

The Unseen, Unheard, Unknowledgeable, and Underrepresented—How Can Law Schools Develop Student Interest in Helping Disadvantaged People?

By Doug Simpson*

“If a free society cannot help the many who are poor it cannot save the few who are rich.”¹

In 22 years of practicing law in a litigation context, time that has included mentoring and training new lawyers, I have noted a common trait: lawyers who have recently emerged from law school often fail to recognize the significance of the law that they learned; they do not see how they might wield diverse legal concepts as case-building tools; and they generally they do not recognize problems or solutions that are multidisciplinary in nature. Worse, having made it through a rigorous legal education preparing them for the upper echelons of society, newer lawyers often have a lack of empathy for claimants, especially those who are disadvantaged.²

In other words, newer lawyers often appear book-smart, having learned many rules, but they have yet to learn how to discover or to elicit facts that will help them *apply* the rules—an important legal skill. And they have not yet acquired values that might assist in promoting positive change.

In mentoring lawyers, little is more rewarding than illuminating the light bulb of insight, helping less-experienced lawyers see and finally appreciate the threads tying disparate rules together. But equally gratifying is witnessing the indignation among newer lawyers who see for

the first time the plight of the disadvantaged. All too often there are so many who can do so much, who end up doing so little for so few.

This paper proposes a practitioner's view of a cross-curricular teaching method that law schools might use to help develop student skills, knowledge, *and* values. I propose that law schools create and use fact patterns that evolve over time—just like real cases. Like real cases, the fact patterns would begin relatively simply, and would evolve over time as students gain greater knowledge. I illustrate how this might work with a fact pattern at the end of this paper.

As discussed below, reported decisions suffer from the shortcoming that they relate to people who for whatever reason had the resources to get through both the lower-court and the appellate-level judicial process, often a process costing hundreds of thousands of dollars in attorney time. Appellate cases themselves are atypical; they represent a very small proportion of business of law, and a system as to which disadvantaged have unequal access. By themselves, appellate decisions do not necessarily acquaint students with skills that lawyers need.³

In contrast, professors can be creative in the introduction of fact patterns and make these as easy or as difficult as they choose. Thus one principal benefit of the proposed method is that the fact patterns used can illustrate problems that disadvantaged people face—the day-to-day or more complex problems that often are never highlighted in reported decisions. Thus, professor-created multidisciplinary fact patterns can be used to promote positive social change by sensitizing law students to issues facing the disadvantaged.

The model I propose may be accommodated within existing law school curriculum programs, particularly those that emphasize lawyering skills. Lawyering skills classes often use context-based learning. But they often do so without explicitly connecting to the first-year core classes. And the core-class instruction is often without reference to the fact patterns set forth in

the lawyering skills classes. This paper advocates tying such classes together with the threads of fact patterns to develop skills and values—making use of the instructional abilities, strengths, and insights of several professors as to the same subject matter to explore the depth and breadth of material that might never make it into a casebook. My model also calls for an early implementation in the first-year curriculum and throughout law school. With this approach, one challenge will be to resist the temptation to over-simplify the fact pattern to include only subjects that students will learn in the first year. First-year students might have the skills to discuss torts, contracts and property; however, they might be less ready to discuss civil procedure, evidence, insurance, or more complicated issues that often are present or well-developed in cases or in case books. But restricting this multidisciplinary fact-pattern method to only the first year would defeat its purposes. After all, real-life cases present as multidisciplinary problems, often lasting years, and students' skills in seeing issues and in dealing with problems that way ought to be honed. Moreover, one of the skills lawyers often lack is the ability to see that they can use the skills they have learned to acquaint themselves with subjects less familiar, subjects that do not tidily fit within any single subject—newer lawyers need to become more adept at making sense of the unfamiliar.

And the development of values should pervade the curriculum, not just the first year. Aside from undeveloped multidisciplinary skills, young lawyers often fail to recognize that they might be unwittingly perpetuating injustices through their actions and inactions—perhaps because they do not see issues. But if they were guided by positive social values, lawyers and their clients alike could be instruments of positive social change.

As an example, below is an illustration showing a product warning-and-instruction label, with a skull-and-crossbones icon, written in English. A lawyer might counsel his or her client

that the change of that warning to remove the skull-and-crossbones icon by itself is perfectly acceptable. But if that lawyer has *values* enabling him or her to appreciate issues confronting the disadvantaged, the lawyer might reflect on literacy issues among minimum-wage workers, or on the ability of the disadvantaged to read English, and thus might counsel against removal of the skull-and-crossbones icon. The lawyer might thus realize that the label written in Russian, on the left, is what the warning-and-instruction label might look like to a person who cannot read or understand the language—and thus the icon is the label’s only warning—the words lack meaning. So counseled, the client might keep the label as is, and thus not only hedge against potential future liability, but also protect disadvantaged workers, or depending on the circumstance, children or others. So the lawyer with developed values becomes an agent of positive social change.

