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Situationist Torts

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I. INTRODUCTION

This Article calls for a situationist approach to teaching law, particularly tort law. This new approach would begin by rejecting the dominant, commonsense account of human behavior (sometimes called dispositionism) and replacing it with the more accurate account being revealed by social sciences, such as social psychology, social cognition, cognitive neuroscience, and other mind sciences.

At its core, situationism is occupied with identifying and bridging the gap between what actually moves us, on the one hand, and what we imagine moves us, on the other. Recognizing that gap is critical for understanding why we have tort law, among other areas of law. Beyond that, a situationist approach helps to make clear the subconscious tendencies and unappreciated external forces that have shaped tort law and tort reforms. A situationist perspective on tort law, this Article argues, also has significant implications for how tort law should be taught.

The Langdellian model of teaching, which has monopolized the law school classroom since the late nineteenth century, has borne the brunt of increasing criticism over the past several decades.¹ Most critics emphasize that the casebook method forces the round complexities of law, lawmaking, and human behavior into the square holes of antiquated legal categories and idiosyncratic appellate decisions.² A number of leading law schools are now dramatically reshaping their curricula to address such concerns.³ Simultaneously, legal theory is in the midst of its own revolution as legal scholars are beginning to reject the hard-core dispositionism at the foundation of law and to incorporate, or at least to acknowledge, emerging insights from the mind sciences.⁴ The curricular and theoretical renovations underway represent what we would call a turn toward the situationist. Those trends have created a hospitable climate for the emergence of a more robust situationist approach to law and law teaching. This Article describes not only

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¹. For a discussion of the Langdellian model, see infra Part III.
². For a sample of critiques of the casebook method, see infra Part III.
³. See infra Part V.G.
⁴. See infra Part V.A.
those trends and their implications but also some specifics regarding how situationist torts would be taught and what a situationist torts casebook would look like.

Part II introduces our approach by offering a situational account of tort law, of the human animal, and of common attributions of causation, responsibility, and blame. Part II also provides a situationist perspective on policy and policymaking and highlights four overlapping situational factors that have long influenced policy and helped explain why dispositionist assumptions have persevered. Those factors are simplicity, legitimacy, affirmation, and power. Part III indicates some of the ways that situational forces have, since the Langdellian revolution, encouraged a dispositionist approach both to tort law and to how it is taught. Part IV briefly describes what a situationist torts casebook might look like. And, finally, Part V offers seven reasons why situationism is ripe and why a situationist torts casebook may help to catalyze meaningful curricular reform.

II. THE MYSTERIES AND FRONTIERS OF TORT LAW

A. What Is a Tort?

Anyone who teaches and writes about tort law long enough eventually recognizes (or should recognize) that the frontiers of tort law are determined by the outcomes of debates regarding a variety of deep mysteries. Among those mysteries is this central enigma: “what is a tort?” A simple question, most novices suppose. Any answer, however, reveals the strikingly contingent nature of tort law. In fact, the typical definition can be characterized as content-free tautology. The late Dean William L. Prosser, one of the field’s most respected authorities, tells us that “tort” is “a term applied to a miscellaneous and more or less unconnected group of civil wrongs other than breach of contract for which a court of law will afford a remedy in the form of an action for damages.”5 Today’s ultimate authority, Wikipedia, more efficiently delivers the same message: “A

5. WILLIAM L. PROSSER, A HANDBOOK OF THE LAW OF TORTS I (1941).
tort is a civil wrong for which the law provides a remedy." In short, a tort is what a court says it is.\(^7\)

Push even slightly on that vacuous definition and one is overcome by still deeper mysteries. For example, what sorts of "harms" can count as a tort? Harms caused by a hurricane? What about those resulting from an epidemic? Tobacco? Sexual harassment? Drunk driving? Fast food? Again, the typical newcomer expects those questions have clear answers, but they do not.

Indeed, conventional responses to such questions have been in flux across jurisdictions for decades. In the middle of the twentieth century, for instance, cigarette manufacturers were immune from tort liability, while manufacturers of less deadly products were subject to strict liability. In the twilight of the twentieth century, the tobacco industry suddenly was accountable for multi-billion dollar damage awards while tort’s impact on most other industries was waning.\(^8\)

Those are just some of the expansions and contractions in the reach of tort liability that have been described as "revolutionary" and "counter-revolutionary."\(^9\) Seismic jurisprudential shifts notwithstanding, the courts that make and apply tort law often pretend to abide by a stable and precedent-based area of law, in

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7. See FOWLER V. HARPER, TORTS v. vi (1933) (“It is the social, rather than legalistic basis of tort law that affords the unifying principles.”); Richard Abel, Civil Rights and Wrongs, 38 LOY. L.A. L. REV. 1421, 1426 (2005) (“Tort law tends to grow through judicial innovation.”); James Boyle, The Anatomy of a Torts Class, 34 AM. U. L. REV. 1003, 1011–12 (1985) (“One standard way of presenting [the material] is to start with the difficulty of defining any of tort law’s operative concepts. In all but the most formalistic of classes, the students learn early on that legal definitions alone are useless, without some idea of the background purpose of the concept.”). Other commentators have highlighted the ambiguities that underlie tort doctrine. See, e.g., Thomas C. Galligan, Jr., The Tragedy in Torts, 5 CORNELL J.L. & PUB. POL’Y 139, 179 (1996) (pointing out the “normally general and vague standards of tort law”); Ralph C. McCullough, Intentional Torts and Bankruptcy: An Evaluation of Geiger v. Kawaaahau, 105 COM. L.J. 21, 23 (2000) (“[T]he concepts inherent in tort law lack precise definition.”).
which basic precedents or principles are said to limit the boundaries of its application. But careful, skeptical scholars know otherwise. Beneath conventional answers to the question of what harms could or should constitute "a tort" lurk unanswered mysteries\textsuperscript{10}—the very mysteries that animate legal theory and the scholars who seek to make sense of existing practices and that motivate symposia like this one.

Even were one to explain why some harms count as torts while others do not, there would still exist the puzzle of how a court or jury determines who or what \textit{caused} a harm. In a universe in which any single event has innumerable causes and in which any major outcome may have been contingent on a matter as trivial as the "want of a horseshoe nail,"\textsuperscript{11} it is no easy task to understand logically how tort law narrows each harm down to one or two causes. That is what legal scholars Fleming James and Roger Perry were famously pointing out when, quoting John Milton, they observed that although tort law possesses "a requirement that the wrongful conduct must be \textit{a cause in fact} of the harm," more is needed, "for 'the causes of [harms] [are] infinite.'"\textsuperscript{12} Similarly, tort giant Dan Dobbs highlights that without the limits imposed by the amorphous doctrine of "proximate cause," "liability would go on forever, one harm leading endlessly to others."\textsuperscript{13} Judge Richard Posner, arguably the most influential tort theorist and judge in the twentieth century, laments the impossibility of logically apportioning causation among multiple parties. According to Posner, for example, the problem with

\begin{itemize}
  \item \textsuperscript{10} Cf. Carrie Menkel-Meadow, \textit{Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process}, 31 \textit{LoY. L.A. L. Rev.} 513, 549 (1998) (noting "bigger questions" such as "what harms should substantively be recognized?"); Jennifer B. Wriggins, \textit{Domestic Violence in the First Year Torts Curriculum}, 54 \textit{J. Legal Educ.} 511, 512 (2004) (describing "thought-provoking . . . discussions about . . . issues such as what harms are recognized, what harms could be recognized [as a tort]").\textsuperscript{10}
  \item \textsuperscript{11} \textit{Mother Goose's Nursery Rhymes} 191 (L. Edna Walter ed., A.C. Black, Ltd. 1922).
    For want of a shoe the horse was lost.
    For want of a horse the rider was lost.
    For want of a rider the battle was lost.
    For want of a battle the kingdom was lost.
    And all for the want of a horseshoe nail.

  \item \textsuperscript{12} Fleming James Jr. & Roger F. Perry, \textit{Legal Cause}, 60 \textit{Yale L.J.} 761, 761 (1951) (first alteration in original) (citation omitted).
  \item \textsuperscript{13} Dan B. Dobbs, \textit{The Law of Torts} 405, 445 (2000).
\end{itemize}
“comparative negligence” is that “there is no methodology for comparing the causal contributions of the plaintiff’s and of the defendant’s negligence to the plaintiff’s injury.”

Professor Geoffrey Hazard underscores the mystery by pointing out that, although comparative apportionments are “impossible in theory,” they are somehow “feasible in practice.” Indeed. But how?

That is a sample of some of the mysteries lurking beneath the façade of tort doctrine. Those enigmas are fundamental to the topic of this symposium—that is, how, where, and why tort law’s boundaries are set. Questions about tort law’s perimeters inevitably lead to discussions and debates about what methods one should use for solving those puzzles and, within given methodological camps, what can be said about their solutions.

As the contributions to this symposium illustrate, the conventional and dominant perspective taken for solving tort law’s mysteries is from the inside. Equipped with a command of tort law’s doctrines and all of its best-known cases, scholars and judges peer outward. Ensconced in the heart of the law, they identify the boundaries of the field by making note of where torts stop. Rarely do they look beyond that boundary to assess what happens with the non-tortious harms, nor do they dwell on the possible boundary-shaping dynamics that might be occurring from the other side of the frontier. Instead, scholars observe what “is,” discern patterns and trends, and then offer principles and reasons to make sense of them.

Being clever animals, we humans have a forceful desire and uncanny capacity to concoct explanations for virtually any phenomenon that strikes us—at times even dipping into the cauldron of the magical and supernatural when more terrestrial options do not suffice. Were history a good teacher, humility would characterize our attempts to explain social behavior. But it is not. Our errors, though often evident in retrospect, are difficult to imagine, much less accept, when a given theory has a grip on our thinking.

17. See JONATHAN HAI DT, THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM 65 (2006); Jon Hanson & Kathleen Hanson, The Blame Frame: Justifying
form, different tort scholars have devised a range of possible explanations to make sense of tort law as it is. Once those stories are in place, "is" typically turns to "ought," and cases that require deviations from those principles are seen as beyond the law's boundaries—as "other" or "not tort law"—and the whole arrangement is perceived as "the way things should be."  

How we get to know tort law thus shares much in common with how we might get to know a person. We imagine that tort law has a personality or disposition—likes and dislikes, a set of stable preferences, areas of comfort and discomfort. We discern that disposition by observing how tort law responds to different situations. We study which claims tort law embraces and which it rejects. It is as if we are assessing a friend's palate by observing the foods she savors and those she eschews. Tort law’s mysteries are thus solved by studying doctrines and cases and examining which claims are vindicated and which are dismissed. Individual plaintiffs bring cases, and courts reach decisions based on a described set of facts. The principles of tort law emerge from judicial holdings in light of the cases' facts. This basic schema for making sense of tort law is depicted in Figure 1.

(Racial) Injustice in America, 41 HARV. C.R.-C.L. L. REV. 413 passim (2006) [hereinafter Hanson & Hanson, Blame Frame].

18. Aaron C. Kay, Danielle Gaucher Jennifer M. Peach, Mark P. Zann & Steven J. Spencer, Towards an Understanding of the Naturalistic Fallacy: System Justification and the Shift from Is to Ought (unpublished manuscript) (on file with authors).

19. True, sometimes judges are explicit about the principles underlying their decisions, but judicial reasoning is only suggestive and can be misleading. Tort scholars recognize the fact that judicial reasoning is often ad hoc and look for deeper principles to reconcile outcomes that jurists' rhetoric typically cannot. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 18 (2d ed. 1972).

[T]he true grounds of legal decision are often concealed rather than illuminated by the characteristic rhetoric of judicial opinions . . . . Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find those grounds. It is an advantage of economic analysis as a tool of legal study rather than a drawback that it does not analyze cases in the conceptual modes employed in the opinions themselves.

Id.
In our view, that conventional way of understanding tort law is, at best, misleading. Taken alone, it is the wrong way to solve the great mysteries of tort law or to understand the "whys" and "wheres" of basic boundary questions.

This Article is premised on the belief that a far more complete and realistic understanding is to be had by altering one's perspective of, and approach to, tort law. First, instead of studying tort law by looking outward from within, scholars should begin by looking inward from outside existing boundaries. Second, instead of assuming that we understand people and simply need to make sense of tort law in light of that understanding, tort scholars should recognize that, in fact, conventional schemas for the human animal are fundamentally flawed. Consequently, it is not possible to comprehend tort law without first having a more realistic conception of ourselves. Third, instead of trusting the attributions of causation, responsibility, and blame routinely made in the law, scholars and judges should strive to take account of the many unappreciated biases that silently manifest in those attributions.

Put differently, the answers to tort law's mysteries are located, less in tort law, and more in long overlooked or misconstrued forces within us. A meaningful understanding of law will come less from scrutinizing the details of doctrine and more from understanding who we are and how we make sense of ourselves and of the situations that give rise to harms, injuries, and other untoward outcomes.
That is the starting posture of the situationist or critical realist approach to law. More specifically, situationism posits that legal theory should be based on the most realistic account available of the human animal—an understanding of the large gaps between what moves us, on one hand, and how we make sense of our behavior, on the other. To do so requires looking to the social sciences, including social psychology, social cognition, cognitive neuroscience, and other mind sciences as well as to the insights gleaned from market actors who specialize in persuasion and influence. In addition, we look to history for lessons of what forces explain the existence of, and changes in, tort law in contrast to the forces that scholars examining tort law from the inside assume establish its core.

In sum, understanding ourselves better will help us to demystify the great tort mysteries and will raise normative doubts about where tort boundaries are currently set and which harms should lie within or outside the tort frontiers.


21. Historians have shown that tort law is the product of forces that seem quite alien to the axioms, principles, and logic of tort theorists. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977) (attributing the development of tort law and other areas of common law to market forces that largely escaped public scrutiny rather than to commonly assumed evolutions in legal theory); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004) (describing the development of twentieth century accident law as the contingent or accidental product of numerous ideas and institutional forces and not the inevitable product of logic or common law principles); Jed Handelsman Shugerman, Note, The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age, 110 YALE L.J. 333 (2000) (examining how “tragic dam failures,” much more so than grandiose revolutions in legal thought, explain American courts’ adoption of strict liability in Fletcher v. Rylands, 159 Eng. Rep. 737 (Ex. 1865), rev’d, 1 L.R.-Ex. 265 (Ex. Ch. 1866), aff’d, 3 L.R.-E & I. App. 330 (H.L. 1866)).

22. The endeavor, while framed here in terms of tort law, is one that has implications for, and could well be launched from, virtually any area of law. One grand takeaway from the situationist approach is that multiplex connections exist among areas of law in our curricula, libraries, and minds that tend to be packaged separately and perceived as independent personalities. A goal of situationism is to see those connections so that they might be disentangled.
B. Volleyballs Are Situational Characters

Because the tasks of elaborating and defending that thesis have been, and will continue to be, taken up elsewhere, we will not expend much space or energy developing them here. As one might imagine, the story of how people get things wrong when they make sense of things is long, complicated, and counterintuitive. After all, if people did not believe they were making sense of things when they made sense of things, they would not conclude that they were making sense. Make sense? Still, for those unfamiliar with the breathtaking discoveries of the mind sciences, it may be helpful for us to provide a sense of their flavor with the aid of an allusion.

Most of you will recall the Robinson Crusoe-esque plot of the popular and critically acclaimed 2000 motion picture, *Cast Away*. Tom Hanks’s character, Chuck, played a Federal Express employee who survived on a deserted island for five years. If you have not seen the movie, you should. It was one of Hanks’s best performances, earning him a nomination for an Academy Award for best actor in a leading role. That much you may remember. What you probably do not recall is that Hanks, for that same movie, was also nominated for MTV’s “Best On-Screen Team” award. Many of you may be scratching your head, asking: With whom could Hanks have possibly co-won an award for best “team”? Wasn’t Chuck alone on an island for most of the movie?

The nomination went to Tom Hanks and Wilson.

“Wilson” is the volleyball from Wilson Sporting Goods that washes up on the island together with other buoyant wreckage from Chuck’s ill-fated flight. Initially, the ball was just that: a ball. But when Chuck cuts his hand trying to start a fire and angrily grabs and heaves the ball, the blood from his hand leaves an image that would quickly become Wilson’s discerning countenance. With the addition

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23. For an overview of that research, see Hanson & Yosifon, *The Situation*, supra note 20, at 149–77, and accompanying citations. For continuously updated narratives relating to discoveries of social psychologists and other mind scientists, see The Project on Law and Mind Sciences at Harvard Law School, http://lawandmind.com (last visited Nov. 15, 2008).


of a few facial features, Chuck transforms the ball into a person with a personality—"a mute, infinitely patient, non-living listener"—and a role—Chuck’s only companion, friend, and therapist.

There is something quite powerful about Wilson’s acting that makes sense of the MTV award nomination. Breaking free of the “ball” typecast, Wilson was believable as a person. An image that looked very little like an actual “face” was all that was required for Chuck and his audience to perceive a face (an illustration of the same tendency that causes people to see a clown’s face in a cloud or a saint’s face on a cinnamon bun). Once some facial features were in place, Wilson’s personality or disposition emerged automatically.

To be sure, Tom Hanks’s superb acting is partially why the ball seemed so person-like. Still, the heaviest lifting was done in and by our own minds; under the right conditions, we are subconsciously eager to see a volleyball as a person.

As believable as Wilson was, there was also something mildly humorous about Chuck’s bond to the ball. The appeal of Wilson and of his relationship with Chuck stems, we suspect, from the fact that the audience could experience both the absurdity of the idea that


28. In 1757, David Hume described the propensity this way:

There is a universal tendency among mankind to conceive all beings like themselves, and to transfer to every object, those qualities, with which they are familiarly acquainted, and of which they are intimately conscious. We find human faces in the moon, armies in the clouds; and by a natural propensity, if not corrected by experience and reflection, ascribe malice or good-will to every thing, that hurts or pleases us.

DAVID HUME, THE PHILOSOPHICAL WORKS OF DAVID HUME 446 (1826). Carl Sagan wrote in 1995:

As soon as the infant can see, it recognizes faces, and we now know that this skill is hardwired in our brains. Those infants who a million years ago were unable to recognize a face smiled back less, were less likely to win the hearts of their parents, and less likely to prosper. These days, nearly every infant is quick to identify a human face, and to respond with a goony grin.

CARL SAGAN, THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK 45 (1996); see also Elizabeth Svoboda, Faces, Faces Everywhere, N.Y. TIMES, Feb. 13, 2007, at F1 (citing research by Doris Tsao, a neuroscientist at the University of Bremen in Germany).

29. The confusion is not just the stuff of movies. The tendency to assign dispositions or personhood to items that lack them—or to exaggerate the role of disposition—goes well beyond sports equipment. We often speak of nations and corporations as if they were individuals who acted according to a single, stable disposition. Our homes and cars develop personalities. Time periods develop dispositions—we can encounter a good day or a bad year. We give names to and perceive the intentions of everything from boats to mountains and from hurricanes to markets. See Joel Garreau & Shankar Vedantam, Dealing with Scary Mr. Market, WASH. POST, Sept. 16, 2008, at C1.
Wilson was anything more than a ball and, at the same time, the plausibility of Wilson as an actual, living person. It is as if part of us was tricked by the illusion while another part of us could recognize that we were being tricked. Wilson was obviously just a ball. Yet Wilson was obviously much more than just a ball. In fact, to many, the most poignant moment in the entire movie occurred when Wilson fell off the raft and drifted out of Chuck’s reach. Swept away ourselves, we sniffled over the loss of a volleyball.30

But then we remind ourselves: Wilson was just a ball. And balls are special. In minds that name and dispositionalize everything from “Teddy” bears to boats or from homes to hurricanes, balls generally remain balls. In fact, if ever there was an item that is moved more obviously by something other than its own volition, it is a ball. Balls are famous for not moving themselves—which is why we have designed so many games and sports where the ball is the passive object and the role of the people around it is to move it. Balls are there to be kicked, dunked, passed, dribbled, punted, slammed, rolled, thrown, dropped, batted, played, caught, chased, fumbled, bowled, hit, gripped, tossed, lateralled, watched, bounced, and so on. Balls do not have preferences. They do not think, and they do not have a will. Balls do not choose. And as long as they are similar in substance and construction, a ball is a ball, is a ball. We do not usually think of a ball as our friend, much less expect it to cop an attitude. Balls are quintessential situational characters.

Believe it or not, by examining our reaction to Wilson, some of the deeper mysteries of tort law are beginning to unravel. Our readiness to find a disposition where none exists reflects the workings of subconscious knowledge structures and implicit motivations with which we make sense of the world—with which we make causal attributions and draw inferences about things we cannot see: motives, intentions, and the like. We find Chuck’s relationship with Wilson both compelling and amusing because we perceive the reality of it and know the absurdity of it. Put differently, we know Wilson, like any ball, was a situational character—that is, an object

moved by something in its situation. And yet, because of a few seeming facial features, we saw Wilson as a dispositional actor.

Wilson thus tickled our attributional schemas. That tickle thus reveals the schemas’ existence. Once we understand that such schemas are present and subject to such easy manipulation—at one moment causing us grief, the next moment, amusement for feeling grief—an important question emerges: if we are making sense of our world largely with the aid of automatic, subconscious schemas, are those schemas leading us to accurate, realistic understandings and conclusions? More concisely: can our schemas be trusted?

Well, the good news is that social scientists have been studying that question for at least a half century. The bad news is that those social scientists have discovered, initially to their own surprise, that our schemas are, like little mind-demons, very often deceiving us, while assuring us that they are reliable. To be sure, those schemas are necessary, innumerable, and helpful in many ways. They are all those things, but they are also jaw-droppingly misleading.

Do not misunderstand. Our claim is not that knowledge structures and attributional schemas are always unhelpful or incorrect. We are not about to assert, for instance, that “we’ve all been wrong about balls,” “that they really do have a personality and intentions.” Clearly they do not; so the conventional ball schema is correct. Instead, the misleading effect of knowledge structures cuts in the other direction and is displayed by our proclivity to see Wilson as something more than a ball. Obviously, the fact that Wilson is not a dispositional actor is hardly a shocking revelation. So let us try again.

Consider this about the movie Cast Away: Chuck was not the person we imagined he was—a fast-talking workaholic turned clever survivalist. He was a character being played by Tom Hanks, subject to a script, a set, a director’s instructions, a huge budget (to try to pay off), an anticipated audience with an anticipated set of tastes and

31. See Chen & Hanson, Categorically Biased, supra note 20, at 1110-11 (describing the connection of humor to knowledge structures).
32. By “schemas” we mean mental structures that help people organize information and provide a framework for understanding the world. For an extensive discussion, see id. at 1133–218.
33. Much to the relief of those involved with the film, Cast Away’s combined and massive production and advertising budget of approximately $125,000,000 was considerably eclipsed by
tolerances, and so on. He was, no less than Wilson, a situational character. Moviegoers simply imagined that Chuck was the person with the personality that they came to associate with Chuck. That is hardly a revelation, and yet many of our same readers, we suspect, felt emotionally connected to, and moved by, the “Chuck” that they were temporarily fooled into believing they were coming to know when engrossed in the movie. That insight, too, is unlikely to unclench many jaws.

Our big claim is not that “situational characters,” such as volleyballs and movie characters, are not real people, no matter how much we might believe them to be. Rather, it is that “real people” are much like Hollywood actors and volleyballs, no matter how much we might believe that they are not. The human animal is a situational character and quite unlike the dispositional actor commonly supposed. That should strike many readers as at least a little farfetched.

C. The Human Animal Is a Situational Character

To avoid being misunderstood, we should be more precise about what we mean by “situationism.” As defined elsewhere, “[s]ituationism is premised on the social scientific insight that the naïve psychology—that is, the highly simplified, affirming, and widely held model for understanding human thinking and behavior—on which our laws and institutions are based is largely wrong.”

