing more than the basis of certain expectation; namely, the expectation of deriving hereafter certain advantages from a thing (which we are already said to possess) by reason of the relation in which we stand towards it."[107] Further he asserted that property "is not material, it is metaphysical; it is a mere conception of the mind."[108] Even that characterization is not broad enough to encompass how vastly property is defined or viewed. An individual's or a court's concept of property depends on the property denomination by which the individual or court abides.

Gradually, property law developed a normative system of hierarchal ownership, modes of acquisition of those rights, and justifications for enforcing individual and public property rights. "[P]roperty is inescapably relational. When the state recognizes and

104. These definitions are not too far off the mark, depending on which philosophy is followed. *See* O. Lee Reed, *What is "Property"?*, 41 AM. BUS. L.J. 459, 461 (2004) (acknowledging DAVID HUME, A TREATISE OF HUMAN NATURE (L. A. Selby-Bigge & P. H. Nidditch eds., 1978) (1740)); s*ee also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 18–30 (C.B. Macpherson ed., 1980) (1690) (natural right to own property).

105. Reed, *supra* note 105, at 468 (citing Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS XXII 69 (J. Roland Pennock & J. W. Chapman eds., 1980) ("Most people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned by persons*.")).

106. *Id.*

107. JEREMY BENTHAM, THEORY OF LEGISLATION 145 (C.M. Atkinson trans., Clarendon Press 1914) (1802).

108. *Id.*

enforces one person's property right, it simultaneously denies property rights in others."[109]

To aid in a student's understanding of the abstract nature of the concept of property, property professors use the bundle of sticks metaphor.[110] The bundle of sticks represent that property comes with many legally enforceable rights that one may (or may not) have at one time concerning property. Each stick in the bundle represents a right of the owner. Some of the sticks include, but are not limited to, the right to: (1) use and enjoy the property, (2) include others onto an owner's property, (3) exclude others from an owner's property, (4) transfer it, and (5) destroy it.[111] An owner can have all the sticks, some of the sticks, share a stick with another, or give away any number of sticks to an individual while retaining the rest of the bundles. Further, an owner of property can possess the rights of a stick presently but not in the future when that stick transfers to another.

The common law property rules discussed during the first year of law school are often challenging, arcane, and sometimes counterintuitive.[112] Even seasoned attorneys and judges still struggle

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109. Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 277 (1991).

110. The metaphor of a bundle of sticks being representative of property ownership is widely attributable to Justice Cardozo in the 1920s. Cardozo declared, "The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time." BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 129 (1928), However, the first use of the phrase was by John Lewis. Lewis said, "The dullest individual among the people knows and understands that his property in anything is a bundle of rights." JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED States 43 (1888).

111. *See* Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 251–53 (2007).

112. *See, e.g.*, Pierson v. Post, 3 Cai. R. 175, 179–80 (N.Y. Sup. Ct. 1805) (seminal case determining the "ownership" rights to a dead fox carcass); Moore v. Regents of Univ. of Cal., 793 P.2d 479, 493–97 (Cal. 1990) (determining whether the plaintiff has a legal property right in his bodily fluids and tissues to bring an action of conversion against the defendant); John K. Phoebus, *The Rule Against Perpetuities—The Implication of a Reasonable Time for the Performance of a Contingency to the Vesting of Future Interests in Commercial Transactions—Maryland's Hybrid Approach to the Rule Against Perpetuities in Commercial Contexts*, 101 DICK. L. REV. 619, 629 (1997) (discussing modernization efforts regarding the Common Law Rule Against Perpetuities and how "[t]he New York legislature has adopted rules of

with some of these concepts. But property law is much more than discussing rights in dead animal carcasses, dirt, or rocks. Property is the cornerstone of the American dream[113] and is an international human right.[114] It intersects with multiple areas of law, those subjects taught in the first year and beyond. But, again, what does it mean to possess "property"? Property is an ever-evolving construction. Whatever *it* is, there are mechanisms in place to protect it. Tort law, which sets right wrongs, is one process by which an owner of personal and real property may defend his or her right to enjoy the bundle of rights that accompany ownership.

Property can be public or private, and its uses can be for residential, commercial, recreational, or agricultural purposes. If the use is agricultural, such use benefits neighboring properties as well. Farming is essential to not only the farmers but also to civil society. Farms provide food, jobs, and economic growth in the areas where they are located by supplying businesses with local produce and products to sell, and they are useful for providing early and continued educational opportunities in areas such as math, chemistry, husbandry, biology, etcetera. In the primary illustration concerning Ace Dooley, Greenacre Farm is an excellent example of how a farm benefits the owner as well as his local and neighboring state communities. Greenacre Farm supplies local businesses with its crops and provides job opportunities for members of the local community.

Injuries inflicted on one's property or interference with one's rights in property illustrate how property and tort law are quixotically intertwined. Major doctrines of tort law interplay with and buttress axiomatic rights of property owners. Tort law is primarily a body of law that redresses wrongdoing against an individual's person or property. Thus, the underpinnings of tort law doctrines like trespass, conversion, and nuisance are to protect against offenses to one's property interest. A person may have a property interest in a thing like

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construction that specifically rebut the presumptions upon which the oft-criticized unborn widow, slothful executor, fertile octogenarian[,] and precocious toddler cases are based).

113. *See, e.g.*, CHASING THE AMERICAN DREAM: NEW PERSPECTIVES ON AFFORDABLE HOMEOWNERSHIP (William H. Rohe & Harry L. Watson eds., 2007).

114. Universal Declaration of Human Rights, G.A. Res. 217A(III), at art. 17, U.N. Doc. A/810 (1948) ("(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived on his property.").

their body, mind, social or political status, personal property, or real property. These property interests are key components in determining whether an actor has committed a tort at all. RPS can help incoming students grasp where property rights fit in the larger legal system.

Let's try it out.

