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## How Not to Teach Contracts, and Any Other Course PowerPoint, Laptops, and the Casefile Method

Douglas L. Leslie  
*University of Virginia School of Law*

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## HOW NOT TO TEACH CONTRACTS, AND ANY OTHER COURSE POWERPOINT, LAPTOPS, AND THE CASEFILE METHOD

DOUGLAS L. LESLIE\*

### I. INTRODUCTION

In this essay, I first discuss the most important question that ought to face any professor teaching Contracts, or any other course: what am I trying to accomplish in this course? Next, I attack the dominant modes of teaching law school courses today, the lecture and the Socratic Method. Finally, I describe my alternative to the dominant teaching modes—the CaseFile Method.

### II. WHY TEACH DOCTRINE IN CONTRACTS (OR ANY OTHER COURSE)?

Do you teach, and examine on, contracts doctrine? Why?

This is what I mean by teaching doctrine. Suppose the topic is the pre-existing duty rule. Teaching doctrine is conveying to the students:

1. The pre-existing duty rule is . . . .
2. The basis for the rule is that the most recent promise lacks consideration.
3. There are exceptions to the pre-existing duty rule.
  - a. Unforeseen circumstances.
  - b. Promissory estoppel (controversial, not recognized everywhere).
  - c. Extra duties undertaken.
4. The U.C.C. has a different rule.

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\* Charles O. Gregory Professor of Law and Thomas F. Bergin Teaching Professor of Law, University of Virginia.

5. Examples of the rule.
  - a. Settlement of a debt.
  - b. Demand for higher wages.
  - c. Surrender of valueless claim.

The commercial outlines do not stop at this point. *Emanuel Law Outline, Contracts* advertises on its front cover “100s of Q&As.”<sup>1</sup> Every *Q* has an *A*. The answers are all of the form, “Yes, because . . .” or “No, because . . .” There is never an answer such as “Jones would argue . . . , and Smith would reply . . . .”<sup>2</sup> Why not? Because the commercial outline is conveying doctrine, not how to lawyer. These outlines,<sup>3</sup> and the students who purchase them, believe this is what you, the professor, want the students to take away from *Contracts*. It may not be the only thing, but it is an essential thing.

I cannot imagine a contracts professor who *only* teaches doctrine. Surely, every professor enriches the study of the pre-existing duty rule by considering such matters as whether the rule is (merely) grounded in the formalism of the

1. STEVEN L. EMMANUEL, *EMMANUEL LAW OUTLINES: CONTRACTS* (5th ed. 1997).

2. Do not blame Emanuel for this. *GILBERT LAW SUMMARIES ON CONTRACTS* is authored by one of our leading contracts scholars. Does it set forth lawyerly arguments? Never. Go to page 197 and you will find the beginning of 116 review questions, followed by the answers. Three answers exhaust the set: yes, no and split of authority. MELVIN A. EISENBERG, *GILBERT LAW SUMMARIES, CONTRACTS* (12th ed. 1993). Need more? Here, in the entirety, is what the contracts Summary says about *Jacobs & Young v. Kent*, 129 N.E. 889 (N.Y. 1921):

Builder and Owner make a contract under which Builder will construct a house for Owner for \$350,000. One of the specifications of the contract is that Builder will use Acme plumbing pipes. Instead, Builder uses Baker plumbing pipes, which are functionally identical to Acme pipes. The problem does not come to light until construction is completed. The cost of completion (*i.e.*, the cost to remedy the defect) would be \$200,000: \$50,000 to tear apart the house to get at the pipes, and \$150,000 to replace the pipes and repair the house. That measure of damage will not be awarded. Instead, damages will be the amount by which the use of Baker pipe diminishes the value of the building as compared to its value if Acme pipe had been used.

EISENBERG, *supra* note 2, at 167. Note that in 1993 dollars the correct price is \$1,112,650.00. See <<http://woodrow.mpls.frb.fed.us/economiccalc/cpihome.html>> (last visited on September 30, 2000). When your students study for their contracts exam, this is what they are learning.

3. The market appreciates the fact that students in law school courses are driven by the need to memorize doctrine. In the spring semester, I surveyed the study aids sold by the Virginia Law School bookstore in the subject of property. There were twenty, each exclusively devoted to Property, and the bookstore administrator told me that more were available that the store did not stock. The cheapest study aids were sets of flash cards (reminding me of high school Latin class) at about \$15. The most expensive was *GILBERT, LAW SCHOOL LEGENDS, PROPERTY* (audio cassette) at \$46.

Had I surveyed the store in the fall semester, I would have found a similar number of study aids for contracts.

past, or can be justified as a way of policing duress. But students understand that they are, at the least, required to memorize the pre-existing duty rule, its exceptions, the U.C.C. variant and so forth, in case there is a pre-existing duty rule issue on the final exam.

Why do we teach doctrine? These possibilities occur to me:

1. If we don't teach doctrine, we don't have enough to teach. To retain our jobs, we teach doctrine.

I do not like this explanation.

2. We teach doctrine in order to have something to test on the final.

This probably has explanatory power. Some professors may argue that testing for doctrine ensures that students have made an adequate effort in the course. It is, in short, a measure of effort.

The purest examination of knowledge of doctrine is the increasingly popular<sup>4</sup> multiple-choice test. I have not seen a multiple-choice test that I thought measured the ability to reason. But, of course, I have not seen all the multiple-choice tests in the law school world. To see that multiple-choice tests do not measure the ability to craft legal arguments, you would need to read some of them. While I have some experience in contracts, I cannot answer the questions from the Harvard Law School examination bank that I have put in the margin,<sup>5</sup> although I can analyze them quite well, thank you.

What is the point of such an exam? It is not to test an ability to reason. But the observation is not limited to multiple-choice exams, for they are just extreme examples. Many, if not most, law schools' exams are designed to

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4. This is a guess.

5. Questions from the Harvard Law School bank include:

1. A promises to buy stock in company X from B. At the time of the contract, both A and B believe that X will win an important governmental contract. Two months later, it doesn't, and the value of the stock falls dramatically. A's promise to buy stock is:

- (A) Discharged, because the contract was a basic assumption to the contract;
- (B) Discharged, if the contract was a basic assumption of the contract for both parties;
- (C) Not discharged, because there was no mistake;
- (D) Not discharged, because there was no misunderstanding.

19. A contracts with B to employ B for 2 years at \$100,000 a year. Mid-way through the contract, because of changes in governmental regulations, it is no longer profitable for A to employ B. A therefore discharges B. A is

- (A) Liable to B, because A breached the agreement;
- (B) Liable to B, because mere unprofitability is not an excuse from performance;
- (C) Not liable to B, because the change in governmental regulations constitutes impossibility;
- (D) Not liable to B, because B has a duty to mitigate.

See <[http://www.law.harvard.edu/Administrative\\_Services/Registrar/exams\\_98-99/exams/less02.htm](http://www.law.harvard.edu/Administrative_Services/Registrar/exams_98-99/exams/less02.htm)> (last visited on September 30, 2000).

have the students spit back doctrine. Some exams ask for more, but if the student does not have the doctrine down, the cause is lost.

