

Teaching Torts by Integrating Ethical, Skills, Policy and Real-World Issues, and Using Varied Pedagogical Techniques: Reflections on Using the Henderson, Pearson and Siliciano Casebook

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I. INTRODUCTION

As a new law professor in 1991, I expressed interest in teaching Torts and was so assigned. At the law school where I work, Torts is a two-semester class mandatory for the first-year students. In the past, Torts was a six-credit class but has, along with other first-year subjects, recently been reduced to five credits.¹ The law school is relatively small with the first-year class typically consisting of 170 to 200 students. Each first-year substantive class is broken into two sections.² The students at the school generally become practitioners rather than academics, many in general practice firms.

Before coming to academia, I was in private practice, primarily representing public school districts. This practice included some tort work, but not an extensive amount.³ Additionally, I had never been a full-time teacher, although I fortuitously had some formal training (a Ph.D. in Educational Psychology) and a series of part-time teaching "gigs."⁴ I also had vivid memories of my own experiences as a law

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1. Torts is currently assigned three credits for the fall semester and two in the spring.

2. Some years, I have taught one section, and others two. Most years, I have taught both semesters of Torts, while I have occasionally taught only one semester.

3. Far greater portions of my practice as a school attorney were devoted to labor and employment, constitutional, disability and special education, and civil rights issues. I have also been very fortunate to teach in those areas in which I have practice experience: in addition to Torts, I have also taught Education Law, Labor Law, Constitutional Law, Evidence, Public Law (a combination of Administrative and Constitutional Law), and Civil Procedure.

4. For example, I had been a teaching assistant for courses in Educational Testing in graduate school, an adjunct instructor in Educational Psychology while being a law student, a teaching assistant in my law school's Moot Court three-credit course, and an instructor for a section of Legal Research and Writing as a third year law student. During my years of private

student, which I was determined to use (or to avoid) in the classes I now teach.

The curricular structure and my practice and educational background led to a number of specific goals and philosophies for my Torts class, and thus for the casebook which would so extensively influence students' Torts learning. Ten of these goals and philosophies and the extent to which my chosen casebook fits them are discussed below in Section II. Briefly, I believe that a Torts class should integrate ethical and moral issues, skills work, critical evaluation of doctrines, exposure to diverse ideological perspectives, as well as real-world issues. Rather than relying primarily on either lecture or Socratic questioning, I use a variety of teaching methods. This approach gives students an active role in their learning process. I also evaluate their performance throughout the semester using an assortment of exam formats.

Based largely on these goals and philosophies, I selected Henderson and Pearson's *The Torts Process* casebook, then published by Little, Brown and in its third edition.⁵ Ten years later, my teaching goals and philosophies are largely unchanged, as is my casebook of choice. Henderson⁶ and Pearson⁷ have added Siliciano⁸ as a third editor, Aspen is now the publisher, and the casebook is in its fifth edition.⁹

I am a demanding casebook consumer, and in some other courses, I have not found any casebook that is a good fit for my class. The Henderson, Pearson, and Siliciano casebook is probably the best fit of any casebook I have found for any course that I have taught over ten years. Furthermore, from my years of use, I have found several specific strengths and a few weaknesses of the casebook that were not anticipated when it was initially chosen. In brief, the Henderson, Pearson, and Siliciano casebook includes materials on ethics, problems and other skill-based activities, a diverse set of ideological perspectives presented in a non-preachy way, and addresses numerous real-world issues and concerns. The casebook also lends itself to the variety of

practice, I was an adjunct professor for several years teaching Education Law to graduate students in Education.

5. JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* (3d. ed. Little, Brown 1988).

6. James A. Henderson, Jr., Frank B. Ingersoll Professor of Law, Cornell University Law School. Professor Henderson is also the co-reporter for the Restatement (Third) of Torts: Products Liability.

7. Richard N. Pearson, Cone, Wagner, Nugent, Johnson, Hazouri & Roth Professor of Law Emeritus, University of Florida College of Law.

8. John A. Siliciano, Professor of Law, Cornell University Law School.

9. RICHARD A. HENDERSON, ET AL., *THE TORTS PROCESS* (5th ed. Aspen 1999).

teaching and active learning methods I employ in my Torts classes. These are discussed in more detail below in Section III.

II. FINDING A GOOD FIT WITH TEACHING GOALS AND PHILOSOPHIES

A. *Coverage of Ethical and Moral Issues*

For several reasons, it is essential that law students consider ethical and moral¹⁰ issues throughout law school.¹¹ First, in practice, clients' problems are not either ethical or substantive; both types of issues are typically involved. Thus, it is dangerous for law students to learn doctrines, review cases, and analyze fact problems in class and on exams without reference to the relevant ethical and moral dimensions. Coverage of ethical issues in a stand-apart Professional Responsibility class in some ways heightens this danger. This curricular structure allows some students to think that ethical issues are somehow separate from the doctrines they are exploring in substantive classes and need only be considered in a separate segment of their professional lives. Moreover, since students do not take the Professional Responsibility class until their second or third year, they often spend at least their first year of law school thinking about doctrines and problems without regard to the related ethical and moral dimensions, setting a pattern which is hard to break later. In response to this problem, my law school has recently adopted an integrated approach to ethics. While students still take a separate Professional Responsibility class, the faculty has created a list of ethical values that it wants students to be exposed to and has assigned responsibility to specific substantive classes. A list of the values assigned to Torts is included in Appendix I.

