

1992

Beyond the Case Method: It's Time to Teach with Problems

Myron Moskowitz

Golden Gate University School of Law, mmoskovitz@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Legal Education Commons](#)

Recommended Citation

42 J. Legal Educ. 241 (1992)

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

Beyond the Case Method: It's Time to Teach with Problems

Myron Moskowitz

The case method is now the primary method of teaching in American law schools. Just about all current American law professors—you and I, that is—were taught by the case method. When we began teaching, we chose our teaching method by looking back to our own teachers, looking around at other professors (many of whom would be judging us at tenure time), and looking into the classroom books available. Everywhere we looked, we saw nothing but the case method. Was some young, insecure assistant professor likely to buck the system? Not likely. The rookie followed the crowd, adopted the case method, was knighted with tenure, and now passes the tradition on to new rookies.¹

And so, King Case Method continues to rule the realm. It's time for some little kid to ask The Question, and I volunteer: Is the King wearing any clothes?

When I began research on this paper, my plan was much more modest. My working title was "Extending the Problem Method to Large First-Year Courses." I had no ambition to challenge the centerpiece of American legal education. But as I read and wrote, I realized two things.

First, the case method was designed not to help students become better lawyers, but to accomplish a more scholarly goal: to enable teacher and students to examine a case as the raw material of a new science, the science of law. Coincidentally, the case method did happen to do a better job of enhancing certain skills useful in law practice, but that was an accidental by-product.

Second, since the main purpose of legal education today is to train lawyers (rather than to examine "the science of law"), we should adopt the problem method. It is designed especially to train professionals. Other professional schools—in medicine and business—use it, and we should too. It has everything the case method has to offer, and more.

Myron Moskowitz is Professor of Law, Golden Gate University. He thanks the following professors for their very helpful comments on an earlier draft of this article: William C. Banks, Dr. Howard S. Barrows, Marilyn J. Berger, David Crump, Nathan M. Crystal, Anthony D'Amato, Deene Goodlaw, Wayne R. LaFave, Thomas A. Mauet, Robert Meisenholder, Thomas D. Morgan, Gregory L. Ogden, David Oppenheimer, Edward H. Rabin, Ronald D. Rotunda, John W. Strong, Mark V. Tushnet, David H. Vernon, Douglas J. Whaley, and John Wilson. He also thanks Ashley Tobin and Matthew Newman for their research assistance.

1. Perhaps my age is showing. Today, the AALS holds seminars for new law teachers, acquainting them with various teaching methods. However, only a fraction of new teachers attend these seminars.

It is time to adopt the problem method as the primary method of instruction² in the standard large class and the standard core course, in every year of law school.³

The Promise of the Case Method

Before 1870 law was taught by the "lecture/textbook" method.⁴ Students listened to lectures (some by professors, but many by judges and practicing lawyers) and read textbooks that distilled the rules from the cases. Both activities were essentially passive: the student absorbed information but did not interact much with the teacher. The purpose of this endeavor was to train students to practice law. As a vocational school with few full-time professors, the law school had a second-class status in the university community.⁵

In 1870 the newly appointed dean of Harvard Law School, Christopher Columbus Langdell, decided to change all this. As part of his program to upgrade the prestige of the law school, he adopted the case method.⁶ Langdell believed that a law school should be a place to study law as a science, just as other university departments studied subjects by the "scientific method."⁷ He viewed the appellate opinion as the raw material of this new science, and the

2. "Primary" does not mean "only." There should be plenty of room for other teaching methods: lectures, demonstrations, case analysis, clinics, and whatever else a teacher finds effective. Students learn in different ways, and some teachers are better at some methods than at others.
3. Professor Cavers proposed "that a substantial part of the time of the law student and of his teachers be devoted to the use of the problem method." David F. Cavers, In *Advocacy of the Problem Method*, 43 *Colum. L. Rev.* 449, 450 (1943). I would go a bit further.
4. See Lawrence M. Friedman, *A History of American Law*, 2d ed., 610 (New York, 1985) (quoting Joseph Redlich, *The Common Law and the Case Method in American University Law Schools* (New York, 1914)):

"[T]he students are assigned a specified portion of a regulation text-book to study, and for the most part to memorize; this is then explained by the teacher and recited on at the next period." Part of the hour was taken up by "quizzing." This was the "more or less purely mechanical testing of the knowledge learned by the students."

See also J. H. Landman, *The Problem Method of Studying Law*, 5 *J. Legal Educ.* 500, 501 (1953).
5. Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 215 (Chapel Hill, N.C., 1983).
6. See Friedman, *supra* note 4, at 612. Langdell was not the first law professor to use cases (just as his namesake was not the first to "discover" America), but he was responsible for its dominance today. *Id.* at 613 n.20.

The case method was just one of several changes Langdell made in his effort to increase the prestige of the law school. He also required admittees to have a college degree or to pass an entrance exam, expanded the LL.B. program from two to three years, and required final examinations in each course. *Id.* at 612.
7. See *id.* at 613 ("He believed that law was a 'science'; it had to be studied scientifically, that is, inductively through primary sources."); see also Arthur E. Sutherland, *The Law at Harvard 175-76* (Cambridge, Mass., 1967) ("Langdell evidently thought of the 'science of law' as analogous to the sciences of chemistry or botany."); Stevens, *supra* note 5, at 52 ("Just as there was to be a 'scientific' base for history, the classics, and politics, the spirit of science was to invade the law.").

law library of cases as his laboratory. As a research scientist might dissect a mouse to learn how its organs work, Langdell would dissect a case to find out how the law works.⁸ Classroom discussion through his “case method” would involve the student in this scientific process.⁹

We might call his program one of “basic science” rather than “applied science.” Just as a physics professor might expect graduate students to go to work for M.I.T. rather than General Motors, Langdell might have expected his students to become law professors rather than practitioners—and several did. He seemed to have little interest in the practice of law.¹⁰

Langdell cared about his students, of course, and he understood that most of them would in fact practice law. But he believed that “mastery of doctrine” (through study of cases) would surely enable them to apply the doctrines to new situations—a lawyer’s bread-and-butter task.¹¹

I submit that “mastery of doctrine” is not sufficient. Most students can learn to apply doctrines to new situations only by *practicing* such application, in law school classes. Langdell overlooked this fact, possibly because practical training of law students was not his top priority, and possibly because the reforms he did institute were such a substantial improvement over prior methods that he felt no need to go any further.