3. It is important to a student's future career as a lawyer to master a subject's doctrine.

If it is true that a beginning law student is enriched by absorbing and retaining contracts doctrine, some are considerably more enriched than others. I collected the syllabi of teachers of Contracts at Virginia. This shows the number of pages assigned in a four-hour course (the numbers in parenthesis represent the number of pages had the course been a six-hour course):

Professor A	325 (487)
Professor B	394 (591)
Professor C	440 (660)
Professor D	471 (706)
Professor E	498 (747)
Professor F	501 (751)
Professor G	543 (814)
Professor H	784 (1176)
Professor I	825 (1237)

Note how this compares with the number of pages offered by representative contracts casebooks:

Casebook	Total pages	Principal cases
Knapp et al.	1265	112
Dawson et al	956	153
Farnsworth et al.	997	138
Scott et al.	940	157

If knowledge of contracts doctrine is important, how is it that we disagree on which, and how much, doctrine is important? Notice that Professor E, who is in the middle, covers only 52% of the casebook materials. Professor A covers a mere third.

The apparent disagreement over the optimal amount of doctrine to cover is also illustrated by the fact that there is no consensus on how many semester hours should be given to Contracts in the first year. I looked at twenty-four law schools that posted course requirements on their web pages. The hours assigned to Contracts were as follows:

First-year credit hours for Contracts	Number of schools
6 hours (2 semesters)	16
5 hours	6
4 hours	2

Do students use the doctrine that they learn in Contracts, or any other course, once the course is over? I have two surveys that suggest that they do not. In the first survey, I asked second and third year students:

Since the end of the first semester of law school,

Did you keep your notes from:

Contracts Y N

Torts Y N

Have you looked at your notes from either Contracts or Torts:

Never

Fewer than four times

Four or more times

These are the results:

Contracts	Kept notes	110
	Did not keep notes	16
Torts	Kept notes	107
	Did not keep notes	19
Looked at notes, if kept	Never	91
	Fewer than 4 times	25
	More than 4 times	5

Do you think that a year or two into law practice, a former student of yours will pull out her class notes to see what you said about a topic? Right.

Last year, I interrupted my labor law class late in the semester, and administered a pop quiz. The quiz consisted of twenty questions testing retention of doctrine from Contracts and Property. There were sixty-four students, about evenly divided between second and third year students. While the atmosphere was festive, the students were asked to take the quiz seriously, and they did.<sup>6</sup> Each correct answer was awarded two points, making a total possible score of forty points. The high score was eighteen, the low score was two, and the most common score was six. A copy of the quiz is in an appendix

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<sup>6</sup> I awarded the highest score, and the lowest score, copies of DOUGLAS L. LESLIE, LABOR LAW IN A NUTSHELL (2000). I did not announce that the lowest score would win a prize.

to this essay. I conclude from the results that however well students memorize doctrine for a final examination, they soon forget the doctrine.

4. Students need doctrine for the bar examination.

If we teach doctrine that is meant to be retained for the bar examination, we must do a poor job of it. Only that can explain why every single law graduate takes a bar review course. Also, many law school courses, which also teach doctrine, are not on the bar.

5. Doctrine is used only to provide the raw material for teaching the skills of analyzing precedent and devising legal and policy arguments.

I contend that the primary role of legal education is to teach students how to analyze precedents and statutes, and how to devise legal and policy arguments on behalf of clients. I do not argue that this is the only role of legal education—skills training and theory-dominant seminars—clearly can serve important purposes. But learning how to analyze and argue is, or should be, the purpose of every basic law school course, including Contracts.

Consider what a lawyer does.<sup>7</sup> A client presents the lawyer with a fact pattern. Guided by the legal issues raised by the fact pattern, the lawyer edits the pattern, discarding some facts as irrelevant, discovering or amplifying others.<sup>8</sup>

Next, the lawyer finds (researches) the legal authority—cases, statutes and regulations. Teaching students how to do this is the province of courses in legal research.

The lawyer must now determine for what propositions the authority stands. Secondary sources perform this task only to a point. A competent lawyer would not rely on the authors of a legal encyclopedia to tell him what a case means. Such sources are only excellent compilations of citations. Outlines from sources such as the American Law Institute and Public Law Institute are written by fine lawyers, but fine lawyers have clients, and the outlines tend to be analysis-neutral.

The lawyer's job almost never ends here. Perhaps some claim is clearly barred by a statute of limitations or an argument foreclosed by a recent binding precedent, but much more often the authorities do not unambiguously dictate the result in the lawyer's case. So, the lawyer devises arguments favoring the client's position, and plans refutations of the arguments disfavoring the client's position. The role of legal analysis is here. What are the authorities trying to

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7. This description is set in the context of conflict resolution, but it applies as well to transactional work.

8. There is a chicken/egg aspect to this. The lawyer must know the law in order to identify the issues, but she must identify the issues to know what law to find. This works out by a hit-and-miss process.

accomplish? For example, is a rule of easy application appropriate, or does such a rule produce too many “bad” results, calling for a more costly-to-apply multi-factored rule? What is a “bad” result?

Finally, having analyzed the authorities and devised the appropriate arguments, the lawyer must articulate the arguments and support them with facts. This articulation may be in the context of a trial, settlement discussions, a petition to an administrative agency or a brief to an appellate court. Skills of articulation are the province of courses in legal writing, trial advocacy and the like.

From this description, the role of the basic law school course is plain. It is to develop skills in deciding what authorities stand for and in devising arguments for how the client can or should prevail under those authorities. Describing doctrine for its own sake is a useless pastime.

### III. HOW CASEBOOKS, LAPTOPS, AND POWERPOINT AFFECT CONTRACTS COURSES

#### A. *The lecture*

I do not believe the lecture is well-suited to teach students how to analyze authorities and devise arguments. If it is, it must be that the students learn to emulate the professor who is explaining what each precedent means, how it can be construed in alternative ways and so forth. Watching a pro do her stuff is helpful; but learning by doing, not by watching, is best.<sup>9</sup>

Do law professors lecture? I put these questions to my colleagues at Virginia:

In connection with an essay that I am working on, I wonder if you could share the following information with me? Each of the three questions pertains only to regular classes (i.e., not seminars, principles & practice, and the like).

1. On average, how many casebook pages do you assign per day to the students in a course?
2. Which of the following best describes your dominant method of eliciting student participation in class?
  - a. Random (a.k.a. “cold”) calling

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9. There is an extensive literature on this across a wide variety of disciplines. See LOUIS B. BARNES ET AL., *TEACHING AND THE CASE METHOD* (3d ed. 1994); EDUCATION FOR JUDGMENT: THE ARTISTRY OF DISCUSSION LEADERSHIP (C. Roland Christensen et al. eds., 1992); Thomas R. Lord, *Are We Cultivating “Couch Potatoes” in Our College Science Lectures?*, 29 J. C. SCI. TEACHING 59 (1999); Melanie Wahlberg, *Lecturing At the “Bored,”* 104 AM. MATHEMATICAL MONTHLY 551 (1997).