Second, relegating ethical issues to a separate Professional Responsibility class and studying them in a stand-alone fashion does not give students a chance to explore them in the context of specific areas of law. For example, with regard to tort clients, students may

10. This Article uses the term "ethical" to refer to the standards of professional responsibility, which attorneys are obligated to meet, and the term "moral" to refer to one's own standards for doing what is right. In class, I typically refer to the latter as the "looking in the mirror and liking what you see" test. Attention to both is essential to good lawyering and attorneys' mental health.

11. While ethical and moral issues must be integrated into Torts and other classes, teachers should not tell students what is right or wrong. Certainly, the Model Rules carve out a set of specific behaviors that are wrong, but in many more situations, reasonable persons can disagree. In these areas, it is a teacher's job to raise issues with students and to expose them to a variety of viewpoints and evidence, in order that they may reach their own conclusions.

need to consider (1) the impact of ethical rules concerning financial dealings with clients when handling cases for a contingent fee, (2) the ethical rules concerning client control of the course of representation when the client is an insurance company defending a claim for an insured, (3) the ethical considerations evoked when a cash-starved tort plaintiff is offered a settlement that is probably less than they could recover at trial, or (4) the ethical considerations present when parents are suing on behalf of an injured minor child.

Third, it is essential to attorneys' mental health to consider the ethical and moral issues involved in their clients' problems. Simply put, while we may disagree over what is right and wrong, we all have a personal sense of what is right and wrong. While clients ultimately control the course of representation, and in later stages of litigation attorneys may not be able to withdraw when they disagree with a client's direction for ethical, moral, or other reasons, attorneys do have some control over whom they represent in the first instance. Moreover, whoever their client is, attorneys need to remain connected to their own sense of right and wrong, rather than shut their values away in order to serve their clients.

A brief exercise I use in Torts and other classes illustrates how easy it is for attorneys' own beliefs to be swayed by the position their client needs them to take. I divide the class into two groups at random (typically by drawing an imaginary line down the middle of the classroom) with one half of the class being assigned to represent the plaintiff and the other half the defendant. Students then argue over the problem against each other on behalf of their client. Later, I ask students to objectively vote on who will win the case. Invariably, the vast majority of students "objectively" believe that their randomly assigned side will win. I then point out to the class how easy it is to fall into believing in a client's side but note that they need to remain truly objective for the sake of their own health and to be the best advocate for their clients.

One of the many reasons I am drawn to the Henderson, Pearson, and Siliciano casebook is that it includes ethical and moral issues in its notes and problems. One of the best examples of this is a problem involving not only a substantive duty to rescue issue but also a longtime client who has left the scene of an accident and lied to the police in an attempt to cover up an affair.¹² The casebook authors include excerpts from the relevant Model Rules concerning client control of representation, confidentiality, candor toward the court and

12. HENDERSON ET AL., *supra* note 9, at 273 (Problem 17).

others, and withdrawal from representation,¹³ as well as an overview note on the moral issues involved.¹⁴ The students are forced to puzzle out their options. Some students are initially inclined to perpetrate a lie in pre-litigation settlement discussions or in court, others to correct a lie without client consent, talk the client into correcting it, or withdraw from representation. Students are surprised to discover which conduct is permitted by the Model Rules and begin to think about which actions are tolerable or comfortable for them professionally. While struggling with the complex ethical issues, the students are also working through a problem with meaty torts duty to rescue, causation, and proof issues.

This problem is not the only occasion in which ethical or moral issues are addressed in the Henderson, Pearson and Siliciano casebook. Students get a basic exposure to the Model Rules and attorney self-governance within the first few pages of the casebook.¹⁵ Later in the first chapter, there are notes on an attorney's obligation to keep client confidences,¹⁶ minors as claimants,¹⁷ and the ethics of "playing to the [racial or other] prejudices of a jury."¹⁸ There is also a problem involving confidentiality issues between an attorney, a minor victim of an alleged statutory rape, and the victim's mother who is suing on her own behalf.¹⁹ The casebook puts the parent's instructions at odds with the minor's wishes, in order to force students to consider who exactly is their client.

Experience has taught me that what is tested determines what students work hardest to learn. In light of this reality and my commitment to integrating some basic ethical materials into my Torts classes, I typically include a discrete ethical issue in fact-pattern essay questions on my exams and give students points for handling it, just as with substantive torts issues.

B. "Top-Down" Teaching and Learning

As a teacher, I take a "top-down" approach, giving students the big picture first, followed by an examination of its nuances and

13. *Id.* at 275-77.

14. *Id.* at 277-79.

15. *Id.* at 10-11.

16. *Id.* at 43-44.

17. *Id.* at 45. This note focuses more on the parents' role as the persons who can sue on behalf of the child while briefly raising the potential conflict between the parents' wishes and the best interests of the child. This note and the cases involving children have proven to be a good springboard for discussing who the client is when parents sue on behalf of their injured children.

18. *Id.* at 68-70.