So what is that highly simplified model of the human animal? According to a group of cultural anthropologists and social psychologists who have researched that question, “[t]he person is believed to consist of a set of ‘internal,’ ‘personal’ attributes such as . . . personality traits, preferences, subjective feeling states, beliefs, and attitudes. . . . Taken together, these attributes define each person


34. The analogy goes too far, of course. We accept the idea that humans have some agency, and we know that there are different factors influencing the people and the law than influence balls. A situationist approach is simply rejecting the dispositionist model that is at the heart of law and dominant legal theories. We will have more to say about that presently.

35. See Hanson & Yosifon, The Situational Character, supra note 20, passim; Hanson & Yosifon, The Situation, supra note 20, passim.

as an autonomous, freely choosing, special individual." They boil down the simple attributional schema to the following elements:

- Actions are freely chosen.
- Choices imply a preference.
- Preferences are stable over time.
- Preferences implicate the identity of the self.
- Outcomes are mostly controllable.
- People are responsible for (and hence the self is implicated in) the choices they make and the resultant outcomes.

From that starting point, it is easy to assume that each individual has control over his or her own destiny and to credit or blame good and bad conduct or outcomes accordingly.

As depicted in Figure 2, the person schema imagines that through an individual’s choices we learn something about her preferences, which constitute the foundation of her identity. It is also possible that her actions reflect the information she had in contemplating her options (which is presumed accurate and sufficient) or her will (which is presumed strong enough to abide by her underlying preferences).

**FIGURE 2: THE PERSON SCHEMA**

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38. Id.

39. Both of those presumptions can be overcome. They would likely be rebutted, for instance, in a situation involving a child partaking in an addictive activity.
Those are the basic elements of what we call *dispositionism* or the *dispositionist person schema*. Given those elements, it makes sense that people who do bad things should be punished, people who do good things should be rewarded, and the situation should be ignored. That is the "dispositionism" that we situationists maintain is largely wrong and it is that conception that underlies naïve theories of the person, including those animating the legal system and dominant legal theories.

Social psychologists Lee Ross and Richard Nisbett famously described "the tendency to make unwarranted leaps from acts to corresponding dispositions . . . [as] perhaps the most fundamental and most common failing of social inference." As has been detailed in other work, that "fundamental attribution error," as it is sometimes called, has both external and internal components. A quick review of a couple of the experimental demonstrations of that error may be useful to readers new to this terrain. Consider this summary of one of the classics:

[C]ollege students participated in a simulated quiz game and were randomly assigned to either of two roles: contestant or questioner. Questioners were asked to compose generalnowledge queries to be posed to the contestants, and the contestants were instructed to answer as many of the questions as they could. The situational advantage of the questioners is clear, given that they could draw from their areas of personal expertise, while contestants were forced to answer questions on unfamiliar topics. Therefore, it should not have been surprising that contestants could only give a small percentage of correct answers. Yet, when it came to estimating the intelligence of the two groups, the situational advantage was forgotten: both questioners and contestants grossly under-appreciated the situational benefit of being a questioner. As a result, both groups ranked the questioners as more generally knowledgeable than contestants. In other words, the game

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41. See Hanson & Yosifon, supra note 20, passim.
was perceived as a fair measure of general knowledge, and the failure of contestants was attributed to disposition.\textsuperscript{42}

The most famous study illustrating the power of situation and the misleading effects of dispositionism is Stanley Milgram's so-called obedience experiment, in which ordinary people gave seemingly fatal shocks to innocent victims.\textsuperscript{43} Although Milgram's research took place nearly five decades ago, it has recently attracted a great deal of attention in both legal-academic\textsuperscript{44} and popular literature.\textsuperscript{45} To summarize the experiment, we draw from a recent description\textsuperscript{46} crafted by Phil Zimbardo, a former president of the American Psychological Association, who may be the best-known social psychologist in the history of the field and whose life and

\begin{footnotesize}
\begin{enumerate}
\item See generally \textit{STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW} (1974); see also \textit{THOMAS BLASS, THE MAN WHO SHOCKED THE WORLD: THE LIFE AND LEGACY OF STANLEY MILGRAM} (2004) (providing a highly readable and scholarly examination of Milgram's contributions to social psychology).
\item A recent increase in the frequency with which legal scholars cite Milgram (and other social psychologists) is depicted in Chart 1, infra. Milgram has been referenced in regard to a variety of legal topics, such as Raj Dhanasekaran, \textit{When Rotten Apples Return: How the Posse Comitatus Act of 1878 Can Deter Domestic Law Enforcement Authorities from Using Military Interrogation Techniques on Civilians}, 5 CONN. PUB. INT. L.J. 233, 260–61 (2006) (applying Milgram's findings to military interrogation of civilians); Benjamin P. Falit, \textit{Curbing Industry Sponsors' Incentive to Design Post-Approval Trials That Are Suboptimal for Informing Prescribers But More Likely Than Optimal Designs to Yield Favorable Results}, 37 SETON HALL L. REV. 969, 971–75 (2007) (predicting how the business practices of pharmaceutical companies and related food and drug laws will evolve according to situational pressures as uncovered by Milgram); Deborah L. Rhode, \textit{Legal Ethics: Moral Counseling}, 75 FORDHAM L. REV. 1317, 1322–23 (2006) (discussing relevance of Milgram's findings to peer pressure and expectations for group loyalty found in organizational structures).
\end{enumerate}
\end{footnotesize}
research shared much in common with Milgram’s.\textsuperscript{47} Zimbardo writes:

Imagine that you have responded to an advertisement in the New Haven newspaper seeking subjects for a study of memory. A researcher whose serious demeanor and laboratory coat convey scientific importance greets you and another applicant at your arrival at a Yale laboratory . . . .

You are here to help science find ways to improve people’s learning and memory through the use of punishment. The researcher tells you why this work may have important consequences. The task is straightforward: one of you will be the “teacher” who gives the “learner” a set of word pairings to memorize. During the test, the teacher will give each key word, and the learner must respond with the correct association. When the learner is right, the teacher gives a verbal reward, such as “Good” or “That’s right.” When the learner is wrong, the teacher is to press a lever on an impressive-looking apparatus that delivers an immediate shock to punish the error.

The shock generator has 30 switches, starting from a low level of 15 volts and increasing by 15 volts to each higher level. The experimenter tells you that every time the learner makes a mistake, you have to press the next switch. The control panel shows both the voltage of each switch and a description. The tenth level (150 volts) is “Strong Shock”; the 17th level (255 volts) is “Intense Shock”; the 25th level (375 volts) is “Danger, Severe Shock.” At the 29th and 30th levels (435 and 450 volts) the control panel is marked simply with an ominous XXX: the pornography of ultimate pain and power.

You and another volunteer draw straws to see who will play each role; you are to be the teacher, and the other volunteer will be the learner. He is a mild-mannered, middle-aged man whom you help escort to the next chamber. “Okay, now we are going to set up the learner so he can get some punishment,” the experimenter tells you.

\textsuperscript{47} To read Phil Zimbardo’s description of his overlapping experiences with Stanley Milgram (including being classmates in high school), see \textit{id}.
both. The learner's arms are strapped down and an electrode is attached to his right wrist. The generator in the next room will deliver the shocks. The two of you communicate over an intercom, with the experimenter standing next to you. You get a sample shock of 45 volts—the third level, a slight tingly pain—so you have a sense of what the shock levels mean. The researcher then signals you to start.

Initially, your pupil does well, but soon he begins making errors, and you start pressing the shock switches. He complains that the shocks are starting to hurt. You look at the experimenter, who nods to continue. As the shock levels increase in intensity, so do the learner's screams, saying he does not think he wants to continue. You hesitate and question whether you should go on. But the experimenter insists that you have no choice. . . .

How far up the scale do you predict that you would go under those orders? Put yourself back in the basement with the fake shock apparatus and the other "volunteer"—actually the experimenter's confederate, who always plays the learner because the "drawing" is rigged—strapped down in the next room. As the shocks proceed, the learner begins complaining about his heart condition. You dissent, but the experimenter still insists that you continue. The learner makes errors galore. You plead with your pupil to concentrate; you don't want to hurt him. But your concerns and motivational messages are to no avail. He gets the answers wrong again and again. As the shocks intensify, he shouts out, "I can't stand the pain, let me out of here!" Then he says to the experimenter, "You have no right to keep me here!" Another level up, he screams, "I absolutely refuse to answer any more! You can't hold me here! My heart's bothering me!"

Obviously you want nothing more to do with this experiment. You tell the experimenter that you refuse to continue. You are not the kind of person who harms other people in this way. You want out. But the experimenter continues to insist that you go on. He reminds you of the contract, of your agreement to participate fully. Moreover,
he claims responsibility for the consequences of your shocking actions. After you press the 300-volt switch, you read the next keyword, but the learner doesn’t answer. “He’s not responding,” you tell the experimenter. You want him to go into the other room and check on the learner to see if he is all right. The experimenter is impassive; he is not going to check on the learner. Instead he tells you, “If the learner doesn’t answer in a reasonable time, about five seconds, consider it wrong,” since errors of omission must be punished in the same way as errors of commission—that is a rule.

As you continue up to even more dangerous shock levels, there is no sound coming from your pupil’s shock chamber. He may be unconscious or worse. You are truly disturbed and want to quit, but nothing you say works to get your exit from this unexpectedly distressing situation. You are told to follow the rules and keep posing the test items and shocking the errors.

Now try to imagine fully what your participation as the teacher would be. If you actually go all the way to the last of the shock levels, the experimenter will insist that you repeat that XXX switch two more times. I am sure you are saying, “No way would I ever go all the way!” Obviously, you would have dissented, then disobeyed and just walked out. You would never sell out your morality. Right?

Milgram once described his shock experiment to a group of 40 psychiatrists and asked them to estimate the percentage of American citizens who would go to each of the 30 levels in the experiment. On average, they predicted that less than 1 percent would go all the way to the end, that only sadists would engage in such sadistic behavior, and that most people would drop out at the tenth level of 150 volts. They could not have been more wrong.

In Milgram’s experiment, two of every three (65 percent) of the volunteers went all the way up to the maximum shock level of 450 volts. The vast majority of people shocked the victim over and over again despite his increasingly desperate pleas to stop. Most participants
dissented from time to time and said they did not want to go on, but the researcher would prod them to continue.48 These results surprised everyone, including Milgram, who did not expect individuals could be so easily led to do harm.49 For our purposes, the greatest significance of Milgram’s experiment is this: people often behave in ways that contradict how they imagine they would. The experiment thus reveals not only how “good people” can become “bad apples” and engage in “evil conduct,” but also, more generally, how our actions are frequently not the consequences of some imagined set of stable preferences, informed by our thinking, and operated through our will. We are buffeted and blown about by hard-to-see situational influences around and within us, at the same time that we chalk up our behavior to identity-revealing choice. We are more like “balls” than we are like the “people” who we imagine ourselves to be.

D. Attributions Are Situational Characters

This section returns to the mysteries of how the dispositionist person schema might influence attributions of causation, responsibility, and blame. Our hypothesis is that the attributional tendencies discovered through social science will powerfully shape, perhaps determine, the law itself. With those discoveries in mind,

48. See id. According to Zimbardo, Milgram’s findings have been replicated and extended by researchers around the globe:

Recently, Thomas Blass of the University of Maryland-Baltimore County [author of The Man Who Shocked The World and creator of the terrific website StanleyMilgram.Com] analyzed the rates of obedience in eight studies conducted in the United States and nine replications in European, African, and Asian countries. He found comparably high levels of compliance in all. The 61 percent mean obedience rate found in the U.S. was matched by the 66 percent rate found across all the other national samples. The degree of obedience was not affected by the timing of the studies, which ranged from 1963 to 1985.

Other studies based on Milgram’s have shown how powerful the obedience effect can be when legitimate authorities exercise their power within their power domains. In one study, most college students administered shocks to whimpering puppies when required to do so by a professor. In another, all but one of 22 nurses flouted their hospital’s procedure by obeying a phone order from an unknown doctor to administer an excessive amount of a drug (actually a placebo) . . . . In still another, a group of 20 high school students joined a history teacher’s supposed authoritarian political movement, and within a week had expelled their fellows from class and recruited nearly 200 others from around the school to the cause.

Id.

49. See MILGRAM, supra note 43, at 13–14, 123.
therefore, it may be possible to shed some light on which sort of harms will fall within or beyond the frontiers of tort law.

Social psychologists have studied what they sometimes call our "naïve attributional" undersandings of how we determine causation and, when appropriate, attribute responsibility and blame. Describing and detailing that research would be too significant an undertaking for this brief Article. We can, however, provide a cursory overview.

The most basic version of the attributional model developed from that naive theory is as follows: perceptions lead to attributions, attributions lead to emotions, and emotions lead to behavioral responses. When something unexpected and untoward occurs, our minds automatically seek an explanation. And our emotional reaction to the underlying outcome will depend on how our minds answer several questions: Which actor or actors do we associate with the harmful outcome? Did that actor act with volition, knowledge, and control? Did the actor intend the act? Did the actor intend the harm? And what motives lay behind the intention and actions? The naive or folk theory of attributions holds that our inferences regarding a person's volition, knowledge, control, intention, and motive shape our attributions. The stronger those inferences regarding a given actor, the more strongly we tend to feel that that actor caused, is responsible for, and is to blame for the outcome. Although people rarely peer inside the black box of their attributions, a little naive introspection typically reveals those sorts of factors.

And the more definitively we make those attributions, the greater our emotional reaction and urge to respond behaviorally to the event and the individuals involved—anger toward, and an urge to punish, the injurer and pity toward, and an urge to compensate, the victim.\textsuperscript{51}

That brief summary should not strike the reader as especially controversial or insightful, given that it purports to be a summary of what most believe is at the core of our attributions. It is, in other words, common sense. Still, making it explicit can be somewhat useful. Some of the mysteries of tort law might, at least in a \textit{naive} way, be solved by considering that folk theory of attributions. Specifically, we can loosely predict that tort remedies (and other legal remedies) will tend to exist for those harms where, on one hand, an “injurer” is perceived to have had sufficient knowledge, volition, and control (and even more so if that injurer is perceived to have acted intentionally and with a bad motive) while, on the other hand, the “victim” is perceived to have acted with significantly less knowledge, volition, and control. In such cases, the desire to punish and the desire to compensate will lead to liability and damages paid by the injurer to the victim.\textsuperscript{52}

\footnotesize{\begin{itemize}
\item \textsuperscript{51} See Jon Hanson & Ana Reyes, Attributional Positivism, The Naive Psychology Behind Our Laws (Apr. 2, 2006) (unpublished manuscript, on file with authors); Jon Hanson & Michael McCann, Situationist Policy: The Theory (Sept. 27, 2008) (unpublished working paper, on file with authors) [hereinafter Hanson & McCann, Situationist Policy].
\item \textsuperscript{52} Note that the tort case will typically include a built-in comparison between at least two parties. Although most naive theories of causation, responsibility, and blame assume that there
\end{itemize}}
Again, that is only the naïve theory of tort law and its mysteries. It nonetheless might help explain some of the more general contours of tort law or of the naïve explanations given for that tortscape. Indeed, general descriptions of tort law proffered by prominent tort authorities sometimes do comport with our simple prediction. For instance, Prosser and Keeton explain:

Apparently courts have . . . worked out an irregular and poorly defined sliding scale, by which the defendant’s liability is least where the conduct is merely inadvertent, greater for acts in disregard of consequences increasingly likely to follow, . . . and greatest of all where the motive is a malevolent desire to do harm.  

But the deeper solutions to tort law’s mysteries, and a deeper understanding of what determines the dimensions and boundaries of tort law, are to be found by studying what social psychologists and other mind scientists have discovered about the implicit or situational mechanisms behind our attributions of causation, responsibility, and blame. The general lesson of that research is clear: our attributions of causation, responsibility, and blame—and our assessments of knowledge, control, intentions, and motives—are not what we suppose they are. Indeed, our presumptions about others and

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54. See Hanson & Reyes, supra note 51. See generally NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS passim (2001) (employing attribution theory to explain how jurors use a combination of common sense, facts, and law in an attempt to make a just decision).
ourselves are typically wrong or subject to significant qualification. Again, this is not the place to defend such bold assertions, but it is also too provocative a claim to leave wholly unsupported. So let us offer a few quick examples of the sort of discoveries we have in mind.

First consider dispositionism. Our proclivity to attribute human actions to the dispositions of the person and not the situation is the most basic of attributional biases (which is not to say that it is without exceptions). Our attributions will likewise seldom acknowledge the integral role of situation and too often focus on the less meaningful role of a person’s disposition. In addition, our attributions will also reflect, much less than we realize, our own affective responses, implicit associations, and implicit motives. Those interior situational forces will often operate automatically, and the reasons that we offer for our attributions will rarely reflect the actual motor behind our attributions. Instead, they are the rationalizations that we concoct for ourselves and for others to make sense of our attributions.

For instance, without our being aware of it, we will react with heightened negativity toward proximate and salient individuals associated with an injury, especially when their conduct deviates from expectations or norms of behavior or when they are members of outgroups. Similarly, our attributions will, beneath the radar of consciousness, reflect our widely-held urge to maintain our beliefs in a just world and a legitimate system. Our sympathy toward a victim will likewise reflect the number of victims that there are and the tractability of compensating those victims. In addition, our

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55. See supra text accompanying notes 37–49 and accompanying notes.
56. For an overview, see Hanson & Yosifon, The Situational Character, supra note 20.
57. See, e.g., Benforado, Hanson & Yosifon, supra note 20 (describing how we blame obese persons for their obesity without considering situational explanations, and how our indignation partly reflects how our minds classify obese persons as part of a different and inferior social group).
attributions will be skewed by the attributions that others make and
the frame through which we first consider the untoward outcome.
And our assessments of whether someone, say, acted "intentionally,"
will itself depend on factors that would seem unrelated to the
question of intent.\footnote{See Joshua Knobe, Theory of Mind and Moral Cognition: Exploring the Connections, 9 TRENDS IN COGNITIVE SCI. 357, 357–59 (2005) (providing a brief review of the literature).}

In those ways, and many others, our attributions are themselves
situational characters—determined, not so much by the underlying
truth of the matter, but by hidden features in our interiors, unnoticed
elements of our environs, and interactions between the two.

That, in our view, supplies the key to solving the great mysteries
of tort law and to understanding its existing boundaries: to
understand tort law, one must understand the implicit situational
factors that contribute to the explicit attributions that we offer to
rationalize our desire to punish some and compensate others.

E. Policies Are Situational Characters

The discussion so far has sketched three interrelated ways in
which our knowledge structures mislead us. We have, in other
words, noted three broken, but dominant, schemas: our tort schema,
our person schema, and our attributional schema. First, we presume
that tort law is like a "person"—that it has a purpose or disposition
that is discoverable through observation. Second, we presume that a
person is like a "person"—that her actions are the consequences of
her thinking, preferences, and will. Third, we presume that our
attributions of causation, responsibility, and blame (and underlying
assessments of volition, control, intent, and motive) are accurate and
based in reality.

The mind sciences have challenged all of those presumptions in
similar ways. In each case, social scientists have discovered that our

http://www.foreignpolicy.com/story/cms.php?story_id=3751 ("Psychologists have found that the
statistics of mass murder or genocide—no matter how large the numbers—do not convey the true
meaning of such atrocities. The numbers fail to trigger the affective emotion or feeling required
to motivate action. In other words, we know that genocide in Darfur is real, but we do not 'feel'
that reality. In fact, not only do we fail to grasp the gravity of the statistics, but the numbers
themselves may actually hinder the psychological processes required to prompt action."); see also
George F. Loewenstein, Deborah Small & Jeff Strnad, Statistical, Identifiable and Iconic Victims
No. 301), available at http://ssrn.com/abstract=678281 (discussing "the identifiable victim
effect"—the greater sympathy shown toward identifiable victims than statistical victims—and
some of its influence on policymaking).
naïve understandings reflect ill-advised faith in our perceptions and reasons. We are getting it wrong: it is as if we are assigning a name and personality to a ball.

The situationist approach to policy requires, first, resisting the temptation to infer a disposition and, second, developing the cognitive muscle necessary for viewing, among other things, people, our laws, and our attributions as ball-like situational characters. Situationism means being suspicious of our intuitions and skeptical of common sense. As physicists might, we need to look at the numerous forces that can account for how and why balls—ourselves, our laws, and our attributions—move as they do.

In other work, we have described four overlapping situational forces that seem to be particularly influential. Although this is not the place for particulars, we can provide a flavor of those four factors, which may be helpful in illustrating why dispositionism is generally the dominant attributional perspective. They are as follows:

- **Simplicity:** Because of various constraints on our cognitions, time, and resources, we are motivated to accept explanations and attributions that are easily managed within existing knowledge structures and that provide cognitive closure, even if such simplicity comes at a cost to accuracy. Similarly, we prefer policies that are easy to imagine, design, and implement.

- **Plausibility and Legitimacy:** Because of our self-conceptions, and our need to explain our behavior, we are motivated to accept explanations and attributions that seem accurate, correct, realistic, coherent, and legitimate and that lend legitimacy to the resultant policy. As it happens, those considerations are often the most prominent of the attributional constraints at the margin—right here, right now regarding this policy question—but

61. See Hanson & McCann, Situationist Policy, supra note 51. There are certainly times when that motive is overcome by other situational forces, including other motives. At times, for instance, individuals may crave complex explanations and attributions, such as when complexity and doubt permit them to believe or behave as they like. See id.

62. See id. Different ways to establish plausibility include appeals to direct observation (“it is so, because anyone can see it is so”), appeals to authority (“it is so because authority X said it is so”), and appeals to process (“it is so because the process it went through leads to its being so”). Id.
it is often the weakest of the attributional constraints in the long run.  

- **AFFIRMATION:** Our attributions are highly sensitive to three interrelated motives to affirm ourselves on different levels: (1) self-affirmation; (2) group-affirmation; and (3) system-affirmation. The *self-affirmation motive* reflects the motive to bolster and rationalize the perceived interests and esteem of the self. The *group-affirmation motive* is the motive to defend, bolster, and rationalize the interest and status of one’s in-group. And, the *system-affirmation motive* is the motive to defend, bolster, and rationalize the interests and legitimacy of the social system (defined at various levels including institutions, hierarchies, organizations, and societies). Among the perceptions of ourselves, our groups, and our systems, which are motivated to affirm, is a notion that we are *just*, that salient inequalities, injuries, harms, can either be justified or, if not, that the injurer is punished and the victim is compensated for the injury.

- **POWER:** Because attributions matter for different individuals, entities, institutions, and groups and because those attributions are manipulable, those individuals, entities, institutions, or groups with the most power (which, briefly, we will define here simply as the ability to influence external and internal situation with respect to attributions) will wield disproportionate influence over which attributions become dominant and most influential over policy.

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63. See id.

64. See id.

65. See id. A growing body of evidence reveals that the last of the three affirmation motives will often trump the first two when there is a conflict. See id.

66. See id. Social psychologists such as John Jost have discovered that a perceived threat to the stability or legitimacy of existing arrangements (“system threat”) leads most people—including those disadvantaged by the system—to defend the status quo through legitimizing attributional schemas and stereotypes that help to turn what “is” into what “ought to be.” See Jost & Hunyady, supra note 58, at 126–28.