In any event, after quite a bit of resistance, Dean Langdell hired his followers and implanted the case method at Harvard.¹² His apostles spread the system to other law schools, and eventually it became the dominant method of law teaching.¹³ Why? Because it gave law schools prestige. No longer would they be seen as mere “vocational” schools taught mainly by (nonscholarly)

8. See Sutherland, *supra* note 7, at 176:

To [Langdell] proper study of the law, like the study of chemistry, physics, zoology, and botany, consisted in the careful observation and recording of many specific instances, and then from these instances derivation of general conclusions that the qualities of the phenomena or specimens observed would hold constant for other instances in the same classes. Langdell’s specimens were the opinions of judges, collected in a library. The student of law, he thought, like the student of chemistry or biology, must learn the arts of close scrutiny and discriminating classification. The student of law, that is to say, must continually study, compare, and classify judicial opinions.

9. *Id.* at 176-77.

10. Friedman, *supra* note 4, at 615; Albert J. Harno, *Legal Education in the United States* 59 (San Francisco, 1953).

11. Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.

C. C. Langdell, *Selection of Cases on the Law of Contracts*, preface (Boston, 1871).

12. Langdell hired one of his own students, James Barr Ames, soon after graduation. See Friedman, *supra* note 4, at 615 (“No matter; to teach a science, scientists were needed, not practitioners of law.”).

13. *Id.* at 616.

judges and practitioners. Now a law school would be a school of science, entitled to as much respect as the chemistry department.¹⁴ The fact that Langdell's method was not intended merely to train lawyers was seen as its virtue, not its vice.

But in fact the case method did turn out better lawyers. Interaction with a Socratic teacher helped to sharpen students' minds. They learned to think on their feet, to express themselves, and to read cases—skills that a practicing lawyer needs and that the lecture/textbook method had done nothing to enhance. In addition, while the prior method taught students the rules of law, the case method gave them a deeper understanding of the rules: it delved into the policy considerations that persuaded judges to adopt them.

But if these benefits are only by-products of a method that was not primarily designed to improve lawyering skills, *and* if the primary purpose of law school has shifted from the "scientific" to the "professional"—that is, if our main purpose today is to turn out good lawyers—we should take another look at the case method. It might be time to go back to the drawing board.

Some professors use the case method to teach the rules of law: they go through a casebook by asking for the facts and holding of a case, and making sure the students understand the holding. Then it's on to the next case.¹⁵ Langdell might well cry out (while turning over in his grave): "Stop! If that is all you're doing, go back to using textbooks and lectures. They explain the rules more clearly, accurately, and quickly than cases do. Just find a good hornbook and read it to your students." Under the case method, the holding is less important than the way the court gets to it. At its best, the case method teaches students to think like lawyers by having them watch lawyers and judges (and law professors) think like lawyers—in other words, by showing them good role models to emulate.¹⁶

Our best teachers understand this and use the case method accordingly. But students do not always understand. Despite all our efforts, many of them

14. See *id.* at 618:

In the history of legal education, . . . [a] principle of vocational training struggled against a principle of scientific training. At the same time a principle of integration with general liberal education struggled against a principle of segregation. University law schools had been weakly integrationist, and weakly and reluctantly vocational. Langdell's new method was antivocational, but strongly segregationist within the university and in the context of scholarship.

15. Almost 50 years ago, another law professor made a similar charge: "[T]he case method as actually practiced in most law courses is not really a process of gaining an understanding of legal principles from the cases so much as it is a process merely of memorizing the facts and rules stated in the cases." Henry Weihofen, *Education for Law Teachers*, 43 *Colum. L. Rev.* 423, 434 (1943); see also Edmund M. Morgan, *The Case Method*, 4 *J. Legal Educ.* 379, 383 (1952) (if the case is used merely as a vehicle for imparting information, "the game is hardly worth the candle"); Lon L. Fuller, *Legal Education and Admissions to the Bar in Pennsylvania*, 25 *Temp. L.Q.* 249, 263 (1952) (observing that good case method instruction was "a rarity" in Pennsylvania law schools, where the method was used mainly to convey information).
16. Langdell's first disciple, James Barr Ames, once said: "The object arrived at by us at Cambridge is the power of legal reasoning, and we think we can best get that by putting before the students the best models to be found in the history of English and American Law." Harno, *supra* note 10, at 61.

try to skip the emulation and simply learn the rules. In 1942, an AALS Committee lamented:

[U]nder the case method students were not only to derive the holdings from the cases but were critically to appraise the application of the legal principles involved, both to the given situation and to other possible variant situations. But we realize now that much of this theory of the case method has not in practice been realized. Actually, students too often regard the cases as authoritative solutions which they need only read and absorb; each case becomes an end in itself, and the educative process stops at the very threshold of its most significant stage.¹⁷

I'm afraid that students often do the same thing today, half a century later.