19. *Id.* at 39-41 (Problem 2).

policies by exploring cases and problems. As a law student, I was frustrated by the "bottom-up" structure of both my casebooks and classes. Under this bottom-up structure, the learner's task in preparing for class is to read numerous cases and be ready to answer questions about them, typically as part of a Socratic dialogue. In contrast, the exam taker's task is to apply general principles to a fact pattern. Neither the casebooks nor most of my classes were explicit about those general principles. It was my task to synthesize the material from the reading and the class into an outline of general principles, which was to be memorized and used on exams. This process proved to be terribly inefficient and a poor fit with my need as a learner to understand the big picture and have a context before reading the cases. Eventually, I discovered commercial outlines and hornbooks and learned to read an overview on a concept (such as duty to rescue) first and then to read the assigned cases to flesh out understanding.

The Henderson, Pearson, and Siliciano casebook is largely a "top-down" book. Most sections begin with an overview of the concept to be covered, typically both in narrative form and with excerpts from the relevant *Restatement* sections. Indeed, this is one of the casebook's features that students often comment favorably upon, both informally and in their course evaluations.

C. Inclusion of Problems

A significant amount of time in law school classes should be devoted to problems, both to prepare students for exams and for real-world practice. Clients come to attorneys with problems based on a set of facts, and it is the attorney's job to sort out and solve that problem. Of even greater short-term interest to students is the tendency of law school exam questions to involve fact patterns where the student is asked to predict the likely outcome and give legal advice. The Henderson, Pearson, and Siliciano casebook includes thirty-six complex problems. In addition, some problems deleted from earlier editions are still included in the *Teacher's Manual*²⁰ for possible use.²¹ The *Teacher's Manual* also includes detailed analysis of all of the

20. RICHARD A. HENDERSON, JR. ET AL., *TEACHER'S MANUAL, THE TORTS PROCESS* (5th ed. Aspen 1999) [hereinafter *TEACHER'S MANUAL*].

21. For example, there is a problem involving some high school girls and a bee that my students find very helpful in understanding tortious intent and consent. *Id.* at 8-11 (Old Problem 1).

problems presented in the casebook.²² The problems in the casebook, like the typical exam question, include issues where there are two sides to argue and the outcome is not certain. Not only do I devote significant class time to most of these problems but I also supplement them in several ways. I typically present a series of short, increasingly more difficult hypotheticals to help students master the basics of a concept and see its ambiguities. I also keep old exams available for students to practice and offer to review their answers to these exam questions.

D. *Work on Attorney Skills*

Attorney skills in investigating facts, proving a claim, solving problems, negotiating, maintaining client relations, or in conducting interviews also need to be integrated into substantive law school classes. As with ethical and moral issues, these are the skills that attorneys use in practice, and law students need to develop these skills throughout law school and in the context of specific substantive legal issues, not strictly in separate stand-alone skills course. The Henderson, Pearson, and Siliciano casebook includes opportunities for skills work. The most extensive skills practice opportunity is found in Problem 32, which combines damages issues with an opportunity to work on negotiation and client-relations skills as well as professional ethics.²³

The problem itself involves a fairly routine back injury, but it is supplemented with information about calculating damages and negotiation strategies. As the *Teacher's Manual* suggests, I assign students to groups of three—a partner, an associate and a client. For one entire class, each group conducts settlement negotiations with another group of three students representing the adverse party. The *Teacher's Manual* also provides confidential information to be given to each side.²⁴ Students then complete a write-up of their negotiation meeting, which is discussed at a debriefing during the first part of the next class. Students invest a lot in, and take a lot away from, this problem.²⁵ To supplement these activities, I have also developed several additional problems of this sort, and I sometimes bring in an

22. This aspect of the *Teacher's Manual* was a comfort to me as a new professor. I would work out the problems in the casebook and then compare my response to the authors' detailed and helpful analysis.

23. HENDERSON ET AL., *supra* note 9, at 664 (Problem 32).

24. TEACHER'S MANUAL, *supra* note 20, at 194–201.

25. Some groups, on their own initiative, have even set up additional settlement discussions outside of class.

outside party to play the client in order to give students opportunities to practice interviewing and advising clients.

E. Providing an Active Learning Role for Students

According to my experience, students learn better when they have an active role in class. I do not lecture extensively nor primarily engage in the Socratic method. Instead, I include a variety of learning activities in each class: brief (five minutes or less) mini-lectures, questions to students about cases, hypotheticals and more complex problems, skills work, small and large group discussions, and other activities. On the first day of class, student volunteers reenact the playful-kick-in-the-schoolhouse fact pattern of the first case in the casebook, the classic *Vosburg v. Putney*.²⁶ This not only breaks the ice, but also puts students on notice that they are expected to be active participants in the class's exploration of torts issues. Moreover, when reenacting cases, the students are forced to critically evaluate the facts. In *Vosburg v. Putney*, for example, the location of the injury and the physical position of the parties at the schoolhouse are hard to square. I tell students after the reenactment to take this same critical approach in examining the various tort doctrines found in the cases.

The Henderson, Pearson, and Siliciano casebook is well suited to this multi-teaching method and active learning approach. As discussed above, it affords many opportunities for students to work on problems and other skills. I often have students discuss the problems briefly in small groups of three or four rather than have one class-wide discussion. This gives more students a chance to talk in a setting that is easier for some of the more reserved students.²⁷ The Henderson, Pearson, and Siliciano text also encourages active learning by including some provocative cases that work well as springboards for policy discussions. For example, in the loss of consortium section, the authors include a loss of consortium claim by a couple who had cohabited for over twenty years, bought a house, had children, and filed income taxes together, but had never legally married.²⁸ This case usually engenders lively debate about whether loss of consortium claims should be available to unmarried couples and, if so, on what basis. I then steer the discussion onto a topic that we confront

26. 50 N.W. 403 (Wis. 1891), *reprinted in* HENDERSON ET AL., *supra* note 9, at 14-16.