Lay people in general, and the disadvantaged specifically, often do not know their rights, let alone how to protect or to advance them. Lawyers are uniquely suited to helping such people whether by themselves or through their clients. The ABA encourages lawyers to be good public citizens, to promote legal understanding among the unacquainted, and to promote access to justice.

As a public citizen, a lawyer should seek improvement of the law, *access to the legal system*, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. *A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.*⁴

The ABA Standards and Rules of Procedure for Approval of Law Schools echoes the sentiment that schools should teach lawyers to become good public citizens by helping the disadvantaged.⁵ After all, and as Martin Luther King noted decades ago, “Injustice anywhere is a threat to justice everywhere.”⁶

The cross-disciplinary fact pattern at the end of this paper is meant to illustrate injustices while providing a vehicle that might help promote positive change. This fact pattern is only an illustration. Professors, of course, could supplement the facts in such a way as to suit their purposes and the lessons. Other fact patterns, of course, could be created, and could be drawn either from casebooks, or from a colloquy with practitioners. If memory serves, professors are masters at creating twists and turns as part of daily class discourse—and are more than capable of creating complex multidisciplinary fact patterns that highlight legal issues while developing student values.

The overall purpose of this paper is to encourage law schools and professors to move beyond teaching from reported appellate decisions, and to coordinate with one another and with practitioners in developing and then in using context-based learning to develop students' skills

and values so that the students will ultimately become instruments of positive change by helping the disadvantaged.

The Social Problem:

People who are most exposed to injustices often are those least able to help themselves by virtue of economics, race, age, gender, education, native language, or a combination thereof. Such persons generally are not empowered to help themselves and may not understand how they might seek legal redress.

Disadvantaged people are often subjected to various industrial, environmental, and toxic-exposure harms, in part, because of the jobs they hold or because of the locations in which they live. Such persons might not be sensitized to the significance of toxic exposure that they face in the workplace or at their homes, let alone the importance of preventing the exposure. Combined with potentially long latency periods between dates of exposure and of disease-related symptoms, disadvantaged people might never grasp the connection between their toxic exposure and their disease, and they often do not have medical care that might assist in making the causal connection.

Moreover, corporate culture discourages acknowledgement or empathy regarding whether corporate products or practices adversely affect disadvantaged people. Companies consequently often blindly ignore and either unwittingly or knowingly take exploit the disadvantaged. Unable to afford legal assistance, or perhaps because of a learned helplessness borne of poverty, disadvantaged people often suffer injuries without adequate redress. Unable to right wrongs, the disadvantaged are seldom instruments of positive change.

We have witnessed many examples of industrial and environmental harms and of the inability of the disadvantaged to prevent or to remedy the harms, and of seemingly uncaring

corporate culture. The 1980s were punctuated with the Bhopal and Chernobyl disasters, each of which tragedies killed thousands. More recent examples include coal-miner safety problems,⁷ World Trade Center disaster-related ailments,⁸ and the 2010 Gulf Oil spill.⁹

Compounding the problem, lawyers often fail to understand or to appreciate interrelationships between uncaring corporate conduct, common toxic exposures and the injuries suffered, and of the inability of disadvantaged populations to prevent harm or to seek redress. Although this paper highlights the plight of the disadvantaged in the context of environmental and toxic-tort law, disadvantaged people face challenges in many other contexts, some of which are discussed below as well.

Typical Law-School Curricula:

Traditional law-school programs relying on the case method are generally exposing students solely to plaintiffs who already have access to vast resources not only to take a case to judgment, but also to take the case through the appellate process to a reported decision. Yet, that legal process can easily cost hundreds of thousands of dollars in attorney time—well beyond the reach of the disadvantaged.

Appellate cases, of course, help students distill principles of law and give insights into both legal reasoning and judicial decision-making.¹⁰ But appellate cases do not help students understand why litigation was necessary to resolve a dispute, the decision-making processes of lawyers and clients, why settlement efforts failed, or why the judicial process failed to resolve the dispute before the appellate level.¹¹ In short, the typical casebook might give students answers, but legal insight and ability often comes not from knowing outright the answers, but from knowing the questions that need to be asked, then addressed.

Moreover, appellate cases are rarefied law—they represent a small fraction of the court's business. In California, in 2009, for example, civil filings totaled 1,581,117 cases, whereas appeal filings totaled 4,471, less than three-tenths of one percent.¹² Total Superior Court case filings, all criminal and all civil cases combined, numbered 9,552,781, only 11,218 of which were tried to a jury—slightly in excess of one-tenth of one percent.¹³ The California Supreme Court issued 116 written opinions—about one-one thousandth of a percent of the cases filed that same year. These numbers serve to illustrate the fact that much legal work is performed outside the context of reported appellate decisions; such decisions are not necessarily representative of the work that lawyers perform daily, let alone the problems that disadvantaged people face.