Let's assume that this is correctable. It is not fair to judge the case method solely by its worst applications, so let's assume that we have the best professor teaching receptive students by using the case method at its highest level. What do we have? Well, we have some excellent modeling going on.¹⁸ Students read good arguments presented by good lawyers to good judges who write good opinions, and they see a brilliant law professor dissect those arguments and opinions.¹⁹ When these students become lawyers and have occasion to explain and criticize a reported opinion for a senior partner, a judge, or occasionally a client, we can expect them to do a terrific job.

Unfortunately, not many lawyers spend much of the working day in this sort of activity. Instead, most lawyers spend most of their time trying to solve problems.²⁰ Those problems consist of raw facts (not yet distilled into the short, coherent story laid out in an appellate court opinion)—facts presented by clients, along with some question like “Legally speaking, how do I get myself out of this mess?” or “How do I plan my affairs to avoid getting into a mess in the first place?”

If our job is to train students to “think like lawyers,” then we should train them to solve such a problem, because that is the kind of thinking that lawyers must actually do. But—you reply—law schools cannot spend their scarce academic resources teaching students every single skill they will need in law practice—how to bill clients, how to manage an office, how to find the courthouse. True, but problem-solving is not like any of those activities. Problem-solving is the single intellectual skill on which all law practice is based.²¹

17. Report of the Committee on Teaching and Examination Methods, Handbook of the Association of American Law Schools 85, 87-88 (1942) [hereinafter 1942 AALS Report].

18. See Morgan, *supra* note 15, at 381.

19. A transcript of a case method class taught by Professor Harry W. Jones appears in Charles D. Kelso, Teaching Teachers: A Reminiscence of the 1971 AALS Law Teachers Clinic and a Tribute to Harry W. Jones, 24 J. Legal. Educ. 606 (1972). Kelso calls it “an example of case-method teaching at its very best.” *Id.* at 628.

20. See Report of the Committee on Teaching Methods, The Problem Method, 1966: Survey and Appraisal, Proceedings of the 1966 Annual Meeting of the Association of American Law Schools (Part One) 198, 207 (1966) [hereinafter 1966 AALS Report] (lawyers “seldom turn to [cases] save when they are seeking solutions to concrete problems”).

21. See Gordon A. MacLeod, Creative Problem-Solving—For Lawyers?! 16 J. Legal Educ. 198 (1963) (“A lawyer might best be described as a professional problem-solver.”); see also Anthony D’Amato, The Decline and Fall of Law Teaching in the Age of Student Consumerism, 37 J. Legal Educ. 461, 470 (1987) (“Lawyering is preeminently problem-solving.”); Cavers, *supra* note 3, at 455; Leo H. Whinery, The Problem Methods in Legal Education, 58 W. Va. L. Rev. 144, 145 (1955).

Some proponents of the case method have agreed but have asserted that the case method does teach students problem-solving.²² Perhaps it does, to the extent that you can learn by watching.²³ But watching is not the same as doing. To learn to play the piano, it probably helps to study Van Cliburn. But that is no substitute for playing the piano yourself.²⁴ Remember your music teacher? "Practice, practice, practice!" While the case method shows the student how others solve problems, the problem method lets students learn to solve problems by actually finding, framing, and analyzing issues themselves.²⁵

But wait a minute. Haven't I forgotten something? What about the hypothetical questions that case-method professors typically pose during class? A hypo may require students to consider the outer boundaries of the principle being discussed, to reconcile that principle with a competing principle, or to apply the principle to a simple set of facts. It surely requires students to "think on their feet," as lawyers must do.

All very useful, but a hypo is not a problem. A hypo usually raises only one or two issues. A problem raises several issues, which must be organized before each can be separately analyzed. A hypo has to be short: it is sprung on the students during class. There's not enough class time to think about and analyze a long set of facts—i.e., a problem. Calling the use of hypos "inadequate" to teach application of legal principles, an AALS committee said in 1942 that "the practice obtained by the student with 'hypos' is necessarily grounded in shallow consideration for want of opportunity to wrestle with the problem before class, and is apt to be secondary to mastery of the applicable principles themselves."²⁶ Clients come to lawyers with problems, not hypos. A lawyer trained to analyze a hypo has not been trained to analyze a longer problem.

Law school clinics can give students this training, but clinics are at the fringe of legal education, usually reserved for a small number of third-year

22. See, e.g., Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 *J. Legal Educ.* 1 (1951); D'Amato, *supra* note 21, at 484; Morgan, *supra* note 15, at 391.

23. See D'Amato, *supra* note 21, at 472 ("The casebooks, after all, contain problems that others have already solved."); see also 1966 AALS Report, *supra* note 20, at 202 ("Every case in a casebook is a problem solved"); W. H. Charles, *What Is the Problem Method?* 40 *Can. B. Rev.* 200, 219 (1962) (calling the case method a "solved-problem" approach). Charles suggested that Langdell used a form of the problem method, as he used the briefs of counsel as well as the court's opinion in his classes. *Id.* at 218. I disagree. Briefs might give the student additional insights into how other people solve problems, but they do not provide the critical ingredient: having the students try to solve problems themselves.

24. A medical professor used an aviation example. Would you ride in an airplane flown by a pilot who learned to fly solely by watching other pilots, but had never handled the controls herself? Howard S. Barrows & Robyn M. Tamblin, *Problem-Based Learning: An Approach to Medical Education 6-7* (New York, 1980).

25. See Charles, *supra* note 23, at 205, 218-19.

26. 1942 AALS Report, *supra* note 17, at 86, 88; see also Cavers, *supra* note 3, at 451; Charles, *supra* note 23, at 210; Edward H. Rabin, *Book Review*, 18 *J. Legal Educ.* 471, 472 (1966); Weihofen, *supra* note 15, at 442; Whinery, *supra* note 21, at 153. Patterson put it bluntly: "The impromptu gropings of the student who is called upon in class to answer hypothetical questions are of little value either to him or to the others." Patterson, *supra* note 22, at 22.

students.²⁷ In the standard large class at the core of the curriculum, only the problem method will give the student this needed training.