67. Hanson & McCann, Situationist Policy, supra note 51.
One well-known policy example may help illustrate the interactions of those four factors and their influence: the regulatory response to smoking-caused harms.\(^6^8\) For much of the twentieth century, the tobacco industry managed to avoid the costs of tort liability by shaping attributions of causation, responsibility, and blame regarding the risks of smoking. Although the strategies varied depending upon the situation (including the audience and the changing plausibility of competing attributions over time), probably the single most important and effective strategy involved promoting the conception of the smoker as an autonomous, liberated chooser. That was an important strategy for at least two reasons. First, manufacturers could make their products more desirable to consumers by associating them with autonomy (“I choose to smoke; therefore, I am a “Marlboro Man” or a liberated “Virginia Slim”). Second, the dispositionist schema helped shield manufacturers from liability or regulation (“he chose to smoke, therefore he, not the manufacturer, is to blame for his lung cancer”). That dispositionist, choice-based perspective of smokers was one that individual manufacturers devoted billions of dollars to promoting.

The beauty of dispositionism, from the tobacco industry’s perspective, is not simply the fact that it moves products and protects profits. Dispositionism works also because it is simple (“she smokes because she wants to”) and plausible (“are you saying that she didn’t choose to smoke?”). Finally, dispositionism is affirming: smokers want to believe they choose to smoke; non-smokers want to believe that smokers choose to smoke; and we all like to believe that the more than 400,000 U.S. deaths per year associated with smoking do not reflect something unappealing about the rest of us or unjust about our system—rather, the victim’s preference-based choices.\(^6^9\)

\(^6^8\) This quick overview borrows from work that one of us has been doing for the last decade on tobacco industry practices. See, e.g., Hanson & Hanson, Blame Frame, supra note 17, at 445–55; Jon D. Hanson & Douglas A. Kysar, The Joint Failure of Economic Theory and Legal Regulation, in SMOKING: RISK, PERCEPTION, AND POLICY 229, 229-76 (Paul Slovic ed. 2001); Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 HARV. L. REV. 1420, 1467-1551 (1999) [hereinafter Hanson & Kysar, Taking Behavioralism Seriously;] Jon D. Hanson & Kyle D. Logue, The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation, 107 YALE L.J. 1163 passim (1998); Hanson & Yosifon, The Situation, supra note 20, at 247-68.

\(^6^9\) Dispositionist attributions dominate most policy debates, notwithstanding the far more powerful role of situation. For examples, see Benforado, Hanson & Yosifon, supra note 20, at 1770–98; Hanson & Hanson, Blame Frame, supra note 17, at 413 passim.
For those reasons, dispositionism is extraordinarily easy to promote through situational manipulation. As the cigarette example indicates, profit-maximizing firms can exercise their comparative power over the situation to reinforce “common sense” regarding who we are and what moves us.

Taking a situationist perspective makes it easier to understand how the situational characters we described above—our laws, our attributions, ourselves—are influenced by a competition or tournament among individuals, groups, institutions, and interests. Each has a stake in promoting certain perceptions and discouraging others, and the playing field on which this competition over the situation takes place is itself hidden largely in the situation. When looking through dispositionist lenses, that competition and its effects are far more difficult to recognize or take seriously.

A situationist understanding of what moves us, our attributions, and our policies, all calls for, among other things, a new way of teaching law and a new sort of teaching materials. In the next section, we consider what a situationist torts casebook might look like.

III. DISPOSITIONIST TORT LAW AND THE CASEBOOK METHOD ARE SITUATIONAL CHARACTERS

A. Dispositionist Tort Law Is a Situational Character

As we summarized above, the dispositionist view of, and approach to, tort law is dominant—so dominant, in fact, that as Professor Menkel-Meadow explains, “[A] major rethinking of legal

70. It was not until the end of the twentieth century, and then only for a relatively short time, that the tobacco industry lost its grip on the competition over relevant attributions. That is true largely because of the efforts of whistle-blowers, scientists, and lawyers who finally managed, with the help of some headline-grabbing revelations and a cascade of media focus, to challenge the choice narrative. Evidence that the industry targeted children, that the product was addictive, that non-smokers were being harmed by secondhand smoke, that states were paying for the costs of smokers, that the industry had withheld information about the health risks and addictiveness of their products, and so on, all combined to flip the blame-the-victim attributions that had been such a valuable industry shield. And, of course, as the attributions changed, so did tort law. Briefly, at least, tobacco industry became subject to multi-billion dollar damage awards. See supra text accompanying notes 8, 68–69.

71. See generally Hanson & Yosifon, The Situation, supra note 20, at 202–78 (describing the process of shaping how we understand as “deep capture”).
education has not occurred, really, in over one hundred years." Even the idea that tort law has an essence or personality—a set of preferences, goals, and attitudes or, if you like, stable principles or doctrines—and that that personality can be discovered through careful study of the cases is still with us. Still more entrenched is the dispositionist view of the person subject to tort law: each individual is presumed to be moved by her preferences, thinking, and free will. Such is the presumption except when a person’s behavior occurs in the presence of extraordinarily salient situational forces. A gun to one’s head or a tempest at one’s stern, for instance, captures our attention, and there are a small number of less dramatic influences that we are schematically primed to look for, such as the incentivizing effects of prices or taxes. In light of the flaws of this dispositionist approach, the question emerges as to why it continues to be dominant. The brief answer is simple: dispositionist tort law is itself a situational character.

In important ways, the dispositionism in law and legal institutions is historically contingent. Christopher Columbus Langdell, the founding father of legal education as we know it, was a hard-core dispositionist. The still-dominant Langdellian case method, which “posited that students could learn both substantive legal principles and legal analysis by studying cases to distill the essential principles and doctrines that courts applied,” reflects that.

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73. See supra text accompanying notes 15–19 (describing the widespread assumption that one can discern the law’s disposition—a disposition that, once identified, is to be respected and promoted).

74. Even the latter situational forces are typically assumed to be internalized through reason and conscious processing informed by preferences. See Hanson & Hanson, Blame Frame, supra note 17, at 426 n.50 (describing “naive situationism”); Hanson & Yosifon, The Situation, supra note 20, at 168–76, 201–18 (providing fuller discussion of the sort of situational forces that we tend to see). For a more detailed summary of the contrast between relatively situationist and relatively dispositionist perspectives on tort law, see Table 1, infra pp. 111–16.

75. The following section will touch on only a few brief examples of situational forces behind dispositionist tort law. There is much more to be said about those forces than we can even summarize here. For a recent article discussing some of the methods by which dispositionists maintain their faulty attributional schemas in the face of situationist insights, see Adam Benforado & Jon Hanson, Naive Cynicism: Maintaining False Perceptions in Policy Debates, 57 EMORY L.J. 499 (2008) [hereinafter Benforado & Hanson, Naive Cynicism].

76. See Jeffrey W. Stempel, All Stressed up But Not Sure Where to Go: Pondering the Teaching of Adversarialism in Law School, 55 BROOKLYN L. REV. 165 (1989) (reviewing STEPHAN LANDMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988)).
dispositionist view of law. The Langdellian mission was to teach students the law’s disposition through the study of cases. As he put it, the law

consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.\textsuperscript{77}

One reason for the success of Langdell’s reform was that at the very moment he implemented his new system for teaching and learning law, dispositionism lay at the core of the legal culture. Furthermore, in part because of Langdell’s approach, the laws and institutions built at that time would reinforce the dispositionist starting point. Craig Haney summarizes that recursive dynamic as follows:

The formative era of American law in the United States occurred during the 19th century . . . . However, the 19th century was also the era of laissez-faire capitalism and “rugged individualism” . . . in which freedom and autonomy were celebrated in the popular ethos. Widely shared political and economic beliefs supported the view that most actions originated in the free and unencumbered choices of the persons who engaged in them.

Social Darwinism—the belief that people survived and succeeded because of their genetic endowment and its relative adaptability—was the prevailing theory that unified the nascent social sciences. Psychology was dominated by the Jamesian “will,” instinct theory . . . and the eugenics movement. . . . [T]he overarching view of human nature that characterized this period . . . [was] the belief that individuals were the causal locus of behavior, that socially problematic and illegal behavior therefore arose from some defect in the individuals who performed it, and that such behavior could be changed or eliminated only by effecting

\textsuperscript{77} CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vii (1871). For a concise history of Langdell and his influence on law teaching, see Dennis Patterson, Langdell’s Legacy, 90 NW. U.L. REV. 196 (1995).
changes in the nature or characteristics of those problematic persons.

... [Steven] Lukes ... has termed the worldview that prevailed during this period *abstract individualism* and described it as the belief that the crucial features of individuals determined social arrangements and that those features were "assumed as given, independently of a social context".

Thus, the intellectual milieu of our nation's formative legal era was characterized by a conception of behavior that focused almost exclusively on individuals and de-emphasized or ignored the influence of social context or conditions in shaping thought and action. The rugged American individualist was embraced as our national character type. Not surprisingly, the law that was formed during this period bore the imprint of this individualism. Legal doctrines and institutions were created and others transformed to reflect this legal theory of behavior, one in which autonomous individuals were at the center of the causal universe and social context was regarded as legally secondary, largely unimportant, or utterly irrelevant.

The coincidence of both the age of psychological individualism and the formative era of American law meant that this model of behavior was literally institutionalized in our legal system. Unlike other intellectual enterprises, the law translates its tentative hypotheses and operating assumptions into doctrinal precedents that harden over time and become exceedingly difficult to overturn. Indeed, it often uses them as the foundation for institutions whose sheer physical scale, political significance, and long-term effect on the popular consciousness make them permanent fixtures in the social landscape. Thus, the legacy of this 19th-century view of human nature persisted in law long after many of its intellectual premises were challenged or abandoned by emerging academic disciplines, often in the
face of convincing social-scientific evidence that documented their profound limitations. 78

We fully concur with Haney’s incisive description, but would add two things. First, the edge that dispositionism initially enjoyed over situationism may be as robust today as it was when Langdell was the Dean at Harvard Law School. 79 Second, the first-mover advantage that Haney describes for dispositionist legal schemas, though important, is only a small part of the story for why dispositionism has generally triumphed. As has been argued at length elsewhere, for instance, dispositionism is advantaged because of numerous manipulable internal situational forces, including subconscious motives for simplicity, closure, self-affirmation, group-affirmation, and system-affirmation. 80 In addition, most of us occupy external situations that generally encourage dispositionist attributions. 81 Furthermore, there are powerful groups and entities with a stake in promoting dispositionism and with a history of successfully protecting that stake. 82 The fact that virtually all of our laws and legal institutions as well as most of our cultural beliefs and social, political, and economic institutions are built upon dispositionist premises also helps to explain why any one area of law or single legal institution remains dispositionist in orientation. To challenge dispositionism in one setting is, in effect, to challenge our entire system—and threats to the system create a form of dissonance within most people that itself encourages dispositionist attributions. 83

79. See Ronald Chen & Jon Hanson, The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law, 103 MICH. L. REV. 1 (2004) (describing the dispositionist schemas underlying all areas of American law, particularly in the last decades of the 20th century); Hanson & Hanson, Blame Frame, supra note 17, passim (broadly describing the history of dispositionist schemas over the last few centuries of American history); Hanson & Yosifon, The Situation, supra note 20, at 287–302 (illustrating the dispositionist presumptions of various areas of law); Hanson & Yosifon, Situational Character, supra note 20 (same).
80. For an extensive, general discussion of those internal situational forces, see Adam Benforado & Jon Hanson, The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy, 57 EMORY L.J. 311, 321–30 (2008) [hereinafter Benforado & Hanson, Great Attributional Divide]; Hanson & Hanson, Blame Frame, supra note 17, at 448–54.
81. See Hanson & Benforado, Great Attributional Divide, supra note 80, at 339–48.
82. See Hanson & Yosifon, The Situation, supra note 20, at 223–29.
83. For examples of how situationist attributions often lead to system-justifying dispositionist backlash, see Benforado & Hanson, Naive Cynicism, supra note 75, at 536–38 and Adam Benforado & Jon Hanson, Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights, 57 EMORY L.J. 1087 (2008).
B. The Casebook Method Is a Situational Character

The longevity of dispositionism reflects another key situational factor on which we now want to focus. To do so, it is helpful to recognize that accompanying Langdell’s conception of law was a concomitant set of pedagogical practices that included the Socratic method and the legal casebook.

Langdell declared and believed that “law is a science.”

He maintained “that all the available materials of that science are contained in printed books.” More specifically, he saw judicial opinions as the “specimens’ from which general principles should be induced.” Langdell thus “assembled a representative set of court decisions to create the first legal casebook.”

In addition, “[t]o ensure that class time was used productively, he introduced the question-and-answer format now called the Socratic method.”

Carrie Menkel-Meadow recently summarized several overlapping elements of the Langdellian revolution, which combined to make the new “scientific” approach more appealing and successful than the prior method for teaching law had been:

Treating law (as a field) as a science of principles learned by induction through reading cases and systematically arranging their holdings into a coherent body of limited, general principles; . . .

Using this so-called “Socratic method” to encourage a certain form of rigorous thinking, designed to sort the relevant from the irrelevant (in facts), to whittle out the necessary and sufficient holding (which became the rule of the case) from the superfluous and unnecessary dicta, and to state with efficiency and parsimony the ratio decidendi of the case;

Facilitating the teaching of many students in one classroom (with remarkably uniform architecture for over a century), which ultimately turned out to be profitable for law schools and universities, if not ideal for learning;

85. Id.
87. Id.
88. Id.
Developing the modern "casebook" (the collection of key cases from the common law in the classic, mostly private law, subjects) from which the "principles of law" were to be derived by students with little textual explanation (and the virtual elimination of didactic lectures); ... 

Placing legal professional training in the university, as graduate training, and removed from total control by the profession (leading to ongoing debates and tensions between academic and professional conceptions of the purposes of legal education); 

Developing a relatively uniform system of legal education, eventually established on a national basis (with "national," rather than state, law being taught), as Harvard educated academic lawyers disproportionately became law professors and adopted the Langdellian method throughout the country.  

Menkel-Meadow's list helps to highlight the fact that the pedagogical styles and methods ushered in by Langdell and the formalists created some deep channels from which significant deviations would be difficult. The parts give strength to the whole, and the whole, to the parts. To be sure, most law students—and, indeed, most law professors—have long presumed that the case method, and the hefty casebooks that go with it, is the best means of teaching law students about the law. After all, if they believed otherwise, many would have abandoned it or instituted pedagogical reforms or refinements during the last century or so. But individual professors seem as committed as ever to their casebooks, and lasting reforms have been few and slight. Curricular homeostasis has been the rule. As Nicolas Zeppos recently put it, "I know of no other university department that uses the same pedagogic approach that it

89. Menkel-Meadow, supra note 72, at 561–63 (citations omitted). 

90. That is true in part because, together, they became associated with "legal education" and the traditions and practices that we think of when we think of "law school." They have been naturalized and are often perceived as if handed down from some greater authority. As social psychologists have shown, such practices are rarely challenged. See Todd D. Rakoff & Martha Minow, A Case for Another Case Method, 60 VAND. L. REV. 597, 599 (2007) (wondering if "perhaps the [case] method's survival just resembles the endurance of certain religious traditions that, once embedded in custom and experience, give rise to new rationales when the old ones fade away") (citation omitted).
did 100 years ago, or bases its first year of education on largely the same basic conceptual categories.\textsuperscript{91} Presumably, therefore, what “is” also “ought to be.”

Although that remains the general presumption, it has been successfully rebutted by scholars who have painstakingly studied legal education. The case method, it seems, is not the manifestation of a well-functioning marketplace of pedagogical options in which practices are determined by careful, thoughtful, rational, individual and collective choices. As Minow and Rakoff write, “Remarkable as such endurance may be, survival is not . . . the best test of an educational curriculum.”\textsuperscript{92} Subsequent sections will highlight some of the case method’s significant drawbacks.\textsuperscript{93} For now, our focus will be on how the case method’s “success” is better understood as yet another example of a situational character. It is, like a ball, an artifact of hard-to-see situational forces. And those forces seem unlikely to yield an ideal system for educating students about laws, legal institutions, and policymaking, and furthermore, are certain to downplay situationist accounts of law and policy.

For a glimpse of those situational forces, consider some of the reasons why the Langdellian approach took hold at the outset. To begin with, a key advantage of the formalist position was that it provided the illusion that the law was its own special authority—an authority that could be discerned only through a new and distinctive educational process. Of course, the formalists’ claims would be falsified and abandoned by most legal scholars soon enough.\textsuperscript{94} Nonetheless, Langdell’s claims were a boon to the idea of “law school” generally and to the success of Harvard Law School in particular. Langdell’s scientific pretensions were keys in paving the way for incorporating a law school at the new research universities. John Henry Schlegel writes:

The [legal academic] profession as we know it today was created at about the same time as the rest of the university disciplines—the late nineteenth and early twentieth


\textsuperscript{92} Rakoff & Minow, supra note 90, at 600.

\textsuperscript{93} See infra Parts IV and V (discussing and outlining several criticisms of, and alternatives to, curricular conventions in law school).

\textsuperscript{94} See infra note 108.
centuries. Significantly, this was at about the same time the current curricular structure fell into place. As part of this collective exercise of academic product differentiation, the law professors chose (or were left with, because no one else wanted) the rules of law as their separate special subject matter and "thinking like a lawyer" as their separate special method.\footnote{95}{John Henry Schlegel, A Damn Hard Thing to Do, 60 Vand. L. Rev. 371, 374-75 (2007).}

Thus, in addition to brushing on a patina of legitimating scientism, the Langdellian "revolution" in 1870 provided a simple, dispositionist way of thinking about and teaching law that distinguished law from other fields and that helped justify and promote the existence of the "law professor" and the "law school."\footnote{96}{Cf. Rakoff & Minow, supra note 90, at 597-98.}

Such advantages were furthered through the use of the case method and casebook, which permitted Langdell to claim that he was providing a window into a national common law and thus to attract and justify teaching students from jurisdictions around the country.\footnote{97}{See Robert W. Gordon, The Geological Strata of the Law School Curriculum, 60 Vand. L. Rev. 339, 341 (2007) [hereinafter Gordon, Geological Strata].}

The success of the idea reflected, not its accuracy or realism, but its consequences: formalist claims and methods helped to create a constituency that would have a stake in promoting the idea.

The advantages of the case method accrued also to teachers, because it provided a relatively easy teaching method, particularly for new professors. Indeed, Langdell himself wrote at the time that a major motive for developing the case method was his own need to concoct a method for teaching not one or even a handful, but a roomful of law students: "I was expected to take a large class of pupils, meet them regularly from day to day, and give them systematic instruction in such branches of law as had been assigned..."
to me.”98 As Bob Gordon explains, “Law professors rarely emerged from a background of scholarship; yet the casebooks ensured that they did not need to know their subject well—either to be learned in its literature or to be an expert in the principles underlying it—to make a successful start as a case law teacher.”99 Relatedly, the case method’s appeal (and longevity) partially reflects the fact that it provides closure regarding a number of difficult questions that would otherwise need to be renegotiated for each teacher:

The strength of his case method lies not in the irrefutability of any of its elements, but in the way it plausibly links together the answers to so many questions. What is there to know? The law consists of a limited number of principles or doctrines. How are we to know them? From systematic organization of the way they are embodied in cases. How will we teach them? By discussing the cases to see what they embody, and by applying the principles to hypothetical sets of facts. What materials will we use? Reports of the cases. Will this be practical? The reports are in the public domain; we can provide all the students copies of the cases, collected into casebooks. Of what use is knowledge of this sort? The application in this way of principles of this sort, to new cases, is what lawyers do.100

In short, “casebooks gave novice teachers a ready-made, off-the-rack set of teaching materials and method of instruction,” and it gave those materials and methods (and hence the professor who employed them) legitimacy.101 Not only would the emerging generation of formalists find a low-cost means of entry into the teaching field, they would also have a stake in believing and promoting the idea that the case method was indeed the best way to learn the law.102

98. Rakoff & Minow, supra note 90, at 598 (quoting C.C. Langdell, A Selection of Cases on the Law of Contracts v-vii (1871)).


100. Rakoff & Minow, supra note 90, at 599.

101. Gordon, Geological Strata, supra note 97, at 342; see also id. (“Another reason the case method succeeded was that it proved adaptable to many different approaches to law.”).

102. We suspect that the attractiveness of Langdell’s classroom and teaching innovations to teachers (and perhaps students) is that it seems well-suited for making the professor seem particularly intelligent, in a way that resembles the classic game-show experiment described above. See supra note 42; Lee D. Ross, Teresa M. Amabile & Julia L. Steinmetz, Social Roles,
case method succeeded in part because it came ready-made with a credible team of advocates.\textsuperscript{103}

The case method contains still other situational effects, which can be more easily comprehended when one considers how people process information. As social psychologists have discovered, the human animal attends especially to those acts or features in its environs that are particularly salient or that she is primed to see through her schemas and knowledge structures.\textsuperscript{104} The same tendency is apparent in how legal theorists approach the law. For instance, the contents of our casebooks are heavily influenced by what is salient in the law as well as the contents of an editor’s theoretical concepts and categories. One can see the former as a sort of bottom-up source of attentiveness and the latter as a type of top-down cause of attentiveness. Bob Gordon has captured those proclivities in his recent discussion of the (situational) forces that influence curricular change. He explains:

[T]opicality—the salience of a field of law in the world outside the school, the legal system (especially the courts) and the profession, politics and the press—is going to force curricular planners and casebook writers to pay attention to some subjects, and the lack of topicality will doom other topics to extinction.\textsuperscript{105}

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\textsuperscript{103} See Schlegel, supra note 95, at 375–76.

For the legal academic, the choice of the law school’s subject matter and method was Fat City. First, one got to play judge, always a heady activity for one so far from the bench. Second, scholarship in the discipline required no messy social science-y fieldwork. Someone else created the materials for research, and then the postal service delivered them to the library. Third, one didn’t really have to know anything about what “real lawyers” did all day, which in any case obviously appeared to be mostly a tedious routine accompanied with the worry that clients might not appear, or if they appeared, not pay for services rendered. And fourth, even in the early years the salaries were generous by standards elsewhere in the university system. The only downside was the need to grade great quantities of exams, a complaint that persists unabated today.

\textit{Id.}

\textsuperscript{104} For a fuller description, see Chen & Hanson, \textit{Categorically Biased}, supra note 20, at 1178–87.

\textsuperscript{105} Gordon, \textit{Geological Strata}, supra note 97, at 365.
According to Gordon, however, such bottom-up salience "is not enough to explain how a subject gets into the canon."\textsuperscript{106} Top-down theories matter too:

Topicality is always naturally filtered through the perceptual lenses and conceptual preoccupations and agendas of legal academics. These, it is hardly necessary to point out, do not always track very closely those of the practicing profession. In 1900, for example, tort law was undergoing what one would not exaggerate to call a revolution; the massive toll of death and injury from industrial, railroad, and street railroad accidents met up with an immigrant bar of plaintiff's lawyers, and the result was the explosion on state court dockets of personal-injury accident suits. As we have seen, these made virtually no impression at the time on Ames & Smith, who had other fish to fry [in their casebook], and plenty of English cases on intentional torts with which to fry them. Even after accident law muscled its way into torts books under the conceptual rubric of negligence, it left out entire fields employing many practitioners—Federal Employer Liability Act lawsuits and workers' compensation, to mention only two. For all tort lawyers and their clients—defendants as well as plaintiffs—the components and calculation of damage awards is a matter of brute survival, but this topic hardly registers in torts books until recent years, because there is not enough theory about damages to make it interesting. It becomes interesting when economic thinking infiltrates legal thinking, because economics reorients the whole field around the bottom line as the touchstone of efficient liability rules.\textsuperscript{107}

Clearly, theory matters. But the changes in theory that can account for curricular change is a function of still other situational forces, including how well a new theory can make sense of the cases and practices that are conventional parts of our legal education system. Thus, there is another sort of recursive brake that exists between the case method and intellectual theories—each

\textsuperscript{106} Id. at 366.
\textsuperscript{107} Id. (footnote omitted).
constraining the other. Casebook and classroom methods that were premised originally on a dispositionist mindset will themselves help to solidify that mindset which, in turn, will help to reinforce the underlying casebook method and classroom pedagogy. Gordon seems to be hinting at such a process here:

The main entry point for theoretical change is law teachers’ receptivity to outside disciplines, and even more important, their ability to assimilate them into conventional ways of legal thinking. Nineteenth-century jurists successfully re-organized the common law subjects into substantive-law categories imported from the modernized Roman Law of the continent. Twentieth-century jurists in turn converted classical private-law into instrumental policy analysis by assimilating the approaches of the “social law” movements. The Realists’ attempt to integrate law and empirical social science . . . were less successful, though they left permanent traces in the marginalia—the “Materials,” notes, and back-of-the-book chapters—of casebooks. Of the modern interdisciplinary movements, Law and Economics has made the most impact, partly I think because much of its style of thinking was already latent, albeit in much less rigorous form, in the types of policy analysis bequeathed by social law and legal realism; it gave lawyers a more rigorous method of doing what they did already.