- b. Advance warning (on-call list, by alphabet, down the seating chart, or similar)
  - c. Ask questions, rely on volunteers
  - d. Lecture, taking questions from volunteers
3. Do you announce to the students that class participation will be factored into the final grade? If so, does it comprise a set amount (e.g., 10%) of the final grade?

Thirty-seven faculty responded. This summarizes the replies.

1. On average, how many casebook pages do you assign per day to the students in a course?

The low was ten pages per day. The high was forty. The most common reply (seventeen professors) was fifteen pages per day.<sup>10</sup>

2. Which of the following best describes your dominant method of eliciting student participation in class?

Fourteen professors who teach in the first year report that they cold-call. Eight first-year teachers use the advance warning method. Eight other first-year teachers use option *c* or *d*; they never call on a student who has not volunteered. So, fewer than 50% of the first-year teachers put students at risk of being called on unexpectedly.

In the upper-class courses, not a single professor, save one visiting professor, calls on students randomly. Seventeen professors report that they use the advance warning method. Twelve professors ask questions and wait for students to volunteer. Seven professors just lecture.

3. Do you announce to the students that class participation will be factored into the final grade? If so, does it comprise a set amount (e.g., 10%) of the final grade?

Eleven professors announce to their classes that class participation *might* be taken into account in determining the final grade. None said that it *would* count (and no percentage was stated). The rest did not tell their students that participation could affect grades, although six professors who made no announcement in fact counted it.

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10. However, the syllabi of our contracts professors yielded figures that are inconsistent with the self-reporting of my colleagues. In Contracts, the low was just under six pages per day, the high was fifteen, and the median nine.

### B. *The Socratic Method*

The data tells me that the Socratic Method is not used in the second and third year of law school at Virginia. Perhaps it is elsewhere, but I doubt it. There is nothing unique about Virginia professors and students.

Is the Socratic Method used in first-year courses, such as Contracts? I am sure that many professors would report using the Socratic Method in Contracts, but whether they actually do is another matter. In my time at Virginia, I have sat in on seven courses, not seven class sessions, rather seven entire courses, every day. Two of these were first-year courses, one Contracts, one Property. Questions of the students, in every course but one, were used to initiate a lecture by the professor. Sometimes the lecture was short, sometimes lengthy; but there was no actual dialogue, and the question asked of the student only served to initiate the professor's remarks. This is not a Socratic dialogue.

To the extent that professors use the Socratic Method, what can we say about it? The Socratic Method is a question and answer dialogue between professor and student. One supposes that to be true to the form, three requirements must be met:

1. The professor must have a place to begin and a place where she intends to end up. She may end up with an "answer" to some puzzle that she thinks is important, or she may end up demonstrating the complexity and incoherence of legal rules. The Socratic Method is a method of teaching, not a view of law.<sup>11</sup>
2. The professor must stick with a particular student long enough to create a dialogue. Bouncing from one student to another may be question and answer, but it is not what is commonly understood to be a Socratic Dialogue.
3. The students are not told in advance who will be called on. If they are, the others will not prepare for class.

Consider this description from a professor thought to have been exceptionally skilled at the Socratic Method:

Powell [Professor Burnele Powell, conducting the interview]: How would you characterize this method, in terms of what it means to teach using the Socratic method?

Louis [the late Professor Martin Louis, the interviewee]: Well, for me it's just simply a matter of asking the student—usually we start with a general question and we refine it. If the student is doing well in answering the more general, easier questions, then you try something a little harder, you probe somewhat more deeply into the subject matter, and you see how far the student can go.

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11. A fine example of this methodology is found in the article by Professor Jones in the first issue of the *JOURNAL OF LEGAL EDUCATION*. Professor Jones gave a script for a Socratic Method class in contracts. See Harry W. Jones, *Notes on the Teaching of Legal Method*, 1 *J. LEGAL EDUC.* 13 (1948).

Usually, the student will get lost or find himself or herself unable to answer the question after awhile. Then, I suppose you have to offer some hints, some helps, some rephrasing of your question in order to try to bring the student toward an understanding of what your latest question is.

Powell: And what does the rest of the class do while you are inquiring of the student?

Louis: There are two possibilities: They sit there and watch and celebrate the fact that they are not the one being called on while they take notes, or occasionally I will ask them or they will volunteer and jump in and try to answer the latest inquiry themselves . . . .

Powell: Do you tend to focus your questions on a particular student, or do you address questions to a number of students?

Louis: I tend to call on a specific student and start with the student. If the student is in trouble, I may seek aid from the student sitting next to him or her, I may seek an answer from the rest of the class, but having obtained an answer I will usually come back to the student until I feel I've spent enough time with the student or, on occasion, the student is obviously so completely discombobulated by the whole affair that nothing useful will be accomplished by staying with the student. Sometimes if the student is doing well I'll stay with him a fairly long time, and I'll wake up and realize that I've been talking to him for twenty minutes, and I'll smile and say, 'That was a pleasure. Thank you very much and I'm sorry I engaged you for longer than usual.'

Powell: What is it that the rest of the class is doing while this student is being focused on?

Louis: As I said once before, probably first thanking their lucky stars that they're not the student, particularly if the student is not doing well. If the student is doing well, they are probably wondering whether they could do as well or why they couldn't do as well, and obviously writing like crazy and trying desperately to hear because sometimes students don't speak up and I have to repeat the answers. Obviously the moment the student has any trouble or I want a more in-depth answer, they know I'll be looking around the rest of the room. So I would say the room can't go to sleep because I will be asking the room to help out. On the other hand, it is clear that once I call on a particular student and begin to ask that student questions, the rest of the room does relax in the sense that, at least for the time being, they are not being called on.<sup>12</sup>

Notice the importance of terror: it is how Professor Louis insured preparedness and attention. Also notice the purpose of the dialogue: it is to drive the student to failure.

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12. *Burnele v. Powell, A Defense of the Socratic Method: An Interview with Martin B. Louis* (1934-94), 73 N.C. L. REV. 957, 959-60, 982-83 (1995).

The late Professor Phillip Areeda, described as “a master of the Socratic Method,” agrees with my third element (cold-calling), and is willing to sacrifice my second (sustained dialogue with one student):

8. I said that [with the Socratic Method] one gets the students to participate actively in this analytic process, but obviously there is insufficient class time to involve the 150 members of my contracts class in every issue.
  - a. What you try to do, therefore, is to induce the students you haven’t called on to participate vicariously—to silently pretend that they must answer the question you have posed another or that they must respond to what another student says.
  - b. You do this by randomly moving around the class, calling on a large number of students every hour. The risk of being questioned induces this vicarious participation. By contrast, many will tune out—waiting for a professorial summary—when the instructor selects only a few students for each day’s dialogue.<sup>13</sup>

Given that terror is the motivator in the Socratic Method, is it sadism that commends it to professors? Areeda offers a different justification:

1. Why should students care? Because they learn best by doing. They learn best to reason about the law and facts by doing so. I have taught antitrust law socratically and otherwise, and have ample evidence that students learned and retained more about analyzing antitrust problems in the socratic years.<sup>14</sup>

To avoid student resentment of the “drive the student to failure” technique of the Socratic Method, some professors find something praiseworthy in almost every student comment. Unfortunately, students perceive, and often feel, patronized by this.