2. Applying Property Law to Greenacre

Returning to the fact pattern involving Greenacre Farm, the ownership of the farm establishes who has the rights and benefits of the farm and its features, crops, equipment, and animal stocks. Only the owner of Greenacre, or its designee, has the right to alienate the property. When the city slicker attorney asked who owned the farm, that was a good question indeed. The question could not simply be answered by the worker because the individual who may appear to be the owner may not, in fact, be the true owner. An owner is one whose rights to transfer the farm would be legally enforceable in court. So, it would behoove the city slicker attorney to check the county recording office records to ascertain who owns the farm. If it is the deceased uncle, then Dewey Cheatum will not be able to sell the farm—unless the uncle devised the farm to him. If the uncle died without a will, then Cheatum may be an intestate heir depending on who else survives the uncle. As an intestate heir, Cheatum would have an ownership shared interest in the farm with the other intestate heirs. The estate would have a lawsuit for harms caused by the neighbors.

In addition to the land, buildings, and appurtenances, the owner of the farm "owns" the animals, crops, and equipment of the farm. The 500 goats at Greenacre Farm are the personal property of the owner of the farm. As each goat gives birth to another kid, that kid becomes the farm owner's property as well. This is true whether the animals escaped from the farm or remain on the farm. The farm owner's property rights in those animals remain until the owner voluntarily or involuntarily relinquishes its property rights in them. Additionally, any wrongs inflicted on Greenacre Farm are actionable by the owner or others who have a recognizable property right in the farm.

The bases of liability for injury to property vary. Liability for harm to crops and livestock can be rooted in trespass, negligence, strict

liability, or nuisance.[115] Under the common law, the Greenacre Farm owner would have a trespass-against-chattel action against the neighbor for his toothless, bald, and eerily neon orange glowing goats. Trespass-against-chattel cases require a direct and immediate interference with the chattel, necessitating physical contact with the property. Though previously, interference could have been intentional, negligent, or accidental to be actionable, modern law has limited trespass against chattels cases to intentional interference.[116]

The tangible nature of the shiny orange iridescent powder may be viewed as a physical invasion onto Greenacre Farm. Some courts have blended these theories, such as trespass and nuisance[117] or negligence and nuisance, to protect an owner's property interest. In *Martin v. Reynolds Metals Company*, the plaintiffs sued based on the theories of trespass when emissions from an aluminum plant caused harm to a farmer's plants and livestock.[118] The Oregon Supreme Court opined that the wrongful conduct necessary to prove trespass and nuisance are identical.[119] The court determined that "any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist" is trespass.[120] Thus, the court held that

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115. The Restatement (Second) of Torts section 165 defines trespass as

> [o]ne who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.

RESTATEMENT (SECOND) OF TORTS § 165 (1965).

116. *See, e.g.*, Berry v. Frazier, 307 Cal. Rptr. 3d 778, 791 (2023); PROSSER AND KEETON ON TORTS (W. Page Keeton et al. eds., 5th ed. 1984).

117. Martin v. Reynolds Metals Co., 342 P.2d 790, 794 (1959).

118. *Id.* at 791.

119. *Id.* at 792.

120. *Id.*

Reynolds Metals' actions in causing chemical substances to be deposited onto Martin's land constituted a trespass.[121]

The Latin legal maxim *Sic utere tuo ut alienum non landas* is a foundational principle in nuisance claims essentially meaning that one should not use his land in any way that causes injury to another.[122] This maxim was forever intermeshed with nuisance actions by Sir Edward Coke in *Aldred v. Benton* ("*Aldred's Case*").[123] In *Aldred's Case*, the plaintiff brought an action against his neighbor due to the neighbor's building blocking the light onto his property and for the foul odor produced by the neighbor's pigsty that had wafted over to the plaintiff's property.[124] The defendant raised a sound defense by arguing that "the building of the house for hogs was necessary for the sustenance of man: and one ought not to have so delicate a nose, that he cannot bear the smell of hogs."[125] Sir Coke, on behalf of the Common Pleas Court, affirmed the jury verdict that an action lay against the defendant on both counts.[126]

Over time, *Aldred's Case* has been believed to hold that when a person uses his or her property in a way that injures the land or an incorporeal right of his or her neighbor, without physically entering onto his neighbor's land, then a private nuisance claims lies.[127] The Restatement (Second) of Torts sets forth three elements for nuisance to be actionable: the interference with the use and enjoyment of land must either be substantial, intentional, and unreasonable, or substantial and

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121. *Id.* at 797.

122. *See* R. Makowski, *Torts: The Nature of Nuisance*, 33 MARQ. L. REV. 240, 240 (1950).

123. *William Aldred's Case*, (1611) 77 Eng. Rep. 816; 9 Co. Rep. 57 b.

124. *Id.*

125. *Id.* at 817.

126. *Id.*

127. *See, e.g.*, Morgan v. High Penn Oil Co., 77 S.E.2d 682, 689 (N.C. 1953) ("[N]uisance is a field of tort liability rather than a single type of tortious conduct; that the feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance; that the invasion which subjects a person to liability to private nuisance may be either intentional or unintentional; . . . and that a person is subject to liability for an unintentional invasion when his conduct is negligent, reckless[,] or ultrahazardous.").

unintentional due to a negligent, reckless, or abnormally dangerous activity.[128]

The drafters of the Restatement define "interest in the use and enjoyment of land" in a broad sense.[129] The term embodies present uses of land and the owner's interest "in having the present use value of the land unimpaired by changes in the physical condition."[130] The drafters noted that damage on vacant land impinges on an owner's interest as much as destruction of crops and flowers.[131] The phrase also encompasses "pleasure, comfort and enjoyment which a person normally derives from the occupancy of land."[132] Nuisance protects the land owner from "discomfort and annoyance" while occupying the land, which is "an interest in the usability of land."[133] Emblematic nuisance cases include air and water pollution,[134] noise annoyances,[135]

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128. RESTATEMENT (SECOND) OF TORTS §§ 821F, 822 (1979). The Restatement (Second) of Torts section 822 details the elements for private nuisance, providing that the actor is liable for damages the plaintiff establishes the following:

> non-trespassory invasion of another's interest in the private use and enjoyment of land if, (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and (b) the invasion is substantial; and (c) the actor's conduct is a legal cause of the invasion; and (d) the invasion is either (i) intentional and unreasonable; *or* (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.