Outside of the classroom, however, the same situational constraints do not apply, or at least not to the same degree. Scholars have time

108. Cf. Chen & Hanson, Categorically Biased, supra note 20, at 1207–11 (describing a more generalized version of the self-perpetuating features of our knowledge structures); Rakoff & Minow, supra note 90, at 600–01.

By taking a retrospective view of facts already found and procedures already used by a court, the appellate decision does little to orient students to the reality of unfolding problems with facts still to be enacted, client conduct still to take place, and procedural settings still to be chosen and framed. Of course, teachers fight against these restraints—some more adamantly than others. But it is hard to do so at a deep level. A well-crafted hypothetical, for example, will alter the facts, but it will not alter the sense that facts are fixed and known (not to mention fixable and knowable). Rakoff & Minow, supra note 90, at 600–01.

to dig deeply into a theory, a case, an area of law, or a hypothesis. They have the opportunity to develop more situationist arguments and insights. Accordingly, there exists a significant disjunction between what law professors write about in their scholarship and what and how they teach in the classroom. Gordon explains:

Interdisciplinary approaches have, however, affected scholarship more than teaching, because traditional teaching materials, and especially the case method, continue to act as a brake on innovation. . . . Torts remains wedded to cases and the case method partly because its status as a required first-year course, in a curriculum committed to using the first year to teach common law thinking.

In those ways, among others, existing methods, conventions, and expectations are constraining how law professors teach and, in turn, what law students learn about the law.

Because of the situational advantages of the casebook method, it has resisted several reform efforts that might have made law school pedagogy far more situationist than it currently is. Professor Menkel-Meadow recently described the efforts of Legal Realists in the early decades of the twentieth century to foster such reforms:

The Realists at Columbia sought to reframe the first year of law school to study social problems and not only arid categories of private law. They were also interested in the social structure which both formed law and affected the variability of its enforcement and compliance.

Karl Llewellyn, the intellectual founder of Legal Realism, saw the importance of law in its social context, with particular processes and particular skills being used to advance particular social ends. As drafter of the Uniform Commercial Code, he sought to develop a "realist" body of law for the operation of commerce as actually practiced by

110. See Benforado & Hanson, Great Attributional Divide, supra note 80, at 361–62.
111. Gordon, Geological Strata, supra note 97, at 367–68.
112. The particular methods and mindsets common to law schools may have acted as a form of buffer from other parts of the university which have tended to be more situationist. Nicholas Zeppos, for instance, recently argued that "the self-contained, isolated character of law schools has allowed them to be resistant to curricular change. Their separation from the general educational currents of the university has left their teaching program longstanding, not surprising perhaps given the role of tradition and precedent." Zeppos, supra note 91, at 327–28.
those who bought and sold goods. As a teacher, he told students they needed both theory and skills to do their work.

For the Realists, law was in constant flux and was not comprised of more or less static "concepts," as the Formalists (Langdellians) saw it. Law was seen as a means to accomplish the larger society's goals and was not an end in itself.

... For some, like [Roscoe] Pound, Legal Realism entailed the sociological and political study of interest groups that made the law, thus broadening the study of law outside the sphere of courts and judges. Others, like Jerome Frank, sought to humanize the study of law by seeing that judges were human beings and thus subject to social, political, and psychological pressures that affected how they interpreted law and resolved disputes. This was legal humanism with social psychology and sociology.

Realists were skeptical of rules and overly abstracted concepts. They added "materials" to the study of cases and hoped to have students study the real world that rules were supposed to regulate. They believed that with the right tools of analysis (and teaching) new rules and legal processes could be developed to respond to and ameliorate particular social problems, such as crime, inefficient or defective business and consumer relations, economic inequalities, unemployment, accidents, injuries, and poverty. They were interested in both public and private responsibilities for social problems, and, with the New Deal, many of them helped launch the great experiments of the administrative state that became the alphabet agencies. Law was no longer a "science" of inductive rules or principles but a "social science" of data gathering and rules-tinkering, modifiable legislation, and public regulation. Law was seen as the dependent variable, society the independent variable, and analysis and evaluation of variability was considered possible and desirable. The idea was to study law as it actually was "in action," not just "in the books," with the hope that "creative legal thought will more and more look behind the pretty array of 'correct
cases' to the actual facts of judicial behavior, will make increasing use of statistical methods in the scientific description and prediction of judicial behavior, will more and more seek to map the hidden springs of judicial decision and to weigh the social forces which are represented on the bench."

As Menkel-Meadow summarizes, "[t]he Legal Realists [thus] produced a wealth of influential academic work and succeeded in influencing policymakers' and jurists' attitudes towards the New Deal . . . ." As dramatic as those successes were, they had surprisingly little impact on legal education. Again, that is true in

113. Menkel-Meadow, supra note 72, at 564–66 (footnotes omitted).

114. Id. at 566. It is possible to give Legal Realists too much credit for legal changes. Our sense is that the Legal Realists reflected larger shifts as much as or more than they caused them—though we agree that they did indeed play an important causal role.

115. See id. at 567 ("Legal Realism did little to change the structure [or performance] of legal education . . . "). Some twentieth century schools of thought, such as Legal Realism and Critical Legal Studies ("CLS"), have operated very much outside the Langdellian box and have turned the formalists' premises more or less upside down, without altering the way law is taught. According to Professors Rakoff and Minow,

If . . . one ceases to believe that the law consists of principles or doctrines, one might still use cases to teach one’s alternative formulation so long as one still cares about working from the particular to the general and back again, in a practical way with a large class, because one thinks this mirrors what lawyers do in practice. This, it seems to us, helps explain why the Realist critique of “law as a science” did not obliterate the case method in law schools; indeed, in many ways the movement just further entrenched it. Rakoff & Minow, A Case for Another Case Method, supra note 90, at 599.

In the 1970s, proponents of CLS went even further than the Realists had in challenging traditional jurisprudential positions. They demonstrated the "radical indeterminacy of legal doctrine," and argued that decisions endorsing one legal doctrine over another could be seen, not as inevitable, but as a social and cultural privileging of one position over another. See Gary Minda, Jurisprudence at Century's End, 43 J. LEGAL EDUC. 27, 39–44 (1993).

In the classroom, though, CLS had surprisingly little impact. In a 1989 article, Professor Robert Gordon summarized conventional CLS teaching techniques. Robert W. Gordon, Critical Legal Studies as a Teaching Method, Against the Background of the Intellectual Politics of Modern Legal Education in the United States, 1 LEGAL EDUC. REV. 59, 76 (1989). His article explained that a CLS teacher often begins class by "making an inventory of [the] conventional argumentative moves" of her discipline, and then presenting "them in opposing pairs." Id. at 77–78. By way of illustration, he pointed to arguments for formality (rules) versus arguments for informality (standards). See id. The CLS-inspired professor would then do the same with oppositional policy arguments, until, as Gordon described, "it becomes relatively simple, when a court or a student . . . makes one of the conventional doctrinal arguments, to elicit from the class the conventional counter-arguments," and thus to show how these arguments are selectively deployed to support one or another legal result. Id. at 78. Arguably, this CLS method did more to hone students' skills at manipulating arguments than to provide situational context with which to better understand and analyze individual policy questions. Gordon conceded that a refined demonstration of the indeterminacy and contradiction of doctrinal and policy arguments "could
part because of the classroom advantages created by the dispositionist approach to law, including the case method and traditional casebook. Strikingly, the methods of teaching seem to have constrained law professors from teaching law as they themselves understand it.116

Bob Gordon similarly highlights that effect in his recent history of pedagogical methods in law school. From the beginning, according to Gordon, the “diffusion of casebooks and case method teaching” played an important role in promoting Langdell’s dispositionist “pure law” private-law curriculum” and in squashing “the public-law, interdisciplinary, and theoretical approaches of Harvard’s chief rivals.”117 Then, in the later years of the nineteenth century, innovators at American schools continued to look to Europe for curricular inspiration. The models were largely German (and sometimes French) schools of public administration. When Woodrow Wilson was asked to design a new law school for Princeton in 1890, he rejected the Harvard template, wanting “not a duplicate of those [law schools] already in full blast all over the country, but an institutional law school, so to speak, in which law shall be taught in its historical and philosophical aspects, critically rather than teach [students] that since the system provides no right answers, they will be justified in making as much money as they can pushing whatever arguments benefit the client of the moment.” Id. at 80.

116. That touches another factor that may help to explain why conventional practices are what they are. We suspect that somewhere subconsciously most law professors have accepted those practices in part because they have been taught and have accepted that there is something “real-worldish” about teaching law as they do. Of course, as many critics have emphasized, there are numerous ways in which the common-law curriculum of the first year is not really so real-worldish, and a meaningful commitment to giving students the knowledge and skills they most need would lead to dramatic transformation of existing practices. Still, there seems to be something about the current approach that many legal academics consider to be a necessary component of the process of learning to “think like a lawyer.” Although it is hard to put one’s finger on exactly what is so realistic about the conventional approach, we suspect that part of it is an unspoken shared sense that law professors must teach students to operate within the façade of formalism and with the language of dispositionism that still dominates lay understandings of our legal system. The real world requires, in other words, that lawyers abide by strict rules that help to keep up appearances of the system. Teaching students to act as if the law has a disposition and authority of its own, that case law is and should be binding as precedent, that the answers to legal disputes can be gleaned simply from understanding the essence of an area of law, and so on, is integral to maintaining the legitimacy and authority of our system. If true, such a practice may be a good thing or a bad thing, depending upon one’s view of the status quo.

technically, and as if it had a literature besides a court record, close institutional connections as well as litigious niceties,—as it is taught in the better European universities.”

The Princeton school’s first chair was to be in public law, which included Constitutional Law, Administrative Law, International Law, General Jurisprudence, History of Law, History of Legal Philosophy, Public Corporations, and Conflict of Laws.118

Princeton’s law school has yet to materialize. But the desire for an alternative approach more like the one Wilson championed (that is, a relatively situationist approach) has lived on. With the rise of Legal Realism and other progressive intellectual movements in the early twentieth century, legal theory and legal pedagogy both would face new criticisms and reforms. Duncan Kennedy has described portions of the shift as follows:

The inventors of the “social” include Jhering, Ehrlich, Gierke, Geny, Saleilles, Duguit, Lambert, Josserand, Gounot, Gurvitch, Pound, and Cardozo. They had in common with the Marxists that they interpreted the actual regime of the will theory [the individualist (or dispositionist) basis of “formalist” or “Classical” legal thought, that private law is designed to help individuals realize their freely-willed ends] as an epiphenomenon in relation to a “base,” in the case of the Marxists, the capitalist economy, and in the case of the social, “society” conceived as an organism. The idea of both was that the will theory in some sense “suited” the socio-economic conditions of the first half of the nineteenth century. But the social people were anti-Marxist, just as much as they were anti-laissez faire. Their goal was to save Liberalism from itself.

Their basic idea was that the conditions of late nineteenth-century life represented a social transformation, consisting of urbanization, industrialization, organizational society, globalization of markets, all summarized in the idea of “interdependence.” Because the will theory was
individualist, it ignored interdependence and endorsed particular legal rules that permitted anti-social behavior of many kinds. The crises of the modern factory (industrial accidents) and the urban slum (pauperization), and later the crisis of the financial markets, all derived from the failure of coherently individualist law to respond to the coherently social needs of modern conditions of interdependence.\footnote{Gordon, \textit{Geological Strata}, supra note 97, at 345 (quoting Duncan Kennedy, \textit{The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought}, 55 \textit{HASTINGS L.J.} 1031, 1034–35 (2004)).}

The new thinking, Gordon explains, certainly had an impact on policy:

Progressive reformers . . . were beginning to initiate statutory reforms in the service of social law visions: factory inspection, food and drug regulation, maximum hours labor laws, workers’ compensation systems, railroad rate regulation, child labor abolition, resource conservation planning, public health regimes, “purity” crusades against the polluting effects of vice, alcohol and obscenity, progressive taxation of income, and many more. These reform efforts involved enacting new statutes, setting up new administrative agencies to administer them, and litigating to repel Constitutional challenges to the new statutes and judicial evisceration of regulatory regimes.

All these new intellectual approaches and concrete reform activities created large bodies of new law outside the Harvard canon of traditional subjects and raised questions of how or whether law schools, which for prestige reasons were one after another converting to the Harvard model, would be prepared to take them on board.\footnote{Gordon, \textit{Geological Strata}, supra note 97, at 346.}

Nonetheless, Gordon’s history shows how the Harvard model resisted the new theory and new laws in the classroom—jettisoning those individuals who sought to bring it aboard as potentially contaminating.

Ironically then, just as Progressivism was beginning to provide careers and motivation for “social” lawyers, . . . the law schools were seized by internal reform movements that
sought to expel or exclude all of those ideas as irrelevant to the study of "pure law." By 1920, policy studies in law schools were even more peripheral than they had been in 1870, having been driven out by the Langdellian private-law case method curriculum. For as the Harvard model proliferated, it exiled or marginalized both the traditional and the newer (Progressive) alternative curricula, sending them off to separate departments or confining them to the law schools' graduate programs. What the Harvard model tended to drive out was not only almost anything that smacked of public law (legislation or administration, law as part of a framework of government, international law), but also legal theory and jurisprudence, as well as anything that provided overviews, perspectives, or comparisons about law—courses in the "elements of law," Roman law, comparative law, legal history, or the sociology of legal institutions or law-in-action.\(^1\)

So why was the Harvard faculty so averse to a more situationist approach to law and legal teaching? According to Gordon, the answer, tempting as it may be to give, is *not* that Harvard professors "were parochial and anti-intellectual philistines who thought anything that was not black-letter law must be bunk."\(^2\) Nor were they "conservatives defending classical-individualist-private-law will theory from Progressive social lawyers."\(^3\) No, their "single-minded reductionism of the Harvard missionaries" was a reflection of the fact that "[t]he canonical curriculum and its casebooks . . . were the product of a transatlantic collaboration with English analytical jurists . . . who were determined to construct from the ruins of the collapsing forms of action a coherent science of substantive principles."\(^4\) Gordon explains:

> in an age of specialization, [those scholars] were trying to establish law as a distinctive discipline and autonomous technical subject that was different from everything else in the academy. The study of public law inevitably

\(^1\) Id. at 347.
\(^2\) Id. at 348.
\(^3\) Id.
\(^4\) Id.
adulterated pure law with political science, economics, and history, and was thus to be avoided. Also, the public law subjects were politically controversial—professors could be fired for taking positions on railroad regulation, the "trust" problem, labor relations, or progressive taxation—issues the alumni and trustees thought too left-wing.\textsuperscript{125}

In other words, even if the scholars were not hard-core dispositionists themselves, their situation required that they behave (and teach law) as if they were.

There is, according to Gordon, a still more important explanation. The stickiness of the Langdellian model reflected the faith and fervor of law professors at the time in the pedagogical methods that the Langdellian revolution wrought:

\[\text{[M]}\text{ostly, I think, Harvard's missionaries and epigones pushed for their constricted curriculum simply because they had become fanatically committed to the case method of teaching law students as a uniquely rigorous and effective method . . . .} \]

The case method was just not suited to teaching about statutes or administrative agency actions (except as these might appear piecemeal in a case), or about the economics of rate-making or antitrust regulation, or about courts in relation to other governmental institutions, or empirical studies of law-in-action, or comparative, historical or theoretical perspectives on law.\textsuperscript{126}

Against the progressive onslaught, the law school curriculum remained surprisingly dispositionist, then, mostly because the teaching methods in place were too appealing to sacrifice.\textsuperscript{127} The case method was the hammer, and cases were perfect nails. As twentieth century scholars discovered that laws and legal theory required drilling, sawing, planing, sanding, and finishing, they nonetheless clung to their favorite tool and excluded their discoveries in the classroom.

\textsuperscript{125} Id. at 348-49.
\textsuperscript{126} Id. at 349.
\textsuperscript{127} See supra note 96 and accompanying text.
C. Summary

In those ways, the case method has been part of the situation that has constrained our willingness to try alternatives and that has influenced what we teach, learn, and "know" about the law. We exist in a situation where mostly everyone accepts the fundamental anti-formalist insights of Legal Realism, and yet the case method reflects the thinking of the formalists. That is the way we are training our new lawyers. And that is the way our students expect to be taught—an expectation that further entrenches conventional practices.

128. To be clear, we are not claiming that law professors blindly accept the judicial reasoning contained in the cases they teach. Certainly they do not. Indeed, "teaching against" a casebook not only is common, but also has a long history dating back to the Legal Realists. See Gordon, Geological Strata, supra note 97, at 342 (explaining how the Realists would often use "cases largely as storehouses of facts about disputes and treated the actual opinions (except for those of a handful of judge-heroes) as examples of unsatisfactory formalist analysis, prompting the students to craft context- and policy-based rationales that would provide better bases for decisions"). Nonetheless, the cases themselves provide the anchor to which analysis is tethered. A professor might challenge a factual claim supporting one conclusion about how a particular case should come out with a different factual claim supporting a different conclusion about how that case should have been decided. There is no careful, extensive examination of the larger situation or policies supporting it. And there is no opportunity, given the number of cases that must be covered, and the limited resources available in a semester, to provide a significant situationist challenge to the dispositionist presumption. Cf. id. at 367 (explaining that the Legal Realists did leave their mark in the casebooks); Schlegel, supra note 95, at 375 (describing the method of offering small amounts of criticism, but nothing more).

129. Our casebooks are reinforcing the cultural stereotypes and expectations about what law school is like (as reflected, for instance, in movies such as The Paper Chase, Legally Blonde, Soul Man, and The Firm) at the same time that those stereotypes are reinforcing the Langdellian model. Descriptive stereotypes wield a prescriptive punch in the classroom. As most law professors who have noticeably drifted from the law school script can attest, it is difficult to teach 1Ls in a way that deviates significantly from Scott Turow's One L without students feeling that they are being deprived of the only authentic path to becoming a lawyer. See, e.g., PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 25–32 (1991) (recounting student's negative reaction to her efforts to include critical theories in her first-year contract law course). Disabusing law students of their expectations or of the normative significance of those expectations is no easy task. Although students go their entire lives learning without the aid of casebooks or the Socratic method, in law school they suddenly become Langdellian zealots. It is their proof to themselves—and perhaps law schools' proof to the world—that a layperson is becoming a "lawyer."

The fact that most law professors take part in this cycle further ossifies it. Law professors are not only teaching law, they are implicitly teaching students about the role of law and lawyers. Kathryn Stanchi explains:

As legal educators, our pedagogical and curricular choices telegraph to our students what we think it means to be a lawyer. Right now, we mostly have courses that teach doctrine (largely by the case method), a few courses that teach skills (like legal research and writing and clinicals), and some courses in legal theory, with only modest overlap between them. Moreover, courses that teach skills and those that teach critical legal theory are rather marginalized. What this telegraphs is that learning to crunch
And, so, the hammer of law school continues to swing.\textsuperscript{131} In the words of Harvard Law Professors Todd Rakoff and Martha Minow:

The plain fact is that American legal education, and especially its formative first year, remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago. Invented, that is, not just before the Internet, but before the telephone; not just before man reached the moon, but before he reached the North Pole;

\footnotesize

\begin{itemize}
\item cases is paramount; lawyering skills are somehow separate from this (and less important); and learning legal theory—especially critical legal theory—is a somewhat esoteric endeavor divorced from both doctrine and the practice of law.
\item As already noted, professors dissatisfied with the current approach are deterred by the significant burdens of developing a set of materials that goes beyond an edited set of familiar appellate cases organized around a familiar doctrinal structure. But we have just glimpsed another source of strength for the status quo. With virtually every course embracing the conventional casebook method and confirming mutual expectations across faculty members and between students and professors, it is extremely difficult for one professor to significantly depart from the established path. One might imagine an alternative universe in which a very different sort of legal pedagogy was the norm, and in which professors, students, and the world were a better place for it. The remaining problem is in how to bridge those universes. To an individual professor, the costs of developing a new approach are prohibitive, even if the benefits to many professors and students would greatly exceed those costs. Overcoming that public-good or collective-good quality is unlikely in a setting where pedagogical reform tends to take place one professor at a time (and, hence, rarely and barely at all). That understates the magnitude of the challenge because a collective illusion may keep individual professors from recognizing the potential collective benefits of a new approach. (If an individual professor believes that a novel approach might be employed by other professors in their classes, then that professor would likely be more willing to invest in creating the materials.) This bias for the status quo is related to a fairly common effect that social psychologists call \textit{pluralistic ignorance}. The phenomenon is all-too familiar in the law school classroom: when, for instance, a professor asks a deeply confused class if there are any questions, and every student remains silent (in the false belief that their bewilderment is unique), the professor moves forward as if he or she had been perfectly clear. Presuming that the group marches forward for good reasons, we go along, even though each of us may tread in ignorance. See Jon Hanson & Goutam Jois, \textit{Can't Get No Satisfaction}, HARV. L. REC., Oct. 19, 2006, available at http://media.www.hlrecord.org/media/storage/paper609/news/2006/10/19/Opinion/Cant-Get.No.Satisfaction-2377324.shtml. Similarly, if the supposition is that the conventional case method is the method as measured in part by the fact that it is the method that everyone employs, that supposition will discourage innovation, even when such innovation might prove beneficial. Furthermore, even were such innovations attempted, few professors may be willing to give them a try in light of the costs of retooling for a course coupled with the fact that existing practices carry their own normative force regarding how all law professors should teach. Finally, even if many can agree that the current system has problems, one single alternative approach is unlikely to generate or enjoy a consensus. The status quo is advantaged because the default wins when the challenger fails to muster sufficient support; again, what "is" eclipses "what ought to be."
\item That is true, of course, moreso in the first-year lecture hall than at the third-year seminar table.
\end{itemize}
not just before Foucault, but before Freud; not just before Brown v. Board of Education, but before Plessy v. Ferguson. There have been modifications, of course; but American legal education has been an astonishingly stable cultural practice.

One conclusion that we draw from all of this is that the legal academy is overdue for a new form of teaching tort law and a new type of casebook that would yield a more situationist approach and understanding. The next section briefly sketches a situationist alternative; it takes a first cut at imagining what a situationist torts book might look like. The following section then examines some of the reasons why despite a long history of immutability, the time might finally be right for the dispositionist case method to yield to a situationist alternative.

IV. SITUATIONIST TORTS CASEBOOK

In this section we want to briefly describe a few basics and answer a few common questions about the kind of torts casebook that might more effectively incorporate situationism.

Although no two torts casebooks are exactly alike, most have a great deal in common. That assertion was confirmed in Professor Gordon’s recent inventory. He found that the vast majority of torts casebooks over the last century shared many features in common. He also discovered, however, “[t]wo outliers whose schemata do not quite fit the regular pattern.” From our perspective, the interesting

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132. Rakoff & Minow, supra note 90, at 597 (footnote omitted).

