What's on First?: Organizing the Casebook and Molding the Mind

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WHAT’S ON FIRST?: Organizing the Casebook and Molding the Mind

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ABSTRACT

This study empirically tests the proposition that law students adopt different conceptions of the judge’s role in adjudication based on whether they first study intentional torts, negligence, or strict liability. The authors conducted an anonymous survey of more than 450 students enrolled in eight law schools at the beginning, midpoint, and end of the first semester of law school. The students were prompted to indicate to what extent they believed the judge’s role to be one of rule application and, conversely, to what extent it was one of considering social, economic, and ideological factors. The survey found that while all three groups of students shifted toward a belief that judges consider social, economic, and ideological factors, the degree of the shift differed in a statistically significant way depending on which torts their professors taught first. These differences persisted throughout the semester, even after the students studied other torts. Further, these differences were observed even when the analysis controlled for law school ranking and were more pronounced among students attending the highest ranked schools.

In interpreting the survey results, the authors employ sociologist Erving Goffman’s theory of “frame analysis” and the work of cognitive psychologists, including Amos Tversky and Daniel Kahneman, on “anchoring.” The Article concludes that the category of tort liability to which students are first exposed affects the “frame” or “lens” through which they view the judicial process. This frame becomes anchored and persists throughout the study of other tort categories. The lessons about the nature of the judging process learned implicitly through the professor’s choice of topic sequence may be even more important than the substantive topics themselves.
## ABSTRACT


## INTRODUCTION


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INTRODUCTION

Neither constitutions nor statutes explain the appropriate role of the common law judge, a fundamental issue at the heart of lawmaking about which legal scholars and politicians alike vociferously disagree. What then should law students be taught about how judges decide cases? Legal formalists once argued that law students should learn the “science of the
law,"¹ consisting of the logical application of rules and doctrines to the facts of the case.² By the 1930s, legal realists countered that students instead should study the "pragmatic and socio-psychological"³ motivations for judicial decisions and consider the impacts of these decisions on society.⁴ Today, even though Kathryn Abrams proclaims that "we are all legal realists (or post-realists) now,"⁵ the debate continues.⁶ Most obviously, outside the walls of the academe, business interests decry policy-oriented "judicial activism"⁷ among judges rendering common law tort decisions and insist that they follow rules and doctrines derived from precedents.

Flying under the radar of the tort debates, the most important battle in the ongoing conflict over the proper role of the common law judge takes place in the classrooms of first-semester law students. Most students enter law

2. See, e.g., Everett V. Abbot, Keener on Quasi-Contracts, II, 10 HARV. L. REV. 479, 481 (1897) (describing jurisprudence as a science with "syllogism in matters juridical" as its "first postulate"); John M. Zane, German Legal Philosophy, 16 MICH. L. REV. 287, 338 (1918) ("Every judicial act resulting in a judgment consists of a pure deduction.").
4. E.g., HARRY SHULMAN ET AL., CASES AND MATERIALS ON THE LAW OF TORTS xv (3d ed. 1976) (explaining, in the preface, "we have tried to present the material in such a fashion as to emphasize social consequences"); see also Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 467 (1897) (arguing, as a precursor of legal realism, that "[j]udges themselves have failed adequately to recognize their duty of weighing considerations of social advantage"). See generally Edward G. White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, 58 VA. L. REV. 999, 1013–26 (1972) (describing the shift from formalist thought to legal realism).
7. See, e.g., Hans A. von Spakovsky & Jack Park, Judicial Nullification in Georgia: Overriding Medical Malpractice Reform and Federal Law to Reward the Trial Bar, HERITAGE FOUND. LEGAL MEMORANDUM, Jan. 2011, at 1 (asserting that "activist justices" on the Georgia Supreme Court "substitute[d] their policy preferences" by ignoring precedent to strike down caps on medical malpractice claims and allowing torts suits against vaccine makers); Editorial, Supreme Court Rove Would Bring Calm, CHARLESTON GAZETTE, Apr. 28, 2004, at 4A (noting that the United States Chamber of Commerce criticized past decisions of a judicial candidate as examples of "judicial activism").
school with little or no understanding of the common law process. To the extent that they have previously thought about the common law judge’s role, perhaps most see it as one of applying rules and doctrines to the facts of a particular case. Those who have been exposed to the law in undergraduate courses taught by government or political science professors, in contrast, are presumably more likely to view the common law judge’s role as one involving decisions based on social, economic, and ideological considerations. In either case, entering law students generally recognize that they are for the first time encountering a new professional culture and body of knowledge that will be important for the remainder of their professional lives. Accordingly, they are quite impressionable. It is here that

8. What knowledge and impressions of the law they do bring to the classroom is the product of undergraduate courses covering the law, see, for example, Gerald P. Moran, Law School and Its Usual Rendition: Some Thoughts for Incoming Law Students, 29 J. LEGAL EDUC. 370, 370 (1977-78) (stating that most entering law students come with “expectations, most of which are largely based upon our undergraduate studies”); media coverage of fictional and non-fictional depictions of the law are drawn substantially from popular culture, literature, and media portrayals; or past work experiences in the legal system or in employment that at least interacted with the legal system, see Ian Gallacher, “Who Are Those Guys?: The Results of a Survey Studying the Information Literacy of Incoming Law Students, 44 CAL. W. L. REV. 151, 155, 157-58 (2007) (noting that in a 2006 survey of 740 students from seven law schools, “[m]ore than 57% had at least one year of work experience before coming to law school,” and approximately 34% had worked “in a law firm or in a legal department of some form”).

9. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 198 (H. H. Gerth & C. Wright Mills eds., trans., 1998) (describing a vocation as requiring “a firmly prescribed course of training”); see also KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 364-65 (1962) (defining a craft as a recognizable line of work that involves a teachable structure, specialized skills, and an evaluation procedure that ensures the presence of such skills); Richard A. Posner, Professionalisms, 40 ARIZ. L. REV. 1, 2 (1998) (stating that a profession “requires highly specialized, even esoteric, knowledge that can be acquired only by specialized formal education or a carefully supervised apprenticeship”).

10. See, e.g., Miriam E. Felsenburg & Laura P. Graham, Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It, 16 J. LEGAL WRITING INST. 223, 256 (2010) (noting that “many beginning law students” experience frustration in the early weeks of law school because “they were trying to learn the law without an understanding of how the universe of the law operates”); Susan Sturm & Lani Guinier, The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity, 60 VAND. L. REV. 515, 521 (2007) (arguing that the first year of law school is “intentionally destabilizing: it invites students to suspend judgment, to question their intuitions, to read structurally, to learn a new language, and to ask different questions”); see also SCOTT TUROW, ONE L 9-10 (1977) (noting that the first year of law school “is also a time when law students typically feel a stunning array of changes taking place within themselves . . . [and when] many law students come to feel, sometimes with deep regret, that they are becoming persons strangely different from the ones who arrived at law school in the fall”).
tomorrow’s judges and lawyers are exposed, most often for the first time, to the strange idea that in a democracy, common law judges deciding tort cases, particularly appellate court judges, make law without any pretense of substantive electoral accountability. These judges decide such important issues as how the costs of the inevitably massive harms inflicted in the modern industrial society are to be shared between manufacturers and consumers, doctors and patients, stores and customers, drivers involved in auto accidents, and other injurers and victims. The judicial authority to make these decisions flows from the idea that by following rules and doctrines derived from precedents, a certain degree of fairness and predictability is assured. At the same time, “the common law is not a frozen pond, but a stream flowing through time.” At least to some extent, most appellate judges consider social, economic, and political factors, as well as their own sense of fairness, in deciding how to interpret precedents and apply them to the facts of the case at hand.

11. Even state court judges, often elected, are not politically accountable in the same manner as members of legislatures and governors. See Model Code of Judicial Conduct R. 4.1(12), 4.1(13) (2010) (providing that judges and judicial candidates should not make statements that could be understood either “to affect the outcome or impair the fairness” of an adjudication or “make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office”); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 664–65 (tent. ed. 1958) (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“[T]he popular election of judges does not in actual practice mean political accountability for particular decisions, nor is it ordinarily so understood.”); but see Thomas J. Miles & Cass R. Sunstein, The Real World of Arbitrariness Review, 75 U. Chi. L. Rev. 761, 766–67 (2008) (reporting empirical findings that federal judges appointed by a Democratic president were more likely to cast liberal votes in an arbitrariness review of EPA and NLRB decisions than their Republican counterparts).