In a course where the terror of cold calling is absent—either in an advance-warning class or a lecture class—will the rational student come to class prepared? In the first part of the first semester, when students are inexperienced, I think they are prepared. After that, my answer is that they generally are not. To defend my answer, I need to make some observations about casebooks and student preparation.

### C. *The casebook*

I examined seven Property casebooks chosen at random. The average number of pages was 1200 (8400 divided by seven).<sup>15</sup> I looked at four labor

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13. Philip E. Areeda, *The Socratic Method*, 109 HARV. L. REV. 911, 916 (1996).

14. *Id.* at 921-22.

15. I was appalled when the pages totaled 8400 precisely. I thought about making the number, say, 8438; but I decided to be honest.

law casebooks (an upper-class course). The average number of pages was 1085 (4340 divided by four).<sup>16</sup>

According to my colleagues, the typical professor assigns fifteen pages per day, both in first year and upper class courses. That means that in a three-hour course, the professor covers 630 pages (three hrs/week times fourteen weeks times fifteen pages/hr). So, a typical course in the second or third year covers sixty percent of the casebook materials. This may be defended on the ground that it allows professors to pick and choose what to cover (e.g., educational flexibility). However, it is a concession that it is “unnecessary” to cover forty percent of the materials.<sup>17</sup> Moreover, the professor who would like to survey all, or nearly all, of the subject cannot. It would require detailed, interstitial editing,<sup>18</sup> and that is too messy.

When the authors of a casebook find a case that “teaches well,” authors of other casebooks rush to use it. How else would one explain the frequency with which *Lucy v. Zehmer*<sup>19</sup> and *Jacobs & Young v. Kent*<sup>20</sup> are found in contracts casebooks? So, when a professor says that she uses a particular book because she likes the cases, I would suggest that she look at the other books. They have an equally good selection of cases. In fact, by and large, they have the *same* collection of cases. If this is correct, the selection of cases is not the critical variable in the attractiveness of a particular casebook. Even if I am wrong, case selection has to share billing with book structure and notes.

It is hard to believe that a book’s structure (how it orders the materials) ought to count for much. I have heard it said that Lon Fuller’s choice to begin his contracts casebook with damages, rather than offer and acceptance, was a breakthrough. If I may quibble; starting a course in contracts with remedies for breach may well have been revolutionary, and the very best way to teach Contracts; but a professor can do it with any contracts casebook. Just begin the course with Chapter Nine.

This brings us to the last characteristic of casebooks, and the one that I want to address: the Notes. Law casebooks consistently offer thoughtful, thorough and detailed notes and questions, mainly questions.<sup>21</sup>

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16. But Property is either a six-hour course (double the hours of an upper-class course) or a four-hour course (133% of an upper-class course). Can it be that first years are so much slower to learn? If so, how can we allow first years to take upper-class courses in the second semester of their first year? An alternative thesis is that professors think that 950-1200 pages “is about right for a casebook.”

17. Since I believe that doctrinal rules are not what we should be trying to teach, I embrace this concession.

18. For example, “read pp. 454-57 (up to note 3), 468 (beginning with the *Stelwell* case)-70; 477-80 (note 1 only).”

19. 84 S.E.2d 516 (Va. 1954).

20. 129 N.E. 889 (N.Y. 1921).

21. There are exceptions, but I claim they are few.

To make my point about the “Notes and Questions” in current casebooks, I circulated this inquiry to first, second and third-year students. They numbered thirty-one first-year students who had completed their first-semester of law school, and seventy second and third-year students who had completed either three or five semesters of law school.

I am beginning to work on an essay on methods of teaching law, and I am collecting some data. I have a class-preparation question that you could help me with.

The following is typical of the notes found in casebooks:

“Minnesota at the time of the *Hughes* case was, and at present is, a race-notice jurisdiction. Would the result in the case be different in a notice jurisdiction? Would the result in *Hughes* be different if a tract index were used? See *Andy Associates, Inc. v. Bankers Trust Co.*, 399 N.E.2d 1160 (N.Y. 1979).”

My question has to do with how you prepare for class. The question is this:

In a law school course how often when a note like this appears in a casebook have you gone to the library, Lexis or WestLaw and read the cited case?

- a. Usually
- b. Often
- c. Seldom (1-3 times)
- d. Never

The response rates were:

1st: 90%

2d/3d: 56%

The responses were:

	1st	2d/3d
Frequently	0	0
Sometimes	0	0
Seldom (1-3 times)	9 of 28	8 of 40
Never	19 of 28	32 of 40

So, students largely ignore casebook citations. But, you may object, it does not follow from the fact that students ignore the citations that they ignore the questions as well. I do not know how to test that assertion empirically. My questionnaire inquired into a concrete act and a response of “never” ought to be completely reliable. I would not trust the accuracy of an answer to the question: “How often did you think about Notes such as this?” However, I think it implausible that a student would actively consider a Note question but *never* care to consult the cited case for a court’s result.

The Note used in the questionnaire was taken at random from a property textbook.<sup>22</sup> At the time of the survey, every property teacher at Virginia used this book. I selected from that book fifteen pages (the most commonly used assignment length) and counted the question marks. The selection<sup>23</sup> was random except that once I opened the book; I went back three pages so as to begin with a new section, as I thought a professor’s assignment naturally would.

There were eighteen question marks.<sup>24</sup> I assert that no student will think about eighteen questions when preparing for a class. Students commonly take four courses per semester. Suppose that comes out to thirteen classes per week and each assignment has eighteen questions? You see the point. I further contend that no professor will address eighteen questions in a class period. Now, that is fine for a professor, who will pick and choose among the questions. It is a disaster for a student who would like to come to class prepared. This is because a professor never forecasts which of the eighteen questions will be taken up in class.<sup>25</sup>

Faced with this, what is a responsible but rational student to do? She might select a random sample of the Notes questions to analyze. She might try to guess which Notes are important—likely to be discussed in class or covered on the exam—and focus on them. Or the student could trust her professor to examine over what was covered in the classroom. She would then ignore all the Notes. Well, she might read them, but she would not think about them. The survey suggests the last option is the universally adopted strategy. A

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22. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (3d ed. 1993).

23. *Id.* at 525-40.

24. Fifteen randomly-selected pages in the Farnsworth casebook on Contracts, pp. 349-64, contained thirty-seven question marks. E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS (5th ed. 1995).