133. In Part V, infra, we offer some reasons for cautious optimism regarding the ripeness of a situationist alternative.

134. Casebooks differ in several ways. Perhaps most obvious, they frequently cover different topics. Richard A. Epstein’s Cases and Materials on Torts, for example, includes sections on subjects that are usually not covered in first-year torts courses, such as defamation and tort immunities. See generally RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS (8th ed. 2004) (also employing basic economic concepts). Dan B. Dobbs and Paul T. Hayden’s casebook examines non-tort systems of compensation, including social security and workers’ compensation. See generally DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY (5th ed. 2005). Some torts casebooks also incorporate other academic disciplines. See generally DOMINICK R. VETRI, LAWRENCE C. LEVINE, JOAN VOGEL & LUCINDA FINLEY, TORT LAW AND PRACTICE (2d ed. 2003) (utilizing anthropology to illuminate tort law); see also Anthony J. Sebok, Using Comparative Torts Materials to Teach First-Year Torts, 57 J. L. ED. 562 (2007) (making a good case for supplementing traditional torts casebooks with comparative materials).


136. Id. at 363.
feature common to the outliers was their relatively situationist approach. The first was John Henry Wigmore’s Torts casebook of 1912:

Most striking about this book is its explicitly theoretical plan of organization, its extensive use of non-case materials (many excerpts from such writers as Machiavelli, Herbert Spencer, Burke, Brougham, Lieber, Bentham, Macaulay, Tocqueville), its attention to comparative law, and its treatment of statutory materials as on par with common law as a proper subject of legal theory. Wigmore, in short, organizes the field by generalizing the broad policies served by the rules. Legal education, I think, would have developed very differently had it evolved along the paths blazed by Wigmore.137

The second was Leon Green’s casebook of 1939:

After a brief introductory chapter on general concepts, Green breaks the field down into contexts and relations: “Threats, Insults, Blows, etc.;” “Physicians, Surgeons, Hospitals;” “Occupancy and Ownership of Land;” “Public Service Companies;” “Counties, Towns, Cities, Boards;” “Manufacturers, Dealers;” “Traffic and Transport [subdivided in turn into Railway, Auto, Passengers, etc.]” This approach had the great virtue of encouraging the reader-student to appreciate the importance of social context to applications of law. But unlike Wigmore, it did not give the student the resources to make comparisons of policies across contexts or to identify larger background factors at work.138

Gordon mentioned those exceptions for the same reason that we will: “[T]hey illustrate some roads not taken.”139 In our view, a return to those roads would constitute an important first step in imagining what a situationist torts book might look like.

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138. Id. (citation omitted).
139. Id.
A. Casebook or Guidebook? Dictionary or Encyclopedia?

Before saying more on that topic, it is useful to discuss the characteristics shared by those high-traffic casebooks. For starters, they usually include many cases and even more squib notes that discuss how each case relates to, or establishes, a “rule,” and how that rule may vary across jurisdictions.\textsuperscript{140} The doctrinal categories are widely shared as are many of the cases employed to illustrate those doctrines. Discussions of why a particular decision was rendered are often brief and straightforward, sometimes containing context-free motivations, such as how the decision advances “economic efficiency” or bright-line predictability. Seldom do the books furnish the socio-economic backgrounds of the plaintiff, defendant, or judge.\textsuperscript{141} Even less common is a description of the party’s communities or the influence of larger forces, such as social norms, prejudices, technologies, or ideologies, on the facts giving rise to the case or on the judge’s decision.\textsuperscript{142} More or less, they take the opinions as they find them and largely accept the judges’ edited account of what happened and what mattered.

Sometimes, in the notes following the cases of the standard casebook, there will be citations to law review articles that provide a hint of situation—for instance, the notes may include some historical detail or sociological context. Occasionally, even a quote containing an intriguing or surprising twist from such an article will be included. But those references and brief excerpts are usually the extent of any context and subtext. And, yet, when one reads the entirety of the article excerpted, one’s impressions of what “really happened” in the case are often transformed.

It is hard not to get the feeling from this basic setup that law professors are supposed to teach torts as if what “really happened” is unimportant—as if reading a case is like watching an inspired-by-a-true-story movie in which the movie is to be judged on its own terms.

\textsuperscript{140} Our review of available torts casebooks revealed that these books generally include between 140 and 170 principal cases, the vast majority of which are significantly edited.

\textsuperscript{141} \textsc{Vetri, Levine, Vogel & Finley supra} note 134, is a notable exception. For another partial exception, see \textsc{James A. Henderson Jr., Richard N. Pearson, Douglas A. Kysar \& John A. Siliciano, The Torts Process} 155–57 (7th ed. 2007) (discussing the relevance of behavioral law and economics in assessing the influence of a judge’s characteristics, such as political partisanship, race, gender, and class, on judicial decision-making).

\textsuperscript{142} Again, there are exceptions. \textit{See Vetri, Levine, Vogel \& Finley supra} note 134.
Why should that be the approach? Why shouldn’t the focus be on the underlying story, rather than on the Hollywood version?

After all, even for the most practical among law teachers, the attorneys who we are training our students to become will always be dealing in real cases, not movies. There is, it seems to us, much to be gained by aspiring lawyers: first, studying the story behind the case; second, learning how real cases are transformed into legal opinions; and third, examining the consequences of those opinions. Put differently, there is much to be gained by looking beyond the appellate-case fact patterns and the doctrinal categories, schemas, and maneuvers that most of us think of when we think of “law” and “casebooks.”

An analogy, somewhat forced, might be helpful. Think of tort law as a first-year student might—a foreign country with its own language, customs, practices, and history. Now envision that country as you might any country—mapped into a variety of regions and cities, occupied by a diverse population, governed through a somewhat complex political system over which various groups compete. Imagine, then, tort law as a nation, not fully independent, but linked and related to still other foreign countries with overlapping histories and languages, politics, interests, and populations.

Actually, that is not the forced part of the analogy. That’s coming next.

The standard torts casebook is, for the new student traveler, much like a foreign-language dictionary. Each case with its holding and squib with its qualification is like a word in a dictionary with its primary and alternative definitions. No doubt, such a book is a valuable item to pack and carry along on such a journey. Certainly, it could prove vital for survival as one attempts to negotiate this unfamiliar landscape.143

Unfortunately, beyond a select lexicon of words and expressions, the foreign-language dictionary does not provide the student much understanding of the foreign country. Indeed, at its core, it is a collection of words which might be taught one-by-one and which the student might eventually use to form sentences and

143. According to Magellan’s Travel Supplies, one of the top ten essentials for foreign travelers is a foreign-language dictionary. See Paula Crouch Thrasher, Going Places, ATL. J. CONST., Apr. 18, 1999, at 4K (citing Magellan’s list).
gain the ability to communicate basic requests and commands: “Where is the bathroom?”; “The car is broken.”; “A plaintiff has the burden of proving four elements”; “There are three types of comparative negligence”; and so on. Certainly, there is valuable knowledge contained in a foreign-language dictionary, but one can learn a great deal more through more immersive and holistic instruction.

A situationist torts casebook would feel more like a guidebook for, or an encyclopedic entry about, the foreign country. A volume that teaches about the origins, history, geography, customs, government, foreign relations, economics, demographics, religions, culture, and so on strikes us extraordinarily valuable for the young traveler. Such a book would provide a very different kind of understanding of the foreign land—indeed, a more useful and accurate one—than does a language dictionary.

As that metaphor is meant to suggest, the situationist approach would represent a significant departure from the conventional approach. Such a casebook would not simply be an alternative to, it would also be a challenge to, the largely dispositionist model of tort law and tort theory implicit in most torts casebooks. A situationist torts book would take a different view of the law and the people subject to it. It would employ a model of the human animal informed by social-scientific disciplines devoted to understanding why humans behave as they do, and how humans make sense of themselves. It would likewise seek to identify the larger situational forces that (under the headings of simplicity, legitimacy, affirmation, and power) have shaped tort law, much as they have other areas of law. Put differently, it would consider tort law to be a situational character—a tort ball—and study the various forces moving it.

Among other problems with our analogy is that most casebooks, as noted above, are not completely devoid of travel-guide tips. Similarly, a situationist torts casebook would include a dictionary of sorts.144 Our point is one of emphasis. The typical casebook, or at least the ones we have spent much time with, are usually heavy on dictionary and disposition and light on encyclopedia and situation. A situationist torts casebook would flip that arrangement. Table 1,

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144. See infra text accompanying note 145.
below, adumbrates a sample of the sorts of differences between a typical dispositionist torts casebook and a situationist casebook.

<table>
<thead>
<tr>
<th>Relatively Dispositionist Perspective</th>
<th>Relatively Situationist Perspective</th>
</tr>
</thead>
<tbody>
<tr>
<td>• premised on dispositional actor schema</td>
<td>• premised on situational character schema</td>
</tr>
<tr>
<td>• assumes the person or “model actor” who is subject to the law is moved by his or her disposition</td>
<td>• assumes the person or “model actor” who is subject to the law is moved mostly by his or her situation</td>
</tr>
<tr>
<td>• assumes that actors involved in creating tort law (that is, judges) are dispositional actors</td>
<td>• assumes that actors involved in creating tort law are situational characters</td>
</tr>
<tr>
<td>• assumes tort law has a disposition and is moved by its own internal forces</td>
<td>• assumes that tort law is best understood as a situational character, moved by situational forces within and around us</td>
</tr>
<tr>
<td>• views tort law as an independent actor with implications just for “torts,” operating among other autonomous, if sometimes overlapping, areas of law</td>
<td>• sees tort law as part of a fabric of laws that are mutually constitutive</td>
</tr>
<tr>
<td>• focuses on tort law’s own purported ends and purposes</td>
<td>• focuses on larger situational ends and tort law’s connection to those ends</td>
</tr>
<tr>
<td>• assumes tort law and the principles, concepts, and categories associated with it are relatively stable across situations</td>
<td>• assumes tort law and the principles, concepts, and categories associated with it are relatively situation specific</td>
</tr>
<tr>
<td>Relatively Dispositionist Perspective</td>
<td>Relatively Situationist Perspective</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>-------------------------------------</td>
</tr>
<tr>
<td>• assumes tort decisions have implications only for individuals involved in dispute or, perhaps, for others who might be deterred in similar situations</td>
<td>• assumes tort decisions have implications for many individuals and groups beyond those involved in dispute and in ways that go beyond those imagined in a typical deterrence story</td>
</tr>
<tr>
<td>• reflects and reinforces the fundamental attribution error and other motivated attributions (looks only at salient individuals and dispositions for making attributions)</td>
<td>• resists and challenges the fundamental attribution error and other motivated attributions (looks for less salient situational forces for making attributions)</td>
</tr>
<tr>
<td>• promotes goals that are premised on dispositionism (e.g., maximizing free choice and consent)</td>
<td>• doubtful of simplistic dispositionist goals, focused on more realistic versions of those goals as well as on how outcomes comport with underlying values and larger situational ends</td>
</tr>
<tr>
<td>• premised on dispositionist conceptions and understandings of other institutions (e.g., markets, regulation, other areas of common law)</td>
<td>• premised on the situationist conceptions and understandings of other institutions</td>
</tr>
<tr>
<td>• assumes that tort law is best understood by approaching it from the inside—from the perspective of individual cases or doctrinal categories</td>
<td>• assumes that tort law is best understood by approaching it from the outside—from the perspective of the underlying harm and the situational forces that do or do not lead to viable tort claims</td>
</tr>
<tr>
<td><strong>RELATIVELY DISPOSITIONIST PERSPECTIVE</strong></td>
<td><strong>RELATIVELY SITUATIONIST PERSPECTIVE</strong></td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>----------------------------------------</td>
</tr>
<tr>
<td>views doctrine on its own terms, or infers from the doctrine an underlying disposition</td>
<td>views doctrine as reflecting naive psychology and social cognition and many other internal or external situational influences</td>
</tr>
<tr>
<td>assumes that doctrine evolves from a more or less independent authority and/or legitimate process</td>
<td>skeptical of the independence of the authority behind doctrine and the legitimacy of the process</td>
</tr>
<tr>
<td>confident that participants (or potential participants) are equally advantaged in the torts process</td>
<td>concerned about advantages and disadvantages that different parties or groups face in tort law and the legitimating cover that process might provide</td>
</tr>
<tr>
<td>presumes that tort law’s effects are fairly constant or consistent across individuals or groups</td>
<td>suspects that tort law’s effects will vary depending upon the situation of different individuals or groups</td>
</tr>
<tr>
<td>assumes tort law is relevant to (and should be focused on) only the sort of harms that we associate with tort law (more or less individualized harms without regard to the situation)</td>
<td>assumes tort law is relevant to (and should be focused on) many social problems (to not only what counts as a “tort,” but also what does not count as a “tort”)</td>
</tr>
<tr>
<td>concerned only about salient, measurable, conventional forms of harms or damages</td>
<td>concerned also about less salient, hard-to-measure, unconventional harms and damages</td>
</tr>
<tr>
<td><strong>RELATIVELY DISPOSITIONIST PERSPECTIVE</strong></td>
<td><strong>RELATIVELY SITUATIONIST PERSPECTIVE</strong></td>
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<td>------------------------------------------</td>
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<tr>
<td>• assumes that tort law should concern itself with one basic, dispositionist goal (e.g., corrective justice or deterrence) and should steadfastly avoid concerns about other goals (e.g., distribution)</td>
<td>• assumes that tort law should worry less about simplistic dispositionist goals and more about situationist goals (e.g., distribution of power and wealth)</td>
</tr>
<tr>
<td>• presumes that tort law “makes sense” and is normatively desirable or just</td>
<td>• presumes that tort law reflects the interests of those with the greatest ability to influence it constrained by other motives (e.g., simplicity, legitimacy, affirmation, and plausibility)</td>
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### B. Some Frequently Asked Questions

1. What Would a Situationist Torts Casebook Actually Look Like?

From the outside, a situationist torts casebook would probably look like the standard torts casebook. It would feature a hardcover and would weigh in at approximately 1,200 to 1,500 pages. Looking between the bindings would bring to mind the tired admonition about judging books and covers.¹⁴⁵

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¹⁴⁵ Even a cursory glance would reveal pages containing, not just black letters, but also photographs, images, diagrams, graphs, maps, and other shiny things that might further distinguish a situationist torts casebook from currently available ones. Along those lines, we agree with students who complain that many casebooks have as much personality as a cinderblock. If casebooks do not have to be that way, we are for change. Studies in psychology and graphic design, among other disciplines, confirm the power of images to teach, while other studies reveal the limitations to teaching exclusively through written words. See, e.g., Jay Cross, Sight Mammals: People Learn from Images as well as Words, Yet Most of Corporate Learning Is Delivered in Text, 2 TRAINING & DEV. 47 (2003) (making the case for images); Stuart J. McKelvie, The Vividness of Visual Imagery Questionnaire as Predictor of Facial Recognition Memory Performance, 85 BRIT. J. PSYCHOL. 93 (2004) (explaining power of vivid images). This may be even truer of today’s students, who do much of their reading on electronic sources—replete with images, animations, and videos—than it was of earlier, more “bookish” generations.
Casebooks generally contain between 140 and 170 cases. Although few torts professors slog through them all, the very presence of those cases creates some urge to do so—an implicit and, we think, harmful measure for students and faculty alike of what a tort class should cover, what pace it should maintain, and what depth it should reach. Although we are eager to reject that measure, we remain fans of using cases to teach. The trick would be to switch from many appellate cases to a smaller number of “case studies,” each built around one or a few appellate cases. A situationist casebook, then, would include roughly two-dozen appellate cases: something like six main or anchor cases (each surrounded by a thick layer of situationist materials), another six secondary cases (surrounded by only a thin layer of situationist materials), and another dozen cases (together with pertinent statutes and regulations) to provide precedential context for that first dozen.

2. Would a Situationist Approach Require More Reading for Students?

Although the reading-per-case would certainly increase substantially in a situationist torts casebook, the number of cases would decline significantly. The net effect of this tradeoff would vary depending on how much reading a professor customarily assigns and how many cases and which parts of the material she opts to assign. Still, we suspect that, on balance, professors who use a situationist torts casebook would likely demand more reading than they would from a typical torts casebook.

Keep in mind, however, quantity of pages may not constitute the most reliable or accurate measure of “reading.” Indeed, pages in a situationist torts casebook would, on average, be lighter and probably more engaging than the standard fare: instead of numerous cases, each with its own complexities and squib notes containing dense text and unanswered (are they unanswerable?) parenthetical questions, a situationist torts casebook would include histories, legal-theoretic overviews, relevant newspaper stories and interviews, and briefs all relating to the same case. Although the number of pages would

146. See supra note 140 and accompanying text.
147. Cf. Rakoff & Minow, supra note 90, at 606 (calling for a switch from the traditional case-method approach to the case-studies approach used in business schools).
increase in a situationist torts casebook, the burden of torts reading would decrease.\textsuperscript{148}

3. Would It Be Harder to Teach This Way?

As we described in Part III, a major reason for the success of Langdell's dispositionist approach is that it was easy for professors to pick up.\textsuperscript{149} As we will describe in Part V, below, a situationist torts casebook may offer scholars an opportunity to teach in a way that better complements their scholarship.\textsuperscript{150} On net, however, professors would have to make a fairly significant investment to make the transition.

In several ways, the situationist approach would also change the classroom experience for teachers and students. To begin with, it would level the playing field considerably by putting more information into the basic reading materials around any given case. Those materials would alter the classroom dynamic and pedagogical practices. They would reduce the role for the Socratic method and increase the role for lectures and more participatory and collaborative approaches, like open discussions, group projects, student presentations, and more creative pedagogical methods.\textsuperscript{151} The situationist materials would also create more opportunities and a greater urge to discuss the notoriously "difficult issues" that torts professors normally avoid, such as economic inequality, racial injustice, and so on.

\textsuperscript{148} Our discussion in the text unrealistically imagines a new kind of casebook without also imagining a new style of teaching. In fact, we are currently experimenting with new teaching methods that would, among other things, reduce the amount of total reading that any one student must complete even as it would increase the amount of reading that the class as whole must cover. Although this is not the place to detail those experiments, the consequence is that subgroups within the class are assigned certain roles or perspectives that require them to gain greater expertise (and thus do more detailed reading) on certain topics than other students do. Taken together, the class does more reading while the amount of reading per student is reduced.

\textsuperscript{149} See supra notes 97–101 and accompanying text.

\textsuperscript{150} See infra Part V.B.

\textsuperscript{151} Of course, there may still be a significant role for the Socratic method. Our point is simply that the Langdellian link between the case method and Socratic method will be broken, and that many professors will likely find the Socratic method less appealing than alternative methods, in light of the nature of the materials. Inasmuch as the new sort of casebook would reduce professors' reliance on the Socratic method, professors might sacrifice the perceived IQ boost that that method promotes. See supra note 101 and accompanying text.
Transitioning to a situationist casebook could be significantly lightened with the aid of a helpful teacher’s manual. The significant changes in the materials and, very likely, teaching methods could be made more tractable with the aid of a detailed and clear teacher’s guide that highlighted key connections in the materials, provided teaching suggestions for covering certain materials, and anticipated and offered suggestions for how to respond to students’ common questions or concerns.

A situationist torts manual would, therefore, reflect different pedagogical ambitions and a far slower pace—something closer to two-weeks per case. Class preparation for professors would be different than it has been with conventional casebooks. It would generally not be enough to read two or three cases for each class and plod through the semester, one modest step after the other. Instead, the professor would need to read large chunks of materials with each new anchor case, and then brush up as necessary on the details of some of those materials as the class trajectory dictates. Reading the entire chunk before beginning to discuss the initial portions of it in class would give the professor a sense of the larger themes and connections and of the context and situational forces in play. Each element in a given set of readings, therefore, would be understood once the entirety of the materials has been reviewed.

Recognizing that a first-time teacher may not always have the opportunity to familiarize herself with the large chunk of readings before beginning a new case, the manual would need to provide an executive summary of the materials in a given section, an assessment of what portions are most important, and suggestions for how the readings were intended to unfold. Such a guide would identify the big and small

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152. In our experience, casebook teachers’ manuals tend to resemble the commercial outlines or case digests available to students: a summary of the case, a rule, a few quick questions, followed by (usually) brief versions of the standard answers. Get in, and get out. It is the sort of guide that can be very useful for a course moving at a Langdellian pace—a three-case per hour cadence. Again, there are clear exceptions here, and we have encountered teacher’s manuals that are remarkably thorough and extraordinarily useful, at least in terms of thinking about how to teach a particular case in a fairly conventional way. Still, the standard teacher’s manual would be of little benefit for a situationist torts casebook.

153. Instead of a stream of bite-sized snacks, the situationist materials would be more like the proverbial pig through the python—swallowed whole, and then digested over time.

154. For instance, it may be important to ensure that students do not review certain readings before certain topics are covered in class. We commonly ask our students to describe a “mind’s eye” version of what the parties looked like and what happened in a particular case. Those descriptions have been surprisingly consistent across most students over the years. To read a
puzzles raised by the materials and furnish at least one box—top view of how the jigsaw pieces might be arranged to create a coherent picture. The manual would also describe some of the most memorable experiences from, and tougher challenges of, teaching situationist torts, revealing various connections from within, and between, each section.¹⁵⁵

Just as important, the manual could offer suggestions for how to teach certain sections and provide sample questions for students with suggested answers as well as a list of questions often raised by students and possible responses.¹⁵⁶

4. What About Basic Black-Letter Tort Law?

One obvious concern is whether students would adequately learn basic tort doctrine. That concern flows from the commonly held presumption that “training lawyers” requires “teaching doctrine” and lots of it. Not surprisingly, conventional methods, which usually contain substantial amounts of doctrine, are routinely hailed as the best methods.¹⁵⁷

Assuming that a major goal of torts instruction is to teach students doctrine or prepare them for the bar,¹⁵⁸ we doubt that

¹⁵⁵. Seemingly less important materials at one point in the semester sometimes become quite important later; a first-time user of the book would need guideposts to help navigate materials that do not have the tractable rhythm of a case-by-case approach.

¹⁵⁶. There are numerous other potential aids to teaching situationist torts that might be considered, such as annotated powerpoint slides, a case-study wiki on which different professors or students could contribute additional context, an Internet discussion board for professors teaching the course, and so on.

¹⁵⁷. See supra notes 96–100 and accompanying text.

¹⁵⁸. We recognize that many, perhaps most, law students matriculate to law school with the expectation of learning the basics of the law, in hopes of passing the bar and practicing law. Particularly given those expectations and the high costs of attending law school, there is some obligation, in our view, to help prepare students for that common path. Law students often spend in excess of $100,000, reconfigure their personal and family lives, and forgo personal and work opportunities to attend law school. See generally Vijay Sekhon, The Over-Education of American Lawyers: An Economic and Ethical Analysis of the Requirements for Practicing Law in the United States, 14 GEO. MASON L. REV. 769 (2007); Leigh Jones, As Salaries Rise, So Does the Debt, NAT’L L.J., Feb. 1, 2006, available at http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1138701909390. Law school thus requires a considerable investment of one’s life, and many of those who are willing to invest tend to do so with professional rewards in mind. We appreciate this investment and what motivates it.

Accepting that as one of the goals, however, is not a good argument for sticking with the dispositionist status quo or rejecting the situationist approach. We have already summarized
studying lots of cases furnishes the optimal game plan. In fact, our own experience from both sides of the podium is that the case method by itself does little to teach doctrine. Students must attempt to translate cases into some sort of manageable form by relying on doctrinal outlines that come, typically, from outside the course—hornbooks, commercial outlines, fellow students’ outlines, and the like. Those doctrinal overviews then act like trees on which the cases that a professor happened to assign are hung like ornaments.