Id. § 822.

129. *Id.* § 822 cmt. a, c, g, & i.

130. *Id.* § 822 cmt. b.

131. *Id.*

132. *Id.* § 822 cmt. e.

133. *Id.* § 821D cmt. b.

134. *See, e.g.*, Cook v. DeSoto Fuels, Inc., 169 S.W.3d 94, 100 (Mo. Ct. App. 2005).

135. *See, e.g.*, Asmann v. Masters, 98 P.2d 419, 420 (Kan. 1940).

odor intrusions, smoke,[136] loud vibrations,[137] flooding,[138] and excessive[139] or inadequate light.[140]

The objective of the tort of private nuisance is to safeguard an individual's "property rights and privileges" regarding the affected use or enjoyment.[141] It springs from the "right to exclude" stick in the bundle of rights that a landowner has.[142] Thus, the most essential element for nuisance is a property right in the subject property. In fact, the Restatement (Second) of Torts section 823 outlines which persons have the right to assert a cause of action under section 822. They include: (1) possessors of land; (2) easement and profits owners of the affected land; (3) owners of non-possessory estates in land that "are detrimentally affected by interferences with the usability of the land."[143]

Based on section 822, courts have recognized three forms of private nuisance: (1) intentional nuisance; (2) negligent nuisance (act of interference caused by an actor's unreasonable conduct); or (3) strict liability nuisance. Intentional nuisance "requires that actor act with purpose or intent of causing nuisance, or know it is substantially certain to result from his or her conduct."[144] The actor must intentionally interfere with use and enjoyment of a property interest. When nuisance is predicated on negligence, as the court in *Milwaukee Metropolitan*

136. *See, e.g.*, Riter v. Keokuk Electro-Metals, Co., 82 N.W.2d 151, 161–62 (Iowa 1957).

137. *See, e.g.*, Stiglianese v. Vallone, 637 N.Y.S.2d 284, 285 (N.Y. Civ. Ct. 1995) (analyzing whether a neighbor's rock band practice constituted a nuisance because it deprived a homeowner of beneficial use and enjoyment of their property).

138. *See, e.g.*, Wiggins v. City of Burton, 805 N.W.2d 517, 530–35 (Mich. Ct. App. 2011).

139. *See, e.g.*, Andrea L. Johnson, Note, *Blinded by the Light: Addressing the Growing Light Pollution Problem*, 2 TEX. A&M J. PROP. L. 461, 466, 472 (2014).

140. *See, e.g.*, Prah v. Moretti, 321 N.W.2d 182, 184 (1982) (looking at a private nuisance claim by homeowner with solar-paneled home based on proposed construction of a residence that would block the homeowner's unobstructed access to sunlight).

141. RESTATEMENT (SECOND) OF TORTS § 821E cmt. a (1979).

142. *See* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 972–73 (2004).

143. RESTATEMENT (SECOND) OF TORTS § 823 (1979).

144. RESTATEMENT (SECOND) OF TORTS § 825 cmt. c (1979).

Sewage District v. City of Milwaukee[145] stated, "there must be proof that the defendant's conduct constitutes actionable negligence, including proof of notice, regardless of whether the alleged nuisance is public or private."[146] To assert a claim for injury to the physical condition of another's land and chattels under negligence, the claimant must prove the same elements as necessary for bodily harm negligence.[147] The conventional elements of negligence are (1) duty, (2) breach of duty, (3) causation and (4) damages.[148] Property owners have a duty to exercise reasonable in the maintenance and use of its property to prevent foreseeable harm to adjoining property.[149] The owner must assert the alleged wrongdoer carried on activities he or she knew or should have been known to involve an unreasonable risk of physical harm to the landowner.[150] One may be culpable for interference caused by an actor's abnormally dangerous activities which may be "out of place in its surroundings" under strict-liability nuisance.[151] Strict Liability nuisance arises "out of conduct that constitutes an 'abnormally dangerous activity' or involves an abnormally 'dangerous substance' that creates a 'high degree of risk' of serious injury."[152]

Employing the framework outlined by the Restatement (Second) of Torts section 822 to assess the liability for the intrusions to Greenacre Farm, the owner of Greenacre Farm has a prima facie claim of nuisance based on either theory of negligence or strict liability. As previously stated, nuisance is a tort that shields a property interest. Thus, the owner of Greenacre Farm must assert that (1) it has property rights and privileges concerning the use or enjoyment interfered with; (2) the invasion is substantial; (3) the neighbor's conduct is a legal cause of the invasion; and (4) the neighbor's invasion was unintentional

145. *See* Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 691 N.W.2d 658 (Wis. 2005).

146. *Id.* at 648–49.

147. RESTATEMENT (SECOND) OF TORTS § 497 (1979).

148. *See* White v. Spenceley Realty, LLC, 53 V.I. 666, 673 (V.I. 2010).

149. *See* Broxmeyer v. United Capital Corp., 914 N.Y.S.2d 181, 184 (N.Y. App. Div. 2010).

150. *See* RESTATEMENT (SECOND) OF TORTS § 371 (1979).