27. I have made several presentations to law faculty on effective discussion techniques for law school classes, including two at the annual conference of Gonzaga's Institute for Law School Teaching. Materials from some of these presentations are available through the Institute by calling (509) 323-3740.

28. *Feliciano v. Rosemar Silver Co.*, 514 N.E.2d 1095 (Mass. 1987), *reprinted in* HENDERSON ET AL., *supra* note 9, at 365-66.

throughout the course: the merits of having bright line rules, such as a legal marriage for loss of consortium claims, as compared to a more flexible case-by-case approach, such as whether the unmarried couple enjoys a “stable and significant” relationship as one court has suggested.²⁹

F. A Sense of Custodianship of the Law

Students should have a sense of responsibility for the law and how it evolves. Teaching the law is like giving students a set of very powerful tools, such as reading cases and making legal arguments, which the average layperson does not possess. Those who have acquired these tools have a special responsibility to use them for the public good, for example by advocating and engaging in other activities to ensure that the law evolves in a socially responsible manner. I encourage students to read cases critically and not be afraid to criticize a rule or result. When students are critical, I encourage them to think through what actions they might take as an attorney to improve the rule or result they criticize, such as limiting the clients they will represent or lobbying the state legislature. The Henderson, Pearson, and Siliciano casebook is somewhat helpful in this regard. As discussed above, it includes many cases and problems that may evoke student criticism and thus provides a starting point for these sorts of discussions. However, because coverage of recent state tort reform legislation and federal proposals in this area (particularly with regard to remedies) is somewhat limited, I have resorted to creating my own supplemental materials in these areas.

G. Exposure to Diverse Perspectives

Students need to be exposed to a variety of ideological and jurisprudential perspectives for several reasons. Such exposure will help students develop their own informed opinions and serve clients from a wide variety of backgrounds. Understanding perspectives different from their own also helps students advocate better for their own views. At the same time, teachers should not preach any single perspective to students. The Henderson, Pearson, and Siliciano casebook is somewhat helpful for this goal. The casebook is especially effective in examining whether the torts system does, or should, serve goals beyond compensation of injured plaintiffs such as social insurance, deterrence or punishment. The casebook provides several notes on this issue, beginning in the first chapter where basic

29. *Butcher v. Super. Ct.*, 188 Cal. Rptr. 503, 512 (Cal. Ct. App. 1983).

instrumentalist and non-instrumentalist perspectives are laid out,³⁰ and continuing in appropriate subsequent places, such as where punitive damages are covered.³¹ Some of these themes are also echoed in the excerpted cases, and related academic commentary is generally cited and sometimes very briefly excerpted.³² Thankfully, the authors remain neutral as to which policy objectives the torts system should serve, leaving the readers to form their own opinions.

The Henderson, Pearson, and Siliciano casebook also includes notes summarizing various perspectives on controversial doctrines such as duty to rescue,³³ vicarious liability,³⁴ and strict liability for defective products.³⁵ There are occasional references to how other countries handle tort issues.³⁶ There is also limited coverage of law and economics theory: a problem compares the standard of care required under the Learned Hand cost benefit approach to that which is economically efficient,³⁷ and there is an appendix providing an overview of law and economics theory in general.³⁸ Finally, the theme to which I return again and again in my class and which runs throughout the casebook is the extent to which a tortfeasor's state of mind or level of fault should determine his or her liability. Coverage of no-fault systems such as workers' compensation, no-fault car insurance, and the broad no-fault tort systems in other countries are also included.³⁹

Other perspectives, such as critical legal studies, critical race theory, and law and feminism, are covered sparsely and somewhat timidly. For example, the *Teacher's Manual* provides a note that is based on a case involving battery and consent issues and asks whether the relative class standing of the parties and the judge might have influenced the outcome,⁴⁰ but the casebook itself does not raise this issue with students. Likewise, when the reasonable man standard is discussed, there is a brief summary of an article suggesting that the standard is gendered and suggesting a good neighbor standard

30. HENDERSON ET AL., *supra* note 9, at 30–34.

31. *Id.* at 694–700.

32. *See, e.g.*, 272–73, 290–97 (regarding duty to rescue).

33. *Id.* at 290–93.

34. *Id.* at 156–59.

35. *Id.* at 497–502, 529–33.

36. *See, e.g., id.* at 293 (comparative law on duty to rescue).

37. *Id.* at 181–83 (Problem 11).

38. *Id.* at 979–86.

39. *Id.* at 721–48.

40. TEACHER'S MANUAL, *supra* note 20, at 15.

instead,⁴¹ but the issue is not explored further. In addition, the authors sometimes miss opportunities to create problems with fact patterns that contradict gender stereotypes. For example, the truck driver injured in Problem 1 is male,⁴² as are the hunters caught in a snowstorm in Problem 5,⁴³ but the parent in Problem 21 who becomes hysterical after a child is bitten by a dog is the mother.⁴⁴ On the other hand, the business owner in Problem 18 is female,⁴⁵ as are the treating physicians and expert witnesses in several of the problems. Race is rarely mentioned in either the problems or in the casebook in general.