25. I sat in on a property class before teaching it myself. I was surprised not to hear active student criticisms of the sort, “Professor, in Note 5 on page —, there are three questions. We didn’t take them up in class. What I want to know is, are we responsible for them? If not, please tell us so, because if we are, I don’t know how to analyze them.” Did I “solve” this when I taught Property? No, I too just ignored most of the questions and took up those that I thought were important or which, for some reason, intrigued me. I relied on student politeness not to ask what they were responsible for.

professor who hopes that students will have thoughts about the Notes will always be disappointed.<sup>26</sup>

Moreover, if called on to analyze a question in the Notes, a student ought to react with irritation. The professor is demanding something for which no rational student would, or could, provide. It should not be surprising then that students will not stand for cold calling in upper-class courses. It is the rare professor who can cold-call in upper-class courses and still draw students. At Virginia, there are none; the faculty are driven to the lecture.<sup>27</sup>

How do lectures and “on-call” lists affect class preparation by experienced students? I have no systematic data but theory and impressionistic evidence suggest there is a profound effect. I once spoke to my son, who was then a second-year law student at Yale. It was mid-semester and I asked him how classes were going. He said okay; but there was a lot of reading. In one required course, he said, the professor had assigned a 1500 page casebook and some 600 pages of supplemental reading, most of it articles by the professor. I asked my son how much of the reading he had done. He replied, “Why, none. Professor [A] just lectures. I will read it before the exam.”

This is an intelligent response to the situation. So long as the professor’s lectures are coherent and self-contained (that is, the professor does not lecture in a short-hand that requires one to have read the casebook—none do), it makes more sense to read the material after the class than before. That way, the professor’s interests and insights can be brought to bear on the readings.<sup>28</sup>

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26. The question is why casebooks are written this way. One can begin with the question of who is the consumer of a casebook. The professor makes the selection and is the obvious candidate. To think of the students as a collective consumer requires a story in which the students evaluate a course based in important part on whether the casebook is satisfying and in which the professor internalizes these evaluations either directly (a desire to be popular) or through the mediation of the dean (other things being equal, unpopular teachers don’t get pay raises). This is not a good descriptive explanation for why casebook, Notes, as discussed above, are not attractive to students.

By covering every topic under the sun in Notes, casebook authors demonstrate their thoroughness and, often-times, sophistication. Perhaps the nature of casebook Notes can be attributed to risk aversion by professors who adopt the casebook. Risk averseness would explain it if professors fear running out of material to talk about in a given classroom hour more than they fear leaving assigned material undiscussed. Another explanation for the kind of Notes found in modern casebooks—many questions, remarkable doctrinal detail—is that professors want to persuade students of the importance and complexity of the course.

27. Some faculty may embrace the lecture format willingly. A good set of lecture notes will last a professor many semesters, freeing up time for other activities. Some fields (e.g., Health Law) may require considerable yearly updating; other fields (e.g., Contracts) none at all.

28. Why don’t professors videotape their lectures and show them in subsequent years? In most subjects, a lecture ought not to require revising more frequently than every three or four years. I am told it is because at a tuition of \$25,000, students want to see a live person. *See* <<http://www.law.harvard.edu/students/catalog/admission/tuition.shtml>> (last visited on



*D. Laptops and Powerpoint slides*

I lump laptop computers and Powerpoint slides in the same category: devices that destroy interactions in the classroom and promote lectures.

In a law school where the door to the classroom is in the back and has a window, I invite you to observe a class where the professor is using Powerpoint slides. The room will be partially darkened and the professor will be talking. The students will not be talking. If you stand there for ten minutes, you are not likely to see a single student speak. In the unusual class where the professor tries to encourage student comments while Powerpoint slides are used, you will see that students appear to be focused not on what their classmate may be saying, and not much on what the professor is saying. Their attention will be glued on the Powerpoint slide like a first-grader focuses on Barney.

Their focus has a purpose. It is essential, in the students' view, to get every bit of information that is in the slides into their notes. This way they will have what they need to memorize for the examination. Some professors, but according to casual observation, not many, distribute copies of their Powerpoint slides before or after class. If the slides are available before class, students can use the professor's remarks to annotate the slides.<sup>29</sup> Professors worry, however, that if copies of the slides are given to students, there is less of an incentive to prepare for class, or to pay attention in class.

Do students appreciate Powerpoint slides? I distributed this questionnaire to students at Virginia:

I am doing a survey for an essay that I will be writing this spring. Could you help me? I do not use Powerpoint in the classroom, but many of my colleagues do. With respect to their use, do you:

Strongly appreciate its use

Mildly appreciate its use

See some uses but on balance dislike it

Wish it would be eliminated.

If you wish to amplify on your choice, do so here:

Here are the results:

Strongly appreciate: 15

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September 30, 2000). I await the perfection of the holographic image. Then the students will not know whether the professor is there or not.

29. This is frustrated by the use of laptop computers. Students do not want annotated hard copies of Powerpoint slides, they want everything on their hard disk. If the professor hands out a hard copy of the slides, the students will type them in. We lack the technology to allow students to download the slides and to annotate them with margin comments.

Mildly appreciate: 48

Mildly dislike: 39

Eliminate it: 9

Never had it: 19

In fact, I was not very interested in these numbers; I was interested in the comments because they might give me clues as to the teaching methods associated with the use of Powerpoint. What I found was a strong, near universal, association between Powerpoint and the classroom lecture. Representative comments were:<sup>30</sup>

I “mildly appreciate its use.” It is convenient for note taking, but generally when a professor uses Powerpoint, then the class is straight lecture and not that interesting.

See some uses but on balance *hate* it—it just makes professors lecture more quickly, skim over important points, and assume that we’re keeping up because we’re frantically typing.

I’ve only had one class where it’s being used. I don’t pay much attention to it. Sometimes it’s nice if I didn’t catch a point or a specific rule it’s nice to be able to look up and catch it, but in general I simply follow the lecture.

In response to your survey, I have to say that while Powerpoint can be helpful in some classes, I find that it can also be a huge distraction. Those of us with laptops tend to copy down anything we see and usually that’s done at the expense of listening to the lecture that accompanies the text on the board. If you were able to ensure that no one spent their time copying the powerpoint presentation and instead listened to the teacher (by posting the presentations online, perhaps), then I think it could be a valuable tool.

At Virginia, the classrooms have been wired so that every student can plug in a laptop computer. With the class matriculating in 1999, each student was required to own a laptop. The result is that every student brings a laptop to class. Looking, again, through the window at the back of the room, you will find that nearly every student is peering into a computer screen. A non-trivial number of students are playing solitaire. I am told that some students will be watching a DVD (closed-captioned). When the professor is lecturing, the students type in their notes. When a classmate speaks, up pops solitaire and other games.

Can the professor conduct a question-and-answer class in the face of a room of computers? I presume so, but the computers make it difficult. For instance, the professor cannot ask, “Note the second paragraph of the court’s

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30. I have posted all the comments on <<http://www.CaseFileMethod.com/powerpoint.htm>> (last visited on September 30, 2000).

opinion, on page 543. What do you think the judge is trying to say?" The reason the professor cannot ask that is that there is no room on the desks for the casebook. Woe to the student who would like to mark up her casebook as a way of preparing for class. She can mark it up, but she cannot bring it to class. (Some students, I am told, try to balance the book on their laps, leading to numerous thumps as books fall to the floor. They soon abandon it.)