151. City of Tyler v. Likes, 962 S.W.2d 489, 503 (Tex. 1997).

152. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 609 (Tex. 2016).

and otherwise actionable under the rules governing liability for negligent, reckless, or abnormally dangerous conduct.[153]

The facts exemplify the neighbor's culpability for nuisance under section 822 due to his negligent or abnormally dangerous conduct in improperly handling toxic materials. The first element is met because the owner has title to Greenacre Farm or some other type of possessory or nonpossessory right in Greenacre Farm. The use and enjoyment of the farm have been interfered with by the owner's inability to exclude the neighbor's intrusion, the toxic materials, from coming onto its land. The farm, livestock, and crops are covered in glowing iridescent orange dust. The owner's right to have livestock, land, and crops free from contamination has been interfered with by the neighbor. The second element requires the invasion to be substantial. In an unintentional invasion, it is the negligent conduct of the neighbor that invades the interest of another. Here, the improper storage of the highly toxic radioactive material on the neighboring farm caused the goats' unpleasant state and damage to crops. This affects the value of the farmer's livestock and land, which is substantial.[154] Also, the physicality of the land and animals have been changed. Third, the injury is directly linked to the neighbor's conduct, his failure to store the radioactive shiny orange iridescent powder. Fourth, the neighbor had a duty to store his toxic material properly and the failure to do so caused harm to Greenacre Farm. Further, the owner of Greenacre Farm did not conduct himself in a manner that has disabled him from bringing an action for the neighbor's invasion on its property.[155] Courts consider the level of the defendant's interference as the principal because the defendant's conduct is of no importance.[156]

During orientation, professors could use RPS to engage students and demonstrate that the underlying precept of nuisance law is the protection of one or more sticks from the bundle of sticks. Particularly, this will help students appreciate the interwovenness of Torts and

153. RESTATEMENT (SECOND) OF TORTS § 822 cmt. m (1979).

154. The interference must be more than a minor annoyance. It must be a "significant annoyance, material physical discomfort or injury to a person's health or property." *See* The Shadow Grp., L.L.C. v. Heather Hills Home Owners Ass'n, 2003 WL 346386, at *2 (N.C. Ct. App. 2003).

155. RESTATEMENT (SECOND) OF TORTS § 281 (1979) (statement for elements for unintentional nuisance based on negligence).

156. *See* Jost v. Dairyland Power Coop., 172 N.W.2d 647, 653 (Wis. 1969).

Property. Another's actions, if they amount to nuisance or trespass, may be enjoined or result in liability to the owner for damages. Because it is the property right that is most essential to the genesis of the tort, in the game of RPS, rock (Property) breaks scissors (Torts). Without the primary property right, there would be no tort.

Rock crushes Scissors.

D. Paper Covers Rock. Paper Wins: Contract Law

Contract law is represented by paper in the RPS game. Paper seems flimsy as game material. It doesn't do a lot on its own; it could become something useful like an airplane or spitball. But in and of itself, paper is an underwhelming object. The often-misattributed quote, "a verbal contract isn't worth the paper it's written on," reminds us however that contracts memorialized on paper are the easiest to protect, prove, perform and enforce.[157] What is placed on the paper, i.e., the writing, gives the paper its power; thus, the words added to paper transform it into either a powerful sword or shield.

1. Understanding the Basics and Interplay with Contract Law

An agreement is a contractual arrangement that is mutually assented to between two or more parties and is recognized as legally binding.[158] It is legally enforceable because it is a vehicle that grants and preserves rights and obligations through the creation of a relationship which entails an exchange of some kind. It may be an exchange of promises, a promise to perform an act or action, or a promise to refrain from doing something.[159] In sum, an agreement or contract is a private legal relationship between two or more parties.[160]

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157. This quote has been attributed to Samuel Goldwyn as early as 1937, but he denied making the statement later. *See A Verbal Contract Isn't Worth the Paper It's Written On*, QUOTE INVESTIGATOR (Jan. 6, 2024), https://quoteinvestigator.com/2014/01/06/verbal-contract/. The quote has also been traced back to a joke printed in an 1890s copy of *The Irish Times and Solicitors' Journal* and an 1890 article in the *Rocky Mountain News* in addition to other subsequent appearances. *Id.*

158. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981).

159. *Id.*

160. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981); *Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See generally* Cates Constr., Inc. v.

Law students are often surprised to learn that they have been surrounded by contracts for years and have themselves been repeatedly contracting themselves for years without ever giving any thought to the obligations and rights that they have been establishing. Every trip to the grocery store or department store to buy a good was a contract; every Friday or Saturday night at the movie theater included at least one contract (two if they splurged for popcorn); and each after-school or summer job was based in contract law. Even when the law students were much younger children, contracts seeped into their favorite childhood movies. In *The Little Mermaid*, Ursula the sea witch contracts with Ariel: Ariel's angelic voice in exchange for becoming human for three days.[161] Jack from *Jack and the Beanstalk* traded his family cow for magic beans.[162] Rumpelstiltskin contracts with a young girl: straw spun into gold in exchange for her first child.[163]

Thus, as a legally enforceable instrument, a contract creates a set of default rules for the contracting parties, and it also creates social incentives. The default rules are retroactive and apply to the promises of the parties as manifested in the contract. When courts generally weigh in on contract formation, interpretation, performance, and remedies, then predictability and uniformity are preserved for future contractors. Predictability and uniformity motivate future contracting parties with important social incentives that affect the assignment of risk between the parties; policing unfair or unequal bargaining power;

Talbot Partners, 980 P.2d 407, 427 (1999) ("[c]ontract [sic] law exists to enforce legally binding agreements between parties; tort law is designed to vindicate social policy."); Wallis v. Brainard Baptist Church, 509 S.W.3d 886, 898–99 (Tenn. 2016) ("A contract is an agreement between two or more persons that creates obligations that are legally enforceable by the contracting parties.").

161. THE LITTLE MERMAID (The Walt Disney Co. 1989); *see also* Michael A. Baldassare, *Cruella De Vil, Hades, and Ursula the Sea-Witch: How Disney Films Teach Our Children the Basics of Contract Law*, 48 DRAKE L. REV. 333, 337–38 (2000).