Thus, reliance on the case method also focuses unduly the outcomes of litigation and diverts students' attention from many other arenas of lawyering with which competent practitioners ought to be familiar, including alternative dispute resolution, administrative practice, legislative advocacy, and client counseling.¹⁴ Consequently, a law-school curriculum focusing upon reported appellate decisions alone under-prepares students for the work that they will actually face as lawyers.

Compounding the problem, many law-school programs present the traditional legal subjects isolated from one another, whereas actual cases often are cross-curricular. Many cases, and in particular environmental and toxic-tort scenarios as illustrated later in this discussion, often involve a number of law-school subjects including torts, contracts, property, corporations, criminal law, civil procedure, property, constitutional law, legal writing, evidence, trial practice, insurance, and of course, environmental law. Such problems provide law schools with an opportunity to use context-based case histories as a thread tying separate law-school subjects together, while also sensitizing law students to problems that disadvantaged people face. Roy

Stuckey thus advocates context-based education throughout the law school program as a best practice for legal education.¹⁵

A Proposed Multidisciplinary Program:

Educational theorists have described educational outcomes as having three components: knowledge, skills, and values.¹⁶ Teaching *values* is not beyond the charge of law schools. After all, the preamble to the ABA accreditation standards states that law schools ought to ensure that its graduates "understand their ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice"¹⁷

Moreover, the ABA accreditation standards require that law schools ensure that their graduates understand that the law is a public profession calling for the performance of *pro bono* legal services.¹⁸ Thus law schools ought to highlight the plight of the disadvantaged—an issue often absent in typical case books—in order to develop students' public-citizen values and to help the disadvantaged gain access to justice.

This paper proposes a cross-curricular-context-based-case-development methodology in which students in multiple separate subjects are presented with the same fact pattern, that professors coordinate in several subjects. Under this model, case histories or fact patterns evolve and are developed in separate classes like layers of an onion as the instructional week or the semester progresses—just as real cases unfold through investigation and discovery. The approach requires coordination between professors of various subjects, teamwork, so that professors hit the teaching points and students understand them.

As students' knowledge increases, their cross-curricular understanding increases, as does their understanding and empathy for disadvantaged populations. Each subject matter would

work off the same basic fact pattern at any particular time, emphasizing certain aspects of it as is appropriate to the subject. Legal writing classes should tie the subjects together, and provide students practical, multidisciplinary writing experiences. The concept is to have a professor in one subject guide discussions of a case history or fact pattern in ways that are pertinent to one legal subject, while another professor is developing other aspects of the same fact pattern in the context of another legal subject.

Important in this process is the coordination between professors of different subjects. The professors themselves could discuss and could develop case histories or fact patterns illustrated below, or other fact patterns that they either create or obtain from practitioners or from other resources, in a way that assists students across the curriculum. This would be particularly important during the first year or two of law school where coursework among students is largely the same and largely predictable. The idea is to develop in-depth understanding of complex legal issues—knowledge and skills—while also dealing with particular unreported case histories or fact patterns that serve to highlight the plight of the disadvantaged—to develop students' values in a way that helps promote positive change.

Illustration of the Proposed Cross-disciplinary Program:

At the outset of the semester, and at intervals thereafter, professors in separate subjects present students with case histories or fact patterns such as those set forth below. The cases or fact patterns are drawn not from reported appellate decisions that are only a small portion of the litigation world, let alone the real work of lawyers, but are drawn from case studies, from practitioners' cases, or from other sources.

Roy Stuckey notes that two books often used for the purposes of case-study teaching are *A Civil Action*¹⁹ and *The Buffalo Creek Disaster*.²⁰ But videos of course can be just as effective in a fraction of the time. The cases on which the movie *Erin Brockovich*²¹ was based inspired one of the fact patterns set forth below, although the movie gave short shrift to many important issues.

Professors can either develop a more complex fact pattern or present smaller fact patterns in unison with professors and other subjects regularly in order to highlight particular teaching points. More complex fact patterns can, of course, evolve over a period of days or weeks as the semester progresses, or can be completed in one subject then taken up in another. The importance is to highlight the cross-disciplinary aspects of fact patterns while developing student values, to sensitize students to problems disadvantaged people face and to get the students asking intelligent questions. After all, as Francis Bacon once noted, "A prudent question is one-half of wisdom."

As with actual lawsuits, and as the semester unfolds, additional facts can be added to the fact pattern to highlight subjects being taught in class, while also sensitizing students to challenges that vulnerable people face. An essential feature of the process is hanging flesh onto the bones by providing actual character to the individuals in the fact pattern, to sensitize students and to assist in developing empathy, interest, and perhaps even caring—after all, the people described in the fact patterns (at least those below, based on real cases) likely are real, even though their stories might never have made it to a reported appellate decision.

Legal-writing projects should be tied into the fact patterns used through the semester, including the drafting of objective memoranda, of legal argument, or even of written discovery.

Testing in various subjects, at least in part, could properly be coordinated with one or more ongoing fact patterns. The concept is to capture students' interest as the semester progresses with ongoing fact patterns and with stories of real people with real problems that might never have seen a jury trial or court of appeal. Additional facts and fact patterns can be added to highlight important issues as well, to be understood and to be addressed much in the way a lawyer handles more than one ongoing case at a time.