12. See Neal Feigenson, Legal Blame: How Jurors Think and Talk About Accidents 3 (2000) (reporting that millions of Americans are accidentally injured each year, nearly 100,000 fatally, and that the cost of accidental injuries exceeds $175 billion annually in medical, employment, and other economic losses).


15. See, e.g., Posner, supra note 9, at 14 (“Judges should understand that the only sound basis for a legal rule is its social advantage, which requires an economic judgment balancing benefits against costs.”).
The balance between these two aspects of the judge’s role, which are in constant tension with one another, is perhaps the most important single issue in the common law process. To what extent should judges be committed to applying specific rules and doctrines from previous cases? How much weight should judges give to the social and economic consequences of their decisions or to their own sense of fairness? To a very large extent, the nature of the appropriate decision-making process of common law judges is determined by judges and lawyers themselves within the craft and tradition of what they understand the common law process to be. The initial framing of this process to which beginning law students are exposed therefore plays an important role in defining not only individual students’ future professional roles, but also the common law torts process itself.

This Article explores whether the sequence in which substantive areas of law are presented to beginning law students affects their understanding of the nature of the judicial role in torts cases. Sociologists and cognitive psychologists believe that the sequence in which concepts are presented to individuals—particularly concepts in tension with one another—profoundly affects what these individuals remember and believe.

If this occurs within legal education, then professors who begin their introductory Torts classes with intentional torts, for example, set their students out on a different path than professors who begin with strict liability or negligence. The professor’s chosen starting point determines what Erving Goffman referred to as the “frame” and Judge Guido Calabresi calls the “lens” through which the student is likely to view the judge’s role in tort law.

16. See, e.g., WEBER, supra note 9, at 199 (alluding to the “‘ideas of culture-values’” that underlie a profession); Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Mr. Rosenwald (May 13, 1927) quoted in Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 34 (1992) (“In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.”); Martin E.P. Seligman et al., Why Lawyers are Unhappy, 23 Cardozo L. Rev. 33, 53 (2001) (“[Law schools] are the entry point to the profession and help shape the system.”); cf. A FEW GOOD MEN (Columbia Pictures Corp. 1992) (providing examples of military professionals sharing knowledge and traditions that are not documented in writing through the testimony of a Marine who is unable to point to sections in the Marine Corps manual describing either the extra-legal disciplinary hearing known as “Code Red” or the location of the mess hall).

17. See Felsenburg & Graham, supra note 10, at 224 (noting that the first eight weeks is a critical period in law students’ education).

18. See infra notes 111–22 and accompanying text.

19. See infra notes 94–97 and accompanying text.

20. Telephone Interview with Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit, and Sterling Professor Emeritus of Law and Professorial Lecturer in Law,
Most law students begin their study of torts with intentional torts.\(^{21}\) At least some professors believe that the subcategory of intentional torts is somewhat more focused on well-established and specific rules and doctrines than are the more open-ended and policy-driven categories of negligence and strict liability.\(^{22}\) Conversely, the judge’s role in cases involving negligence, and especially strict liability, are arguably less rule-driven and more likely to be focused on social, economic, and ideological factors and/or the judge’s own sense of fairness. Real judges’ common law decision-making processes rarely, if ever, lie at one polar extreme or the other, and most law students realize this. Nevertheless, the student is likely to view the judicial role through somewhat different frames depending upon where her study of tort law begins.

By the end of a single-semester introductory Torts class, presumably all students have been exposed to intentional and negligent torts and many to strict liability torts as well. The next question, therefore, is whether it all comes out in the wash or whether sequence matters. Will the individual frames through which torts students initially view the common law judicial role continue to influence the student’s understanding of the judicial role throughout the course? Cognitive psychologists describe “anchoring bias,” the notion that an individual’s initial exposure to a concept or message can have a significant effect on how the individual interprets subsequent related experiences or messages.\(^{23}\) In other words, a student’s conception of the judicial role adopted during the study of one category of tort liability during the first weeks of the semester is likely to persist throughout the semester. If the framing and anchoring theories pioneered by sociologists and cognitive psychologists apply to the topic sequence in the introductory course as we suggest here, then casebook editors are teaching students one of the most important lessons of the first year of law school—the appropriate function of the common law judge—by their chosen sequence of topics.

To test these hypotheses, we surveyed beginning law students enrolled in Torts courses taught by fifteen professors at eight law schools, four private and four public, which varied significantly in terms of their academic

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Yale Law Sch. (July 9, 2012). Those who have attended Judge Calabresi’s lectures and classes are familiar with his frequent use of this term in similar contexts.

21. See infra notes 42–48 and accompanying text. The vast majority of torts casebooks begin with intentional torts. Based on anecdotal evidence, we believe that an increasing number of professors, squeezed for time in a three or four credit course, are deleting intentional torts or at least starting the semester elsewhere. However, it is a safe assumption that a substantial majority of students begin with intentional torts.

22. See infra notes 67–71 and accompanying text.

23. See infra notes 111–33 and accompanying text.
Students were prompted to respond to six substantive statements to reveal their understanding of the judge’s role in torts cases. With the cooperation of their torts professors, we surveyed the students during the first, seventh, and last week of the semester. As the course of their first semester of law school progressed, all groups, regardless of where their study of torts began, shifted away from the view that a judge’s role is one of applying rules and doctrines to the facts of a case and toward an understanding of the judicial role that recognized the importance of policy. However, this shift was greatest, in a statistically significant way, among students who began their study with strict liability torts. To our surprise, the shift among students who began with negligent torts was even less pronounced, although still statistically significant, than the shift among students who began with intentional torts. All these results held true even when we held constant for the rank of the students’ law school.

The conclusion here is a simple one: Sequence in teaching the law matters. The most important lessons learned by law students may be those that law professors teach unwittingly. Accordingly, professors should pay more attention to the subliminal messages that aspects of teaching, such as topic sequence, communicate to those first entering the legal profession. In the 1930s, realist law professors, such as Karl Llewellyn and Jerome Frank, brought attention to the unintentional psychological impact of many factors in the litigation process. The results of this study suggest that the successors to Llewellyn and Frank would be wise to heed these lessons as they pursue their own craft.

Part I of this Article describes the sequence in which the three main categories of tort liability—intentional torts, negligence, and strict liability—are presented in torts casebooks and the explanations typically

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24. See infra note 142 and accompanying text.
25. See infra text accompanying notes 141–42.
26. See infra Part III.C.
27. See infra Part III.C.1.
28. See infra text accompanying notes 147–49.
29. Jerome N. Frank observed that “distinctly personal biases are operating constantly” within a judge. JEROME N. FRANK, LAW AND THE MODERN MIND 106 (1949). As an example, when the judge “listen[s] to a witness with . . . a twang or cough or gesture,” he may be reminded of another individual with a similar characteristic in the past, and this “may affect the judge’s initial hearing of, or subsequent recollection of, what the witness said, or the weight or credibility which the judge will attach to the witness’ testimony.” Id.; see also Karl N. Llewellyn et al., The Case Law System in America, 88 COLUM. L. REV. 989, 995 (1988) (suggesting that the judge is influenced by both “the thought patterns and mental images absorbed from his surrounding,” as well as his own priorities and prior experiences).
30. See infra notes 39–85 and accompanying text.
31. See infra notes 42–50 and accompanying text.
offered by editors to justify the chosen sequences. Part II describes how the concepts of frame analysis, or framing, and anchoring, both originally developed by sociologists and cognitive psychologists, might apply to the learning process of first-semester law students. In Part III, we describe the methodology of the student survey and present and discuss the results. We then briefly conclude.

I. TOPIC SEQUENCE IN THE TEACHING OF TORTS

The White Rabbit put on his spectacles. "Where shall I begin, please your Majesty?" he asked. "Begin at the beginning," the King said gravely . . .

Alice's Adventures in Wonderland.