162. J. Roberts, *The Story of Jack Spriggins and the Enchanted Bean*, *in* ROUND ABOUT OUR COAL FIRE 35, 36 (2d ed. 1734).

163. Rumpelstiltskin was a short story in *Grimm's Fairy Tales* by the Brothers Grimm published between 1812–1822. *See Rumpelstiltskin*, GRIMMS' FAIRY TALES, https://www.grimmstories.com/en/grimm_fairy-tales/rumpelstiltskin (last visited Mar. 15, 2024).

creating course of performance[164]; and interpretating and construing contract language; as well as creating precedent.

Freedom to contract, which is a cornerstone of common law contract law, applies throughout the contract decision-making process and is not unlimited. As with everywhere else in life, contract rules and principles are necessary to prevent inequity and misunderstanding. Thus, contracting parties and courts rely on state law and statutes, case law, the Uniform Commercial Code, the Restatement (Second) of Contracts, and scholarly treatises.[165]

Parties may agree to exchange money, goods, services, or rights.[166] Contract formation may occur spontaneously or by way of protracted negotiations concluding with a written agreement. A contract may result from a verbal agreement, written agreement, or through conduct by the parties.[167] Contracts that are an exchange of promises are called bilateral contracts,[168] while contracts that involve an exchange of a promise for performance are called unilateral contracts.[169] Furthermore, parties enter into contracts with an expectation that there will be a benefit for them. Therefore, contract formation is the first important phase on the contract continuum. Formation is the moment when obligations and rights are established through the creation of a valid contract—a starting point from which performance may commence.

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164. U.C.C. § 1-303(a) (AM. L. INST. & UNIF. L. COMM'N 2012) ("A 'course of performance' is a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.").

165. *See generally* E. ALLEN FARNSWORTH, CONTRACTS (4th ed. 2004); JOHN E. MURRAY, JR., MURRAY ON CONTRACTS (5th ed. 2011).

166. Contracts for real property and services are governed by the common law, and contracts for the sale of goods are governed by the UCC. *See generally* RESTATEMENT (SECOND) OF CONTRACTS (1981); U.C.C. (AM. L. INST. & UNIF. L. COMM'N 2012).

167. RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981).

168. *See* Davis v. Jacoby, 34 P.2d 1026, 1029 (Cal. 1934).

169. *Id.* The Restatement (Second) of Contracts does not make a distinction between bilateral and unilateral contracts, which is a change from the Restatement (First) of Contracts. RESTATEMENT (SECOND) OF CONTRACTS § 1 reporter's notes to cmt. f (1981).

A valid contract requires mutual assent and consideration.[170] Mutual assent is often defined as the process of offer and acceptance.[171] An offer is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[172] Acceptance of an offer is the reciprocal manifestation of assent to offered terms in the manner and means required by the offeror.[173] The offeror, as the master of the offer, may stipulate the means by which acceptance is carried out either through performance or by promise.[174]

Consideration is the bargained-for exchange that induces the parties to enter the contract, the belief that each will be better off because of the contract.[175] The Restatement (Second) of Contracts is silent on the correlation of value or price of the bargain relating to the subject matter of the contract; rather, it sets forth the simple requirement that an actual bargain be present. This leaves contracting parties broad leeway in creating their bargain and gives courts latitude in interpreting the bargain itself. However, a lot of leeway in creating and interpreting bargains is both a blessing and a curse. Leaning too far to the side of flexibility can lead to the conclusion that the bargain was illusory[176] and thus non-existent; too far the other way and under strict construction principles, a chilling effect may be created on business dealings. Thus, courts typically limit their focus to whether or not the consideration was actual and true and not a sham, mere gesture, or illusion.[177]

Once a contract has been validly formed, if it is enforceable,[178] it will vest the contracting parties with obligations to perform and rights

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170. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981); *see also* Garza v. Perry, 523 P.3d 822, 831 (Wash. Ct. App. 2023).

171. RESTATEMENT (SECOND) OF CONTRACTS § 22 (1981); *see also* Cano v. State Farm Mut. Auto. Ins. Co., 425 F. Supp. 3d 779, 790 (W.D. Tex. 2019).

172. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).

173. *Id.* § 50(1).

174. *Id.*

175. *Id.* § 71.

176. *Id*. § 77; *see also* Wood v. Lucy Lady Duff-Gordon, 118 N.E. 214, 214–15 (N.Y. 1917).

177. *See* Batsakis v. Demotsis, 226 S.W.2d 673, 675 (Tex. Civ. App. 1949).

178. Valid contracts must have demonstrable mutual assent and consideration. When a valid contract is not subject to any affirmative defense such as the Statute of

to require performance. Upon a showing of enforceability, the court will assist in strictly enforcing the contractual rights and obligations. Thus, contract law as a law school subject spans the cradle-to-grave study of the formation, performance, and remedies of contracts. The course discusses pre-contract negotiations, the requirements for valid and enforceable formation of a contract, all of the situations that can occur in the discharge of obligations phase of a contract, (also known as the performance phase) and finally, the remedies available to a non-breaching party if there has been a breach of contract. The contract law course will also include a study of equity principles and equitable vehicles available to parties if a contract has not been properly performed but relied upon, nonetheless.[179]

During the discussion of contract law, the other first-year subjects arise early and often. When students begin briefing their contracts cases in their textbooks, students are confronted with procedural questions relating to the litigation that gave rise to the case in their textbook. In order to understand how the contract dispute arrived in court, a contemporaneous understanding of Civil Procedure is necessary. The land or real estate contract issues require recognition and understanding of the rights and obligations tied to real property, i.e., property law. Finally, as first-year students start to tackle issues such as affirmative defenses[180] to contract claims, they are introduced to vocabulary that they have already learned in Torts. Both Torts and Contracts will discuss misrepresentation and fraud.[181] Tort law and contract law will also both explore punitive and emotional distress

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Frauds, lack of capacity, duress, unconscionability, mistake, misrepresentation, fraud, impossibility, impracticability, or frustration of purpose, the contract is deemed to be enforceable. *See generally* RICHARD A. LORD, WILLISTON ON CONTRACTS (4th ed. 1991).

179. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (**"**A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.").

180. An affirmative defense to a contract claim of breach acts as a justification to excuse the non-performing party and relieve them of liability. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 110–272 (1981).

181. "A misrepresentation is an assertion that is not in accord with the facts." RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981). *See generally* H-M Wexford LLC v. Encorp. Inc., 832 A.2d 129 (Del. Ch. 2003).

damages.[182] Thus, the inter-relatedness of contract law with the other areas of law taught in the first year of law school is present not only from the start of class but also well before a student even walks through the law school door.

However, students will focus almost entirely on the contract law issues in their contracts reading and either ignore or discount the importance of the Civil Procedure, Property and Torts issues that are comingled. By giving students a primer on how these other subject matters influence and affect the outcome of a contract dispute, professors provide an essential framework for how our body of law works as a multi-component system. By introducing this collaboration early in orientation through RSP, students will be better equipped to focus on the contractual principles and issues presented in contracts class throughout the academic year.

Let's try it out.

2. Applying Contract Law to Greenacre

Looking at our hypothetical, contract law is relevant as soon as Ace Dooley arrives by some means of transportation. Whether he bought or rented a car and drove to Greenacre Farm or rode a bus or bike, he entered into a contract for the purchase of the good, lease of the good, or passageway as a service. If Greenacre Farm is charging an admission fee to visitors to the farm, a contract is created between the farm and its visitors. Ace Dooley can check another contract off his list by simply paying to access the premises.

Looking around, Ace Dooley, having studied the Uniform Commercial Code, immediately recognizes that the growing crops of beets and corn are *ripe* for contracting. At first blush, he may have assumed that growing crops affixed to the land lead to a real property issue. However, under UCC section 2-105(1):

> "[g]oods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action. "Goods" also includes the

182. RESTATEMENT (SECOND) OF CONTRACTS §§ 353, 355–56 (1981).

> unborn young of animals and *growing crops* (emphasis added) and other identified things attached to realty as described in the section on goods to be severed from realty.[183]

Thus, the beets, corn, and daisies, while being part of the land, are goods capable of being bought and sold via contract law and, specifically, through the use of UCC Article 2.[184] All of the equipment, such as the tractors, combines and irrigation systems, also fall under the UCC definition of goods[185] and are acquired through contractual sales-purchase relationships. The goats are likewise UCC goods, and while the farm runs a breeding business, any "unborn young of the animals" will also fall under the UCC definition of goods.[186]

Ace Dooley sees contracts everywhere he turns. Some have been executed or performed already while others remain executory.[187] Some contracts may fall under the classification of output or requirement contracts.[188] Additionally, the successful growing of the crops and raising of the goats will necessitate the purchase of fertilizer and feed by Greenacre Farms. The purchase of these items will be made by way of another series of contracts. The equipment may need fuel, water, or electricity to function properly. The supply of the fuel or utility services will be provided by way of more contractual relationships. These may be ongoing supply agreements that also give rise to output or requirements contracts.[189]

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183. U.C.C. § 2-105 (AM. L. INST. & UNIF. L. COMM'N 2012).

184. *See id.*

185. *See id.*

186. *See id.*

187. *See generally* Knaebel v. Heiner, 673 P.2d 885, 887 n.5 (Alaska 1983) (citing *Executory Contract*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

188. U.C.C. § 2-306 (AM. L. INST. & UNIF. L. COMM'N 2012) ("A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.").

189. *Id.*; *see generally* FARNSWORTH, *supra* note 166, at 82 (citing Lacledge Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975)) ("A requirements contract is one under which the seller agrees to sell and the buyer to buy all of the goods of a particular kind that the buyer may require. It assures the buyer of a source for those goods for

Unless the owner of Greenacre Farm is wholly responsible for all of the work being carried out on the farm, employment contracts will be necessary before hiring employees. We know from the hypothetical that the farm does in fact have employees. Each employee will have an employment agreement which is a service agreement. If ever there was a time to have bought (contracted for) a notepad, now is the time thinks Ace Dooley. He needs paper and pen just to keep track of all the contracting swirling around him.

The farmhouse, barns, silo, and greenhouse on Greenacre Farm have not, presumably, magically appeared on the land or fallen from the sky like Dorothy's house in *The Wizard of Oz*.[190] Their arrival and attachment on the property is also the result of successful contracts and contract law. The farmhouse and barns may have been built according to construction contracts. If the farm owners built the house and barns themselves, then they likely purchased the component elements such as lumber, nails, and steel, which are all goods under UCC Article 2.[191] By doing such, they have entered into a series of contracts for the purchase of building supplies. It is possible that the silo or greenhouse were contracted for and delivered to the farm. The delivery of the silo and greenhouse would likely include a series of transportation and construction or installation contracts which is each governed by common law contract law. The ownership of the farm and all of its buildings are surely protected against calamity by way of insurance.[192] The purchase of insurance is carried out with a contract.

When Ace Dooley overhears the discussion between the slick city attorney and the farm foreman, they are discussing the purchase of the farm. While the subject matter of their discussion is clearly the land and the farm, i.e., real estate, the fulfilment of their proposed deal

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the contract period. An output contract is one under which the seller agrees to sell and the buyer agrees to buy all of the goods of a particular kind that the seller may produce in it business."); R.A. Weaver & Assocs., Inc. v. Asphalt Constr., Inc., 587 F.2d 1315 (D.C. Cir. 1978); MDC Corp. v. John H. Harland Co., 228 F. Supp. 2d 387 (S.D:N.Y. 2002).

190. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

191. U.C.C. § 2-105 (AM. L. INST. & UNIF. L. COMM'N 2012).

192. For an explanation of insurance contracts and general liability, see Ronald M. Sandgrund & Leslie A. Tuft, *Liability Insurance Coverage for Breach of Contract Damages*, 36 COLO. LAW. 39, 43–44 (2007) (discussing the contractual obligations assumed in insurance contracts and when breach of contract versus tort liability is the appropriate remedy).

requires a contract. Thus, if the farm or real property law is the Rock in the RPS game, and contract law is Paper in the RPS game, contract law will prevail over property law in achieving the parties' objectives. Additionally, any sale of land or real estate must be memorialized with a writing to satisfy the Statute of Frauds.[193]

Paper covers Rock.

When the farm manager agrees to sell their beets, corn, and daisies to various merchants, they are negotiating contracts. As seen above, each of these crops is qualified as a good and thus personal property.[194] The contracts in buying all of the flowers grown at the farm may also eventually become output contracts governed by the UCC Article 2 while the beet and corn contracts will become requirements contracts under the UCC Article 2.[195] Once again, if the farm is looking for a financial gain from their crops, they must rely upon the contractual vehicle to achieve their goals. If the parties do not have all the information they need, they can also rely on contract law gap fillers.[196] Signed purchase orders for personal property may also be contractual "offers" capable of being accepted and eventually enforced.[197]

Paper covers Rock.

Finally, Ace Dooley overhears Dewey Cheatum, the purported owner of Greenacre Farm, discussing the sale of the farm with the city lawyer. Dewey Cheatum seemingly states that he may not actually be the owner of the business enterprise. Dewey Cheatum stated that he lived on the farm, took care of his uncle and the farm, made improvements to the land, and assumed he would inherit it when the uncle died. Now that the uncle has passed away, he wants to contract

193. RESTATEMENT (SECOND) OF CONTRACTS §§ 125–29 (1981).

194. U.C.C. § 2-105 (AM. L. INST. & UNIF. L. COMM'N 2012).

195. *Id.* § 2-306.

196. "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." *Id.* § 2-204(3). Thus, the UCC allows for contract formation without all the necessary terms because the UCC can default to gap filler provisions as long as the parties have manifested intent to be bound and a reasonable basis for providing a remedy exists. *See id.*

197. *See* Cobaugh v. Klick-Lewis, Inc., 561 A.2d 1248, 1249 (Pa. Super. Ct. 1989) (citing RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981)) ("An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conduct it.").

for the sale of Greenacre Farm quickly. Whether the uncle and Dewey Cheatum had a valid contract for the transfer of ownership of the property is unknown. There is also no mention of the uncle's last will and testament.[198] Furthermore, the contract-equity issue of promissory estoppel may be triggered if the uncle promised the land to Dewey Cheatum, and Dewey Cheatum gave up a prior benefit or job and moved to the farm to take on the operational activities. It was reasonably foreseeable to the uncle that Dewey Cheatum would make this move and that Dewey Cheatum actually detrimentally relied upon the uncle's promise, and if he does not own Greenacre Farm, he will incur an injustice or an injury.[199] It appears that ownership of the farm, i.e. the property, will involve contract law once again.

Paper covers Rock.

E. Scissors Cuts Paper. Scissors Wins: Tort Law

This matchup may make the most sense from a pedagogy standpoint. The pairing and pitting of contract law with tort law often arise in contracts because a breach of the covenant of good faith and fair dealing implicit in every contract is an action *ex contractu* (consequences from breaching a contract), and a breach of the duty of good faith and fair dealing implicit in every contract is also an action *ex delicto* (consequences of a tortious action).[200] This gives rise to the term "contort." As contrasted with a contract claim, a tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability.[201] In the context of torts,

198. When there is an enforceable contract to create a will or dispose of certain property, not revoke a will, etc., the will disposition is governed by contract law first, then wills, trusts, and estates law second. UPC section 2-514 sets forth what is necessary to have an enforceable contract related to a will. UNIF. PROB. CODE § 2-514 (amended 2019); *see also* Pederson v. First Nat'l Bank of Superior, 143 N.W.2d 425, 428 (Wis. 1966) ("A contract to make a will or to enter into a mutually satisfactory disposition remains in effect until the contract is discharged by performance or until it is abandoned by mutual consent or rescinded by agreement.").

199. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

200. *See* J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 1–19, 53–69 (1888) (discussing the common law recognition and division of causes of action that have its bases in tort and contract).

201. RESTATEMENT (SECOND) OF TORTS § 7 (1965).

"injury" describes the invasion of any legal right whereas "harm" describes a loss or detriment in fact that an individual suffers.[202]

1. Understanding the Basics and Interplay with Tort Law

A tort claim consists of the elements of duty, breach, causation, and damages. The primary aims of tort law are to provide relief to injured parties for harm caused by others, to impose liability on parties responsible for the harm, and to deter others from committing harmful acts. Torts can shift the burden of loss from the injured party to the party who is at fault or better suited to bear the burden of loss.

Typically, a party seeking redress through tort law will ask for damages in the form of monetary compensation, although other tort remedies may also be available. Tort law is distinct from contract law, particularly with regard to damages. Although a party may have a strong breach of contract case under contract law, a breach of contract is not typically considered a tortious act.[203]

A typical first-year torts class is divided into three general categories: intentional torts (e.g., intentionally hitting a person); negligent torts (e.g., causing an accident because of carelessness); and strict liability torts (e.g., liability for making and selling defective products.) Intentional torts are wrongs that the defendant knew or should have known would result through his or her actions or omissions.[204] Negligent torts occur when the defendant's actions were unreasonably unsafe. Unlike intentional torts and negligent torts, strict liability torts do not depend on the degree of care that the defendant used. Rather, in strict liability cases, courts focus on whether a particular result or harm manifested.[205]

The distinction between tort and contract generally focuses on whether the plaintiff can recover damages in tort or contract. Recovery in contract is predicated on a breach of contract and damages are limited to the benefit of the contract. For recovery in tort, there must be a showing of harm above and beyond disappointed expectations.[206]

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202. RESTATEMENT (SECOND) OF TORTS § 7(1) (1965).