Professors can work with practitioners in their various communities to come up with fact patterns. The example set forth below is intended simply to illustrate this concept, and might be supplemented with additional material at some point in the future. Lawyers in general and litigators in specific likely have many, perhaps hundreds, of case histories that present unique or cross-disciplinary problems that professors can adopt in the classroom to develop skills, knowledge, and values. Judges also might serve as a resource for such materials.

The following example is a truncated case history to illustrate how a case might implicate multiple subjects to teach skills and knowledge. The case study also introduces students to the plight of the disadvantaged, hopefully developing student interest in promoting positive change once they become lawyers.

Fact-Pattern —Life in the High Desert—General Overview:

Twelve-year-old Ruth and her younger brother, Bill, a nine-year-old boy, tended to themselves after school and all summer long. Their parents worked full time at the nearby natural-gas compressor station.

Living in the high California desert, the days were both long and hot, but every day the kids cooled themselves in the mist that came from the compressor-station's cooling towers.

They learned to spend time there with their friends after school, playing cards, jacks, or just hanging out. The mist was cool on the skin. The evaporation tempered the day's hot sun.

The kids also spent long summer days swimming in the compressor station's employee swimming pool. They thought the color of the water was funny looking. But everybody attributed it to living in the desert. The well water tasted and looked strange, but everybody accepted it.

At home a block away from the gas-compressor station, the family cooled their home with swamp coolers. Swamp coolers, much like cooling towers, cool the air by evaporation, by blowing air through cascading water streams.

The family quenched their thirst by drinking water drawn from the family's well. The water was used in drinks such as in iced tea, in baby formula, in ice cubes, and in cooking. The well also served as the water supply for the family's bathing needs.

Unbeknownst to Ruth and Bill, the cooling-tower water and related mist were laden with carcinogenic hexavalent chromium, a cooling-tower corrosion inhibitor. The purpose of the hexavalent chromium was to give the plant's pipes a continuously renewed protective coating. The water also had biocides and slimicides mixed in. These products were designed and manufactured to keep the water free of biological growth.

The cooling-tower mist emitted from the tops of the towers bathed hundreds of acres of surrounding area in these contaminants, day in and day out. The homes closest to the plant were hit with the greatest concentration.

The gas-compressor station changes its cooling-tower water frequently. The discharged water, called blowdown, is dumped daily into unlined settling ponds in the sandy desert soil. In fact, when the metals from the cooling tower settle to the bottom of the online settling ponds and form a hard surface, a company employee plows the bottom of the settling ponds to encourage dissipation into the desert sands beneath.

The gas company knows the exact location and owner of every drinking water well in the area. There are several hundred such wells in the compressor station's immediate vicinity.

Unbeknownst to Ruth and Bill and their parents, the carcinogenic contaminants migrate directly into the aquifer that supplies their home with water—the very same water in which they shower daily; the same water that feeds their swamp cooler; the same water that washes their clothes and their bed sheets; and the same water that they drink in their iced teas. This also is the very same water used to mix their baby-formula powder fed to them when they were babies.

As youngsters, Ruth and Bill and the other kids in the neighborhood have a higher resting respiration rate than adults. Moreover, they are much more active than typical adults, with a higher respiration rate per day than the average adult. Consequently kids typically are more severely exposed and get a greater dose of airborne carcinogens than adults breathing the same air.

By the time the kids reach high-school age, they are orphaned. Their parents worked at the compressor station, but both parents died of colon cancer. Both parents had worked at the compressor station as cooling-tower cleaners, exposed daily to the water as they inhaled and ingested the mist. The parents never were told of the true nature of contaminants in the water.

The parents never were trained in industrial hygiene, nor were they issued respirators or other personal protective equipment.

The gas company that used the corrosion inhibitor knew the location of contaminated water. It also knew that people's wells were being impacted, and thus that people were being exposed, but did nothing about it.

Ruth and Bill both had osteotomies by age sixteen, and now suffer from lung cancer. They had suffered a lifetime of inhalation exposure, dermal exposure, and ingestive exposure to known carcinogens.

The kids' parents were not well-educated and could not read. The Material Safety Data Sheets (MSDSs) and product labels, even if they had been provided to these gas-company employees, would have been meaningless. The labels might as well have been in Russian.

The hexavalent chromium supplier is a publicly traded Fortune-500 company that has produced its corrosion-inhibiter product since the 1930s. It had its headquarters and all of its operations in Pennsylvania, but shipped products to several states.

In the 1940s, the company supplied the product to customers in barrels marked with 12" square label complete with a skull-and-crossbones, with warning words as set forth below:



Danger! Harmful or fatal if swallowed!
May cause cancer, including lung cancer, or death.
Prevent skin contact. Do not ingest or inhale.

In case of ingestion, induce vomiting, and seek immediate medical attention!