This leads me to comment on the current debate over distance-learning. At its core, distance-learning consists of a professor lecturing over the Internet. If legal education values the dissemination of doctrinal information and its analysis by professors, distance-learning is surely wonderful. A note of caution, though: for those Arizona State and Virginia law professors who dream of their lectures being beamed into the Harvard classroom, I have bad news—the transmission doesn't run in that direction. If, as I believe, legal education requires students to learn by doing, distance-learning is a disaster.<sup>31</sup>

#### IV. THE CASEFILE METHOD

The CaseFile Method creates a classroom environment in which fully prepared students interact with each other and with the professor to analyze precedents and to create and evaluate legal arguments favoring and disfavoring the position of a hypothetical client.

The CaseFile Method assigns a different CaseFile each class period over the course of a semester. A CaseFile consists of a fact pattern and a selection of authorities, primarily court cases. The fact pattern is presented in two parts. The first part is a memo from a partner to an associate setting out the assignment. The second part is a memo from a paralegal describing the course of his research. The facts average two to three pages. Each fact pattern is set in a particular state. An entire CaseFile averages seventeen pages.

In Contracts, the precedents are from the state in which the facts occur, and sometimes from other states as well, especially when there is no authority in the state where the facts occur. In class, students are asked to extract the doctrinal rules from the precedents and to devise arguments for and against the outcome desired by the client. The CaseFiles are distributed over the Internet or by hard copy in cooperation with the professor's law school or bookstore.

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31. Distance-learning is not saved by having discussion groups after the lecture. Look at the quality of the discussion leaders, for that is where the education, if any, will occur. Online "discussions" are so lacking as to barely be worth mentioning. Try it sometime when you see a website announce, "Hal Sutton will be live Tuesday at 9:00 p.m. to engage in an online discussion with all you golf fans."

### A. *Origin of the CaseFile Method*

Four years ago, I learned that students in MBA programs that use the “Case Method” far prefer MBA classes to law school classes.<sup>32</sup> This was told to me by joint-degree candidates at Virginia, and I have had it confirmed by students from other schools. The Case Method is the dominant, often exclusive, method of teaching at many of the nation’s leading graduate business schools (e.g., Harvard, Stanford and Darden (Virginia)). The core features of the Case Method are:

1. One Case a day.
2. Class participation is an explicit percentage of the grade in the class (commonly 50%).
3. The final examination is another Case.

The Case Method has produced thousands of Cases and several books on its rationale and methodology.

### B. *The Case and the CaseFile*

In MBA programs, a typical Case varies from five to twenty pages. It presents a fact pattern and asks students to plan a course of action. A Case might, for instance, give the history of a successful retailer and ask whether the retailer should expand by opening new company-owned locations or by franchising. A Case in a course in personnel management might be set out along the following lines. The Case describes Margaret Mullen, who has been with the company for ten years. The Case describes the nature of the company and Mullen’s work record. In the last year, Mullen’s performance has declined. The Case sets out how the company measures employee performance (e.g., quantity of sales, supervisory evaluation) and locates Mullen’s performance figures in the overall scheme. Finally, the Case tells how similarly-treated employees have been treated in the past. Students are asked to recommend to the company what to do about Mullen’s lagging performance. Possible solutions include discharge, formal warning with explicit performance goals, formal warning from director of personnel, verbal warning from Mullen’s immediate supervisor and so forth.

CaseFiles are different from MBA Cases. They are not drawn from actual controversies, although I try to make them realistic, as well as interesting. A CaseFile contains the materials from which to “solve” the CaseFile; solve in the sense of discovering and analyzing relevant doctrine and devising arguments.

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32. Some authors mistakenly equate the use of cases in law schools with the Case Method used in MBA programs and elsewhere. *See e.g.*, <<http://www.abo.fi/instut/hied/case.htm>> (last visited on September 30, 2000). The confusion arises out of the word “case.” In law, a case is a judicial opinion; in the Case Method, a case is a problem authored by an academic to be solved by students.

A professor using CaseFiles is ordinarily more directive in the classroom than is an MBA professor using Cases. MBA students have two or more years of business experience before coming to the program. In the first year, MBA students are assigned to teams, with each team containing members with different business backgrounds. With the professor's help, MBA students use past experience and commonly-agreed upon courses of action to address the Case in class. Contracts students in law schools, by contrast, have no experience analyzing precedents and devising arguments. Even in upper-class courses, these skills can be considerably refined. The result is that the law school professor using CaseFiles will find herself giving more reactions to good and bad arguments than will the MBA professor.

Case and CaseFile classes are more interesting than a lecture (or an abstract discussion) on "Theories of Effective Personnel Control: Discharge and Discipline" or "The Evolution of the Pre-existing Duty From Common Law to U.C.C." The Case Method replicates in a classroom setting what the students will do as managers of companies. The CaseFile Method, while using simple fact patterns, previews to the students what lawyers do. In both Case and CaseFile classes there is a heightened sense of realism and relevance. Analyzing issues through student discussion is more interesting than listening to a lecture or watching a professor grill a hapless non-volunteer.

*C. Class participation as an explicit component of the grade*

Absent intervention by the professor, I do not believe that an adequate level of student participation in the classroom can be reached.<sup>33</sup> Participating in class risks embarrassment. The gain from participating is only dimly perceived by students, if it is perceived at all. Interestingly, the student who enjoys participating may be informally sanctioned by classmates for taking up too much "air time." The most vocal students enjoy class-wide notoriety.

The professor can produce student participation only with a punishment or a reward. The Socratic Method and all other forms of cold-calling rely on punishment. The unprepared student risks public humiliation. On-call lists use punishment to elicit participation from a few designated students. Those students not on call have no greater incentive to prepare than if they were to attend a lecture. In fact, according to classroom norms, students not on the on-call list misbehave when they volunteer in class.

The CaseFile Method encourages participation by rewarding it. A student can choose her own time to participate and, with some constraints, her own topic.

So, a CaseFile professor is well-advised to make participation an explicit component of the grade. Like the MBA programs, I assign it as 50% of the

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33. Could a professor lecture a CaseFile? Absolutely, and the students would, I think, like it better than a traditional lecture; however, what a wasted opportunity to engage the students.

final grade. Participation in my courses has two elements: quantity and quality. Each day I record who has contributed. At the end of the semester, I make a subjective judgment of the quality of each student's contribution over the course of the semester. Some professors using CaseFiles make a quality judgment of each day's contribution. I have never had a student complain about the subjective aspect of the participation component.