203. DAN B. DOBBS, THE LAW OF TORTS § 1 (2000).

204. *Id.* § 2.

205. *Id.*

206. Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1246 (Fla. 1993).

Contract law protects a plaintiff's expectations. Tort law is defined by the duty owed to an injured party.[207]

Additionally, because tort damages are not restricted to the "benefit of the bargain" as contract damages are, not only may a plaintiff recover compensatory damages (e.g., medical bills, pain and suffering, future damages, lost wages, inconvenience), but the plaintiff may also recover punitive damages. Punitive damages in tort are designed to punish the tortfeasor for reprehensible conduct as well as deter the wrongdoer and others from committing like offenses in the future.[208] An example of the difference in tort and contract damages arose in *Mitchell v. Fortis*,[209] wherein "[t]he jury awarded [the plaintiff] $186,000 in compensatory damages, including $36,000 on the breach of contract claim and $150,000 on the [tort] bad faith . . . claim."[210] The jury also awarded $15 million in punitive damages for the tort bad faith claim to punish the defendant for its reprehensible behavior and to deter the insurance company and others from engaging in like conduct.[211] A plaintiff is not limited in bringing the claim as either tort or contract. Rather, the plaintiff may bring the action as both a tort claim and a contract claim as both may arise out of the same contract. However, the plaintiff must elect between damages and may not recover in both tort and contract. Because tort damages will almost always be larger than contract damages, especially when punitive damages are awarded, the plaintiff most often elects tort damages.

Scissor cuts Paper.

Let's try it out.

2. Applying Tort Law to Greenacre

An incident occurs when the errant tractor gravely injures a farm visitor at Greenacre Farm. The tractor has been recently purchased, by way of contract, although the buyer/farmer did not read the terms and conditions governing the sale of the equipment nor did he read the user

207. *Id.* at 1246.

208. *See, e.g.*, State Farm Mutual Auto. Ins. v. Campbell, 538 U.S. 408, 409 (2003); Gamble v. Stevenson, 406 S.E.2d 350, 355 (S.C. 1991); Mitchell v. Fortis Ins. Co., 686 S.E.2d 176, 183 (S.C. 2009).

209. 686 S.E.2d at 182.

210. *Id.*

211. *Id.*

manual. Whether the disclaimer of the warranty of fitness is valid will be a contractual question. However, if the tractor has a design, manufacturing, or warning defect, this may trigger a products liability claim or negligence issue. Products liability and negligence fall under the umbrella of tort law. In this case, tort law (Scissors) will prevail over contract law (Paper). Scissor cuts Paper.

As Ace Dooley makes his way to his car, he notices the farm pathway is covered by slippery river rocks. If he was in fact a paying visitor and subsequently slips and falls on the rocks, he will have a cause of action against the farm. Supposing that the entrance ticket Ace bought stated on its back that the farm "represents that it is a safe, secure and happy family place to visit," Ace may consider suing the farm for damages sustained in his fall. If Ace sues the farm under the law of contract, he may seek one of three remedies: his expectation interest, his reliance interest, or his restitution interest. If he seeks his reliance or restitution interest and prevails, he will be compensated in a manner to be effectively placed back in the position he was in prior to the ticket contract. If Ace sues for his contractual expectation interest, he will be compensated with the goal of placing him in the position he would have been in if the ticket contract had not been breached. However, Ace will not be able to recover anything more than what he either expended or expected under contract law. Punitive damages, which are meant to punish or sanction a breaching party, are not generally available under the law of contracts. If Ace wished to pursue a cause of action to compensate him for his medical bills, pain and suffering, inconvenience, lost time from law school classes, etcetera, and that included punitive damages, allowing him to be compensated for the damages associated with the tortious conduct of the farm, he would have to sue in tort. In this case, tort law, Scissors, will prevail over contract law, Paper.

Scissors cuts Paper.

V. CONCLUSION

Law school orientation does not require a complete overhaul with new legal philosophies, strategies and objectives. Everything that law schools need to create meaningful and helpful introductory orientation programs for incoming first-year law students already exists somewhere in the tomes of the history of legal education. By looking

at the past and borrowing the old tradition of the Elementary Law course and repackaging it into a short, cotaught orientation module, law students will receive the benefit of an introduction to law school that is formative and informative.

> Orientation can provide the road map by providing and reinforcing syntactical, substantive, and pedagogical contexts. In so doing, orientation can lessen students' stress and enable them to focus on developing the skills and understanding the content of what they are learning. . . . Such context will enable students to calibrate their study methods to maximize learning.[212]

By combining the first-year doctrinal classes into one fun and exciting hypothetical, the basis of the game, students can play with the facts, the terminology, the courses and legal concepts. Framing the module within the RPS game means that students do not have to struggle to understand the structure of the game before they play it. Thus, they will not only be prepared for the beginning of their legal studies but will look forward to them with an understanding of how the law and jurisprudence work as a whole and not in a vacuum. Orientation will be informative, engaging, and fun and lead to an easy transition to classwork.

While the evolutionary nature of the law requires law schools and law professors to be flexible and adapt to changes, the origins of law school and the art of teaching law students should never be lost. Old ideas need to be dusted off, updated, and presented with a flair of modern creativity to make the elementary basics relevant again today. These fundamental educational foundations when provided through play can only benefit the future lawyers whose education is entrusted to university faculty on the first day of orientation. In this game, we all win.

212. Lustbader, *supra* note 71, at 345.