But one chief salesman believed that the warning inhibited sales. This salesman was legendary in the company, selling much more than others, in part by telling customers including the gas company that they had to run fewer cycles of the product than the company advertised (he advocated that the company change the water and the additive more frequently), which, of course, yielded not only a greater product-consumption rate, but also a greater rate of disposal. The chief company salesman advised customers whose unlined blowdown settling ponds were coagulated with used chromium at the bottom a condition that inhibited dissipation of the water, that they could plow the bottoms of the settling ponds with tractors at regular intervals to increase the dissipation rate.

The hexavalent-chromium company changed its warnings in the 1950s. It removed the skull-and-crossbones image, then changed the warning language to read as follows: “Caution. Use only with adequate ventilation. May cause skin irritation.”

But medical evidence did not justify the downgraded warnings. The evolving but generally accepted medical knowledge, including several hundred books on the topic within the hexavalent chromium supplier’s library, supported the human health effects that the company had warned about in the 1940s product label, but did not support the downgraded warnings.

Moreover, the hexavalent chromium company repeatedly performed animal testing in which the eyes of rabbits were sutured open, and then the product was repeatedly applied to the rabbits' eyes to determine the extent of eye irritation caused by the product. Rabbits’ skin was shaved, then abraded with sandpaper to expose more sensitive layers of skin beneath, and then the hexavalent-chromium product was applied to determine the skin-irritation effects of the

product. Similarly, lab rats were fed the material and forced to inhale the product to determine the extent of cancer cases in the lab-rat population, to be extrapolated to humans.

Inexplicably, the MSDSs that the manufacturer supplied to its customers differed from those it received from its own suppliers. That supplied to their customers and had fewer warnings as to adverse human-health effects than those MSDSs relied upon in-house by the company's own internal industrial hygienists to protect worker safety for the workers who created the product. Likewise, the personal protective equipment recommended on the supplied-with-product MSDSs differed from the protective equipment required within internal written standards and worn internally within the hexavalent chromium manufacturer. Thus internal handlers of the product were told to wear Tyvek suits and respirators, but customers were told only that paper masks should be worn.

The company later upgraded its warnings. But the warnings are not as significant as the warnings given by NIOSH (National Institute for Occupational Safety and Health).

Cooling towers sometimes got slimy, which gummed up the works. The hexavalent chromium supplier developed, sold, and advised customers as to the use and disposal of slimicides and biocides in the cooling tower water.

Thus, the hexavalent-chromium supplier advocated a mixture of water laced with corrosion inhibitors, slimicides, and biocides. Although the hexavalent-chromium supplier advocated this mixture, all within the same stream of water, it had no program whatsoever for warning customers of the human-health effects of the resulting mixture, or whether active ingredients, when combined with other chemicals, might cause human health effects not

envisioned by the products when use separately—as if the company sold *nitro and glycerin*, never warning or caring enough to learn and to warn about the effects of *nitro glycerin*.

In fact, the corrosion inhibitors, the slimicides, and the biocides were products created by separate corporate divisions. Several people within the chain of command, in private meetings, expressed concern about mixing the products together. But nobody wanted to be the bearer of bad corporate news—the products were extremely profitable, and anything restricting their use could decrease company profitability, and make the employee who raised the concern a corporate pariah.

A nearby property owner owns a dairy farm. The gas-compressor company, knowing that its unlined settling ponds have caused contamination to the regional groundwater supply, recently told the farmer that the *farmer's dairy operation* was causing groundwater contamination, not the other way around. The company advised the farmer that his dairy farm was making the water unusable for the company's industrial water supply, and that it expected the farmer to stop immediately, and to clean up the groundwater, or it would sue the farmer.

The farmer knew that he had a groundwater problem. After all, his turkeys' eggs have been coming out yellow, and the water for the dairy cows has been yellow-green. This color has been similar to cow urine. To avoid the lawsuit, the farmer agreed to sell the farm that had been in his family for generations, to the gas company. But he did so at ten cents on the dollar, thinking that he had contaminated his property.

Unbeknownst to the farmer, his property was down-gradient from the gas-compressor company. The water was indeed tainted, but tainted by the gas-compressor-company's hexavalent chromium, not by the farmer's dairy operation. The gas-company representative in

charge of the negotiation with the farmer earned a bonus in return for keeping a lid on the farmer's suit, and for avoiding the potential of other suits.

Ruth and Bill knew nothing of a possible claim until a paralegal from the plaintiff's attorney's firm came knocking on the door, explaining the situation. The paralegal then signed them up as additional plaintiffs. The paralegal personally went to all the homes within several miles of the gas company, and signed up plaintiffs.

Many of the possible plaintiffs lived on the gas-company property while working for the gas company. Although the gas company knew or suspected their injuries as a consequence of the proximity to the cooling-tower emissions, it allowed the workers to stay in the nearby buildings, arguably aggravating the workers' injuries due to increased exposure.