Problem-Based Learning in Higher Education

For a moment, let us think of law professors as educators whose subject happens to be law, rather than as lawyers who happen to teach. From this perspective, we have much in common with our colleagues in other professional schools. We are all trying to turn out people who will render high-quality professional services to others.

The current trend toward problem-based learning in higher education stems in part from Dr. Benjamin Bloom's analysis and ranking of the types of learning (in ascending order of difficulty and importance): (1) knowledge, (2) comprehension, (3) application, (4) analysis, (5) synthesis, and (6) evaluation.²⁸ Problem-solving helps students to move up this ladder. While lectures teach items 1 and 2, the problem method enables students to learn 3 and 4, and sometimes to go further.

Graduate schools of business have used the problem method for some time, calling it (ironically) the "case method."²⁹ Harvard began using it in 1911.³⁰ Students work on elaborate problems (called "cases") created especially for this purpose. Each case contains raw facts about a firm faced with some sort of crisis. The students study the cases at home and discuss them in large classes. The new method displaced the lecture method because "[i]t asks not how a man may be trained to know, but how a man may be trained to act."³¹

In medical education, the problem method has had to vault some of the same hurdles it now faces in law schools. Medical schools too have been staffed by people who had no training in teaching and simply adopted the teaching methods (mainly lectures) used on them as students.³² Many medical professors have viewed problem-solving as a vocational skill, inappropriate for academic study.³³ Others have imagined the problem method to be more expensive and time-consuming than conventional medical education.³⁴

27. Judge Jerome Frank considered Langdell a "brilliant neurotic" who founded a system which is far removed from the needs of the practicing lawyer. As a partial remedy for this, Frank proposed that law schools run legal clinics. Jerome Frank, *A Plea for Lawyer-Schools*, 56 *Yale L.J.* 1303 (1947).
28. Benjamin Bloom, *Taxonomy of Educational Objectives: Handbook I: Cognitive Domain* (New York, 1956). Professor Michael Josephson has adapted this list to law schools by rearranging and renaming the items as follows: (1) knowledge, (2) understanding, (3) issue-spotting, (4) problem-solving, (5) judgment, and (6) synthesis. 1 Michael Josephson, *Learning & Evaluation In Law School* 58 (Los Angeles, 1984).
29. See Melvin T. Copeland, *And Mark an Era* 259 (Boston, 1958); C. Roland Christensen & Abby J. Hansen, *Teaching and the Case Method* (Boston, 1987).
30. Copeland, *supra* note 29, at 255.
31. *Id.* at 263.
32. See Barrows & Tamblin, *supra* note 24, at 2.
33. *Id.* at 5.
34. See Stewart P. Mennin & Nancy Martinez-Burrola, *Cost of Problem-Based Learning*, in Arthur Kaufman, *Implementing Problem-Based Medical Education* 208 (New York, 1985).

But the realities of what medical students need to learn overcame these obstacles. Doctors (like lawyers) spend their careers trying to solve problems, and to do so they must “learn how to learn.” No medical student can learn all the scientific knowledge she might need in practice, and much of what she does learn will soon be forgotten or obsolete. When she gets into practice, she must be able—without the help of any teacher—to read what she needs to read in order to learn how to solve a patient’s current problem. The problem method is the best way to get a medical student headed in that direction.³⁵ In addition, it helps students retain knowledge: knowledge acquired to help solve a problem is remembered better than knowledge acquired without such a motivation. “Knowledge *used* is better remembered.”³⁶ And the problem method motivates medical students to work harder, for it “challenges them with the very situations they will face in their elected professional field.”³⁷

Because of these advantages, several medical schools have by now adopted the problem method,³⁸ and the method is making its way in other fields.³⁹ In some schools, first-year medical students start with problems, without any prior study of medicine,⁴⁰ and the problem method is used in large classes.⁴¹

35. See Barrows & Tamblyn, *supra* note 24, at 9-10, 109; Robert E. Waterman & Cooley Butler, Curriculum: Problems to Stimulate Learning, in Kaufman, *supra* note 34, at 16, 17; Howard S. Barrows, Problem-Based, Self-Directed Learning, 250 JAMA 3077, 3080 (1983).

36. Barrows & Tamblyn, *supra* note 24, at 9-10, 16; see also David G. Thompson & Reed G. Williams, Barriers to the Acceptance of Problem-Based Learning in Medical Schools, 10 Studies in Higher Educ. 199, 203 (1985); Geoffrey R. Norman, Problem Solving Skills Versus Problem Based Learning, 79 Cornell Veterinarian 307, 308 (1989).

37. Barrows & Tamblyn, *supra* note 24, at 13; see also Arthur Kaufman & S. Scott Obenshain, Origins, in Kaufman, *supra* note 34, at 1, 3 (“The students’ enthusiasm for the [problem method] course was overwhelming.”).

38. Use of the problem method reportedly began in 1969 at McMaster University in Canada (W. Pallie & D. H. Carr, The McMaster Medical Education Philosophy in Theory, Practice and Historical Perspective, 9 Med. Teacher 59 (1987)), and then spread to other medical schools, including Harvard (LuAnn Wilkerson & Grahame Feletti, Problem-Based Learning: One Approach to Increasing Student Participation, 37 New Directions for Teaching & Learning 51, 52 (1989)), New Mexico (Arthur Kaufman, Implementing Problem-Based Medical Education 1 (New York 1985)), Newcastle (in Australia) (Barrows, *supra* note 35), Limburg (in Holland) (*id.*), Southern Illinois (*id.*), and Dartmouth (Kathleen K. Colby, Thomas P. Almy & Michael Zubkoff, Problem-Based Learning of Social Sciences and Humanities by Fourth-Year Medical Students, 61 J. Med. Educ. 413 (1986)).