John Goldberg, Anthony Sebok, and Benjamin Zipursky, leading torts scholars who edit their own casebook, "recognize that there is a fundamental choice to be made about where to start a course in Torts," but they argue that the importance of this disagreement among editors of various books is "overblown." This Article investigates whether this opinion is correct.

Most torts casebooks begin with intentional torts, often after a brief introductory chapter covering any one of a number of topics including the

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32. See infra notes 67–73, 79–81, 83–85 and accompanying text.
33. See infra notes 94–99 and accompanying text.
34. See infra notes 111–33 and accompanying text.
35. See infra notes 138–50 and accompanying text.
36. See infra Parts III.A, III.B.
37. See infra Part III.C.
38. See infra notes 151–57 and accompanying text.
39. See infra notes 151–57 and accompanying text.
historical development of tort law,\textsuperscript{43} the structure of a lawsuit,\textsuperscript{44} or even a brief contrast among intentional, negligent, and strict liability torts.\textsuperscript{45} The casebook widely believed to dominate the market, \textit{Prosser, Wade and Schwartz's Torts: Cases and Materials},\textsuperscript{46} as well as the casebook believed to rank second in sales, Richard A. Epstein's and Catherine M. Sharkey's \textit{Cases and Materials on Torts},\textsuperscript{47} both start with consideration of intentional torts.\textsuperscript{48} A very small number of torts casebooks, notably Marc Franklin, Robert Rabin, and Michael Green's \textit{Tort Law and Alternatives: Cases and Materials},\textsuperscript{49} begin with negligence. Finally, Harry Shulman, Fleming James Jr., Oscar S. Gray, and Donald G. Gifford's \textit{Cases and Materials on the Law of Torts}\textsuperscript{50} is the only torts casebook we have been able to identify that


\textsuperscript{45} E.g., \textit{Farnsworth & Grady, supra} note 42, at xxxviii–xxxix; \textit{Keeton, Sargentich & Keating, supra} note 42, Chapter 1 (also listing vicarious liability and no-fault plans as additional "forms of liability").

\textsuperscript{46} \textit{See supra} note 42.

\textsuperscript{47} \textit{See supra} note 42. Casebook publishers regard information about sales and market shares as "proprietary" and decline to release it, but few familiar with this field would dispute that these two casebooks rank first and second in sales.

\textsuperscript{48} \textit{Epstein Torts Casebook, supra} note 42, at 3–75 (beginning with a chapter on "Intentional Harms: The Prima Facie Case and Defenses"); \textit{Prosser Torts Casebook, supra} note 42, at 1–132 (presenting "Intentional Interference with Person or Property" as the first chapter on substantive tort law after a brief introductory chapter).


\textsuperscript{50} \textit{Shulman & James Casebook, supra} note 14.
begins with strict liability torts. One of the coauthors of this Article, Don Gifford, is, along with Oscar S. Gray, one of the two current editors of that casebook.

A. The First Punch: Beginning With Intentional Torts

The decision made by the vast majority of torts professors to begin with intentional torts seems a curious one. One of the current editors of the Prosser casebook acknowledges “that negligence is the heart of modern tort law.” Basic intentional torts seem less important. Richard Epstein, whose coedited casebook also begins with intentional torts, admits,

[F]ew tort actions are brought today for gang beatings on a public street, no matter how compelling the case for tort liability. The expansion of tort liability for personal injury and property damages has been primarily for losses accidental from the point of view of the defendant. As a matter of practice the hoary law of intentional torts looks like a backwater in an otherwise booming sea of common law liability.

Real world tort law today is all about “designing a satisfying system for dealing with unintentional harms—auto accidents, professional malpractice, product injuries, toxic exposures, and the like.” As of 2005, intentional torts represented less than three percent of all tort trials in state courts and a similarly small percentage in federal courts.

51. Chapter 2 of the casebook considers “Traditional Forms of Strict Liability.” SHULMAN & JAMES CASEBOOK, supra note 14, at 49–130. It is preceded by an introductory chapter that presents Ives v. S. Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1911) (holding a workers’ compensation act creating liability without fault to be unconstitutional) and the history of the common law of torts. Id. at 1–48.

52. PROSSER TEACHER’S MANUAL, supra note 40, at v (reporting an observation by current coeditor David F. Partlett).


54. MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, TEACHER’S MANUAL TO TORT LAW AND ALTERNATIVES: CASES AND MATERIALS I (9th ed. 2011) [hereinafter FRANKLIN, RABIN & GREEN, TEACHER’S MANUAL]; see also HARRY SHULMAN, FLEMING JAMES, JR., OSCAR S. GRAY & DONALD G. GIFFORD, TEACHER’S MANUAL TO LAW OF TORTS: CASES AND MATERIALS VI (5th ed. 2010) [hereinafter SHULMAN & JAMES, TEACHER’S MANUAL] (“The central focus in modern tort law is determining when the costs of accidents should be shifted from one party to another.”) (emphasis in original).

Notwithstanding other explanations proffered by editors, the principal reasons that torts casebooks begin with intentional torts appear to be history and tradition. When James Barr Ames of Harvard published the first torts casebook in 1874, it began with the intentional torts of assault and battery. In fact, the vast majority of the entire 804-page book covers topics usually categorized as intentional torts, despite the emergence of negligence as the dominant standard in American tort law covering accidental injuries during the preceding sixty years. On one hand, it is possible that Ames' sequence simply reflected the historical reality that the roots of assault and battery lay in the English writ of trespass, which gained prominence in courts of law in the thirteenth century, well before the birth of the writ of trespass on the case, from which, it was traditionally assumed, negligence evolved. On
the other hand, Ames and his dean at the Harvard Law School, Christopher Columbus Langdell, were on a mission to promote an understanding of the law that focused on the common law process as a rule-to-application “scientific” method in order to justify professional education for lawyers within the university context. 64 The more rule-like nature of intentional torts better fit their purposes than did the somewhat messier and policy-driven initial negligence opinions from the preceding decades. 65 Today’s torts professors who follow the traditional sequence might plausibly be considered unwitting conscripts, nearly a century and a half later, in Langdell’s mission to change society’s understanding of how the law works and what legal education should be. 66

Editors who begin with intentional torts offer several other reasons why they believe intentional torts to be the logical starting point for the study of torts. For example, Epstein describes it as “a relatively well defined and manageable subset of torts.” 67 Other editors find intentional torts to be “a nice warm-up for the materials on negligence,” 68 “relatively accessible to the student just starting her or his law school career,” 69 and characterized by “memorable” cases. 70 Most important, the comparative simplicity of the often rule-based analysis in intentional torts provides an arguably better vehicle for exploring both the utility and the limitations of rules in common law development. Dan Dobbs and Paul Hayden describe their goals in

64. See, e.g., C. C. Langdell, A SELECTION OF CASES ON THE LAW OF CONTRACTS vii (Lawbook Exch. 2d prtg. 2002) (1871) (“Law, considered as a science, consists of certain principles or doctrines.”); Christopher C. Langdell, Address at the Meeting of the Harvard Law School Association on the 250th Anniversary of the Founding of Harvard University (Nov. 5, 1886), in 3 L.Q. REV. 118, 124 (1887) (stating that “all the available materials of that science are contained in printed books”); see also W. Burlette Carter, Reconstructing Langdell, 32 GA. L. REV. 1, 136 (concluding that Langdell “used the term ‘science’ because ‘science’ was the prevailing test of a discipline’s validity within the university”).

65. Morton Horwitz bluntly concludes that “the law of negligence became a leading means by which the dynamic and growing forces in American society were able to challenge and eventually overwhelm the weak and relatively powerless segments of the American economy.” Horwitz, supra note 60, at 99.

66. We are indebted to Professor David A. Super of the Georgetown University Law Center for suggesting how Ames’ objectives were better served by his focus on intentional torts.

67. Epstein Torts Treatise, supra note 53, at 2. Epstein identifies several other reasons for beginning with intentional torts. In addition to the others described in the text, he also notes that “understanding intentional harms helps make sense out of some modern areas of tort liability, such as the important question of whether and when a defendant landlord should be held responsible for the rape or murder of a plaintiff tenant by a criminal intruder.” Id.