The product supplier has had insurance for a period of sixty years. With different contractual provisions, the policies provide the company with defense and indemnity. For some more recent years, the gas company has a high self-insured retention, with excess policies above the retention. All carriers are entitled to subrogate against those who caused the loss.

The Regional Water Quality Control Board (RWQCB), an administrative agency whose primary purpose is the protection of the water quality of the state, recently issued an administrative cleanup and abatement order directing the gas company and the hexavalent chromium supplier to cleanup and to abate the effects of the nuisance created by the groundwater contamination.

The insurers claim that they need not defend or indemnify because the action by the administrative agency is not a lawsuit, and thus is not within coverage afforded by the insurance

policy. The insured's claim that the insurance policies provide coverage, or are ambiguous, and should be interpreted in their favor.

By statute, there is no insurance coverage for certain acts committed by an insured: "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." Insurers claim that there is no possibility of insurance coverage because there was no accident, and hence there is no need to provide the defendants with insurer-retained counsel.

The RWQCB also recently had a hearing, after formal notice and public comment, naming the site to a standing general order that prohibits the dumping of industrial wastewater without a proper permit. The standing general order could be quasi-legislative, and thus perhaps is not subject to judicial review or even to a *writ of mandamus*—it must be enforced as a matter of comity.

The wastewater dumping impacts nearby streams. The streams are tributaries that lead to the ocean. They are so-called blue-line streams, streams over which the Army Corps of Engineers might have jurisdiction. The waters thus might be federal-jurisdictional waters.

The RWQCB has in effect been deputized by the Environmental Protection Agency to issue permits for wastewater dumping pursuant to the Clean Water Act. The RWQCB administers such permits by deputizing municipalities to issue waste water subpermits.

The local city government has failed to properly enforce its own wastewater-dumping subpermit. It thus violated a statute designed to protect the class of individuals including the plaintiffs. The wastewater permit statute was intended to prevent the types of harms that occurred.

After the paralegal contacted these potential clients, a law firm put ads in the local newspapers about town-hall meetings to discuss the causes and effects of the water contamination. Several thousand people attended several public meetings.

The community has had cancer clusters, as well as many cases of IBS (irritable-bowel syndrome), and more-than-usual osteotomies and Crohn's disease cases. One expert opined that a single molecule of hexavalent chromium can cause, and with substantial medical certainty, will cause cancer. Other experts dispute that position and the reliability of the other expert's methods.

About one year after the initial lawyer-inspired newspaper calls for public meetings, the first plaintiffs began suing the gas company and the hexavalent chromium supplier. The companies demurred based on the one-year statute of limitations, asserting that newspapers' accounts of cancer clusters put people on notice that they too might be injured.

The defendant insured tendered the lawsuits to the insurers, seeking defense and indemnity. Some insurers accepted the defense; others denied coverage, some accepted the defense while reserving rights to disclaim coverage.

Publicly traded, the hexavalent-chromium supplier has annual SEC reporting requirements. It has failed to report that the claims exist. There are now 6,000 individual claimants. The claimants seek damages not only for their personal injuries but also for nuisance and trespass to their properties. All plaintiffs claim that they cannot use the water for drinking, bathing, or for livestock. They are also suing the city for inverse condemnation and breach of mandatory duty, based on the failure to enforce the waste-water permit standards. They seek attorney's fees.

A test group of 240 claimants went forward to a custom-designed trial before a three-judge arbitration panel because the case was too large for the court. The judges awarded an average of \$550,000 to each claimant, a judgment of about \$133 million. This is the first of several trial phases.

The plaintiff's attorney's firm, with its \$43 million of attorneys' fees earned, then rented a cruise ship in the Mediterranean Sea. The firm invited the three arbitration-panel judges, and other judges from the same courthouse where the remaining claims are venued, to "lecture" aboard the cruise ship.

Given the size of the case, the judge presiding over the case decided to appoint a retired judge as a discovery referee to handle the frequent discovery problems the parties were having. As it turns out, the sitting judge was a cruiser judge, as was the appointed discovery referee.

The plaintiffs demanded all documents pertaining to the hexavalent-chromium manufacturer's knowledge of chromium's adverse health effects. The hexavalent chromium supplier produced only 70 pages of documents. Believing that there were more documents over the nearly 100-year history of the hexavalent-chromium manufacturer's history, the plaintiffs brought a motion to compel the production of further documents to the discovery referee. They also requested sanctions.

The discovery referee/cruiser judge granted the motion to compel. Not believing the hexavalent chromium supplier, he also issued evidence sanctions. The evidence sanction, said the judge, is an order that the defendant is liable to all plaintiffs. The only remaining question is damages. The judge noted that the defense could present a motion to lift sanctions if they could present convincing evidence of the production to plaintiffs of all of the discoverable documents.

Months pass, but defense counsel does not report the fact of evidence sanctions to his own client—it is bad news. Defense counsel selected by the hexavalent chromium supplier also does not report the fact of the evidence sanctions to the insurance carrier consortium. The hexavalent chromium supplier fails to report the news to the SEC in its annual public reports. Insurance carriers, upon learning about the evidence sanctions, claim that the insured is in breach of the cooperation clause in the insurance policy, entitling them to disclaim coverage.