*D. The final exam: just another CaseFile*

Each CaseFile is self-contained. While references to analyses of other CaseFiles are appropriate in the class, and often occur, they are not necessary. Students understand that on the examination they will be asked to bring their skills of analysis to bear on a new CaseFile. They will not be required to memorize "rules" from CaseFiles used during the semester. This has an important and beneficial effect: CaseFile Method students do not take notes in class. Neither notes nor outlines are of any use on the "final CaseFile." Freed from the need to record the class in notes, a student is able to follow and participate in the discussion. This is directly attributable to the nature of the exam.

The "final is just another CaseFile" feature of the CaseFile Method has another important effect. It is the rare CaseFile that can be fully analyzed in a class period, neither a minute more nor a minute less. Like any other professor, a CaseFile Method teacher wants to avoid dealing completely with a CaseFile only to find there are ten minutes left in the class hour. As a result, CaseFiles tend to err on the side of having more issues than can be completely dealt with in one class. In a traditional law school class, the professor may postpone a last bit of analysis to the following day. On the next day, the professor finishes up the prior day's materials and proceeds to the next assignment. In a CaseFile Method class, this would sacrifice the benefits of "one CaseFile a day."<sup>34</sup> If a professor believes that she can teach farming without plowing every field, failing to reach some parts of the analysis does not worry her. However, it would worry a student who must accumulate and memorize doctrine, rules and principles for a final exam that is backwards-looking. Because the "final is just another CaseFile" approach does not require this of students, they feel less angst that some of the farm was not cultivated.

*E. Choice of precedents for CaseFiles*

It would be a mistake for the CaseFile method to discard the great "teaching cases" in Contracts (and other courses). These precedents can be identified by their universal appearance in all, or nearly all, contracts

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34. This is not so important. "One CaseFile a day" offers the excitement of something new each class period.

casebooks. When there is no well-known teaching case on a particular issue, I prefer recent cases to old.

On those occasions when I want students to see the black-letter rules, the CaseFile contains a quote from the Restatement or a brief excerpt from a fictional hornbook on contracts. When I want to raise in advance a policy perspective that students would not likely see on their own, the CaseFile contains a quote from a fictional treatise on the philosophy of contract law.

#### *F. Dynamics in the CaseFile classroom*

Consider how an ordinary law school class is conducted, using a contracts case, *Jacob & Youngs v. Kent*.<sup>35</sup> In *Jacob*, a building contractor, perhaps deliberately, installed a brand of pipe in the Kent's new house that was different from the brand specified in the construction contract. The Kents claimed breach of contract—which it was—and refused to make the final payment on the project unless the specified brand of pipe was substituted. In an opinion both elegant and hard to follow, Judge Cardozo refused to allow the Kents to stop their performance (paying for the house) and awarded them only nominal damages.

In the ordinary law school class, the relevant facts of *Jacob & Youngs* are extracted and then the doctrine (condition vs. promise, substantial performance vs. material breach) is extracted. Students are then asked what policy justifications, if any, might account for a result in which the Kents do not get for what they bargained. Once this is done the professor may probe both doctrine and policy by asking, for example, could the contractor lay walnut flooring if oak was called for, or suppose Mrs. Kent's grandfather was a founder of the Reading Pipe Company, the brand specified by the Kents?

A CaseFile class proceeds in much the same fashion, but the purpose of analyzing *Jacob* is explicit and stated at the outset: extract the doctrines and policies from *Jacob* in order to apply them to the CaseFile fact pattern. This produces a different dynamic. Students feel that using the CaseFile fact pattern, as the focus of the analysis of the precedents, is closer to what lawyers do, and it is. Moreover, the CaseFile fact pattern previews what will be discussed in class. This is different from springing the same hypothetical during the class.

#### *G. Student preparation*

Every student in every CaseFile Method class, first-year or upper-class, is prepared for class every day. This is a strong statement, I know, but in my experience, it is true. Glancing at the desks where the CaseFiles are spread out, covered with highlightings, confirms the preparation. The reason is simple. A student cannot contribute to the CaseFile discussion without having

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35. 129 N.E. 889 (N.Y. 1921).

read the CaseFile—everyone will be able to tell—and the CaseFile is the only thing the class is about.<sup>36</sup>

#### *H. Mastery of doctrine*

I don't require the students to memorize doctrine. My reasons are the subject of the first part of this essay. Lawyers don't memorize doctrine. When they need doctrine, they look it up. If they know doctrine, it is because they acquire the knowledge over years of practice. Students memorize doctrine for an exam, and then they forget it.

That being said, let me share the comment of a professor that used CaseFiles in his course last year:

I think you undersell the Casefile Method in de-emphasizing the amount of doctrine students learn using it. My sense was that the students in my course learned quite a bit of doctrine, even though their knowledge of it was more visceral than analytic—arising out of the cases themselves rather than a professor's gloss on the cases. I don't know whether my students will retain their doctrinal knowledge any better than they would if they had taken a conventional course, but I don't think it's really true to say that they're learning analytical skills RATHER than doctrine. They're learning both.

#### *I. Class participation in a CaseFile course*

I counted the number of students participating each day in my courses in Property, Health Law, and Sports Law last year. The average in each course was in the mid-twenties. It is not clear that it is a "better" number than, say, fifteen. My point is simply that there is a lot of discussion in a CaseFile course.

A frustration that some students feel in a CaseFile course is not being able to talk enough. It is not that they need a participation credit—I do not give additional credit for speaking more than once—but often they do not have an adequate opportunity to follow-up on a point previously made, as I try to spread the participation around. Balancing follow-ups with opportunities for new participants to talk is a skill that must be developed by the professor.

Some students cannot talk in class. Even though they are enrolled to become lawyers, they can not talk in class. This happens in my classes, and has been reported to me by other professors using CaseFiles. In many CaseFile sessions, I call on a student and ask him "to begin." After it becomes clear to me which students have trouble volunteering, I call on one of them to start the discussion. Sometimes this will "break the ice" for the student, but not always.

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36. To every rule, there is an exception. In Health Law, I have a death and dying week (e.g., when can the patient's life support be turned off, etc.). You could talk without reading the CaseFiles that week, if you picked your spot.



I allow a student who has missed a class to get participation credit by writing me a two to three page memo on the CaseFile that they missed. The memo is not required. I impose a limit of three memos, although I have lifted the limit for some absences due to illness or a death in the family. In Contracts, my rough count is that every student who missed a class turned in a memo. That is grade angst for you.

I always have a firm idea of where it is best to begin the analysis in class (we never recite the fact pattern), and it is usually with the first precedent; but a student might begin anywhere. Thus, one of my roles is to restructure the order of the materials as the discussion unfolds. In some sessions, I vary the routine by putting several points (names of cases or descriptions of issues) on the chalkboard and insist that we proceed through the points in order. Whichever approach I begin with, the inquiries are always: what does this precedent stand for; is it persuasive; how does it relate to our fact pattern; and what arguments can we make with respect to it?

I try to reserve some minutes at the end of the hour to make the structure of the CaseFile's analysis explicit. This "bottom line" is important to students, although I sometimes have trouble taking the minutes to do so when the discussion is active.