68. Ward Farnsworth & Mark Grady, Teacher’s Manual to Torts: Cases and Questions ix (2d ed. 2009).


70. Id.
teaching intentional torts to include the concept that "[r]ules do not necessarily determine or predict cases, but they do tell lawyers something about the kinds of arguments that must be made and the kinds of evidence to obtain." At the same time, editors view intentional torts as a fertile ground for showing students that rules are not self-defining but require examination of the purposes and policies underlying the rules.

It is likely that students who begin their study of torts with intentional torts spend more time on this subject than do students who begin with negligent or strict liability torts. Even reasonably prudent torts professors occasionally fall behind the schedules prescribed in their syllabi. In the first weeks of the semester, a considerable amount of their time and attention is focused on teaching a new vocabulary, discussing how to read a case, and describing basic principles of the common law. Teachers of first-year courses recognize that the pace of student learning is considerably slower and more deliberate in the earliest weeks of the semester than it is later.

In addition, many professors who begin with intentional torts almost certainly use cases involving affirmative defenses to intentional torts to bootleg into their teaching what is arguably the most important single issue in all tort law—the basic choice between a fault-based and a strict liability standard. For example, a professor might introduce this basic issue through discussions of self-defense cases in which the defendant reasonably, but mistakenly, believed that his life was in danger.

71. DAN B. DOBBS & PAUL T. HAYDEN, TEACHER'S MANUAL TO ACCOMPANY TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 38 (6th ed. 2009). Dobbs and Hayden also identify the following goals for teaching intentional torts: "developing skills and elementary knowledge necessary to move forward" and beginning the teaching of legal analysis, including "the construction of arguments or opinions using two or more rules." Id.

72. For example, Dobbs and Hayden advise instructors using their casebook that although "[r]ules may be thought of narrowly in terms of technical doctrine . . . applying them in particular cases may be easier if we try to see the underlying purpose or principle . . . ." Id. at 38.


74. For example, Robert L. Rabin reports, "Like generations of earlier torts professors, I begin the introductory course with discussion of assigned cases from a casebook, moving slowly at first, exploring the facts, issues, procedural framework, and rationale for decision. During the semester, the pace will quicken and the issues will vary." ROBERT L. RABIN, PERSPECTIVES ON TORT LAW xi (4th ed. 1995).

75. See, e.g., Courvoisier v. Raymond, 47 P. 284, 287 (Colo. 1896) (holding that a defendant facing circumstances that would lead a reasonable person to believe he was in danger of loss of life or of grave bodily harm may use deadly force even if the victim in fact posed no threat). One of the authors of this article, Don Gifford, used this opinion to introduce his
avoid liability for battery and wrongful death under these circumstances mirrors a fault-based standard,\textsuperscript{76} while holding the defendant liable in this context reflects a strict liability-based standard. Similarly, in teaching the well-known trespass/necessity case of \textit{Vincent v. Lake Erie Transportation Co.},\textsuperscript{77} a professor might discuss how requiring the defendant to compensate the plaintiff for damage, even when the defendant acted out of necessity, addresses the distinction between strict liability and negligence standards. Again, the case offers an opportunity to introduce students to these broader questions, all under the guise of teaching intentional torts.\textsuperscript{78} What is not clear is why professors beginning with intentional torts prefer to introduce the choice between fault-based and strict liability standards indirectly while teaching intentional torts rather than beginning the course with the study of either negligence or strict liability where the issue would be raised in a more transparent and meaningful manner.

\textbf{B. Why Begin with Negligence? “The Central Themes in Tort Law Today”}\textsuperscript{79}

As previously mentioned, a very small number of torts casebooks begin with negligent torts.\textsuperscript{80} Marc Franklin, Robert Rabin, and Michael Green explain that beginning with anything other than the unintentional harms that lie at the heart of contemporary tort practice would “give[] a misleading signal about the central themes in tort law today” and that “the introductory issues in analyzing negligence versus strict liability . . . pose no special

students to the distinction between negligence and strict liability standards during the decade in which he began his Torts course with intentional torts.

\textsuperscript{76} Id.

\textsuperscript{77} 124 N.W. 221, 222 (Minn. 1910) (holding that even though defendant ship owner who re-tied his ship to the plaintiff’s dock during a storm acted under necessity and thus was not liable for trespass, defendant still was required to compensate plaintiff for the resulting damage to his dock). \textit{See also} \textit{SHULMAN \\& JAMES, TEACHER’S MANUAL, supra note 54}, at 236 (comparing the “reasonable person standard” used by court to the “similar one used in negligence law”).

\textsuperscript{78} \textit{See Teacher’s Manual to Accompany Robert A. Keeton, Lewis D. Sargentich \\& Gregory C. Keating, Tort and Accident Law: Cases and Materials i} (4th ed. 2005); \textit{SHULMAN \\& JAMES, TEACHER’S MANUAL, supra note 54}, at 28 (describing the holding in \textit{Vincent} as resting on “strict liability basis”); \textit{EPSTEIN TORTS TREATISE, supra note 53}, at 64 (discussing the court’s reliance on a doctrine of “incomplete privilege” as a partial defense to the trespass claim, rather than on negligence law).

\textsuperscript{79} \textit{FRANKLIN, RABIN \\& GREEN, TEACHER’S MANUAL, supra note 54}, at 2.

\textsuperscript{80} \textit{See supra note 49 and accompanying text}. 


difficulties for beginning law students and hold more intrinsic interest for the law students of today than do intentional torts.”

C. Beginning with Strict Liability Torts: “An Extraordinarily Clever Organ of Propaganda”?82

The choice of the coeditors of Shulman, James, Gray and Gifford’s Cases and Materials on the Law of Torts83 to begin with strict liability torts at first blush seems a more curious choice. That decision was made decades before one of us (Gifford) joined the casebook as an editor. Coeditor Oscar Gray explained that the sequence reflected the historical reality that liability based on trespass, a strict liability tort, preceded the historical development of negligence.84

The “strict liability-first” sequence is integral to the structure of this casebook and aims to disabuse students of the commonly-held notion that fault-based liability is the historical norm. After teaching from the casebook for several years, following more than a decade of teaching from the intentional torts-first Epstein casebook, coeditor Gifford observed:

The teaching of battery and assault most often is accomplished by inductively working toward rules or definitions that will predict how courts will respond to various fact-patterns resulting in claims under these torts. This process inevitably strengthens the beliefs of most entering law students that “the law” is a list of doctrines and rules and that what lawyers and judges do is to try to pigeonhole fact-patterns within the proper rules. In doing so, we believe, early teaching of intentional torts obscures the reality of the torts process that is simultaneously both more fact-based and more policy-oriented.85

81. FRANKLIN, RABIN & GREEN, TEACHER’S MANUAL, supra note 54 at 2.
83. SHULMAN & JAMES CASEBOOK, supra note 14.
84. Interview by Don Gifford with Oscar S. Gray, Jacob A. France Professor Emeritus of Torts, Univ. of Md. Carey Sch. of Law, in Balt., Md. (July 11, 2012).
85. SHULMAN & JAMES, TEACHER’S MANUAL, supra note 54, at 231. Similarly, Judge Guido Calabresi, who has used the Shulman & James casebook and its predecessor editions in teaching Torts at Yale for many decades, observes that it enables him to introduce his students to different law and perspectives on the law, particularly the economic consequences of rules. Telephone interview with Guido Calabresi, supra note 20.
The study described in this Article tests that intuition.

II. FRAME ANALYSIS AND ANCHORING

In this Article, we contend that when the torts professor selects intentional torts, negligence, or strict liability as the beginning point in the Torts course, she chooses, at the same time, to initially expose her students to one of two or more varying conceptions of the role of the common law judge in deciding tort cases. The judge’s role in deciding intentional torts cases, at least on the surface, appears to focus more on applying the definitions and rules governing battery or assault than does the judge’s role in deciding whether the defendant’s conduct meets the amorphous test of “unreasonableness” so as to constitute negligence or whether the defendant will be held liable on a strict liability basis under the even more policy-laden tests for strict liability torts such as abnormally dangerous activities or nuisance.