According to Professor Howard S. Barrows of Southern Illinois University, “Twelve years ago there only three medical schools in the world that employed PBL [problem-based learning] and they were felt to be deviant and questionable.” Letter from Howard S. Barrows to Myron Moskovitz (Sept. 9, 1991). Today, however, “PBL is becoming widely accepted in medical education, at least ten schools have an organized PBL approach and I would estimate thirty or more are retooling. A recent census of the AAMC would indicate that almost every medical school in the country is experimenting with PBL in some way or other.” *Id.*

39. For example, dentistry (R. D. Brown & J. R. Moore, Problem Situation Teaching in Oral Surgery, 1977 Brit. Dentistry J. 151); psychopathology (D. A. West & M. M. West, Problem-based Learning of Psychopathology in a Traditional Curriculum Using Multiple Conceptual Models, 21 Med. Educ. 151 (1987)); and nursing (Donald R. Woods, What About Problem-Based Learning? 15 J. C. Sci. Teaching 62, 63 (1985)).

40. Barrows, *supra* note 35, at 3079; Pallie & Carr, *supra* note 38, at 63; William Birch, Towards a Model for Problem-Based Learning, 11 Studies in Higher Educ. 73, 75 (1986); Thompson & Williams, *supra* note 36, at 201.

41. Howard S. Barrows, Ann Myers, Reed G. Williams & Edward J. Moticka, Large Group Problem-Based Learning: A Possible Solution for the “2 Sigma Problem,” 8 Med. Teacher 325 (1986).

These developments in professional education are really parts of a larger movement in pedagogy. The teaching of problem-solving has been moving into undergraduate education.⁴² It is becoming recognized that the problem method does more than facilitate learning of the subject at hand: it improves reasoning processes that can be applied to other situations.⁴³

Teaching Law by the Problem Method

The literature on the problem method of teaching law is sparse but laudatory.⁴⁴ A 1942 AALS report states:

[U]nder the "problem method" deduction of legal principles becomes not the end of legal education, but the means to an end—that, the adequate solution of the legion of problems which a dynamic society precipitates in ever-new combinations. . . . The "problem-method" recommends itself as a pedagogical device for re-orienting legal education to its major, basic task.

. . . The merit of the problem method is that it more effectively forces the law student to reflect on the application of pertinent materials to new situations and accustoms him to thinking of case and statute law as something to be used, rather than as something merely to be assimilated for its own sake.⁴⁵

A later (1966) AALS report lists five virtues of the problem method: (1) it approximates the lawyer's approach to the law, (2) it affords training in planning and advising, (3) it broadens the range of matters open to the student's consideration, (4) it increases the effectiveness of instruction where case law is inadequate (primarily where legislation is involved),⁴⁶ and (5) it provides a stimulus to student interest.⁴⁷

42. See, e.g., G. D. Moss & D. McMillen, A Strategy for Developing Problem-Solving Skills in Large Undergraduate Classes, 5 *Studies in Higher Educ.* 161 (1980) (describing use of a form of problem-method teaching in a course in modern Asian studies); Birch, *supra* note 40, at 75, 77 (discussing use of problem method in teaching engineering and public service); Woods, *supra* note 39, at 63 (noting that problem-based learning has been used to teach agriculture, and proposing that it be used to teach science). Christensen and Hansen include materials used in teaching seminars for Harvard faculty from several different departments. Christensen & Hansen, *supra* note 29.

43. See Wilkerson & Feletti, *supra* note 38, at 55.

44. See W. H. Bryson, The Problem Method Adapted to Case Books, 26 *J. Legal Educ.* 594 (1974); Cavers, *supra* note 3; Charles, *supra* note 23; H. F. M. Crombag, J. L. de Wijkerslooth & E. H. van Tuyl van Serooskerken, On Solving Legal Problems, 27 *J. Legal Educ.* 168 (1975); Kenneth Culp Davis, The Text-Problem Form of the Case Method as a Means of Mind Training for Advanced Law Students, 12 *J. Legal Educ.* 543 (1960); Landman, *supra* note 4; MacLeod, *supra* note 21; Richard S. Miller, A Report of Modest Success with a Variation of the Problem Method, 23 *J. Legal Educ.* 344 (1970); Gregory L. Ogden, The Problem Method in Legal Education, 34 *J. Legal Educ.* 654 (1984); Stevens, *supra* note 5, at 215; Charles W. Tainter, Required Summer Term and "Problem" Course, 2 *J. Legal Educ.* 347 (1950); Marlin M. Volz, The Legal Problems Courses at the University of Kansas City, 7 *J. Legal Educ.* 91 (1954); Bernard J. Ward, The Problem Method at Notre Dame, 11 *J. Legal Educ.* 100 (1958); Weihofen, *supra* note 15, at 441-46; John W. Whelan, Experiments with "Problems," 9 *J. Legal Educ.* 245 (1956); Whinery, *supra* note 21; 1942 AALS Report, *supra* note 17; 1966 AALS Report, *supra* note 20.

45. 1942 AALS Report, *supra* note 17, at 87-88; see also Ogden, *supra* note 44, at 657-66 (discussing advantages and disadvantages of the problem method).

46. See Patterson, *supra* note 22, at 23; Ogden, *supra* note 44, at 663-64.

47. 1966 AALS Report, *supra* note 20, at 206-11.

Commentators have defined “the problem method” in various ways.⁴⁸ However defined, there seem to be three essential features.