H. Coverage of Some Real-World Content

Students need to be made aware of some real-world issues such as the impact of sympathetic (or unsympathetic) parties in jury cases, the impact of joint and several liability, vicarious liability and other doctrines upon "deep pocket" defendants, and the use of experts to prove cases. The Henderson, Pearson, and Siliciano casebook and the accompanying *Teacher's Manual* do an excellent job in raising these issues. For example, the *Teacher's Manual* suggests that jury sympathy issues may be one way to explain the result in the famous "spring gun" case, in which property owners defend their property with a spring gun and are successfully sued by a burglar who is injured as a result.⁴⁶ The coverage of damages is particularly relevant to real-world practice. As with ethics and skills issues, students should consider, throughout their study at law school, not only who will win claims but what remedies are available, rather than discussing remedies solely in a separate class. The casebook not only discusses the possible remedies but also explains the basics of how to calculate damages, even including present value and life expectancy tables.⁴⁷ I try to follow through on this "real-world content" goal and its coverage in my chosen casebook by including some of these real-world issues in essay exam questions and giving points to students who address them.

41. HENDERSON ET AL., *supra* note 9 at 199-200 (citing and quoting Leslie Bender, A Lawyer's Primer of Feminist Theory and Tort, 38 J. LEGAL. EDUC. 3 (1988)).

42. *Id.* at 27.

43. *Id.* at 93.

44. *Id.* at 359. In fairness, this problem is preceded by a brief note concerning the possible gender bias of tort rules regarding recovery for mental harm.

45. *Id.* at 289.

46. TEACHER'S MANUAL, *supra* note 20, at 35 (referring to *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971)).

47. Several students and law firms have commented that our work in class on damages seems to make my Torts students particularly attractive as interns.

I. Academic Skills

It is important for all first-year faculty to help students develop the academic skills that are peculiarly relevant to law school. In addition to legal analysis, these skills include briefing cases, preparing course outlines, and writing law school exams. I have not seen any casebook in Torts or other substantive courses that covers these skills, and the Henderson, Pearson, and Siliciano casebook is no exception. Consequently, I prepare my own materials in these areas. For example, I give students a copy of my brief for the first case in the casebook and discuss the purposes of, and strategies for, case briefing with the students. When the class has completed its study of our first tort claim (battery), I hold an optional session on the purposes and strategies of outlining, in which I hand out a sample piece of an outline prepared in different formats and work with the students to construct another piece of the outline. I discuss the need to include policies and examples from cases and hypos in their outlines and generic arguments (such as the slippery slope) that come up repeatedly in the Henderson, Pearson, and Siliciano casebook and in class. For example, given a holding from an older case, one might argue that the holding has stood the test of time and should thus be given special veneration (which in class we refer to as the "old rules are good rules" argument). On the other hand, one might argue that times have changed since the decision and thus its holding should not be given much weight (the "old rules are bad rules" argument). I also provide students with before-exam study checklists, which are essentially lists of concepts they should include in their outlines.

Finally, I also conduct an optional session on writing law school exams in which I work through an essay question from an old exam and work on spotting and analyzing the issues presented. I then offer written feedback on the students' written answers to these exam questions, making available detailed scoring sheets for the questions.

J. Evaluation of Students

Multiple exams in varied formats maximize the reliability and validity of grades. Hence, I choose to give more than one exam. This provides students with feedback about their performance before the course is completed and allows time for them to make adjustments. It also forces students to learn the material throughout the year rather than leaving the real learning for the end of the semester. From the teacher's perspective, multiple exams increase the validity (fairness) and reliability (consistency) of the grades—in other words, giving

multiple exams makes it more likely that the grades truly reflect the level of a student's mastery of the material. I also use multiple evaluation formats—some multiple choice questions, some fact pattern essays (both take home and in-class under timed conditions) and some policy and theory questions. As discussed above, my fact pattern essay questions frequently include ethical and real-world issues.

As for the policy questions, I give students a list of possible questions on the last day of class. They are then allowed to discuss the questions with one another but are not allowed to do outside research. This approach gives students some confidence heading into the exam and particularly helps those who have good insights but may not think quickly on their feet. From the teacher's perspective, it adds a new focus on preparation for the exam. Students must not only understand the "rules" and be able to apply them to fact patterns but also engage in some sophisticated theoretical synthesis and policy discussion. Sometimes, in order to shape exam preparation, I include policy questions on the list of possible questions given to students although I have no intention of asking the question on the exam itself. A sample list of policy questions and instructions to students is attached in Appendix II. My final Torts exams are always cumulative and closed book, in part because torts is a bar exam subject. The Henderson, Pearson, and Siliciano casebook works well with my evaluation philosophy because its many problems are good preparation for the fact pattern essays on my exams.

III. ADDITIONAL STRENGTHS AND WEAKNESSES

In the ten years since I first chose *The Torts Process*, my experiences with it have identified additional strengths and a few weaknesses.

A. *Organization of Concepts*

While I do not work through the Henderson, Pearson, and Siliciano casebook in the exact order in which the casebook is laid out, I have found it works well when used in the particular order chosen for my course. The casebook starts with Chapter 1,⁴⁸ which deals with battery and its defenses such as consent and defense of self and others. Chapter 2⁴⁹ then moves on to causation in fact, and Chapter 3⁵⁰

48. HENDERSON ET AL., *supra* note 9, at 1–100.

49. *Id.* at 101–61.