#### *J. Student reactions to the CaseFile Method*

Anonymous student evaluations in my CaseFile Method courses have been very positive. I limit my upper-level courses to sixty-four students (the size of the classroom). Every course I have taught since I began using CaseFiles has been fully enrolled. Professors at other schools using CaseFiles report student enthusiasm for the method.

Two common positive remarks are of the sort "this will really help me this summer (when working for a firm)," and my favorite "the class goes by so quickly."

The popularity of the CaseFile Method is not because the demands on the students are less onerous than in other courses. CaseFiles average about seventeen pages per day. Participation is graded. Students report that they like the CaseFile Method because it mirrors what they will find in the practice of law. I believe, though, that the fact that the CaseFile predefines the purpose of each class has much to do with it. Also, class participation is legitimated. In any event, student evaluations reported the consistency with which the students read the CaseFiles with care.

*K. CaseFile limitations*

I do not expect the CaseFile Method to be used at schools where classes in basic courses have 150 students. Student participation is part of the CaseFile Method and I have no idea how it can be accomplished in a large class.<sup>37</sup>

I can handle participation in my upper-class courses of sixty-four students each. This is somewhat surprising to me because the classes should contain self-selected “talkers.” The students seem to appreciate that not everyone can talk every day. They also seem more satisfied to listen to the comments of their classmates than are many first-year students. I suspect it is a lessening of grade-angst in the upper-classes.

I cannot find a way to cover purely historical material in Contracts and Property using a CaseFile. Perhaps I have not tried hard enough; but one could argue that if no modern relevance can be shown, leave the material to a course in Legal History.

I have a Property CaseFile that works well in the area of fee simple determinables and contingent remainders; but otherwise, I cannot not write a CaseFile that puts students through all those little three-line, “identify the future interests” exercises found in property casebooks. If I wanted to do them, I would not use CaseFiles for, say, two class periods, and I would play an “identify the interest game.” The same is true for assumpsit and the other writs in Contracts.

Nor have I decided what the best way is to address what I might call “pure theory” in the CaseFile Method. By pure theory I mean, for example, the Coase Theorem, crystal/mud rules, property rules/liability rules and the nature of contract default rules. There are (at least) three approaches to pure theory:

1. Ignore it. Let the professor bring it up as he deems it relevant.
2. Put it in a CaseFile that may seem contrived. For instance, one of my CaseFiles in Contracts describes a fact pattern pending before a trial judge who has just returned from a law and economics conference for judges and makes a speech to the local bar association praising the insights of the Coase Theorem. The partner asks for a memo describing the Coase Theorem and how it might apply, or not, to a pending case before the judge.
3. Set aside a few “theory days,” in which the CaseFile Method is not used.

I combine the first and second approaches.

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37. I suppose that a professor could use CaseFiles and make the same compromises that any large-class professor makes—lecture, on-call lists, and the like. Professor Moskowitz argues that problems are suitable for large classes, and I agree. Myron Moskowitz, *Beyond the Case Method: It's Time to Teach With Problems*, 42 J. LEGAL EDUC. 241, 242 (1992). The CaseFile Method involves more than the use of problems.

V. MARKETING CASEFILES AND SOME REMARKS ON INTERNET DISTRIBUTION  
OF TEACHING MATERIALS

Some professors believe that CaseFiles are some kind of computerized legal instruction. This is not correct. I distribute the CaseFiles over the Internet; but the students invariably convert them to hard copy, even though they own laptops and use them in other courses to take notes. Students are still accustomed to paper.

The materials need to be formatted in the same way for all students and their printers. I distribute the CaseFiles in two ways. A student can have access to the CaseFiles and secondary materials in any of my courses by paying a \$24 fee for a password. The CaseFiles are then downloaded in Adobe pdf format (a free program to the reader) and printed out. The pdf format insures that the page breaks and so forth will be the same for every student. Every student will see the same second paragraph on page six.

Internet distribution is pretty successful, and will continue to get better. My Internet distribution has been nearly flawless, but there have been occasional problems with a student's own computer that have been attributed to the website or the pdf files. Still, some professors prefer to have the CaseFiles reproduced and sold by their own school or bookstore.<sup>38</sup>

I supply a Teaching Note with every CaseFile in every course. The Teaching Note explains what I do with the CaseFile.

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38. In that event, I provide the professor with a CD containing the CaseFiles, a copyright permission, and I ask for a royalty of \$20 per student. For students who do not resell their casebooks on the used book market, a CaseFile course is cheaper than a traditional course. I have not tried to make the comparison in light of the used market.

## Appendix

## Twenty Questions

\_\_\_\_\_ (name)

Year 2 3 (circle)

1. When are the four unities required?
2. *O* conveys Blackacre “to Charlottesville School Board, its successors and assigns, so long as the premises are used for school purposes.” What is the effect of the “successors and assigns” language?
3. *O* conveys Blackacre “to Charlottesville School Board, its successors and assigns, so long as the premises are used for school purposes.” What interest does the School Board have?
4. What interest does *B* have in the following examples:
  - a. conveys to *A* for life, then to *B* and her heirs if *B* lives to attain the age of 21.
  - b. *O* conveys to *A* for life, but if *B* attains 21 during *A*’s life, to *B* upon attaining 21.
5. Jackson owns a duplex: a two-family home with a common center wall. Jackson rents one of the two units to Martin. A month later, Jackson rents the second unit to Paul. Paul is learning to play the drums and keeps Martin awake at night. If this is enough to permit Martin to get out of the ease, what is the doctrine?
6. Maxwell types out and signs a deed to his farm to Frampton. Maxwell puts the deed in a safety deposit box. A month later, Maxwell dies, leaving a daughter as his only heir. Does Frampton take the farm?
7. When is “touches and concerns” relevant?
8. What is a prescriptive easement?
9. What is curtesy?
10. How do you partition a tenancy by the entirety?
11. What are the elements of promissory estoppel?
12. List three types of contracts to which the Statute of Frauds applies.
13. Mack and Terry agree that if John comes to school on Tuesday, Mack will pay Terry \$50. Draft this as a condition subsequent.
14. Under what conditions does a mutual mistake void a contract?

15. What is the difference between the peppercorn theory of consideration and past consideration?
16. Are either or both of these deals enforceable? Give your reasons.
  - a. "I will sell you 1600 crates of light bulbs for delivery on next Tuesday."  
"You have a deal."
  - b. "I will sell you 1600 crates oranges for delivery on next Tuesday. We can decide on the price then."  
"You have a deal."
17. The parties enter into contract for the sale of a farm. Before the farm is transferred, the buyer says that the seller, now deceased, told her that he would see to it that an ice house that obstructed a view of the mountains would be removed. Does the death of the owner void the deal?
18. The parties enter into a written contract for the sale of a herd of elk. Before the herd is transferred, the buyer says that the seller told her in negotiations that he would trim the antlers of the bull elk before delivery, which he did not do. Can seller successfully invoke the parol evidence rule if the buyer sues for her costs of trimming the antlers?
19. What is a unilateral contract?
20. State the mailbox rule in Contracts.