The first feature is, of course, the problem. The problem involves several issues cutting across several cases and statutes. It is meant to resemble a complex situation that a lawyer might face in practice.⁴⁹ The problem may be framed in the context of litigation, negotiations, drafting, or planning. The student must approach the problem in a specified role, such as advocate, judge, advisor, planner, legislator, or law clerk to any of these.⁵⁰

The second feature is the advance distribution of the problem. Students are expected to work on the problem at home and come to class prepared to discuss it. Whereas the hypothetical sprung during class calls for “thinking on your feet,” the take-home problem gives the student time for in-depth, well-organized legal analysis.⁵¹

The third feature is that the problem is the focus of the class discussion.⁵² (Under the case method the hypothetical is incidental.) The assigned cases, statutes, and other materials become tools for helping to solve the problem. A Socratic discussion of the cases—the essence of Langdell’s case method—still

48. It has been defined most simply as the method “whereby students learn law by using it in working out concrete legal problems.” Ward, *supra* note 44, at 100. Ward goes on to set out six specific objectives of the problem method. *Id.* at 101.

The 1942 AALS Report defined the method in terms of four characteristics: (a) reasoning versus memory of information, (b) conduct versus information for its own sake, (c) natural setting for learning versus artificial setting for learning, and (d) the priority of the problem versus the priority of principles. 1942 AALS Report, *supra* note 17, at 87; see also Weihofen, *supra* note 15, at 443.

Professor Cavers managed to discuss the topic intelligently while refusing to provide any definition. Cavers, *supra* note 3, at 449. I will not trouble the reader to learn whether I am capable of such a formidable task.

49. See Ward, *supra* note 44, at 107 (“[G]enerally speaking, a single, lengthy, and fairly complex problem is best suited to serve the several objectives of the method.”).

The term “problems” was defined by the 1966 AALS Report to include “skeletal hypotheticals with pre-digested facts which often are found in casebook notes.” 1966 AALS Report, *supra* note 20, at 204. Though it recognized that this diluted the definition, the Report justified the dilution:

Even though a problem calls merely for the answer to a legal question and entails no difficult analysis of facts, the experience it exacts of the student in resolving an uncertainty of law or action by reference to legal materials is different from his experience in looking at those materials with no new problem to solve but merely to see how a court or legislature had solved a problem that had confronted it.”

Id. While I appreciate the difference, I believe that the problem method can contribute much more to a student’s education if the problem is complex. Thus, my definition of “problem” is narrower.

50. See Charles, *supra* note 23, at 209; Ward, *supra* note 44, at 107.

51. See 1966 AALS Report, *supra* note 20, at 202-03:

The basic characteristic of the problem method, as the Committee has defined it, lies in the task it poses for the student. The Committee sees the method as requiring the student, in preparing for class, to focus his study on a problem or problems posed in advance of class. His task is to wrestle with each problem, drawing on whatever material may have been assigned to be studied in connection with it.

See also Ward, *supra* note 44, at 107 (“Advance distribution is necessary Pop-off opinions ought not to be encouraged.”); Charles, *supra* note 23, at 202, 207.

52. 1966 AALS Report, *supra* note 20, at 203-04; Charles, *supra* note 23, at 202; Wilkerson & Feletti, *supra* note 38, at 53.

occurs, because the students must understand the cases in order to analyze the problem. But the students must do much more. They must analyze a new complex set of facts, organize the issues into a logical framework, read the relevant authorities with an eye towards resolving the client's concerns, and apply the authorities to the facts of the problem. In class, the professor guides the discussion around these tasks.

Within these boundaries, there can be many variations of the problem method.⁵³ The problem may be simple, complex, or something in between, depending on how advanced the students are and how experienced they are in problem analysis. Students may be required to submit written answers to problems, prepare outlines of answers, or merely prepare to discuss the problems in class. Students may be assigned to argue against each other in class, or to serve as judges. They may work alone or in teams. Problems can require library research (even into nonlegal materials) or simply some assigned pages. Problems may cut across two or more fields of legal subject matter.⁵⁴

An Example

On the assumption that my readers—like most of my students—are more receptive to the concrete than to the abstract,⁵⁵ I now move to the concrete. Let's take a typical casebook assignment for one class and see how it might be taught under the case method and the problem method.

The course is Criminal Procedure, and there are 50 to 100 students. Last class, we discussed the *Miranda* opinion, and today we will focus on the *Miranda* warnings. We will cover four cases (typical for most teachers): *Berkemer v. McCarty*,⁵⁶ *Rhode Island v. Innis*,⁵⁷ *New York v. Quarles*,⁵⁸ and *Duckworth v. Eagan*.⁵⁹ For those of you who are unprepared, I will summarize the cases (just this once!).

In *Berkemer*, the Supreme Court elaborated on *Miranda*'s holding that warnings need not be given unless the defendant is in "custody" or "deprived of his freedom in a significant way." *Berkemer* held that even though a traffic stop of defendant (for unsafe driving) was a valid seizure of the person (though not an arrest), the stop did not constitute "custody" or "deprivation of freedom," so no *Miranda* warnings were required.

In *Innis*, the Court held that the warnings need not be given unless the police engage in "interrogation," which it defined as "express questioning" or

53. See Whinery, *supra* note 21, at 150 ("No one problem method can be said to be the proper one under all circumstances.")

54. See Ogden, *supra* note 44, at 656-57 (suggesting several ways to use problems).

55. See Weihofen, *supra* note 15, at 443 ("Learning proceeds from the concrete to the general, not from the general to the particular.")

56. 468 U.S. 420 (1984).

57. 446 U.S. 291 (1980).

58. 467 U.S. 649 (1984).

59. 492 U.S. 195 (1989).

“any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.”