50. *Id.* at 161–435.

introduces negligence. Later in Chapters 4⁵¹ and 10,⁵² the casebook returns to intentional torts: property torts such as trespass are in Chapter 4 and intentional torts involving primarily intangible harm such as assault, false imprisonment, intentional infliction of emotional distress and Section 1983 “constitutional tort” claims comprise Chapter 10.

Like the Henderson, Pearson, and Siliciano casebook, I begin with intentional torts and their defenses, to make students focus immediately on fault and state of mind as a basis for liability and because these claims are somewhat more bright line and thus easier for new law students to grasp than negligence. However, I prefer to cover all of the intentional torts before moving on to negligence. I thus cover Chapters 4 and 10 immediately after Chapter 1 and have found that the Henderson, Pearson, and Siliciano casebook adapts well to being used in this order. I spend the rest of the first semester on negligence claims and defenses (Chapter 3) and strict liability for animals and abnormally dangerous activities (Chapter 5).⁵³ Also, I wait to cover causation in fact (Chapter 2) until after the breach of duty element of negligence claims. I do so for two reasons. First, although causation in fact is an element of intentional torts claims, students struggle with some of its nuances and I have found it is better not to cover it too early in the first semester when students are still struggling with legal analysis. Second, the causation-in-fact cases presented in the casebook are all negligence cases and are more easily understood by students after some exposure to negligence.

In the second semester, the primary focus is on damages (Chapter 7),⁵⁴ products liability (Chapter 6)⁵⁵ and defamation (Chapter 11).⁵⁶ A copy of the reading assignments section of a recent syllabus from my Torts class is attached as Appendix III.

B. Organization Within Concepts

Overall, the Henderson, Pearson, and Siliciano casebook’s organization of concepts within each chapter is clear and helpful. The general organization is conceptual rather than chronological. For example, the product liability materials in Chapter 6 are organized by type of claim: negligence; warranty; and then “strict liability” for manufacturing defects, for warning or instruction defects, and for

51. *Id.* at 437–80.

52. *Id.* at 749–811.

53. *Id.* at 481–506.

54. *Id.* at 615–700.

55. *Id.* at 507–614.

56. *Id.* at 813–65.

design defects. They are not organized in the order in which these claims evolved in court cases. Similarly, in the breach of duty part of the chapter on negligence, there are separate sections discussing the different ways to establish a standard of care: reasonable person, cost-benefit analysis, violation of statute, compliance with or violation of custom, and *res ipsa loquitur*.⁵⁷ The casebook authors seem to have taken great care to organize the materials in a way that is helpful for year-law students, although law professors in their own minds might organize the concepts differently. For example, a law professor might think of strict liability claims involving animals or abnormally dangerous activities as akin to negligence claims where owning the animal or engaging in the abnormally dangerous activity is the deviation from normal behavior which can result in liability. For beginning law students, however, it seems easier to think of these claims as separate from negligence, and the casebook follows this structure.

Although I find the organization of the product liability materials in Chapter 6 clear and helpful, this section includes a great deal of material and thus students tend to struggle to keep the big picture in mind. To help my students with this problem, I supplement the materials with handouts. For example, students complete a matrix for negligence, warranty and the three "strict liability" claims comparing the claims on such matters as who can sue, who can be sued, the *prima facie* case, defenses, and remedies. A copy of the matrix is attached as Appendix IV.

The one area where the Henderson, Pearson, and Siliciano casebook's organization could be improved is the chapter on defamation (Chapter 11). The authors separate this chapter into two subsections with one of them covering the common law tort and the other its constitutionally-imposed wrinkles. Some students are confused by this structure, often thinking there are two separate (common law and constitutional) claims. Others become frustrated when they learn a set of common law doctrines and then have to rethink their understanding in the constitutional section. Organizing the defamation chapter by element rather than by source of law would be consistent with the organization of the rest of the casebook and a welcome change.

57. *Id.* at 163–252.

C. Coverage of Concepts on My Syllabus

In a two-semester course, there is enough time to cover topics such as misrepresentation and invasion of privacy that are assigned to advanced Torts courses in some law schools. My law school's recently revamped curriculum also assigns a wide ranging list of skills, values, and content to be covered in Torts class, although it is left to the individual faculty member to decide how to cover them and in how much detail. These topics are listed in Appendix I. I can cover almost all of these topics primarily using the Henderson, Pearson, and Siliciano casebook, although the casebook itself remains a manageable size of just under 1000 pages. Moreover, it is the only casebook I am familiar with that covers topics such as Section 1983 "constitutional tort" claims.⁵⁸ Even then, I also cover two topics not included in the casebook: consumer law (primarily claims under deceptive trade practice and related statutes) and statutes of limitations. For these two topics, I rely on other materials.

For the remaining topics on my syllabus, the Henderson, Pearson, and Siliciano casebook's substantive coverage is excellent. Cases are typically preceded by overviews and supplemented with problems. Where jurisdictions vary in their approach to a concept, such as the procedural impact of *res ipsa loquitur* or the rules for product liability claims, the various approaches and their underlying policy bases are laid out for the students.