An equally effective way of teaching doctrine and preparing students for the bar, in our view, is to incorporate the doctrinal outline into the materials and require that students learn it. That has been our approach. In the first packet of materials, students are given a sizeable, but not overwhelming, doctrinal overview of tort law—the sort of outline commonly reviewed for bar exams—and are asked to study it over the following several weeks. One month into the course, we give students a short, graded, bar-exam-like, multiple-choice quiz to ensure that they have basic familiarity with doctrine. This practice has worked well with our students, who, ex post, seem to appreciate having been required to learn a large chunk of doctrine. A situationist torts casebook could similarly contain such an outline supplemented, perhaps, with overviews of doctrine relevant to a particular case or section.

5. What About the Goal of Training Good Lawyers?

For reasons that we have already touched on and that we will expand on below, a situationist torts casebook would also further the end of training good lawyers. On the purely practical side, it would expose students to the work product of real lawyers. To illuminate both the lawyering experience and the adversarial nature of the litigation process, a situationist torts casebook would include, where possible, portions of judges’ bench memos, attorneys’ briefs, amicus briefs, and pertinent transcripts from oral testimony, depositions, and interrogatories. Those materials should help
students understand how lawyers frame arguments. In addition, including samples of relatively pedestrian briefs as well as more exemplary work product can serve as valuable teaching devices. Much can be learned from such a contrast. Litigation-related materials will also permit students to witness how judges handle allegations, factual information, and doctrinal reasoning routinely furnished by attorneys, but invisible in conventional casebooks. The materials might, for instance, reveal facts, context, and arguments later ignored or misconstrued by appellate judges and provide students with an opportunity to reverse engineer how judges decide cases. Lessons might also be gleaned about the judicial decision-making process from examining the comparative influence of briefs of disparate quality and from different sources. Moreover, those materials can shed light on the situational forces moving the parties and the implications of a case that extend well beyond the litigating parties. In short, a situationist torts casebook would arguably come much closer to replicating and illustrating the lawyering experience than does the now-standard first-year casebook.

Advocacy and evidentiary documents also supply opportunities for innovative teaching strategies. For instance, assigning the plaintiff’s materials to one portion of the class and the defendant’s materials to a second portion, followed by a class discussion or debate—perhaps in mock-trial fashion in which a third portion of the class serves as the judge or jury—offers an ideal way for students not just to begin thinking like lawyers, but also to begin acting like them. Participating in such an exercise before reading the actual opinion can be particularly informative; students debate the underlying issues prior to learning how a court actually adjudicated those same issues. The process could yield insights about, not just judicial decision-making, but human decision-making. Among other lessons, students might observe how people can be biased by merely identifying with a “side.”

A situationist torts casebook would also include interviews of lawyers, litigants, judges, community members, and other parties who might have affected, or been affected by, a case. Many of those

materials already exist in newspaper accounts of the underlying incident, trial, verdict, or aftermath of the case or in law review articles detailing the case. A situationist torts casebook could also include web-link boxes containing URLs to, and brief descriptions of, useful websites, wikis, stories, programs, audio files, videos, and maps relevant to a given case. Such materials would vivify cases that are often experienced otherwise as lifeless abstractions.

6. Doesn’t Training Good Lawyers Require Focusing Primarily on Doctrine?

We reject the conventional view that teaching large amounts of tort doctrine is beneficial, much less necessary, for training good lawyers.

To begin with, tort law is famously easy. Particularly when compared to property, contracts, and civil procedure, tort law doctrine may be, among first-year courses, the least confusing. There are no major counterintuitive, tricky rules to master—no code and no rule against perpetuities. It is a natural place to focus on non-doctrinal features; indeed, we suspect that the doctrinal intuitiveness and simplicity of tort doctrine is, in part, why tort law has been the wellspring of important legal theories. In short, students can learn the doctrine fairly easily on their own, without much expert instruction.

But even if tort doctrine were complicated, no amount of detailed review is going to be of much help to the students. After all, most students will not be practicing tort law, and none, in any event, will be practicing law for at least another couple of years—by which point they will absolutely have to “learn the law” as if for the first time anyway. That is true, in part, because two to three years is long enough for most students to forget the specifics. It is true also because there are at least fifty versions of tort law, and the variations across states are not necessarily trivial. States routinely feature different rules, for example, on the elements of negligence claims.


and damages.\footnote{164} We know of no casebook—nor would we want to see one—that attempts to teach the significant doctrinal distinctions across jurisdictions. One way or another, young lawyers will later have to learn the specifics of the relevant jurisdiction in which they practice.

Relatedly, tort law has been one of the most fluid areas of law over the last fifty years.\footnote{165} Just consider, for instance, the so-called “Tort Law Revolution” and its counterrevolution.\footnote{166} Focusing just on damages, consider how frequently punitive damages change through statutory modification,\footnote{167} or how such changes routinely intersect with a complex dynamic of forces found in the U.S. Supreme Court, state supreme courts, Congress, and state governments.\footnote{168} And, as evidenced in recent presidential debates and myriad sources of political commentary (not to mention this Symposium), our nation clearly remains in the midst of a deep, philosophical debate about the proper role of tort law.\footnote{169} As a result, studying damages at one moment may not prove as beneficial as first-year students are led to believe.

For all those reasons, we believe, the best-trained lawyer is not the one who mastered the minutiae of one version of tort law during her first year of law school, but the one who best fathoms the forces shaping tort law and, given that, can find the details on a need-to-know basis. A situationist understanding of tort law is something that cannot be learned on the spur of the moment. Doctrine can be.

\footnote{164}{See John Y. Gotanda, \textit{Punitive Damages: A Comparative Analysis}, 42 COLUM. J. TRANSNAT'L L. 391, 421 (2004) (“Punitive damages are allowed in a great majority of states, although the circumstances permitting such relief vary greatly.”).}

\footnote{165}{See, e.g., Leslie Bender, \textit{Teaching Torts as if Gender Matters: Intentional Torts}, 2 VA. J. SOC. POL'Y & L. 115, 145 (1994) (describing the relation of changes in tort law to gender).}

\footnote{166}{See \textit{PROSSER} supra note 5.}


\footnote{169}{\textit{Transcript from Republican Presidential Candidates Debate}, \textit{FED. NEWS SERVICE}, Jan. 5, 2008, \textit{available at} Lexis/Nexis News Wire (comments by Governor Mitt Romney: “And American corporations—last year they spent more money defending tort lawsuits than they spent on research and development”).}
For all those reasons, we believe tort law is an exceptionally
good place to start with situationism. But there is more. Training
students to "think like a lawyer" means teaching them not to perfect
doctrinal distinctions, but to understand how a complex problem—
such as a toxic spill or poverty—implicates many areas of law,
including tort law. Given that very few students will become "tort
lawyers" but that many will face problems that entail a tort
component, the situationist approach may again be an improvement
over common practices. As Professors Minow and Rakoff explain:

What we are saying . . . is that students need more [than
they are now getting with the conventional case method],
and they need more not for arcane or unusual careers, but
simply to be good lawyers . . . [W]hen we think of what
students most need that they do not now get, we think:
"legal imagination." What they most crucially lack, in
other words, is the ability to generate the multiple
characterizations, multiple versions, multiple pathways, and
multiple solutions, to which they could apply their very
well honed analytic skills. And unless they acquire legal
imagination somewhere other than in our appellate-case-
method classrooms, they will be poorer lawyers than they
should be.

It is not just that the doctrine-heavy case method fails to
encourage imagination; it impedes it by removing the real-life
complexity from a policy quandary, preempting consideration of
larger situational factors, and truncating any discussion of potential
policy solutions:

Langdell's case method fails in this mission [of teaching
students to "think like a lawyer"]. It fails because lawyers
increasingly need to think in and across more settings, with

\[170. \text{Cf. Quinn Murphy, Policy-Driven Tort Analysis: Peeling the Onion from the Inside Out!,}
\text{45 St. Louis U. L.J. 913, 913 (2001) ("Torts makes sense on a conceptual level to first-year}
\text{students whose moral sense of right and wrong are often consistent with existing tort law. . . .}
\text{[Also], tort law is predominantly black letter law, which appeals to first-year students who have}
\text{not yet become comfortable with the endless levels of ambiguity ever present in the American}
\text{legal system." (citations omitted)).}

\[171. \text{Cf. Susan Gochros, Career Options for Hawaii Attorneys in State and County}
\text{Government Offices, 2 Haw. B.J. 6, 38 (Nov. 1998) (describing benefits of becoming familiar}
\text{with "many different areas of the law").}

\[172. \text{Rakoff & Minow, supra note 90, at 602.} \]
more degrees of freedom, than appear in the universe established by appellate decisions and the traditional questions arising from them. The Langdellian approach treats too many dimensions as already fixed. When what is at issue is whether an appellate bench correctly decided a case, or how its decision fits into the general fabric of appellate decisions, self-evidently we have already decided that the paradigmatic institutional setting for thinking about a legal problem is the appellate court. Accordingly, we will restrict our consideration of the proper incidence of legal force to the modes that courts can use. By focusing on appellate cases, we also assume that the facts of the problem are known: if not because they are really known, then because the rules of procedure will treat them as no longer contestable. Moreover, most of what we know will consist of what K.C. Davis denominated "adjudicative facts" rather than "legislative facts": The who, what, and when of the named parties, rather than information about the social situation in general. Typically the procedural rules (either the rules governing how parties frame an issue for decision or the rules governing discretionary review) will also stipulate the issue (or small set of issues) that are open for discussion.  

But even for those students who are dead-set on becoming tort lawyers and accident attorneys who handle only conventional tort law cases, we do not believe that filling them with doctrine does as much to help them succeed as does teaching them about the ideas, arguments, and political and economic forces that mold tort law. That is true for reasons we have already listed, but it is true for other reasons as well.

First, there is something to Langdell's claim. There is something to be said for possessing such a mastery of an area of law that one can apply doctrine "with constant facility and certainty to the ever-tangled skein of human affairs." But the means to that end, it seems to us, is not to know an area of doctrine cold. What,

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173. *Id.* at 600.
174. LANGDELL, *supra* note 77, at vii; see also Rakoff & Minow, *supra* note 90, at 599; *supra* note 96 and accompanying text.
exactly, are the benefits of supplying doctrinal specificity, particularly when each case in a traditional torts casebook arose from a different jurisdiction, at a different time, before a different judge, confronting different issues, and featuring different levels of expertise among the litigants, attorneys, and witnesses? What good is such a snapshot of a moving target? To make useful predictions, it may be more valuable to know what is moving the target—what is moving the tort ball.

Second, a tort lawyer will not enjoy great success by handling the standard slip-and-fall cases—though, no doubt, it’s a living. Success will require knowing how to manage the unusual, difficult case—in which the law is unclear and in which lawyers find themselves, to borrow a phrase, on “the frontiers of tort law.”175 It is within those gray interstices of black-letter doctrine where good theory and a deep understanding of the law are most needed.176

This discussion has assumed that an important goal of law school and its courses is to prepare students to pass the bar exam and to become successful practitioners of law. For the reasons just reviewed, a situationist approach would accomplish those ends, possibly better than any existing approach. We admit, though, that absent more experience, we have little to go on besides our own biased, hopeful speculation.

Supposing we are wrong, we might still prefer a situationist alternative to the current methods of teaching torts. That is true because, ultimately, we doubt that our primary obligation is to the financial success or even to the professional skills of our students. By the way we teach (or the ways we do not teach), we are shaping,

175. Indeed, to be a good tort law lawyer means knowing how tort law will react in different situations, for such knowledge can help an attorney assess the prospects of a potential case and, if one takes a case, more effectively advocate before a court. Put another way, a good tort lawyer is not one who can only regurgitate tort flash cards. We concede, however, that flash cards may be helpful for studying for the bar. See Denise Reibe, A Bar Review for Law Schools: Getting Students on Board to Pass Their Exams, 45 BRANDEIS L.J. 269, 307 (2007).

176. Cf. Stanchi, supra note 129, at 611–12 (“[T]he focus on teaching doctrine via the case method defines ‘thinking like a lawyer’ in a cramped and one-dimensional way. It is not even clear whether analyzing common law cases was wholly reflective of what ‘thinking like a lawyer’ meant 100 years ago (Langdell had his critics even then), and it is certainly not an accurate reflection of what lawyering is, and should be, today. In my view, ‘thinking like a lawyer’ means mastering doctrine and being skilled, but it also should mean having a strong sense of the theories related to the doctrine, as well as the criticisms of the doctrine. And, most importantly, ‘thinking like a lawyer’ means knowing how to use not only doctrine, but legal theory and legal criticisms in a practical context.”).
not just lawyers, but also laws. Our system of justice is in the balance, a system that poses undeniably immense implications for people around the globe who are directly or indirectly subject to it. The problem is not simply that bad laws pose a threat, but also that the conventional approach stands in the way of the law's promise. As Professors Minow and Rakoff put it: "[O]ur society is full of new problems demanding new solutions. Less so than in the past . . . are lawyers inventing those solutions . . . . In our view, the stodginess of American legal education is partly to blame."177 Arguably, our primary responsibility, therefore, should not rest on preparing students to appeal to the gatekeepers of the state bars but rather to study and teach about the implications of our system and to help better ensure that the values espoused by those who defend our legal system are realized.178

V. WHY SITUATIONISM NOW?

If we are right that our proposed approach is significantly different from existing approaches, then skepticism from our readers would be both predictable and understandable. We ourselves, in fact, have significant doubts about whether many other professors would opt to take the sort of approach we propose—particularly in light of the history of resistance to such reforms and the situational advantages of the conventional dispositionist approach.179

As we have already hinted, the history of American legal education is strewn with the asterisks of failed curricular challenges and alternative casebooks, and the Langdellian dynasty remains firmly entrenched.180 Even the relatively recent efforts at change

177. Rakoff & Minow, supra note 90, at 597.
178. We hasten to add that law schools hold themselves out as doing more than simply training students to be technicians. Law schools are training leaders and shapers of society. See Susan Sturm & Lani Guinier, The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity, 60 VAND. L. REV. 515, 537 (2007) (noting that endorsing goals of detached mastery and excellence for its own sake is "inconsistent with law schools' stated mission of developing leaders and advancing social justice and acts as a barrier to meaningful change") [hereinafter Sturm & Guinier, The Law School Matrix]; Toby Stock, Harvard Law School, A Message from the Dean of Admissions, http://www.law.harvard.edu/admissions/jd/ (May 2007) (last visited Mar. 31, 2008) (informing potential applicants that Harvard Law School students are here to "learn how to be great lawyers and leaders") (emphasis added).
179. See supra notes 112–116 and accompanying text.
180. See supra text accompanying notes 112-116.
have been met with overwhelming opposition.\textsuperscript{181} The one partial exception may be the incorporation of economics,\textsuperscript{182} but even that success has been mixed and modest in the classroom.\textsuperscript{183}

For seven core reasons, however, we are hopeful that the situation might be right for a turn toward the situationist.

\textbf{A. Bridging the Gap Between Social Science and Law}

As already noted, the most dramatic curricular jolt experienced in law schools has been the introduction and proliferation of law and economics. Professor Thomas Ulen calls law and economics “one of the most successful innovations in the legal academy in the last century.”\textsuperscript{184} But one need not be an expert to recognize the

\begin{itemize}
  \item \textsuperscript{183} See Menkel-Meadow, supra note 72, at 579–80 (“To the extent that change has been desired by some in legal education, it has succeeded only with heavily funded initiatives from outside of the legal academy.”). The most successful effort to influence legal theory has been through the Olin Foundation’s support of Law and Economics scholarship and other initiatives. “Efforts by the Russell Sage Foundation to seed law and social science approaches to legal study were more modest (and took root in only a few schools-Wisconsin, Denver, Buffalo, and, for some time, Yale and Chicago).” Id. at 579; see Hanson & Yosifon, \textit{The Situation, supra} note 20, at 272–84 (describing the influence of the Olin Foundation in promoting law and economics in legal academia). Consider also curricular reform at Columbia Law School, referenced in \textit{supra} note 181. In 1989, the school added a mandatory fall-semester course for 1Ls called Introduction to Law & Economics. See Lewis D. Solomon, \textit{Perspectives on Curriculum Reform in Law Schools: A Critical Assessment}, 24 U. Tol. L. Rev. 1, 6–7 (1992). The course is no longer required, and the law school now features a relatively traditional first-year curriculum. See Columbia Curriculum Guide, http://www.law.columbia.edu/academics/curriculum (click “Open the Curriculum Guide,” click radio button for “Foundation Curriculum,” and check “Fall” and “Spring” boxes, and click the “Search” button) (last visited Nov. 18, 2008).
\end{itemize}
prominence of economic theory on law’s landscape. Even a cursory scan of course offerings and casebooks reveals that almost every law school offers at least a basic course in law and economics, and most casebooks include substantive analyses of the intersection between that theory and a given area of law.\textsuperscript{185}

The success of law and economics is a manifestation of situational influences; indeed, its appeal turns in part on the fact that it is highly dispositionist and thus affirming of the Langdellian starting point.\textsuperscript{186} In a way, though, law and economics has also changed the situation, which is why we mention it. Through its success and influence, law and economics has changed the norms of what is acceptable in legal theory and law teaching. Both have become more interdisciplinary in recent years (the former more than the latter), and social scientific methods have gained in prominence.\textsuperscript{187} Consequently, the path is more open now for other social scientific and interdisciplinary approaches than it was thirty years ago and certainly than it was when Langdell was holding seating charts.\textsuperscript{188}

At the same time that interdisciplinary approaches and, in particular, social scientific methods have come into vogue among legal academics, the social scientific evidence of our attributional


\textsuperscript{186} Those themes are developed at length elsewhere. See Hanson & Yosifon, The Situation, supra note 20; Hanson & Yosifon, The Situational Character, supra note 20; see also supra note 183 (mentioning the role of the Olin Foundation and promoting law and economics); cf. Gordon, Geological Strata, supra note 97, at 367 (“Of the modern interdisciplinary movements, Law and Economics has made the most impact, partly I think because much of its style of thinking was already latent, albeit in much less rigorous form, in the types of policy analysis bequeathed by social law and legal realism; it gave lawyers a more rigorous method of doing what they did already.”).


\textsuperscript{188} Arguably, law and economics has helped lay a groundwork on which even very critical theorists might gain some additional traction in the classroom. Cf. Penelope Pether, Measured Judgments: Histories, Pedagogies, and the Possibility of Equity, 14 CARDOZO STUD. L. & LIT. 489, 537-38 (2002) (arguing that law schools should strive for an interdisciplinary approach to law teaching); Francisco Valdes, Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education, 10 ASIAN L.J. 65, 75 (2003) (discussing syllabi of courses on Asian Americans and the Law and noting that “[t]hey each marshal interdisciplinary materials to bring into sharp relief the uses of Law in the origin and construction of everyday realities shaping Asian American lives”).
errors has been piling up. As legal academics begin to explore new fields, they are encountering discoveries that have far reaching implications for law and legal theory. Indeed, in recent years, social psychology, social cognition, cognitive neuroscience, and other mind sciences have problematized the long-dominant conception of the person. It is as if the legal world had been operating on geocentric assumptions and was only now beginning to confront the heliocentric discoveries of modern astronomy. The implications are too profound to assimilate. Nonetheless, some legal theorists are now beginning to grapple with that evidence, and we suspect that their project will be long-lived.

It has already been shown that insights from the mind sciences can help us better understand law and legal theory. Consider the research of Professors Linda Hamilton Krieger and Susan T. Fiske, who illustrated that judges are appreciably affected by cognitive biases and situational influences when interpreting the meaning of ambiguous statutory provisions, examining essential elements of proof and defense, justifying established or novel constitutional doctrines, assessing whether and how much to punish criminal defendants, and formulating legal rules.

Furthermore, it is not difficult to find examples of the mind sciences informing judicial reasoning. Indeed, more than a decade ago, Supreme Court Justice Ruth Bader Ginsburg wrote that “[b]ias

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189. See supra text accompanying notes 40–49.

190. This transition toward situationism has been occurring in other disciplines, often well ahead of the transition in legal theory. It is also a transition that many students are amenable to (even if judges continue to write their opinions as if they are Langdellian formalists). Cf. Rakoff & Minow, supra note 90, at 601 (“The students we now teach are all raised with media renditions of multiple perspectives, time shifts, and conflicting realities . . . they live in a world that presumes the influence of perspective on what is known and what is real. The appellate decision neither acknowledges this world nor equips the student to unpack how courts stabilize lived experiences so that the law may be applied.”).


both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." 193 That was not the first explicit mention of implicit biases in the Court's jurisprudence, and it was certainly not the last. 194

Much has also been written about the social psychology of jury deliberations, 195 the burgeoning use of expert psychological evidence in trials, 196 and, more generally, the power of emotions and other internal situational influences in how we formulate, interpret, and respond to laws, 197 including tort law. 198 The basic lesson of much of

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194. For a more recent example, see Uttecht v. Brown, 127 S. Ct. 2218 (2007) (discussing whether the granting of a motion to excuse for cause constitutes an implicit bias in the procedure of a case).


198. See, e.g., Hanson & Kysar, Taking Behavioralism Seriously, supra note 68; Geoffrey Christopher Rapp, The Wreckage of Recklessness, 86 WASH. UNIV. L. REV. 111 (2008) (describing how recent work in behavioral economics and neuroeconomics indicates that individuals fail to process risk in the way the black-letter-law definition of recklessness presumes, which calls into question the degree to which decisions can easily be classified as "conscious" or "unconscious").
that research is that the model (dispositional) chooser, voter, consumer, or actor imagined in law and legal theory is generally far different from the actual humans (situational characters) who are subject to, and responsible for, those laws and legal theories.\textsuperscript{199}

There is other evidence that law schools, among other university departments,\textsuperscript{200} have been taking the mind sciences increasingly seriously in recent years. The chart below\textsuperscript{201} signifies the number of law review articles that cite to three prominent social psychologists—Mahzarin Banaji, Stanley Milgram, and Tom Tyler—in the last four sets of five-year increments:

\begin{center}
\begin{tabular}{|l|c|c|c|c|c|c|}
\hline
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\hline
Social Scientists & & & & & & \\
Stanley Milgram & 12 & 29 & 67 & 96 & 92 & 133 \\
Philip Zimbardo & 2 & 10 & 28 & 36 & 36 & 52 \\
Tom Tyler* & 7 & 129 & 310 & 491 & 388 & 558 \\
John Darley & 0 & 17 & 100 & 266 & 221 & 318 \\
Susan Fiske & 0 & 0 & 11 & 25 & 144 & 207 \\
Mahzarin Banaji & 0 & 0 & 7 & 35 & 81 & 116 \\
John Jost & 0 & 0 & 0 & 14 & 49 & 77 \\
TOTAL & 23 & 206 & 555 & 986 & 1,011 & 1,455 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{199} See Hanson & Yosifon, The Situational Character, supra note 20, at 24–32; supra Part II.

\textsuperscript{200} See, e.g., Kwame Anthony Appiah, The New New Philosophy, N.Y. TIMES MAG., Dec. 9, 2007, at 34 (describing "recent movement known as 'experimental philosophy,' which has rudely challenged the way professional philosophers like to think of themselves").

\textsuperscript{201} We conducted the relevant search on June 20, 2008. We used the "US Law Reviews and Journals, Combined" database on Lexis/Nexis. For more precise data, including indication of citation to other social psychologists, see the chart below. The extrapolation factor of 1.439 is based on a projection of current citations in this five-year period. It assumes that the citation rate will continue at the same rate for the balance of that period.
Though the chart is hardly irrefutable proof of the mind sciences’ ascendancy in the legal academy, it suggests increased awareness by legal academics of some of the more prominent social psychologists.