In *Quarles*, the Court held that, even where the “interrogation” and “custody” requirements are met, if the police are seeking a gun hidden by the defendant, the need for “public safety” outweighs the need for the warnings, so the warnings need not be given.

Miranda had held that the warnings must include advice of the right to appointed counsel during interrogation. In *Duckworth*, the Court upheld warnings which told the defendant that he had a right not to answer questions until he obtained a lawyer, but a lawyer would not be appointed for him until he went to court.

How will these cases be handled under the case method and the problem method? How will the student prepare? What will go on during class time?

Preparing for a class under the case method, the diligent student will probably “brief” each of the four cases, writing a summary of the facts, issues, holdings, and reasoning.⁶⁰ Knowing that the teacher may ask her about any of these aspects, she will probably try to do a careful job. She will learn how to read a case carefully, and she should also learn the rules of law contained in the court’s opinion.

The student may expect that the professor will pose hypos that require the application of these rules and cases to new fact patterns, but probably these will be what I call ambush hypos, sprung during class without prior notice. There is no realistic way to prepare for them (unless the casebook contains some that the teacher might use).

During class, the teacher might call on a student to recite on the first case, *Berkemer v. McCarty*, and might prod periodically as the student recites the facts, holding, and reasoning. When satisfied that the class understands the holding of the case and the rules it applied, the teacher moves on to the next case. Another teacher might lead the students into a discussion of the historical context of the case and the social or economic forces that might have affected the judges, might examine the underlying policies that the rules or the holding tried to effectuate, or might pose hypos that force the students to think how the rules and holding will apply to different fact situations. For instance, after the recitation on *Berkemer*, the teacher might ask why the warnings should be given to an arrestee, but not to a mere detainee. How does this distinction properly serve the competing interests of law enforcement and protection of the suspect’s privilege against self-incrimination? What if the detention had occurred in a police station rather than on the highway?

Then the class proceeds to the next three cases, handled in pretty much the same way. At the end of the hour the students should understand each of the cases discussed and some of the difficult policy issues involved. And they may have some notion of how to apply each case to a simple fact situation.

60. See Morgan, *supra* note 15, at 382.

Now let us imagine that the teacher uses the problem method. Before class, the students get a lengthy written problem to analyze while they are reading the four assigned cases. The problem might look something like this:

Memorandum

To: My Law Clerk

From: Wally Walkum, Esq.

Re: State v. Rippov

My client, Rick Rippov, is on trial for burglary and assault with a deadly weapon. Before trial, I moved to suppress three statements which Rippov allegedly made to Police Officer Connie Copp. The transcript of Copp's testimony at the hearing on the motion is attached, along with some cases I found: Berkemer v. McCarty, Rhode Island v. Innis, New York v. Quarles, and Duckworth v. Eagan. Please advise me as to what arguments I should make in support of my motion, and whether they are likely to succeed.

Transcript of Testimony of Officer Copp

Q. Officer Copp, what happened when you first saw Mr. Rippov?

A. I was investigating a series of warehouse burglaries. In each case, the burglar had entered through a skylight and had taken only small things he could carry. In one burglary, he shot and wounded a security guard. I looked through our arrest records, and found that Rippov and about half a dozen other crooks in town had a similar method of operation. Officer Bob Bopp and I went to a street corner where I thought Rippov hung out, and he was there. He saw us, and started to walk away, but I stopped him. I took him by the arm and said, "We'd like to talk to you for a minute." I patted him down, but felt nothing. I then told him that we had a witness who saw him go through the skylight at Putz Plumbing. He said, "No way, man. There was nobody around that place when I went in."

Q. Did he say anything else?

A. Yes. I then placed him under arrest, and I asked him if he had a car nearby and wanted me to call someone to come and get it. He said, "Yeah. I have some special skylight screwdrivers in that car."

Q. Any other statements by Rippov?

A. Well, we then took him to the station. On the way, while I was driving, I told him his rights. I told

him that he had a right to remain silent and a right to a lawyer, and that when we got to court the judge would get him a lawyer for nothing if he couldn't afford to pay for one. He said he understood all that. I asked him if he wanted to tell me about the burglaries, and he said, "OK." I asked him if he pulled the Putz job, and he said, "Yes, but the stuff I ripped off wasn't worth enough for you to bust me for that one."

- Q. Did you believe that the need for public safety required you to get as much evidence as you could against Rippov?
- A. Sure. He already shot one person. We had to put him away before he hurt anyone else.

While preparing for class, the student must read the assigned cases in much the same way as the student under the case method. But in addition to understanding the facts, rules, holding, and reasoning, the student must think about solving the problem. The student must find the rule which applies to each subpart of the problem, see how the policies underlying the rule apply to the problem (because the problem often presses the rule to its outer limits), and see if the facts of the cases might be different from those of the problem in some legally significant way, so that the case holdings do not control. In addition, the student must try to organize the several issues in the problem into a coherent outline. It is not enough to understand the cases and rules in isolation. The student must see how they relate to each other.

All this takes more time and effort than studying for class under the case method, but some powerful incentives are operating. First, since the problem is similar to a law school essay exam, the students know they are getting some practice in exam analysis. Second, analyzing the problem is playing lawyer, and playing lawyer is fun. Learning by problem analysis is usually more fun than learning concepts in the abstract. (Which way would you rather learn vocabulary? By memorizing lists of words or by doing a crossword puzzle?)

The class itself can also be more fun for the students, even though it is more demanding than one taught by the case method. The class might begin with a Socratic discussion of the cases, to make sure that the students understand them. Or the teacher might prefer to jump right into the problem, bringing in the cases where appropriate. Let's assume that the teacher takes this approach and calls on Ms. Jones (a pretty good student):

Prof: Ms. Jones, this is a long problem. Where should we start?