Admittedly, professors beginning with intentional torts typically do use such cases to explore the limits of rules and definitions and the importance of policy in determining these limits. Notwithstanding this possibility, however, we hypothesized that by the end of their Torts courses, students whose study of torts began with intentional torts are more likely than students who began their study with either negligent or strict liability torts to perceive the judge’s role as one of applying a set of legal rules and definitions to the facts of the case at hand and less likely to attribute significance to the role of social, economic, and ideological objectives in the judicial process than would students whose study of torts began with either negligent or strict liability torts.


88. Frank J. Vandall, Applying Strict Liability to Professionals: Economic and Legal Analysis, 59 Ind. L.J. 25, 43 (1983) (concluding that “[s]trict liability in abnormally dangerous activities is primarily a question of social policy”).

89. Alan E. Brownstein, Constitutional Wish Granting and the Property Rights Genie, 13 Const. Comment. 7, 49 (1996) (observing that “few common law areas are as explicitly grounded on policy based balancing as is nuisance law”).

90. See supra notes 71–73 and accompanying text.
Before we describe the study itself, this Part reviews the relevant social science literature that describes frame analysis and anchoring and then applies these concepts to the issue of whether topic sequence within the Torts course affects how law students perceive the judge’s role in adjudication.

A. Frame Analysis

In 1974, sociologist Erving Goffman introduced the concept of frame analysis or framing theory. As Dennis Chong and James N. Druckman explained more than three decades later:

The major premise of framing theory is that an issue can be viewed from a variety of perspectives and be construed as having implications for multiple values or considerations. Framing refers to the process by which people develop a particular conceptualization of an issue or reorient their thinking about an issue.

In applying this process, Goffman theorized, an individual “render[s] what would otherwise be a meaningless aspect of the scene into something that is meaningful.” As such, according to David A. Snow and Robert D. Benford, frames “can be construed as functioning in a manner analogous to

91. See infra notes 138–50 and accompanying text.
92. See infra notes 94–110 and accompanying text.
93. See infra Part II.B.
94. ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE 21 (Ne. Univ. Press 1986) (1974) (“When the individual . . . recognizes a particular event, he tends, whatever else he does, to imply in this response (and in effect employ) one or more frameworks or schemata of interpretation . . . ”). Goffman himself credits William James, Alfred Schutz, and others with the insights underlying his exposition of frame analysis. Id. at 2–8.
95. Dennis Chong & James N. Druckman, Framing Theory, 10 ANNU. REV. POLIT. SCI. 103, 104 (2007). Similarly, Donald A. Schön and Martin Rein explain frame analysis as follows:

Each story conveys a very different view of reality and represents a special way of seeing. From a problematic situation that is vague, ambiguous, and indeterminate (or rich and complex, depending on one’s frame of mind), each story selects and names different features and relations that become the “things” of the story—what the story is about. . . . Each story places the features it has selected within the frame of a particular context . . .

96. See GOFFMAN, supra note 94.
linguistic codes in that they provide a grammar that punctuates and syntactically connects patterns or happenings in the world.\(^9\)

In the past, legal scholars typically applied frame analysis, or “framing,” to parties’ handling of quantifiable variables in contexts such as legal negotiation,\(^9\) litigation,\(^9\) and the market pricing of securities.\(^10\) Indeed, Russell Korobkin and Chris Guthrie, among the leading scholars writing about the phenomenon, define “the framing effect” as “reference point bias.”\(^10\) In doing so, they reflect the earlier work of cognitive psychologists Amos Tversky and Daniel Kahneman.\(^10\) Korobkin and Guthrie report that when litigants choose between “an option with a known outcome and one with an uncertain outcome . . . [they] often consider not only the expected value of each choice, but also whether the possible outcomes appear to be ‘gains’ or ‘losses’ relative to a reference point, typically the status quo.”\(^10\)

In other words, the status quo “frames” the litigant’s perception of each quantified alternative.

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102. Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 Sci. 1124, 1128 (1974) (“In many situations, people make estimates by starting from an initial value that is adjusted to yield the final answer.”).

Social scientists also apply framing and frame analysis to a broad array of non-quantifiable contexts, including media and public relations, film and broadcasting, and the mobilization of social movements. More recently, legal scholars have begun to employ framing or frame analysis to situations other than those involving quantifiable variables. For example, Amy Kapczynski uses “frame mobilization” to analyze how various players in intellectual property law “engage the field of ideas to theorize their interests, build alliances, mobilize support, and discredit their opponents.”

While other scholars identify the effects of law in framing social or political movements, this Article is the first to consider the role of framing in the process through which law students develop an understanding of the judicial process. Here, as in any other educational setting, frame analysis is closely allied with the concept of schema. According to cognitive psychologists, a schema consists of the organized body of knowledge that an individual retains about a specific concept, action, event, or other segment of knowledge that influences her interpretations of new situations.


109. See JOHN P. HOUSTON, FUNDAMENTALS OF LEARNING AND MEMORY 410 (4th ed. 1991) (identifying schema as “the organized body of information an individual has about some action, concept, event, or other segment of knowledge”); JEANNE ELLIS ORMROD, HUMAN LEARNING (5th ed. 2008) (defining schema as “a closely connected set of ideas . . . related to a specific object or event . . . [that] often influence how we perceive and remember new situations”); W. SCOTT TERRY, LEARNING AND MEMORY: BASIC PRINCIPLES, PROCESSES, AND PROCEDURES 288 (3d ed. 2006) (defining schemas as “outlines of general knowledge that are stored in semantic memory”).
For our purposes, the relevant frame is the chosen frame through which the professor presents the judicial role in the handling of torts cases during her students’ introductory study of the common law. Is the emphasis on the application of rules and doctrines to the facts of the case? Or is the focus on either the judge’s own sense of fairness or her consideration of social, economic, and/or ideological factors? Each of these alternatives reflects a distinct and hypothetically polar opposite frame for interpreting the judicial process. In the real world, of course, every law professor teaches a merged version of these two frames. The more accurately stated issue is where the frame of the judicial role presented by the professor lies along the continuum beginning with rule or doctrine application at one end and terminating with the consideration of social, economic, and ideological considerations, as well as the judge’s own sense of fairness, at the other end.110

B. Anchoring

Once an individual adopts a frame for interpreting events or concepts, that frame is likely to be resilient and persist even when, looking objectively at new information and situations, it should not. This idea is derived from the concept of “anchoring,” but also is referred to by a variety of other labels including “status quo bias”111 and “belief perseverance.”112 According to Marcel Kahan and Michael Klausner, "[a]nchoring’ refers to the ability of initial ‘reference points’ to influence judgments. Once initial reference points, or ‘anchors,’ are established, adjustments to these initial anchors tend to be too small. Anchoring thus biases final judgments in the direction of the anchor.”113 Later research suggests that the anchoring effect results

110. Embedded within these two competing frames describing the judicial process is another set of frames. The issue is how does the judge frame the legal dispute? To what extent does he or she apply rules and doctrines to the facts of the case? To what extent does he or she consider social, economic, and political factors or his or her own sense of fairness? Initially, this frame analysis is historical: What did the judge in the opinion reported in the casebook ultimately do? More important, however, is the implicit predictive question in the student’s mind: What will the judge do in cases in which I represent one of the parties?

111. William Samuelson & Richard Zeckhauser, Status Quo Bias in Decision Making, 1 J. RISK & UNCERTAINTY 7, 8 (1988) (“Individuals exhibited a significant status quo bias across a range of decisions.”).


from the "enhanced accessibility of anchor-consistent information, not insufficient adjustment."\(^{114}\)

As with framing and frame analysis, the existing literature predominantly describes anchoring in the context of quantifiable variables,\(^{115}\) but the same concept, regardless of the label used, has broader application. As Amos Tversky and Daniel Kahneman write, "It is a psychological commonplace that people strive to achieve a coherent interpretation of the events that surround them . . . ."\(^{116}\) Other commentators have further noted, "It appears that beliefs—from relatively narrow personal impressions to broader social theories—are remarkably resilient in the face of empirical challenges that seem logically devastating."\(^{117}\)

Though the idea is generally not labeled as "anchoring," the literature of education and learning theory routinely describes the same phenomenon. As early as the 1890s, American psychologist and philosopher William James, in his lectures to teachers on psychology, said, "In admitting a new body of experience, we instinctively seek to disturb as little as possible our pre-


\(^{115}\) E.g., Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Bias*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES*, supra note 116, at 3, 14 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982). Tversky and Kahneman describe anchoring as follows:

> In many situations, people make estimates by starting from an initial value that is adjusted to yield the final answer. The initial value, or starting point, may be suggested by the formulation of the problem, or it may be the result of a partial computation. In either case, adjustments are typically insufficient. That is, different starting points yield different estimates, which are biased toward the initial values.