Recent titles of books and law review articles also suggest a growing acceptance of situationist insights. The emergence of behavioral economics is one indicator of that trend. From 1980 to 2003, 449 articles included the phrase “cognitive biases.” In the last four and a half years alone, 712 articles have included that phrase.

But deeper dips into the mind sciences have also been occurring at increasing rates. There have, for instance, been numerous interdisciplinary conferences over the last several years, including the annual American Psychology-Law Society Conference, the Law and the Emotions Conference, and the First and Second.


203. We conducted this search on June 20, 2008. We used the “US Law Reviews and Journals, Combined” database on Lexis/Nexis, and searched between January 1, 1980 and December 31, 2002.

204. Id. (searching between January 1, 2003 and June 20, 2008).


Conferences on Law and Mind Sciences. There are now innumerable law review articles drawing from the mind sciences and some promoting new theoretical approaches based on the mind sciences. Situationism, Behavioral Realism and Empirical Legal Realism are three closely related examples of that trend. Recent book publications by law faculty and by social psychologists further illustrate that movement.

So too does contemporary media coverage of the law. Jeffrey Rosen’s *The Brain on the Stand* in the *New York Times* and Steven Keeva’s *A Failure of Imagination* in the *American Bar Association Journal* are two prominent examples. Law-related blogs have likewise evinced this trend, with Adam Kolber’s *Neuroethics & Law Blog*, not to mention *The Situationist*, frequently featuring posts related to mind sciences and law.

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Over the last decade, as best-sellers such as *The Tipping Point* and *Freakonomics* have lent social science a sheen of counterintuitive hipness and reality television has tapped into a cultural fascination with how people behave in contrived situations, journalistic experimentation has become increasingly common. In addition to *The Washington Post Magazine*, it has been featured in *The New York Times*, Harper’s, and *Reader’s Digest*. Its most regular home, however, has been on network-television newsmagazines.

*Id.*

The emergent incorporation of mind sciences in the legal academy may in part reflect a recent organizational shift in social psychology and social cognition. For most of the twentieth century, admits John Cacioppo, President of the Association for Psychological Science, “psychological science could be described as a set of balkanized fields with specialized journals regarded as the place to publish by those within a field and read by few outside that field.” Even as recently as 1991, social psychologist Thomas Scott complained that psychology “is a federation of often-unrelated disciplines,” lacking “a clear identity.” Perhaps for the same reason many academics in other disciplines found the mind sciences to be unduly cumbersome to draw upon.

Times have changed, however, as Cacioppo now calls psychology a “hub scientific discipline” and “an integrative, multilevel science.” The reorganization has made the mind sciences better equipped to aid academics in other fields, a phenomenon that advances the arguments of those academics calling for the incorporation of psychology in their respective disciplines. As explained by Tom Tyler, it has also enabled psychology to better inform and refine interdisciplinary approaches to theoretical and practical questions of law. That reorganization may help explain the recent shift within law and economics toward a “behavioral law and economic” model, which accepts some of the insights from psychology and related mind sciences. Indeed, frustration with law and economics provided an independent motive for seeking other explanations for human behavior as seen through the law.

216. Id. (italics omitted).
217. Id.
221. See supra note 220.
event, at the very moment that legal scholars were inclined to look for interdisciplinary bridges to build toward social sciences, psychology was well placed to begin building toward law.

Other relatively situationist schools or fields within law may also be showing a renewed momentum over the last few years. The recent set of histories in tort law suggests an opening, perhaps a call, for a situationist approach to torts. One leading example of such histories is Robert Rabin and Stephen Sugarman’s *Tort Stories*, a supplemental text that provides students with a contextual—or what we might call situational—understanding of ten leading tort cases, focusing on how the litigation was shaped by lawyers, judges, and socioeconomic factors, and why the cases have attained landmark status.222 *Tort Stories*, like other books in the *Stories* series, is intended, not just for legal scholars, but also for law students to provide some depth and context to the one-dimensional casebook renditions. The books have received praise from both legal academics and law students alike—praise that we suspect may reveal a growing appetite for more situationist approaches.223

**B. Bridging the Gap Between Scholarship and Teaching**

A second reason that a situationist casebook might be more successful now than in the past is that law school faculty members (particularly junior, tenure-track professors) are under increasing pressure to “publish or perish,”224 where tenure and promotion decisions are primarily measured by scholarly production and placement. Moreover, to obtain placement in top law reviews, scholarship is expected to be interdisciplinary and broad in focus,

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224. See Oren Gazal-Ayal, Economic Analysis of “Law & Economics”, 35 CAP. U. L. REV. 787, 788–89 (2007) (“The publish-or-perish mantra has become a household motto for faculty members, at least at the early stages of their careers.”); Trotter Hardy, Review of Hibbitts’s Last Writes?, 30 AKRON L. REV. 249, 252 (1996) (discussing Professor Bernard Hibbitts’s argument that “there has been an increasing pressure for law faculty to publish or perish”); Mitchell Nathanson, Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor, 11 J. LEGAL WRITING INST. 329, 345 (2005) (“In order to reach the goal [of tenure], there is great pressure on tenure-track professors to publish in elite law reviews.”).
and, increasingly, to contain many of the elements that are traditionally not included in the first-year pedagogy.

In light of those expectations, one of the main, traditional advantages of the Langdellian dispositionist case method—a low-cost way to begin teaching a subject—begins to have drawbacks. The simplicity of the case method for teaching has to be balanced against the irrelevance of the case method for research. The gap that currently exists between writing and teaching can be more easily narrowed by adopting a relatively situationist pedagogy. Such a teaching approach may require a more significant investment in preparation, but that investment would generate scholarly returns. Given the situation of many tenure-track law professors, therefore, a turn towards situationism in the classroom may now be welcomed.

C. Bridging the Gap Between the “Real World” and the Classroom

The chasm between what legal scholars generally know about the law and the way they teach it, has contributed to the growing dissatisfaction with law school pedagogy. But a related dissatisfaction is now being expressed from other quarters.

From outside the Ivory Towers, for example, there has been a common complaint about the artificial constructs endemic to most exchanges between law faculty and students. One practicing attorney recently put it this way:

In today’s world, most legal transactions—certainly those faced by the vast majority of lawyers—are no longer single-shot transactions reflecting one area of the law. The complexity of today’s world and every transaction, whether personal, governmental, business, or otherwise, is too multifaceted to approach issues as if they were susceptible to legal analysis based upon a single area of the law. . . . Perhaps I am merely asking for the application of “Law and Reality,” since in reality, few questions facing today’s

225. See supra text accompanying notes 102–103.
226. See supra text accompanying note 224.
lawyer are unidimensional and clearly cut from a single strand of legal reasoning. When problems are approached in the classroom as if they stood all alone, we are shortchanging both our students and the profession.\textsuperscript{228}

The disconnected sterility of the case method elicits a similar dissatisfaction. In a recent study of law school pedagogy, the Carnegie Foundation identified a number of related concerns:

By questioning and argumentative exchange with faculty, students are led to analyze situations by looking for points of dispute or conflict and considering as “facts” only those details that contribute to someone’s staking a legal claim on the basis of precedent. . . . [T]he case-dialogue method drills students, over and over, in first abstracting from natural contexts, then operating on the facts so abstracted according to specified rules and procedures; they then draw conclusions based upon that reasoning. Students discover that to thinking like a lawyer means redefining messy situations of actual or potential conflict as opportunities for advancing a client’s cause through legal argument before a judge or through negotiation.\textsuperscript{229}

Expressed in our terms, the Carnegie study reveals that teachers are teaching and students are learning law as a subject matter significantly divorced from reality—with the goal to simplify, abstract, dispositionalize, and distance oneself from the complex, untidy, contingent situations of what actually took place.\textsuperscript{230}

Such findings have been confirmed in studies of law students themselves. In a 1994 Robert Granfield found that the process of learning to “think like a lawyer” left many students unable to take

\begin{footnotesize}
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    \item \textsuperscript{228} Wayne S. Hyatt, \textit{A Lawyer’s Lament: Law Schools and the Profession of Law}, 60 VAND. L. REV. 385, 398 (2007).
    \item \textsuperscript{229} \textsc{William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, Educating Lawyers: Preparation for the Profession of Law} 187 (2007).
    \item \textsuperscript{230} \textit{Cf.} Eleanor M. Fox, \textit{The Good Law School, the Good Curriculum, and the Mind and the Heart}, 39 J. LEGAL EDUC. 473, 477 (1989) (describing traditional legal education as presenting law as a “cold . . . intellectual puzzle” in which the “mind was split from the heart” (internal quotations omitted)) [hereinafter Fox, \textit{The Good Law School}]; Robert Granfield, \textit{Constructing Professional Boundaries in Law School: Reflections of Students and Implications for Teachers}, 4 S. CAL. REV. L. & WOMEN’S STUD. 53, 63 (1994) (reporting Harvard law students’ disappointment that most of their classes made them feel that “[t]he real life drama of human events as well as social context is considered superfluous to the legal issues”).
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sides on policy questions. The following quote from a second-year Harvard Law student is representative:

What happened to me my first year was that I began to realize that in law there are no principles, you can always construct an argument for anything. As I began to realize this, I became less invested in the ideas and beliefs I once had. I often wonder what I believe now. I could represent anyone you asked me to, but ask what I believe, I don’t think I could really say.  

In a 2005 introduction to a new law journal, two Harvard Law School students summarized the problem of their contemporaries this way:

Once we’ve learned how to argue any point to anyone in any way, it’s remarkably easy to convince ourselves that defending toxic tort suits is somehow morally equivalent to prosecuting them. While this may seem in some ways liberating[,] . . . it is in fact also limiting in a deeply frightening way. Trapped in this self-imposed straitjacket, we deny responsibility for making the choice and refuse to see the consequences thereafter. Therefore we no longer act as agents, in the sense that we no longer see ourselves as affecting the world with each decision.  

The 2007 Carnegie Report picks up on many of those same themes:

By contrast, the task of connecting [the abstraction-based] conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the case-dialogue method. Issues such as the social needs or matters of justice involved in cases do get attention in some case-dialogue classrooms, but these issues are almost always treated as addenda. Being told repeatedly that such matters fall, as they do, outside the precise and orderly “legal

231. Granfield, supra note 230, at 66; see also Stanchi, supra note 129, at 613 (describing how even classes taught by more critically inclined professors can have that distancing effect on students).

landscape," students often conclude that they are secondary to what really counts for success in law school—and in legal practice. In their all-consuming first year, students are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses.

This warning does help students escape the grip of misconceptions about how the law works in order to hone their analytical skills. But when the misconceptions are not addressed directly, students have no way of learning when and how their moral concerns may be relevant to their work as lawyers and when these concerns could throw them off track. Students often find this confusing and disillusioning. The fact that moral concerns are reintroduced only haphazardly conveys a cynical impression of the law that is rarely intended.233

We agree. We would caution, however, that the problem is less the result of using cases and more the consequence of using large numbers of cases and little else. Supplemented with the messiness of situation, a case can teach not only the law, but both the "social consequences" of the law and the harmfully sanitizing influence of the lawmaking process. Done properly, as sketched in Part IV


As it stands, however, there is little, if any, room in the present first year curriculum for candid, value-based discussions. This flaw is inherent in the socialization process that is the ultimate objective of the first year of law school. Learning to 'think like a lawyer' through the Case and Socratic Methods almost completely discounts the social, moral, and ethical dimensions present in the actual practice of law. As a result, most law students are not fully conscious of the social contexts in which the law exists and are thus not adequately prepared to address the issues that accompany them in practice.

Id. (citations omitted). See also Zeppos, supra note 91, at 332.

Professor [Elizabeth] Mertz finds that law professors use the Socratic Method to refocus student attention from questions of content to questions of authority. In discussing cases, professors insist on precise identification authority issues, sometimes to the point of demanding an exact repetition of the opinion's language, but encourage a highly speculative reconstruction of the litigants' underlying interaction that converts it into legal discourse. The result is to create a closed linguistic system which is capable of in essence gobbling up all manner of social detail without budging its core assumptions.

Id. (internal citations omitted).
above, the case method comprises a useful means of demonstrating how the law works and of emphasizing "matters of justice." Indeed, by taking other related areas of law and placing the legal cases within their historical and social context, and by examining the social-psychological forces at work, a situationist torts casebook would enable law professors to employ case law as a device for illuminating major social issues like poverty, racism, healthcare, the environment, and so on. At its core, such a casebook could demonstrate how tort law constitutes one of many strands contained in an interconnected web of causation and behavior. Consequently, topics generally omitted in basic first-year courses would become meaningful and, at times, crucial.\(^2\)

We concede that evolving from the classic pedagogical model would undoubtedly prove difficult. Yet as related policy problems continue to worsen, the pressure for confronting them—and the frustrations from ignoring them—will only build. A situationist approach may relieve that pressure and those frustrations. Better yet, it might help prepare students and professors to better imagine and design potential solutions.\(^3\)

\section*{D. Bridging the Race and Gender Gaps}

One can readily observe how the dispositionist curriculum and pedagogy unequally affect identity groups. The effects are apparent in the classroom itself and, not surprisingly, students and professors alike have joined the call for reform. Kimberlé Crenshaw, for instance, writes:

Minority students across the country have waged a series of protests to draw attention to problems of diversity in the nation’s law schools. Although the students’ bottom line demand is often for the recruitment of more minority faculty and students, the anger and frustration apparent in these protests indicate that the disappointment is not simply over the lack of "color" in the hallways. The dissatisfaction goes much deeper—to the substantive dynamics of the

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\begin{itemize}
\item \textit{234.} See \textit{infra} text accompanying notes 254–257.
\item \textit{235.} See \textit{infra} text accompanying notes 295–300.
\end{itemize}
classroom and their particular impact on minority students.\(^{236}\)

Why do the substantive dynamics of the law school classroom elicit this response? In part, because the classroom itself is a situation that varyingly affects different groups. In her classic study of Harvard students, Catherine Krupnick found not only that "men and women behave differently as speakers, or that male and female students do, but that at Harvard male and female students do. It is sometimes thought that the admissions process evens out the differences, and, to be sure, every teacher can cite examples of "extremely articulate female students,"\(^{237}\) but the general pattern revealed "that male students talked much longer in the predominant classroom circumstance"—a result that itself was somewhat situationally dependent.\(^{238}\) Krupnick concluded that "the classroom environment is a likely factor in women’s less than equal experience of coeducation,"\(^{239}\) an issue that "should be monitored carefully by those who care about providing equal education."\(^{240}\)

Some years later, Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow, and Deborah Lee Stachel undertook the challenge and began carefully monitoring the experiences at the University of Pennsylvania Law School in hopes of explaining "women’s less than equal experience" there.\(^{241}\) Summarizing their findings, they wrote:

We propose three related hypotheses to explain our primary empirical finding, which is that men outperform women at

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238. Id.
239. Id. at 22.
240. Id. at 21.
the University of Pennsylvania Law School. Our research suggests that (1) many women feel excluded from the formal educational structure of the Law School; (2) many women are excluded from the informal educational environment; and (3) some women are individually affected by the gendered stratification within the Law School, in terms of potentially adverse psychological consequences and more limited employment opportunities.  

The authors resisted dispositionist attributions for their findings and instead looked to the situation. They attributed the "gendered effect" to "the institutional design of the law school experience, rather than personal qualities of individual female or male students." And, in the situation, they argued that "[t]he pedagogical structure of the first-year large classes, often constrained by limits on student participation, fierce competition, a mandatory grading curve, and few women faculty—produces alienation and a gender-stratified hierarchy." The problem, though, exceeded mere structure; the pedagogical focus and approach, the substance of the classroom exchanges, and the perspective most often taken and encouraged in the classroom combined to disadvantage some groups and advantage others:

The hierarchy within the large first-year Socratic class also includes a hierarchy of perspectives. Those who most identify with the institution, its faculty, its texts, and its individualistic perspectives experience little dissonance in the first year. On the other hand are students who import an ambivalent identification with the institution, who resist competitive, adversarial relationships, who do not see themselves in the faculty, who vacillate on the emotionally detached, "objective" perspectives inscribed as "law," and who identify with the lives of persons who suffer from existing political arrangements. These students experience much dissonance.

243. Id. at 45.
244. Id.
245. Id. at 47 (citation omitted).
It is that dissonance, according to Guinier and her co-authors, that encourages women in law school to, in effect, "become gentlemen." 246

The schema for the model lawyer (and law student247) is detached, autonomous, and rational. He "uses rights-based reasoning to analyze legal problems in terms of competing, mutually exclusive claims. He can argue all sides of any issue, because he has no personal stake in any of his arguments." 248 Law school thus teaches students, by their own account, "to be 'less emotional,' 'more objective,' and to 'put away . . . passions.' For some, this ability to suppress feelings [is] considered an enormous accomplishment; for others, it is considered a defeat. Second only to the skills of 'objectivity,' students report that over time they have learned to stop caring about others." 249

"For all practical purposes, many women students are faced with the choice of trading their identities as women for identities as lawyers." 250 Given those options, "some women . . . disengage[] from law school because they find its adversarial nature, its focus on argumentation, and its emphasis on abstract as opposed to contextual reasoning to be unappealing and disengaging." 251 More generally, "[o]ver three years at the Law School, women students come to sound more like their male classmates, and significantly less like their first-year 'selves.'" 252

Although they frame the issue as one of gender (and, we agree), it is also possible to frame their findings in terms of attributional styles—that is, relative dispositionism and situationism. Law school (particularly the first-year curriculum) tends to promote a relatively dispositionist view of the world, the law, and the classroom—one that, in the extreme, wrongly assumes that neither situation nor

246. Id. at 59–60.
247. Cf. Sturm & Guinier, The Law School Matris, supra note 178, at 539 (explaining how law school culture "profoundly shapes not only how students interpret and experience the classroom, but also how students see the law and themselves as lawyers").
249. Id. at 49–50.
250. Id. at 46 n.116.
251. Id. at 65.
252. Id. at 40–41.
perspectives matter; that detached rationality, abstract reason, and careful logic should form the foundation of all relevant policy discourse; and that rewards and punishments are allocated in life, law, and the classroom in accordance with merit and desert as determined through competition on level playing fields.

Entering law school are some groups of students who are more likely to accept those dispositionist presumptions and some who tend to embrace a relatively situationist perspective. In the typical law school classroom, the former group’s attributional style is replicated and rewarded while the latter group’s is rare and unwelcomed. The relative dispositionists can thus drift easily on the currents of the dispositionist law school curriculum, in classrooms with professors who employ dispositionist pedagogy while teaching about a dispositionist legal system. Those relative dispositionists are advantaged as well, inasmuch as they tend to feel (and to be) relatively unencumbered by situational forces themselves. Each is relatively free of strong emotional ties and at liberty to pursue advocacy for its own sake. Each, in other words, can behave in ways that better fit the expectations set by the ideal lawyer and law-student schemas. The relative situationists, however, must confront and struggle with what amounts to a hostile environment. They can come to embrace the law school model and attributional styles, they can actively resist them, or they can dis-identify with those elements.

253. The only legitimate perspective is that of the dominant group, which is not seen as “perspective,” but as clear-sightedness.
254. A related set of observations has been made about studying economics. See, e.g., Julie A. Nelson, Feminism and Economics, 9 J. ECON. PERSP. 131, 145 (1995) (“Feminist economists suggest that not only the content of economic courses, but also the teaching style used could undergo a beneficial transformation.”). Furthermore, the classroom experience likely has an effect on the composition and orientation of the field as a whole. See id. at 145–46.

[E]conomic pedagogy may subtly shape the demographic composition of future economists. Much has been written about the way in which the ‘classroom climate’—including instructors’ patterns of interaction with men and women students and sex stereotyping in textbooks—may make women less confident about succeeding in particular areas. The standard androcentric biases in the topics, models and methods of economics may be added to the list of ways in which women students may be subtly influenced to believe that ‘economics is not for (or about) me.’ The current emphasis on mathematical technique also leads to self-selection of those students, male and female, who find abstract analysis satisfying but who may be weak in broader analytical thinking, and self-exclusion of many students who perhaps have fine analytical skills, but see little use for them in economics. Such selection leads to a vicious cycle, in which students and instructors are both heavily invested in the status quo.

Id. (citations omitted).
of law school that create that bind. Each of those options comes at a significant cost—perhaps sacrificing their identity,\(^2\) or their commitments, or their performance, or their aspirations,\(^2\) or some combination of those.\(^2\)

That dynamic may be part of what Professor Patricia Williams was getting at when recounting her years as a law student: “My abiding recollection of being a student at Harvard Law School is a sense of being invisible.”\(^2\)

One of us (with Jay Hook) has collected some additional (experimental) evidence that provides support for the idea that women in law school “become gentlemen.” (Because the results are preliminary and the experiment is part of other work now in progress, we will offer only a loose and cursory sketch here.)

Basically, two groups of first-year students at Harvard Law School were asked to read some paragraphs that roughly communicated the following:

Maria had a genetic disorder, PKU, the effects of which she minimized through tedious and expensive care throughout her childhood. When Maria went to college, she discontinued her medical regimen and later became pregnant. Her baby was born with some learning disabilities, which could be attributed to the fact that Maria was no longer taking care of herself—a risk that Maria had been aware of.

Those students were then asked to answer a question much like the following: “Various people and factors were responsible for what


\(^{256}\) See Fox, The Good Law School, supra note 230, at 482 (“The tendency to marginalize students and their personal educational needs and choices is responsible for some of the greatest failures of the law school,” including students who feel “disengaged, unexcited and alienated.”).

\(^{257}\) Situations often influence, among other things, people’s construals, attributions, and behavior. For instance, legal economists are more apt to assume the human animal is rational and self-serving than are people unschooled in the economic approach. With such a schema and expectation in place, economists are more likely to behave that way themselves. Robert H. Frank, Thomas Gilovich & Dennis T. Regan, Does Studying Economics Inhibit Cooperation?, 7 J. ECON. PERSP. 159 (1993); see also Hillary Haley & Jim Sidanius, Person-Organization Congruence and the Maintenance of Group-Based Social Hierarchy: A Social Dominance Perspective, 8 GROUP PROCESSES & INTERGROUP REL. 187 (2005) (describing the various processes that tend to match people’s sociopolitical attitudes with institutional environments).

happened to Maria’s baby. What percentage out of a total 100 percent responsibility do you attribute to her?”

One group of subjects had not yet taken torts—a course that, we hypothesized, would tend to encourage and reward relatively dispositionist attributions of causation, responsibility, and blame. The other group had taken torts.

Part of what we discovered is summarized in the chart below. Before torts, the men and women, on average, assigned quite different percentages of blame to Maria—men assigning significantly more than women did. In the group that had taken torts, as we predicted, men and women both tended to assign more responsibility to Maria (though the increase for men was not statistically significant), and women were now attributing roughly the same amount of responsibility as men were (the increase for women was statistically significant and difference between men and women in the post-torts group was not significant). Put another way, the data suggested that women were, in an attributional approach, “becoming gentlemen.” Or, as we might put it, relative situationists were “becoming dispositionists.”
If law school is responsible for such a transformation, that would be troubling in part because, as we have summarized above, social science indicates that the dispositionist attributions tend to be highly inaccurate—even as they provide a false sense that the existing outcomes are just. In other words, they may promote injustice. If social psychology and the mind sciences are correct to warn us about such errors in our attributions, then we should worry about the possibility that this error is being amplified and continuously reinforced in law school. Indeed, part of what it may mean to “think like a lawyer” may simply be to become more dispositionist—and thus to be more inclined to make attributions that are relatively inaccurate and system-justifying.