Teaching Opportunities That Can Be Drawn from the Fact Pattern:

The above fact pattern is but one of many cross-disciplinary fact patterns emerging from a practice of environmental and toxic-tort law practice involving vulnerable populations. The fact pattern involves children, who by themselves are a vulnerable population and are foreseeable bystanders of a product manufactured by one company then sold and used by another. The children's parents are less educated, illiterate, minimum-wage laborers, exploited by the company employing them, and neglected by the chemical company that could have and should have foreseen and protected against injuries. There are aspects of administrative law, civil procedure, of contracts including insurance contracts, of civil procedure, of professional responsibility, and of course torts, property and environmental law.

The fact that pattern can be used to develop or to illustrate areas of law in various classes as follows:

- Torts: Nuisance, trespass, waste, battery, strict liability failure to warn, strict liability design defect, strict liability manufacturing defect, fraud, inverse condemnation, government immunity, breach of mandatory duty (governmental negligence *per se*).
- Contracts: Implied warranty of merchantability, contracts of insurance and other indemnity agreements.
- Labor law: the exclusive remedy rule, exceptions thereto.

- Administrative Law: Regulatory oversight and enforcement of environmental laws, quasi-legislative and quasi-judicial administrative acts, and the process of appeal.
- Constitutional Law: Jurisdiction. Comity, and the ability of the judicial branch to review quasi-legislative orders of regulatory agencies, local government acting to enforce federal government legislation, condemnation, and inverse condemnation.
- Evidence: Are the manufacturer's internal industrial-hygiene standards an admission of the company's knowledge of the dangerous propensities in side effects of its products? Can the internal standard for handling products used as the standard of care for negligence claim as against the manufacturer? Can later changes to product labels and to MSDSs be used as a post-occurrence change to show the defective nature of the earlier warnings in a strict liability case? Can plaintiffs prove general and specific causation—whether the particular products can cause and in this case did cause the injuries, and through what experts and procedures such as preliminary causation hearings? Are 40-year old documents admissible as business records or otherwise where there is no witness to testify as to the mode of preparation of the documents?
- Trial Practice: students can portray the various sides of the case including (1) plaintiffs (2) the gas-compressor company, (3) the product manufacturer, (4) the administrative agency seeking cleanup, (5) the municipality that alleged breached mandatory duties and inversely condemned property, and (6) the product manufacturer's and the gas-compressor company's insurers.
- Environmental Law: What environmental laws have been violated by the migration of contaminants from the gas-compressor facility? What plaintiffs have a private right of action? What conduct can they attempt to force through declaratory relief or otherwise? What regulatory agencies have jurisdiction, and what effect are violations of their regulations? What will be the regulatory path that oversight of this facility will take, and what can the public do to influence that regulatory path? What can be done to protect individuals from such harm from this and similar sites in the future?
- Legal Writing: Research projects can involve the preparation of objective memoranda as well as argumentative motions such as motions to dismiss/demurrers and motions for summary judgment, or even motions to compel. Students could write motions discussing the Daubert rule. For example, given the latency period between exposure and understanding of the harms as set forth in plaintiffs' complaint, students can be asked to prepare a demurrer based on the statute of limitations. Written discovery projects can be coordinated with civil procedure, and can include various written discovery tools.
- Insurance: Insurance has evolved over several decades, a fact that often comes into play in environmental cases because of the long period of time between causative events and resulting harms. Issues include contract interpretation, whether the claims fall within the coverage provisions, whether any exclusions, conditions, or limitations apply that affect coverage, whether policies properly stack horizontally or vertically, whether excess or umbrella policies are anticipated, and drop down to provide defense or indemnity as against the claims.

- **Civil Procedure:** The fact pattern can be used to illustrate the use of interrogatories, requests for admissions, depositions, requests for production of documents, subpoenas and expert-witness discovery. Sanctions for failure to produce discovery. Demurrers or motions to dismiss, for want of jurisdiction, and based on the statute of limitations. This can be coordinated with the legal-writing class.
- **Professional Responsibility:** The propriety of advertising, targeted advertising, signing up plaintiffs by knocking on individuals' doors, judicial misconduct, and whether lawyers for the gas-compressor company have a duty to third parties where the lawyers are aware that death or great bodily injury might be a consequence of the down-gradient contaminated drinking water wells.
- **Corporations:** Often the profit motive gets in the way of sound judgment. How within the corporate structure can or should change be made, whether as to labeling, product composition, advice as to clients' disposal practices, and reporting to shareholders? What duties does a publicly traded company have as to SEC reports?
- **Criminal law:** Knowing that death or serious bodily injury could occur from exposure to impacted drinking water wells or through other emissions, what crimes have been committed?