D. Case Selection and Editing

The Henderson, Pearson, and Siliciano casebook includes a nice mix of classic cases as well as cases illustrating modern concerns, divergent views, and intriguing fact patterns. When appropriate, the casebook provides a narrative overview of a concept rather than relying on cases exclusively. The cases themselves are heavily edited but not overly so. Another bonus is that the casebook authors understand when procedural concepts in cases will be unfamiliar to first-year students and include notes explaining such concepts. For example, when a case involves a directed verdict, the casebook includes a note generally explaining the nature and effect of directed verdicts.⁵⁹ The casebook also begins with a brief overview of how torts claims are resolved, addressing not only litigation but also

58. All law students should be exposed to this important material. It could be assigned either to Torts or to Constitutional Law but seems to fall through the cracks and not be taught in either class at many schools.

59. HENDERSON ET AL., *supra* note 9, at 37.

investigation and pretrial activities.⁶⁰ I assign this reading to students for the first day but do not spend class time on it.

IV. CONCLUSION

In summary, the Henderson, Pearson, and Siliciano casebook has been an excellent teaching aid in my Torts class. It includes materials on ethics, problems and other skill-based activities, a diverse set of ideological perspectives presented in a non-preachy way, and addresses numerous real-world issues and concerns. It lends itself to the variety of teaching and active learning methods I employ in my Torts classes. For these reasons, I enthusiastically recommend its use by other Torts professors.

60. *Id.* at 1.

APPENDIX I

SKILLS, VALUES AND CONTENT ITEMS ASSIGNED IN
WHOLE OR IN PART TO TORTS BY GONZAGA LAW
SCHOOL FACULTY, March 18, 1999

ESSENTIAL SKILLS

Item	Course
Identify the set of information relevant to a legal issue: facts; legal rules; policy; theories; social, economic, and moral context.	All first-year courses
Find patterns that exist in the set of information.	All first-year courses
Apply patterns in analogous situations.	All first-year courses
Generate and evaluate patterns that support various positions (such as those of the parties to a dispute).	All first-year courses
Identify the most realistic outcome.	All first-year courses
Learn and perform case reasoning and analysis.	All first-year courses
Learn and perform statutory analysis and construction.	All first-year courses, Administrative Law & Creditors' Rights
Synthesize all legal material relevant to an issue.	All first-year courses
Perform systematic factual investigation.	Civil Pro., Torts & Constitutional Law
View and analyze legal and ethical issues, doctrine, and problems in their social, economic, and moral context.	All required courses
The basics of negotiation.	Contracts, Torts & Dispute Resolution
Experience in negotiation.	Contracts, Torts, Remedies & Dispute Resolution

ESSENTIAL VALUES

Item	Course
Think critically about and take responsibility for the growth of the law and the profession.	Orientation, Torts, Prof. Resp. & Dispute Res.

ESSENTIAL CONTENT

Item	Course
The objective and subjective tests.	Contracts & Torts
An understanding of current problems with the legal profession.	Civil Procedure & Torts
Perspectives on the practice of law.	All first-year courses & Law Office Workshop
Traditional models of practice.	All first-year courses
The impact of the changing face of the profession on practice: women, people of color, <i>etc.</i>	Criminal Law & Torts
Torts is a relatively new system of largely state judge-made rules to compensate persons who suffer personal injury or property damage.	Torts
Tort doctrines are highly fact-bound and manipulable.	Torts
The defendant's state of mind/level of fault is highly relevant to her liability under the current tort system.	Torts
The concept of tortious intent, as distinguished from motive.	Torts
The traditional torts involving intentional interference with the person and common defenses to them .	Torts
Modern tort claims involving intentional interference with the person.	Torts
Tort claims involving intentional interference with property.	Torts

The concept of negligent behavior as breach of a duty to exercise ordinary care, the different standards to establish breach of duty, and the limitations on duty.	Torts
The concept of causation in fact.	Torts
The concept of proximate causation.	Torts
Limitations on recoverable harm under negligence.	Torts
Defenses to negligence.	Torts
The tort claims involving animals or abnormally dangerous activities for which fault is not a requirement and the defenses to them.	Torts
The existence of tort systems (e.g., workers compensation, no-fault car insurance, entire tort system in other countries) in which fault is irrelevant (basic familiarity only).	Torts
Products Liability	Torts
Defamation, including its constitutional limitations, and available defenses.	Torts
The defense of immunity in its various forms.	Torts
The concept of vicarious liability.	Torts
The concept of and doctrines relating to joint tortfeasors, including joint and several liability and contribution.	Torts
The concept of survival statutes.	Torts
The role of expert witnesses in tort suits.	Torts
The role of insurance in the tort system and how a claim is handled when the defendant has liability insurance (basic familiarity only).	Torts
Fraud, misrepresentation.	Torts
Consumer protection.	Torts
Burden of proof and presumptions (civil, criminal).	Civil Pro., ⁶¹ Torts, ⁶² Crim. Law & Evidence
Punitive damages.	Torts
Statutes of Limitation	Property & Torts

61. Burden of proof.

62. Presumptions.

APPENDIX II

SAMPLE POLICY QUESTIONS

(Memo to student re: possible policy questions on final exam)

The policy question will be 25% of the exam, with a suggested answer time of 45 minutes. There will be a one-bluebook (normal sized handwriting, one side of page every other line) limit on answers; 3 double spaced pages for typists. The policy question will be one of the 5 questions listed below. You may discuss these 5 questions with other students in this class, and no one else (including your professors). You may not do any outside research. You will have to certify that you have complied with these rules when you take the exam.