*Id.* at 14 (citation omitted); see also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787 (2001) ("When people make numerical estimates (e.g., the fair market value of a house), they commonly rely on the initial value available to them (e.g., the list price).") (emphasis added).


existing stock of ideas. We always try to name a new experience in some way which will assimilate it to what we already know.\textsuperscript{118} A century later, a leading educational textbook states that "learners are more likely to interpret new information in ways that are consistent with what they already ‘know’ about the world."\textsuperscript{119}

Frame-anchoring can be viewed as one variant of the well-known primacy effect. Lance Holbert and colleagues observe that "[t]here is solid empirical evidence supporting the claim that when someone comes into contact with two competing messages in immediate succession, the first message consumed tends to be more persuasive."\textsuperscript{120} Thus, the frame presented initially "may establish a cognitive framework . . . that guides interpretation of later items."\textsuperscript{121} Similarly, C.A. Insko writes that the first message an individual encounters can alter his understanding of any subsequent messages.\textsuperscript{122}

To the law professor, the importance of topic sequencing in the law school classroom may most readily resemble the more familiar phenomenon of \textit{path dependence} in common law or constitutional law development.\textsuperscript{123}

\textsuperscript{118} WILLIAM JAMES, TALKS TO TEACHERS ON PSYCHOLOGY AND TO STUDENTS ON SOME OF LIFE’S IDEALS 87 (Arc Manor 2008) (1983). James also stated:

\begin{quote}
The gist of the matter is this: Every impression that comes in from without . . . no sooner enters our consciousness than it is drafted off in some determinate direction or other, making connection with the other materials already there, and finally producing what we call our reaction. . . . Educated as we already are, we never get an experience that remains for us completely nondescript. . . . [w]e dispose of it according to our acquired possibilities, be they few or many, in the way of “ideas.” . . . And it may well solemnize a teacher, and confirm in him a healthy sense of the importance of his mission, to feel how exclusively dependent upon his present ministrations in the way of imparting conceptions the pupil’s future life is probably bound to be.
\end{quote}

\textit{Id.} at 86, 91.

\textsuperscript{119} ORMROD, supra note 109, at 271.


\textsuperscript{122} C.A. INSKO, \textit{THEORIES OF ATTITUDE CHANGE} passim (1967) (presenting research illustrating how interpretation of new information depends substantially on attitudes formed from prior exposure to similar information).

any judicial process relying on precedent, the law is shaped not only by the reasoning of judges but by the order in which cases come before them. \(^{124}\) Litigants on both sides of an important issue sometimes go to great lengths to manipulate the sequence of cases presented to a court. \(^{125}\) Each side involved in a continuing or repetitive dispute seeks to assure that cases presenting facts favorable from its perspective are resolved first, so that when the court decides subsequent cases posing the same basic issue, but with less favorable facts, it will be bound, or at least influenced, by the holding in the earlier cases. \(^{126}\)

The law student’s propensity to anchor or to continue to follow her first frame of the judicial role is one example of what Oona Hathaway describes as “increasing returns path dependence.” \(^{127}\) Once the torts student adopts an initial way of interpreting the judicial role, it is more difficult to change to a new interpretation, even if such a change is warranted by changed facts in later-considered opinions. \(^{128}\) Hathaway identifies the same pattern among judges, who she asserts “accumulate experience and knowledge over time” and “draw on earlier analogous cases in deciding later cases even if they do dependence also has been observed in a variety of other fields, including technology, see Stephen Redding, *Path Dependence, Endogenous Innovation, and Growth*, 43 INT’L ECON. REV. 1215, 1215 (2002); the operation of markets, see S. J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-in, and History*, 11 J.L. ECON. & ORG. 205, 207 (1995); theories of poverty and international development, see Mahmud Yesuf & Randall A. Bluffstone, *Poverty, Risk Aversion, and Path Dependence in Low-Income Countries: Experimental Evidence from Ethiopia*, 91 AM. J. AGRIC. ECON. 1022, 1022–37 (2009); and physics, see J. W. Dougill, *Path Dependence and a General Theory for the Progressively Fracturing Solid*, 390 PROC. ROYAL SOC’Y LONDON 341–51 (1983).

124. See Hathaway, *supra* note 123, at 604, 622–27 (“The system of stare decisis thereby creates an explicitly path-dependent process in which later decisions rely on, and are constrained by, earlier decisions.”).


126. See id. at 631 (analyzing the impact of binding and persuasive precedents).

127. Id. at 606–07.

128. The most commonly cited traditional example of increasing returns path dependence was the adoption of the QWERTY typewriter keyboard. Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332, 332 (1985). Despite the fact that other keyboard arrangements would have been more efficient, the QWERTY keyboard became virtually universal and survived even into the computer era because of the massive efforts that would have been required to retrain typists.
not strictly constitute a binding or persuasive precedent.” This leads to what she describes as “lock-in or inflexibility” among judges.

It is not unrealistic to expect that something similar occurs with first-semester students, anxiously grasping for certainty in a new and unfamiliar world that requires them to interpret what it is that common law judges do. Research in contexts other than legal education shows that the anchoring effect is most pronounced in situations where an individual adopts her initial frame for understanding concepts at a time when her ability to accurately interpret them is particularly weak. This may be due in part to the psychological commitment she has made to the initial frame: As with the concept of sunk costs in economics, the more an individual invests in forming an initial frame, the less inclined she is to abandon that frame for a new one. Alternatively (or additionally), this effect may stem from the individual’s need to perceive that she is in control—a perception reinforced by retaining the status quo.

When a student first arrives at law school, she brings with her some conception, or frame, of the judge’s role in the common law process. However, in all probability, she is initially very open to accepting a new frame explaining the judge’s role. After all, she entered law school to learn about such things! In the Torts classroom, she begins by spending several weeks on one of three categories of torts cases: intentional torts, negligent torts, or strict liability torts. For most law students, probably more than three quarters, the class begins with intentional torts. Regardless of the starting area of tort liability, the frame for understanding the judicial role that the student initially adopts will fall somewhere along the line between explaining the judge’s role as solely one of applying rules and doctrines to

129. Hathaway, supra note 123, at 628.
130. Id. at 631.
131. Hanson & Kysar, supra note 112, at 646–47 (finding that test subjects initially shown a blurry photo were less able to identify a subsequent sharper image than were subjects who first viewed a less-blurry photo and concluding that “if individuals construct their initial hypothesis at a time when their basis for, or ability to, make such a judgment is particularly weak, they may be unable to interpret correctly subsequent better information that is inconsistent with that hypothesis”).
132. See Epley & Gilovich, supra note 114, at 316 (“We also obtained evidence that adjustment is effortful, and so anything that increases a person’s willingness or ability to seek more accurate estimates tends to reduce the magnitude of adjustment-based anchoring biases.”).
133. Samuelson & Zeckhauser, supra note 111, at 39–41 (analyzing psychological causes of the anchoring effect and status quo bias).
134. See TUROW, supra note 10, at 59–60 (observing, in his autobiographical account of his first year of law school, “I... never resisted that sensation of being taken, overwhelmed. . . . I had the perpetual and elated sense that I was moving toward the solution of riddles which had tempted me for years.”).
the facts of the case or one of the judge emphasizing the role of social, economic, and ideological factors in deciding cases.

After three to six weeks, the vast majority of professors who began with intentional torts move on to negligent torts for most of the remainder of the semester. If time allows, they may discuss strict liability torts at the end.\textsuperscript{135} The Franklin, Rabin, and Green casebook, almost certainly the most widely-used of the casebooks beginning with negligent torts, proceeds through an exploration of strict liability torts and, at the end, intentional torts.\textsuperscript{136} After a period of time, those professors who initially taught strict liability torts turn their attention to negligent torts and then intentional torts.\textsuperscript{137} By the end of the semester, most students will have been exposed, to a greater or lesser extent, to all three categories of tort liability. However, the anchoring phenomenon led us to hypothesize that the tort student’s initial understanding of the judicial role, influenced by the category of tort cases first studied, would persist throughout the first semester even after exposure to other categories of tort liability.