Perhaps we should be most troubled by the possibility that law school is likely advantaging some groups and disadvantaging others, even as it pretends to provide a level playing field for all who enter.259 As Guinier and her co-authors elaborate, although women may be becoming gentlemen, their “academic performance over time does not mirror that of men.”260 “[T]here is an academic cost, and perhaps a mental health cost, to discarding passions, politics, emotions, and community-based identities that were once central to the student’s identity.”261 In sum, “the educational strategies of the Law School sustain hierarchy, legitimate inequity in the name of merit, and yield serious, adverse consequence[s] for many women.”262

A very similar dynamic is no doubt at work with respect to other historically and culturally disadvantaged groups. In an important article on the experience of racial minorities, for instance, Professor Crenshaw argues that “[l]aw school discourse proceeds with the

259. Predictably, the conventional explanation for many of the phenomena that they studied is attributed to disposition. Id. at 83–84 (“The men make the rules and then develop predictors of performance under those rules. When women do not achieve predicted rates of performance, the men question the women, rather than question the rules.”).


261. Id. at 48.

262. Id. at 98. There is much to say about the role of the “lawyer” and “law student” stereotypes, and how they might impact the performance of different groups at law school—owing to stereotype threat, implicit associations, and similar dynamics. Although they are beyond the scope of this paper, they do form a very important part of what we consider to be the situation of law school (and beyond), and we are at work on another paper that we hope will provide a reasonably comprehensive inventory of such interior situational influences on educational outcomes. See Jon Hanson & Michael McCann, Standardized Test Nation (Sept. 27, 2008) (working paper, on file with authors).
expectation that students will learn to perform the standard mode of legal reasoning and embrace its presumption of perspectivelessness.\textsuperscript{263} According to Crenshaw, this approach asserts "that legal analysis can be taught without directly addressing conflicts of individual values, experiences, and world views" and transmits this assumption to students by "discounting the relevance of any particular perspective in legal analysis."\textsuperscript{264} The norm of perspectivelessness "discount[s] the relevance of any particular perspective in legal analysis and . . . posit[s] an analytical stance that has no specific cultural, political, or class characteristics."\textsuperscript{265} It is as if situation is irrelevant, and all that matters are the facts—and their neutral interpretation.\textsuperscript{266}

This norm of perspectivelessness is problematic in general, and particularly burdensome on minority students. While it seems relatively straightforward that objects, issues, and other phenomena are interpreted from the vantage point of the observer, many law classes are conducted as though it is possible to create, weigh, and evaluate rules and arguments in ways that neither reflect nor privilege any particular perspective or world view. Thus, law school discourse proceeds with the expectation that students will learn to perform the standard mode of legal reasoning and embrace its presumption of perspectivelessness. When this expectation is combined with the fact that what is understood as objective or neutral is often the embodiment of a white middle-class world view, minority students are placed in a difficult situation. To assume the air of perspectivelessness that is expected in the classroom, minority students must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts. The consequence of adopting this colorless mode is that when the discussion involves racial minorities, minority students are expected to stand apart

\begin{footnotes}
\footnotetext[263]{Crenshaw, supra note 236, at 35.}
\footnotetext[264]{Id.}
\footnotetext[265]{Id.}
\footnotetext[266]{"Perspectivelessness" obviously has much in common with the more general concern about the gaping void between the classroom and reality. See supra text accompanying notes 115–116.}
\end{footnotes}
from their history, their identity, and sometimes their own immediate circumstances and discuss issues without making reference to the reality that the “they” or “them” being discussed is from their perspective “we” or “us.” Conversely, on the few occasions when minority students are invited to incorporate their racial identity and experiences into their comments, they often feel as though they have been put on the spot. Moreover, their comments are frequently disregarded by other students who believe that since race figures prominently in such comments, the minority students—unlike themselves—are expressing biased, self-interested, or subjective opinions. The result is that minority students can seldom ground their analysis in their own racial experiences without risking some kind of formal or informal sanction. Minority students escape the twin problems of objectification and subjectification in discussions when minority experiences are deemed to be completely irrelevant, or are obscured by the centering of the discussion elsewhere. The price of this sometimes welcomed invisibility, however, can be intense alienation. Crenshaw’s description seems very much in sync with that of Guinier and her co-authors and with our argument that law school is encouraging dispositionism and punishing those who seek to offer a more situationist account of human behavior—in the law or in the classroom.

The similarity between Crenshaw’s distinctions and our own becomes more evident when examining how she describes the role of perspective and the illusion of perspectivelessness (or, straining a bit, “situationlessness”) playing out, not just in the classroom, but also in the law itself. Specifically, she discusses “the tension between competing frameworks for defining and remedying racial discrimination.”

Perspectives are important in determining the scope of antidiscrimination law. Yet minority perspectives are rendered irrelevant by some of the United States Supreme

268. See id. at 46 (“Minority perspectives are devalued not simply in the discussion of doctrine, but in the construction of doctrine as well.”).
269. Id.
Court’s approaches in which the significance of the victim’s experience of domination is minimized by the search for an actor who intentionally and irrationally discriminated against certain victims. The result of this search is that protection afforded to minorities is limited.

Discriminatory intent is increasingly the sine qua non of a successful claim. The United States Supreme Court has adopted the view that the injury is found in the intentional deprivation of rights on the basis of race. Thus, the inquiry focuses on the beliefs, actions, and experiences of perpetrators. This effort to ground antidiscrimination protection in the identification of a particular discriminating actor might appear to be rational and noncontroversial in the absence of a competing view. Yet, when we contrast this view—which . . . [might be] labeled the “discrimination approach”—with what we called the “domination approach,” another equally plausible view is revealed. In the domination model the search for a particular perpetrator is not as important as seeking to remedy the conditions which render the community in question subordinate to whites. Such an approach relies on the reintroduction of historical details and the inclusion of the victims’ personal experiences and aspirations which initially gave rise to the case. This domination model values the perspectives of the victims and when those perspectives are introduced, the conclusions drawn from the discrimination model make less sense. Unlike the discrimination approach, the domination model privileges the perspective of the victim. Her views, her experiences and her condition become the focal point of the analysis. Under the domination model, intentionality—which is the determinative factor under the discrimination model—is but an additional insult to an already established injury.270

In other words, the dominant perspective is dispositionist, focused as it is on “intentions,” “perpetrators,” “the identification of a particular discriminating actor,” while the alternative perspective is situationist, inasmuch as it focuses on “seeking to remedy the conditions which

270. Id. at 46–47 (footnotes omitted).
render the community in question subordinate to whites,” it “relies on the reintroduction of historical details,” and it “values the perspectives of the victims” and their “views, . . . experiences, and . . . condition[s].” 271 In calling for the law to look beyond the victim (often the first and only person to be blamed) and the perpetrator (typically the second, and only other potential person to be blamed) to circumstances and context, Crenshaw is calling for a more situationist approach. 272

The failure to take a situationist perspective is exactly what many law students—particularly those who come to law school keenly aware of, and troubled by, the power of situational forces—find alienating about the law school experience. The problem is not merely a matter of ignored perspective; it is that a host of obvious situational forces are dismissed as non-existent. Even worse, many students perceive those same forces as the foundation of injustices to which law school, of all places, seems blind or insensitive. The student who offers such arguments is met with anything from indifference to indignance. 273 The arguments themselves are seen as fanciful and dangerous—the product of ignorance, bias, hypersensitivity, and emotion and the stuff of unwarranted intergroup animosity. 274 Little wonder that those who see racial issues as, at least in part, the consequence of broad situational forces often find the law school experience particularly unpleasant. As Professor Crenshaw explains:

271. Id. (emphasis added).

272. We might go further than Crenshaw suggests and would look to the situation of the "perpetrator," for instance. Our point, however, is simply that Crenshaw’s preferred policy approach would be, at least somewhat, a more situationist regime.

273. See, e.g., Matthew L.M. Fletcher, Note, Listen, 3 MICH. J. RACE & L. 523, 523 (1998) (describing how, as a law student, situational justice is “buried by the discourse of the dominant culture”).


For a number of reasons discussed above, minority perspectives are often excluded and dominant perspectives are privileged in the legal inquiry. Moreover, dominant perspectives are not identified or associated with any characteristics; the perspective is nameless. Most debilitating for minorities, however, is that while dominant perspectives are granted the protection of apparent objectivity, minority perspectives are identified as such and viewed as subjective and biased. As a result, legal concepts, claims, and categories that value minority perspectives are sometimes viewed as suspect or biased.

Id.
Given the infrequency with which most law teachers create the space for and legitimize responses that acknowledge the significance of a racially-informed perspective, it is not surprising that minority students often choose the role of "good student" rather than run the risk of appearing to be incapable of exercising the proper decorum and engagement in legal analysis. Such experiences teach minority students that in law school discourse, their cultural and experiential knowledge is not important or relevant. Indeed, they learn that any failure to observe the constructed dichotomy between the rational-read non-racial and non-personal-and the emotional-read racial and experiential-may elicit derision or disregard. To expect minority students to feel comfortable or to be creative in such a classroom is the equivalent of asking someone to perform a two-handed task with one hand tied behind her back.275

So, what to do? As the next section argues, there seems to be widespread agreement that at least part of the solution involves moving from our dispositionist approach toward a more situationist one. The very fact that there is such agreement on the part of so many critics of our current system offers a compelling reason for why now may be an opportune moment for meaningful change.

E. Building a Bridge to Situationism

Scholars who have considered solutions to those sorts of problems have often proposed reforms that would, among other things, encourage a more situationist curriculum and pedagogy.276 When Professors Minow and Rakoff discuss the gap between the real world and the classroom,277 they argue that "[e]ven the most imaginative and energetic teacher simply needs different materials."278 “Students ought to be presented with relatively dense

275. Id. at 39.
276. This “solution” was implicit in many of the criticisms that we reviewed in the previous two subsections of the conventional Langdellian model.
277. See supra text accompanying notes 115–116.
278. Rakoff & Minow, supra note 90, at 601.
materials that lay out a situation, experienced as a problem for a person, or group of people, for legal treatment . . .”

Professor Menkel-Meadow’s “ideal legal curriculum,” which “would situate law and its functions in a broader human context” includes features that we, too, would like to see as part of the basic curriculum and that a situationist torts book would attempt to promote. “[S]ituat[ing] law” would mean, among other things, that students would “study those fields whose knowledge base informs how and why law is made—sociology, history, political philosophy, political science, and anthropology—so law students could learn about the historical and cultural variations in how human beings create and enforce norms for their coexistence.” Menkel-Meadow argues that first-year students:

should also encounter . . . a real or simulated “client” . . . to understand how legal problems present themselves. Thus, students would learn simultaneously about how law came about and what it can and cannot do to solve social and human problems. Such teaching would ask, as its central themes, what produces the norms by which people live and guide themselves and others, how do those norms vary in different cultural and social settings, and what predispositions or patterns occur in different social groupings.

Similarly, Mary O’Brien Hylton writes:

No area of the law can or should be taught without regular, thoughtful reference to material conditions. Toward this end, . . . students deserve more than the often shallow rhetoric of efficiency, personal choice, and incentives that frequently inform[] most class discussions. Inequality of material conditions is not a side issue—it is at the heart of the law.

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279. Id. at 604.
280. Menkel-Meadow, supra note 72, at 580.
281. Id.
282. Id. at 580–81.
283. Hylton, supra note 233, at 1362.
Consider, also Professor Crenshaw’s suggestions for addressing some of the flaws in the typical law school classroom when racial issues are implicated by a case:

Some of these dilemmas can be addressed by altering the way racial issues are framed, by presenting racism as a serious societal problem, and by explicitly deprivileging dominant perspectives. Instructors wishing to explore racial issues without contributing to the anxiety of minority students should resist framing minority experiences in ways that make such experiences appear to be disconnected to broader issues and that can be easily forgotten as soon as the policy discussion is over. Instead, the frame should be shifted so as to illuminate the connection between racial subordination and the values and interests that appear to be race-neutral or that are simply taken for granted. Situationalism is committed to making just those connections and to revealing the ways in which the dominant, dispositionist perspective contributes to the very problems—racial or otherwise—that it removes from the classroom discussion and from the minds of students as a topic of any relevance.

Crenshaw astutely observes that “[w]hen the instructor places an entire legal framework at issue, minority perspectives can be included in ways that illuminate better the racial consequences of dominant values, concepts, and rules.” By challenging the dispositionist premises of tort law, situationalism opens the door for alternative perspectives. More broadly, a pedagogical approach that reveals the situational contingency of the law simultaneously undermines the seeming neutrality, correctness, and naturalness of dominant dispositionist presumptions. When the law is a ball, the question is no longer just one of learning what it contains, but also one of figuring out how it came to be that way and whether it ought to be that way.

284. Crenshaw, supra note 236, at 43.
285. Id.
286. Cf. id. at 48 (“[T]he introduction of competing perspectives can destabilize this apparent objectivity. More importantly, creating space for competing perspectives can loosen the constraints upon those who have been forced to adopt a perspective which is often at odds with their reality. By contrasting alternative points of view with the dominant perspective, the subjectivity of legal analysis is revealed.”).
287. Id. at 43.
In sum, there seems to be a consensus among critics of the conventional model of teaching law that a more situationist approach would be an important part of any solution. That consensus provides us greater optimism about the prospects for a situationist torts casebook.

**F. If You Build the Bridge, They Will Come**

A sixth reason that a situationist casebook might catch on is that its very existence may alter people’s perceptions about how best to understand and teach law. As explored in Part III, the dispositionist casebooks have had a significant self-perpetuating effect on how law is conceived of and taught.\(^{288}\) The absence of a tractable alternative to the library full of Langdellian casebooks partly explains why dispositionism still thrives—which, in turn, helps explain why those conventional casebooks still dominate the law school experience.\(^{289}\)

A presence of a situationist option is likely a necessary element for any effort that seeks to break that reinforcing cycle.\(^{290}\) As Professor Menkel-Meadow underscores when lamenting the rigidity of legal education,\(^{291}\) a key mechanism for change will involve law teachers both acknowledging that “the study of law is itself necessarily a multi-disciplinary enterprise, borrowing from . . . the insights, methods, and canons of other fields to tell us about how we govern ourselves.”\(^{292}\) In that way, a situationist torts casebook would represent and help catalyze pedagogical reform.\(^{293}\)

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288. See supra text accompanying notes 128–130.
289. See supra text accompanying notes 128–130.
290. For many of the reasons we discussed in Part V.G, infra, however, we do not think that it is a sufficient component for change—or at least not rapid or significant change. Coupled with the growing commitments on the part of legal academic leaders and prominent law schools to foster change, however, we are more optimistic regarding the catalyzing effect of such a situationist casebook. See infra notes 294–305 and accompanying text (summarizing those commitments).
291. See Menkel-Meadow, supra note 72, at 594–95.
292. Id. at 557.

> [P]revalent law school curriculum and pedagogy are not well suited to producing [effective and ethical] lawyers . . . . Seeing this, many law professors have experimented with course design and delivery seeking to impart these traits and practices to their students. Recent discoveries in social psychology and neuroscience demonstrate rather clearly that a pedagogy based upon contextually rich, emotionally
G. Building Bridges

The final and arguably most important reason why meaningful situationist reform may be possible now is that many U.S. law schools are currently contemplating major reform. Indeed, some law schools are actually beginning to implement such reforms. Viewed broadly, those curricular efforts are in the situationist direction as legal educators seek to promote experiential, contextual learning and to bridge many of the gaps we have sketched.

No curricular shift is more seismic in its symbolism and significance than the one now underway at Harvard Law School, the first phase of which commenced in the Fall of 2007. Langdell’s legacy is, of course, still driving nails at Harvard, but the reform reflects a deliberate, collective attempt to rethink and remold legal education at the very place where the hammer’s die was first cast.

Advocated by the Harvard Law School administration under the farsighted and pragmatic leadership of Dean Elena Kagan and embraced by the faculty and the alumni, the reform seeks to prepare future lawyers for economic, cultural, and technological changes by requiring them to become skilled in modern system design, problem-solving techniques, and innovative approaches to legal issues.

Although individual faculty members vary in how intensely and substantively they embrace those goals in their traditional classes, it is fair to say that all Harvard Law School students are now presented with more complex, fact-intensive problems, many of which intersect with practical and real-world issues. Added to the first-year experience are courses in international and comparative law,
legislation and regulation, and complex problem solving. Common law courses are being trimmed and truncated to make room. The explicit goals behind the changes are as follows:

- greater attention to statutes and regulations;
- introduction to the institutions and processes of public law;
- systematic attention to international and comparative law and economic systems;
- opportunities for students to address, alone and in teams, complex, fact-intensive problems as they arise in the world (rather than digested into legal doctrines in appellate opinions) and to generate and evaluate solutions through private ordering, regulation, litigation and other strategies;
- more sustained occasions to reflect on the entire enterprise of law and legal studies, the assumptions and methods of contemporary U.S. law and the perspectives provided by other disciplines, and to develop a common fund of ideas and approaches relevant to designing effective and just laws and institutions.  

Rather than master or regurgitate mere doctrines as discerned through appellate opinions or digested in outlines, first-year students at Harvard Law School are now expected to "generate and evaluate solutions through private ordering, regulation, litigation and other strategies."  

The experience exposes students to more frequent and sustained examination of connections between one area of law and another, between one legal system and another, and between legal theory and other academic disciplines. Such comparisons and contrasts help to bring into relief many of the contingent traditions and debatable assumptions underlying our legal system. Curricular reform at Harvard Law School unmistakably, though not explicitly, reflects both the desire to shift, and a means of shifting, away from

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298. See HLS Faculty, supra note 296.

299. Id.
the dispositionist conventions and toward a more situationist approach to law.

Having said that, we nonetheless find compelling Professor Kathryn Stanchi’s recent criticism of Harvard Law School’s new curriculum. She argues, in effect, that the sort of change needed in the first-year curriculum may go beyond that contemplated in the reform. Indeed, creating a special course devoted to the new (more situationist) approach may underscore its marginality, not exhibit its centrality. Stanchi writes:

Even Harvard’s new first year curriculum, which laudably requires a course that integrates legal theory with problem solving, to some extent maintains the segregation; the Problems and Theories course is separated from Legal Research and Writing, and both of these courses look like rogue outsiders when compared with the dominant curriculum of doctrinal courses. In my view, this separation is a mistake, even—especially—in the first year.

The separation . . . does not serve the purposes we want our pedagogy to serve.300

The good news, as Professor Stanchi recognizes, is that the division is unnecessary. We endorse some of her other suggestions for reform, the “centerpiece” of which is “to increase the number of courses that integrate doctrine, theory and skills so that students learn to use both doctrine and legal theory, including critical theory, in a practical context.” More specifically, she calls for

[R]eplac[ing] some of the courses that emphasize teaching doctrine by the case method, . . . particularly in the first year. And, we should name the courses accordingly, so they do not sound as if they are all about the doctrine. In short, if we want to teach “thinking like a lawyer, we should be explicit about doing it. Most importantly, we should define that “thinking” broadly, to include not only the basic skills . . . but also mastery of doctrine and legal theory, including critical theory.301

A situationist torts course could be one concrete step toward “do[ing] it right.” Furthermore, such changes strike us as consonant with,

300. Stanchi, supra note 129, at 611.
301. Id. at 612.
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though not mandated by, Harvard Law School's curricular reforms and aspirations.

Other law schools have taken similar, though more modest, situationism—enhancing curricular alterations. Stanford Law School, for instance, recently announced changes to the upper-level curriculum that will place less emphasis on adversarial tactics and more on "team-oriented, problem-solving techniques." Stanford Law School, for instance, recently announced changes to the upper-level curriculum that will place less emphasis on adversarial tactics and more on "team-oriented, problem-solving techniques." Stanford Law School, for instance, recently announced changes to the upper-level curriculum that will place less emphasis on adversarial tactics and more on "team-oriented, problem-solving techniques." 302

Georgetown University Law Center now requires its first-year students to enroll in "Law in a Global Context," a course premised on the idea that "the legal problems today's students must be prepared to face increasingly transcend national boundaries and involve more than one legal system." 303 Similarly, the University of Michigan Law School now requires its students to complete a two-credit course in transnational law. 304

The speculation, particularly among those who study law school pedagogy, is that other American law schools will increasingly follow the paths being cleared by such pioneering institutions. 305

VI. CONCLUSION

This Article has examined law school curriculum from an unconventional perspective. Like moviegoers grown attached to a volleyball named Wilson, most law students and legal scholars have grown attached to the idea that the conventional law school curriculum is moved from its own personality. A situationist approach is based on the view that that curriculum, like the law itself, is more like a volleyball, moved by situational forces and not by some imagined disposition. 306 And at this moment, such situational forces appear to be gaining traction.


306. Some of our readers have had misgivings about the situationist approach because they perceive it as ideologically loaded. Undoubtedly, it is. But no approach to law is any less loaded with ideological implications. Robert E. Lane writes: "At the roots of every ideology there are
Indeed, this is a particularly good situation for significant pedagogical or curricular change. A consensus that our legal education system is broken now exists among many powerful members of some of the most influential law schools. Those leaders have gone beyond merely recognizing the problem; they are taking significant steps to fix it. In short, the prospects for substantial

premises about the nature of causation, the agents of causation, [and] the appropriate ways for explaining complex events.” ROBERT E. LANE, POLITICAL IDEOLOGY: WHY THE AMERICAN COMMON MAN BELIEVES WHAT HE DOES 319 (1962). Similarly, at the roots of every approach to tort law (or virtually any law) are premises about the nature of causation, the agents of causation, and the appropriate ways for explaining complex events. The situationist and the dispositionist attributions are examples of such competing premises. Indeed, they have been linked to competing ideologies. See Benforado & Hanson, Great Attributional Divide, supra note 80, at 314.

With respect to that competition, there are several key points to keep in mind about the situationist approach. First, the idea that tort law is, as seen from the dispositionist perspective, somehow ideologically neutral is an illusion. Cf. Crenshaw, supra note 236, at 40. The appearance of perspectivelessness is simply the illusion by which the dominant perspective is made to appear neutral, ordinary, and beyond question. As a result, while the perspectives of minority students are often identified as racial, the perspectives of their majority classmates are not. Moreover, when the instructor presents as a 'given' the perspectivelessness of a particular rule or value, then many decisions that effectively burden minority group members will appear to both the instructor and most students to be the result of an unbiased, objective legal analysis. As long as other perspectives are obscured by the illusion of objectivity, the fact that courts are making choices that privilege the perspectives and interests of some groups over others will go unrecognized.

Id. at 48. Second, an important part of taking a situationist perspective is to recognize and examine the presence, origins, and effects of such illusions. Third, tort law is an important place to have ideological discussion in law school precisely because, as recent tort debates illustrate, it is one of the few areas of law where the ideological stakes are explicit and salient. See generally Hanson & Yosifon, The Situational Character, supra note 20. As Professors Prosser and Keeton put it in 1964: “Perhaps more than any other branch of the law, the law of torts is a battleground for social theory.” PROSSER & KEETON, supra note 53, at 15. A close examination of that battleground reveals that the bigger part of the social theoretical fight is actually a contest between relative dispositionists and relative situationists. See Benforado & Hanson, Great Attributional Divide, supra note 80; Benforado & Hanson, Costs of Dispositionism, supra note 192; Hanson & Kysar, Taking Behavioralism Seriously, supra note 68. Finally and most importantly, social science has shown that dispositionist presumptions underlying legal and lay conceptions of the person are more or less wrong. See Benforado & Hanson, Costs of Dispositionism, supra note 192, at 64–65. Thus, we do not call for a situationist approach on ideological grounds but on accuracy grounds.
reform seem more likely today than they have been in the last 140 years.

In our view, the turn away from Langdell and towards situationist tort law is long overdue.