There are no right answers to these questions. Your score will depend on how well you defend whatever position you take. Remember that a well-defended position includes examination of the arguments on **both** sides. A well-defended position is supported by several arguments, and these arguments are not just listed, but developed through discussion and examples. You may want to look at the policy questions and scoring sheets on old exams in preparation for answering this question.

1. Courts have developed a number of different standards for proximate cause. In your opinion, which standard is best and why?
2. Several people in class, as well as some commentators, have suggested that tort law should impose a legal duty to rescue, when the burden of rescuing is small. Please discuss whether this is, or isn't, a good idea.
3. Should the reasonable person standard be modified such that the reasonable person takes on the defendant's mental illness and/or mental retardation?
4. In Washington the IIED tort is one of last resort—that is, a plaintiff can only bring an IIED claim if she cannot recover for her harm on any other tort theory. Discuss why you think this is, or isn't a good idea.
5. Should joint and several liability be eliminated?

APPENDIX III
EXCERPTED SYLLABUS
TORTS I
LYNN DAGGETT

Note: This is my best estimate, but no guarantee, of how quickly we will move through the material. If we get off track (and we are sure to at some point), please prepare for each class the assignment following the one we just worked on. Moreover, please note that we will move fairly slowly at first and more quickly after that until we reach full speed of about 20 pages per class.

Date	Topic	Assignment*
I. Intentional Torts to the Person		
	A. Battery	
8/23	Vosburg (intent element)	1-11(skim);11-23
8/25	Administrative matters; Vosburg cont'd	reread Vosburg
8/26	Garrett; Restatement on battery	23-34; pay close attention to Restatement intent and other elements, language on 12-13, 20-21, 24-25 to figure out elements of battery
8/30	the Contact element	34-35; 753-757; problem (will be handed out)
9/1	B. Assault	749-753
9/2	C. False Imprisonment	759-768
9/6	Labor Day - no class	
	D. Defenses to Intentional Torts	
9/8	1. Consent	35-47; 50-59
9/9	2. Defense of self and others	59-77
9/13	3. Defense of property	77-88, skim 94-100
9/15	E. Newer Intentional Torts:	
9/16	Intentional Infliction of Emotional Distress	768-97
9/20	F. Newer Intentional Torts: Recovery for civil rights violations (Section 1983)	798-811; handout
9/22	II. Intentional Torts to Property:	
	Trespass & Nuisance	437-456; 469-76
9/29	MULTIPLE CHOICE QUIZ ON INTENTIONAL TORTS ROOM C1	
9/23	III. Negligence: duty and breach	

	A. the general standard	163-181
9/27		182-200
9/29		No new reading
9/30	B. violation of statute	200-215
10/4	C. custom	215-236
10/6	D. res ipsa loquitur	236-252
10/7	E. limits on duty	
	1. Premises liability	252-266
10/11	2. Duty to rescue	266-279
10/13		279-297
(10/21	hand out take home essay quiz on duty and breach, due at beginning of class	
10/28)		
10/14	IV. Negligence:	101-110
	causation in fact	
10/18	Founders' Day holiday - no class. Monday classes meet Tuesday 10/19	
10/19		110-119
10/20		119-143
10/21		144-148
10/25		149-161
10/27	V. Negligence:	297-309
	proximate cause	
10/28		309-320
11/1		320-329
11/3		334-344
11/4	VI. Negligence: harm	344-364
11/8		365-374
11/10		374-392
(11/17	MULTIPLE CHOICE QUIZ ON NEGLIGENCE CAUSATION AND	
HARM	ROOM C1 Noon -12:50 p.m.)	
11/11	VII. Negligence:	410-422; 425-428
	defenses	
11/15		428-435
11/17	VIII. Strict Liability	481-485
11/18		485-506
11/22		No new reading
(11/24,	11/25 Thanksgiving holiday - no class)	
11/29	Catchup/review	
12/1	Catchup/review	
12/2	Catchup/review	

TORTS II TENTATIVE SYLLABUS

Class	Topic	Assignment*
I.	Damages	
1	Medical expenses	615-629
2	Lost earnings	629-650
3	Pain and suffering	650-664

4	Damages/Negotiation	Problem 32 (664-687)
	Exercise	
5	Debrief exercise;	687-700
	punitive damages	
II.	Products liability	
6	A. Negligence and	507-521
	warranty claims	
7	B. "Strict liability"	522-537
8	C. Causation and	537-553
	defenses	
9	D. Warning defects	553-573
10	E. Design defects	573-591
11		591-614
III.	Liability Insurance	
12		701-719
IV.	Introduction to	
	consumer law	
13,14		Handout (one class to cover material, second class for small group exercise)
V.	Defamation	
15		813-823
16		824-842
17		842-865
18		No new reading
VI.	Misrepresentation	
19		915-932
20		932-944
21		944-966
22	VII. Statutes of	Handout
	limitation	
VIII.	Invasion of privacy	
23		867-879
24		879-900
IX.	Interference with	
	business relations	
25		959-966
26		966-978
27	Catchup/review	
28	Catchup/review	

*Reading is from Henderson, Pearson and Siliciano, The Torts Process (5th ed) unless otherwise indicated.

APPENDIX IV

PRODUCTS LIABILITY MATRIX

	Negligence claims	Warranty claims (express, 2 types of implied)	"Strict Liability" claims
Plaintiffs			
Defendants			
Prima facie case			<ul style="list-style-type: none"> • Mfg defect • Warning/ instruction defect • Design defect
Defenses			
Damages			
When to use			