Conclusion:

Lawyers who have recently emerged from law school often appear underprepared for dealing with real-world problems. Real-world problems often do not present as tightly packaged, closed-cell appellate cases; real-world problems are multidisciplinary, drawing from many core and non-core law-school subjects at once. Appellate cases themselves suffer from the shortcoming that they are not representative of real-world problems, especially in regard to disadvantaged people who do not have the same access to justice as others and thus do not have their types of problems reflected in appellate decisions. Underprepared lawyers miss issues—and risk harming their clients' interests, or at least risk being less effective than they might otherwise be.

Overcoming the inertia of traditional appellate-case-based teaching might be a challenge, and admittedly would require quite a bit of forethought, of preparation, and of coordination. Course materials might be more difficult to obtain or to develop—more time consuming than teaching from cases within a traditional appellate casebook.

But adopting a multidisciplinary, context-based teaching method, such as is illustrated in the fact pattern, has too many benefits to ignore. First, the context-based method is flexible—fact patterns can be

developed and adjusted to suit the professors' desired teaching points. The fact pattern could evolve over time with the progress of student knowledge. And the method could be used not only in the first year, but in later years as well.

Second, because the context-based method is so flexible, it can be used to highlight the kinds of issues that might never be documented in an appellate decision. Law students can thus be exposed to material that they might not see in a traditional casebook-based course, and thus can become more flexible and more able to deal with real-world problems when they leave law school. The context-based method can thus be used not only to expand student knowledge, but also to develop law-student values, the value of assisting the disadvantaged in gaining access to justice.

Third, because recommended fact patterns are multidisciplinary, the method can tie together several subjects and show the links or crossovers between traditional core subject and those more peripheral, all while developing future lawyers' minds to not only understand legal doctrine, but to ask intelligent questions, then seek the answers.

I urge law-school professors either to develop material for context-based teaching to expand law students' minds, or to work with practitioners to obtain materials, as in the illustration, that can be used in multidisciplinary context-based teaching. Law professors I believe ought to coordinate with one another to assist in making lessons more meaningful. There are so many real world problems ready to be solved, we need to help law students be ready to solve them.

¹ John F. Kennedy, Inaugural Address (Jan. 20, 1961) (“To those peoples in the huts and villages across the globe struggling to break the bonds of mass misery, we pledge our best efforts to help them help themselves, for whatever period is required—not because the Communists may be doing it, not because we seek their votes, but because it is right. If a free society cannot help the many who are poor, it cannot save the few who are rich”).

² The word “disadvantaged” is not easy to define. I use it broadly in this paper to include any person or group who is socially, racially, economically, culturally, or politically deprived of life, liberty, or pursuit of happiness. Such persons or groups often cannot effectively seek and obtain an effective remedy, through the justice system, for grievances in accordance with human rights principles and standards. *See, e.g.* Ramaswamy Sudarshan, Rule of Law and Access to Justice: Perspectives from UNDP [United Nations Development Project] Experience, presented to the European Commission Expert Seminal on Rule of Law and the Administration of Justice as Part of Good Governance (Jul. 3, 2003).

³ ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION 144 (2007).

⁴ MODEL RULES OF PROF'L CONDUCT, pmbl. (2002) (emphasis added).

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- ⁵ AMERICAN BAR ASSOCIATION, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS , pmbi. (2009-2010).
- ⁶ Martin Luther King Jr., Letter from Birmingham Jail (Apr. 16, 1963).
- ⁷ Ken Ward Jr., *Research Warned about Outdated Coal-Dust Limits*, CHARLESTON GAZETTE, Apr. 14, 2010, at 6A.
- ⁸ Samet et al., *The Legacy of World Trade Center Dust*, 356 N. ENG. J MED. 2007 2233 (May 31, 2007).
- ⁹ Marty Beckerman, *BP's Other Toxic Legacy: 'Decades of Misery' for Gulf Health*, ESQUIRE MAGAZINE, June 21, 2010, available at http://www.esquire.com/blogs/politics/gulf-oil-spill-health-effects-062110?click=main_sr.
- ¹⁰ ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION 144 (2007).
- ¹¹ *Id.*
- ¹² STATE OF CALIFORNIA JUDICIAL COUNCIL, ADMINISTRATIVE OFFICE OF THE COURTS, COURT STATISTICS REPORT INTRODUCTION IX-X (2009).
- ¹³ *Id.*
- ¹⁴ John Elson, *The Regulation of Legal Education: the Potential for Implementing in the Crate Reports Recommendations for Curricular Reform* 1 CLINICAL L. REV. 363, 384-85 (1994).
- ¹⁵ *Supra*, 3 at 146-57.
- ¹⁶ *Supra*, 3 at 43.
- ¹⁷ *Supra*, 5.
- ¹⁸ *Id.*
- ¹⁹ JONATHAN HARR, A CIVIL ACTION (1995).
- ²⁰ GERALD STERN, THE BUFFALO CREEK DISASTER (1977).
- ²¹ ERIN BROCKOVICH (Universal Studios 2000).