III. \textbf{Survey of First-Semester Torts Students}

In this Part, we describe the survey we conducted of first-semester torts students during the Fall semester 2011,\textsuperscript{138} the methodology used to analyze the data,\textsuperscript{139} and the results of the survey.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{135} E.g., the \textit{Prosser Torts Casebook} begins with intentional torts (pages 17–132), and then spends five chapters exploring various aspects of negligence (pages 133–712), before turning to strict liability torts (pages 713–863). \textit{Prosser Torts Casebook}, supra note 42. Similarly, Epstein begins with intentional torts (pages 3–75) and provides an overview of the history of strict liability and negligence (pages 77–143), before moving on to negligence (pages 145–589), and finally addressing strict liability (pages 591–841). \textit{Epstein Torts Casebook}, supra note 42.
\item \textsuperscript{136} \textit{Franklin, Rabin \& Green}, supra note 49. The Franklin, Rabin \& Green casebook begins with an introduction (pages 1–29), and then covers negligence (pages 30–128), strict liability (pages 507–896), and finally, intentional torts (pages 897–1286).
\item \textsuperscript{137} For example, the Shulman, James, Gray \& Gifford casebook begins with an introductory chapter containing \textit{Ives v. S. Buffalo Ry. Co.}, 94 N.E. 431 (N.Y. 1911) (holding a workers’ compensation act creating liability without fault to be unconstitutional) and the history of the common law (pages 1–48), before covering strict liability torts (pages 49–130), negligence (pages 131–557), and, finally, intentional torts (pages 763–842). \textit{Shulman \& James, Teacher’s Manual}, supra note 54.
\item \textsuperscript{138} See infra Part III.A.
\item \textsuperscript{139} See infra Part III.B.
\item \textsuperscript{140} See infra Part III.C.
\end{itemize}
A. Survey Design and Sample Characteristics

The data set employed in our analysis is a compilation of survey research data collected from more than 450 first-year law students at eight law schools during the Fall 2011 semester. Participating students attended the University of Colorado School of Law, the Georgetown University Law Center, the University of Maryland Carey School of Law, the New York University School of Law, the St. Thomas University (Florida) School of Law, the University of Toledo College of Law, the Wake Forest University School of Law, and the University of Wisconsin Law School.

The students were surveyed at three different points during their first semester of law school. We asked the fifteen participating professors to encourage their students to complete the voluntary survey available online through the SurveyMonkey® website. The first survey was administered during the first week of the semester. We re-administered the survey to students following the first six weeks of their respective Torts classes. We designated this point in the semester to administer the second set of surveys because we believed that most professors would have concluded their study of any introductory material, as well as the first of the three areas of tort liability, i.e., intentional, negligent, or strict liability torts. The final survey was administered during the last week of classes.

The substantive portion of our survey consisted of six statements to which the participating students were instructed to respond by characterizing how much they agreed or disagreed with each statement. The responses were classified within an ordinal Likert scale of values. The available response values ranged from 1 to 5, with 1 representing "strongly disagree," 2 representing "disagree somewhat," 3 representing "neither agree nor disagree," 4 representing "agree somewhat," and 5 representing "strongly agree." The statements appeared, in order, as follows:

1. The role of the judge is to apply a set of legal rules and definitions to the facts of the case at issue.
2. If two courts disagree on the same legal issue, then one of them is wrong.
3. Legal rules and definitions are more important in determining whether a victim should recover than is the judge’s own sense of what is fair in a particular case.

141. Likert scales are designed to quantify measures that are otherwise fundamentally qualitative, such as feelings and attitudes. Likert scales will typically allow for survey participants to express a spectrum of possible response values.
4. In deciding whether to apply a rule or definition to the case before the court, the judge is likely to consider social, economic, and/or ideological factors.

5. In practice, most judges use the law to support decisions on the basis of their own sense of fairness.

6. In practice, most judges use the law to further their own social, economic, and/or ideological objectives.

We also prompted each respondent to indicate her or his gender. For the three surveys, female students produced a total of 566 survey responses, while male students accounted for a total of 657 survey responses.

For the purposes of our analysis, the eight schools where students participated were classified into three “groups” that we created based on the 2012 law school rankings published by *U.S. News and World Report*. Despite our use of these rankings, we do not necessarily endorse either the methodology used by *U.S. News and World Report* to establish such rankings or the importance often granted to such rankings. However, for our limited purposes, these groupings appeared appropriate to test the proposition that the balance of policies and rules taught in the Torts classroom is more a function of the reputation of a school, the academic credentials of its aggregate student body, or even differences in the pedagogical objectives of faculty members depending upon the stature of the school than it is a function of topic sequence. Group 1 consisted of the Georgetown University Law Center and the New York University School of Law and produced a total of 519 survey responses. Group 2 was composed of the University of Colorado School of Law, the University of Maryland Carey School of Law, the University of Wisconsin Law School, and Wake Forest University School of Law. The students of Group 2 schools produced a total of 525 survey responses. Group 3 included the St. Thomas University School of Law and the University of Toledo College of Law and produced 179 survey responses.

The students who participated in the surveys did so anonymously, and the survey questions remained identical during the three administrations.

142. For methodological purposes, the classification of participating schools into “groups” should be construed as ordinal coding (reflecting the relative *U.S. News and World Report* rankings of the schools) as opposed to categorical coding. The use of the term “tier” to identify these groupings would have been more methodologically proper from a social science perspective, but we did not want readers to confuse our groupings with the “Tier” assignments provided by *U.S. News and World Report* in its annual school rankings.
B. Analysis

Our objective was to model the students' attitudinal shifts in their understanding of the judge's role in common law adjudication that occur during their first semester of law school. We drafted the six stimulus statements listed above with this objective in mind. We analyzed the responses to all six statements together. To do this, we created an index score measurement that represented the aggregated response values for all six statements. The first three statements were expected to produce lower Likert scale response values in policy-oriented students, while the final three statements would produce higher response values. To devise a scale in which a Likert score of 1 = rule-oriented and a Likert score of 5 = policy-oriented for all six questions, we reversed the scale for questions 1–3 so that it matched the direction of the scale for questions 4–6.143

In our analysis, we used ANOVA (analysis of variance), a form of statistical hypothesis testing to determine whether any differences in the survey responses from various groupings of respondents were unlikely to have occurred by chance alone, thus suggesting correlation in a statistically significant manner.144 During our analysis, we conducted both simple ANOVA tests, in which a single variable is tested for significant differences between samples, and two-way ANOVA tests, which evaluate the effects of two variables such as topic sequencing and school group.

C. Results

1. The Effect of Topic Sequence upon Index Scores

Our entire sample on average produced an increase in the Index Score from the pre-semester survey to the end-of-semester survey. This indicates

143. Because (1) not all of the students completed both the pre-semester and the later two surveys and (2) student anonymity prevented us from matching the answers for the later surveys with the answers for the pre-semester survey, we replaced the pre-semester response for each student respondent with the mean pre-semester response for that class.

144. ANOVA is conducted by calculating $F$, which is the ratio of estimated variance between separate samples to the estimated variance within the samples. If $F$ is sufficiently high, it indicates that the variable being evaluated has a significant effect. The $F$-statistic is considered sufficiently high when the statistical probability value ($p$) is extremely low. The $p$-value represents the percentage probability that the difference in response values is produced by chance or random errors. For example, a $p < 0.05$ means that the probability that the difference of the means for two classes due to chance is less than five percent. A $p$-value of 0.10 approaches statistical significance. Our analyses concluded statistical significance when $p$-values were less than 0.05.
that after a full semester of torts, students were more likely to acknowledge the influence of social, economic, and ideological factors and fairness in the judging process and were less likely to see the judge’s role as one of rule-application. When broken into three groups on the basis of which category of torts the students studied first—i.e., intentional, negligent, or strict liability torts—each group produced an increase in average Index Score.

**Figure 1. ANOVA of Change in Index Scores by Topic Sequence**

However, an application of ANOVA to the changes in the average Index Scores for the three groups of students, without controlling for any other variables, indicates that the average increases among the groups differed significantly from one another. The greatest increase was produced by the students who were first exposed to strict liability. Students enrolled in courses that began with intentional torts produced the next-highest increase in average Index Score. Students who were first introduced to negligent torts accounted for the smallest increase in average Index Score. These

145. The F-test statistic quantifying this difference was 3.32, which attained a probability level of $p = 0.036$. See supra note 144.
results suggest that topic sequence represents a determinative factor in first-semester students' changing attitudes regarding the roles played by policy and fairness in adjudication.

2. The Effect of Topic Sequence with Control for School Group

We informally observed that, at least among the schools in our sample, a much higher proportion of students in Group 3 schools began their study of torts with intentional torts than with either negligent or strict liability torts. This suggested the possibility that the greater shift toward an understanding of the judicial role as policy-oriented found among students who began their study with strict liability torts might result from other differences in the educational approach at higher-ranked schools, or even from the composition of the student body and their past educational backgrounds.

Figure 2a. TIER 1: ANOVA of Chance in Index Scores by Topic Sequence and School Group
Accordingly, our next step was to examine whether the school group variable offered any explanatory power for our initial ANOVA results. However, we were limited in this statistical application by the fact that our Group 3 schools did not include any students that began their semesters with strict liability torts. Therefore, only Groups 1 and 2 were compared.

The multivariate ANOVA, which evaluated the effect of topic sequence while also controlling for the school group variable, produced noteworthy findings. Even with school group controlled, topic sequence still generated a significant effect on students' perceptions of the role of the common law judge. The students' school grouping, however, did not generate a separate net effect, meaning that the effect produced by topic sequence did not vary in a statistically significant way depending upon the

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146. A multivariate analysis is one that analyzes data while taking into account more than one variable.
147. $F = 5.485$, $p = 0.004$. See also supra note 144.
students' school group. Among both Group 1 and Group 2 students, the greatest increase in average Index Score was observed among students who studied strict liability first. We found the lowest increase among students who studied negligence first, with the increase in the average Index Score for intentional torts students falling in between the other two groups.

3. The Effects of Topic Sequence With Control for Gender

Figure 3a. MALES: ANOVA of Chance in Index Scores by Topic Sequence and Gender

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148. $F = 0.016$, $p = 0.901$. See also supra note 144.
149. We found that the average student Index Scores from each of the three assigned groups increased from the pre-semester survey to the post-semester survey. Notably, Group 1 schools produced the highest average Index Scores of the three groups for both pre-semester and post-semester surveys. However, the degree of increase in the average Index Scores found in the aggregated responses to all six questions did not vary significantly among any of the three groups. Consequently, our data suggest that school ranking by itself does not have a significant effect on the attitudinal shifts of first-year torts students. This absence of effect produced by the school group variable further substantiates the existence of a topic sequence effect.
Next, we investigated whether gender may play a role in determining student responses to the stimulus statements. The effect of topic sequence with the gender control proved significant again. The effect of topic sequence did not vary by gender, suggesting that topic sequence exerts a similar effect on female and male students. The relative order of the degree of change is also affirmed in Figures 3a and 3b: for both females and males, strict liability-first students produced the greatest average Index Score increase, followed by intentional torts-first students, and then finally by negligence-first students.

CONCLUSION

The survey results support our hypothesis that students who begin their study of torts with strict liability experience a greater shift toward understanding the judge’s role as being influenced by social, economic, and
ideological factors and a sense of fairness and less as a process of rule application than do students who begin their study with either intentional torts or negligence.\footnote{151} Moreover, a control for school tier placed on a portion of our sample produced results that indicate that the differences in attitudinal shifts may be more pronounced in students from higher-ranked schools.

We were surprised to find that our data suggested that students who begin with intentional torts experience a greater attitudinal shift toward perceiving the judicial role as being policy-influenced than do students who begin with negligent torts. Perhaps many first-semester law students find that when tort law holds defendants liable for intentional wrongdoing or for the kinds of egregious ("abnormally dangerous") activities justifying the application of strict liability principles, the results reflect the outcomes they would have expected when they entered law school—outcomes reflecting their own personal sense of fairness and their own judgment premised on their analysis of social, economic, and ideological factors not yet constrained by legal rules. In contrast, the fundamental principles of negligence law developed during a time when tort law was evolving in a pro-defendant direction. In large part, judges created the more specific rules and doctrines of negligence law precisely to enable them to keep cases out of the hands of jurors, who, like beginning law students, often had both a strong sense of fairness and their own ideas about social, economic, and ideological concerns.

We recognize that students take other first-semester courses concurrently with Torts and that these courses will inevitably affect their understandings of the judicial process. However, this does not detract from the findings of this study. If anything, the finding that a single factor, the choice of sequencing in a particular course, affects in a statistically significant way how different groups of students taught by fifteen professors at eight different schools perceive the role of judges in deciding cases suggests that the influence of topic-sequencing in Torts is even more potent than it otherwise might seem.

We acknowledge that correlation between topic sequence and students' perceptions of the nature of the judicial role is not necessarily accompanied by causation. It could be that professors who choose casebooks beginning with strict liability torts are those who would teach a more policy-oriented course regardless of which category of tort liability appeared first in the

\footnote{151. See supra note 145 and accompanying text.}
WHAT'S ON FIRST?

We also tried to avoid normative conclusions—no doubt with only limited success. For the few law graduates who practice cutting edge tort law, say *parens patriae* litigation against tobacco companies or lead pigment producers, understanding the interplay between tort doctrine and policy is critical. But for graduates whose practices consist of more routine types of tort cases such as auto accidents and slip-and-fall claims, at least in most instances, the application of rules and doctrines more accurately characterizes their professional milieus.

In any event, the sociological and cognitive psychological theories of framing and anchoring, as well as the results of our survey, support our hypothesis that topic sequence in legal education matters. Only a much more ambitious study could determine for sure whether this effect survives the remaining five semesters of law school and students’ other experiences in becoming lawyers.

Sequencing choices are not unique to Torts courses. For example, should Civil Procedure courses begin with jurisdiction or with the rules of civil procedure? Should Constitutional Law begin with governance issues or with civil liberties? Should Contracts begin with damages, consideration, or

152. We considered conducting an additional survey of the professors whose students we surveyed and attempting to hold constant for professors’ expressed pedagogical goals, but decided against it out of concern for reliability.


154. See supra Part II.A.

155. See supra Part II.B.

156. See supra Part III.C.

157. At least one sequencing choice within a constitutional law casebook became part of a larger and more contentious debate. Compare Randy E. Barnett, Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom, 10 HARV. J.L. & PUB. POL’Y 101, 106 (1987) (suggesting that Gerald Gunther, editor of a classic Constitutional Law casebook that Barnett had studied as a student, helped to re-legitimate substantive due process, which had long lingered in academic disgrace after its use in early twentieth century cases to strike down regulatory economic legislation, by pairing it in the casebook with more recent cases striking down restrictions on women’s reproductive rights), with Randy E. Barnett, What’s So Wicked About Lochner?, 1 N.Y.U. J.L. & LIBERTY 325 (2005) (reporting Gunther’s response that his intent had not been to revitalize substantive due process but to undermine the reasoning of the reproductive rights cases!). This story highlights another example of how a casebook
offer and acceptance? Although these issues are often debated, no one has studied the subliminal impact of such choices on students' understanding of broader principles of the law. Those studies, like this one, are overdue.

Although there is much that remains to be studied, this Article sends a powerful message: The most important lessons taught in the law school classroom are not the substantive principles—whether rules or policies—we intend to teach. First-semester torts professors teach lessons more fundamental than either the elements of battery or the policies that courts consider when deciding whether an activity is abnormally dangerous and therefore strict liability applies. Whether we fully appreciate it or not, what we teach the next generation of lawyers and judges subliminally, through factors such as our choice of topic sequence, significantly affects their understanding of how the common law judge functions within a democratic but constantly changing society.

editor's juxtaposition of opinions within a casebook had important, albeit unintended, consequences on students' perceptions of the law.