Ms. Jones: Well, our lawyer Walkum has asked us to advise him as to the admissibility of the three statements Rippov made, so I guess we should start with his first statement, "There was nobody around that place when I went in."

Prof: Good. So what do you think? Is that statement admissible?

Ms. Jones: Yes, I think so. No *Miranda* warnings were required at that point, because Rippov was not in custody or deprived of his freedom in a significant way.

Prof: What? In the transcript, Officer Copp testified that she stopped him. Isn't that a pretty significant deprivation of freedom?

Ms. Jones: Well, maybe, but one of the cases we read says that a stop which is not an arrest is not enough to trigger the *Miranda* warnings.

Prof: And which case is that?

Ms. Jones: *Berkemer v. McCarty*.

Prof: Tell us about *Berkemer*, Ms. Jones. What happened there?

[Here Ms. Jones recites facts, holding, and reasoning of *Berkemer*, with some professorial prodding—just as with the case method.]

Prof: OK, now maybe we understand *Berkemer*. In our case, will the defense attorney be able to distinguish *Berkemer* in any way? Do we have any relevant facts not present in *Berkemer*?

Ms. Jones: Well, Officer Copp did pat down Rippov, and there was nothing like that in *Berkemer*.

Prof: True enough, but why is that fact relevant here?

Ms. Jones: A pat-down is more intrusive on someone's privacy than a mere stop.

Prof: Is that what *Miranda* warnings are supposed to protect, someone's privacy in his body and clothing?

Ms. Jones: Well, no. The warnings are supposed to protect the privilege against self-incrimination. So maybe the pat-down doesn't matter.

Prof: But why would an *arrest* matter? You told us that the Court in *Berkemer* held that once the officer arrests the defendant, he must give the warnings before interrogating. Isn't an arrest just a bit more of an intrusion on privacy than a stop or a pat-down?

Through the problem, the students learn how to apply a case to a new fact situation and how the case might or might not be "distinguished" from the new fact situation. In addition, our professor is using this problem to probe the student's understanding of the underlying rationale of *Berkemer* (that *Miranda* warnings are required only when there is a "coercive atmosphere" which might induce a defendant to confess). A carefully drawn problem not only teaches application of the law; it serves also as a launching pad for an exploration of the public policy dimensions of the Court's holding.

Some of these things could be accomplished through hypos. But the problem given out ahead of time provokes the student to think about these matters before class. That allows a more complex problem, makes the preparation a more valuable exercise, and permits the teacher to conduct a more sophisticated class discussion. And advance notice of the problem puts the student on a somewhat equal footing with the teacher. All the cards are on the table when the class begins. There are no hypos hidden up the professor's sleeve. If some students still see the class as a battle of wits with the professor, the problem method does tend to level the playing field.

Wouldn't it be just as effective to give the students a set of short hypos before class? No. A problem is more than a collection of hypos. It is an integrated story with elements that must be identified, extracted, and organized into a coherent structure. A lawyer in practice does not receive a list of hypos from the client. The lawyer gets a story, and must sort out interrelated issues based on the questions to be resolved and the rules of law that apply. These issues must be organized before they can be analyzed.

The problem method is ideal for teaching the skill of organization, or "issue-management": how to organize a cumbersome set of facts and issues. The key vehicle for teaching this is the outline.

Outlining

The teacher who assigns the above problem might direct the students to try to analyze it at home in outline form. During class, the teacher might ask for a student's outline, put it on the blackboard, and then have the class criticize it. By the end of the class, a coherent outline should emerge. For today's problem, it might look something like this:

- I. R's first statement ("No way, man")
 - A. Was it the fruit of an illegal stop? [Pursuant to cases re the "specific and articulable facts" needed for a stop, discussed in earlier classes.] Consider following facts:
 1. R had arrest record.
 2. R had similar method of operation.
 3. R started to walk away when C approached.
 - B. Was it the result of a failure to give required *Miranda* warnings?
 1. Was R in custody or deprived of freedom in a significant way? Compare *Berkemer v. McCarty*. Consider following facts:
 - a. Two police officers conducted interrogation.
 - b. C touched R on arm.
 - c. C patted R down.
 - d. C used polite language.
 2. Was R interrogated? Compare *Rhode Island v. Innis*. Consider following facts:
 - a. C did not ask a question.
 - b. C's statement re witness seems to call for a response.
 - c. C's statement was a lie.
- II. R's second statement ("Yeah. I have some")
 - A. Was this the fruit of an illegal stop?
 - B. Was this the result of a failure to give required *Miranda* warnings?
 1. Was R in custody by this time? Consider fact that he had been arrested.

2. Was R interrogated? Compare *Innis*. Consider fact that C might have been asking about R's car for administrative purposes, rather than to get incriminating answer.
- III. R's third statement ("Yes, but the stuff . . .")
- A. Was this the fruit of an illegal stop?
 - B. Was this the result of a failure to give required *Miranda* warnings?
 1. Were warnings required?
 - a. Was R in custody by this time?
 - b. Was R interrogated? Compare *Innis*.
 - c. Did the "public safety" exception excuse the giving of proper warnings? Compare *N.Y. v. Quarles*. Consider facts:
 - (1) R had shot guard.
 - (2) C was investigating "series" of burglaries.
 2. Were proper warnings given?
 - a. No advice that statements would be used against R. See *Miranda*.
 - b. No advice of right to appointed counsel during interrogation. Compare *Duckworth v. Eagan*.

For a law professor this outline may seem obvious and easy to prepare, but most students find it a difficult exercise—at least when they start out.

Outlining is based on certain principles. You can help the students induce these principles by going through the process of outlining several problems, or you can simply tell them what these principles are. I usually tell them—several times. Here is what I tell them.

The major headings of an outline (the Roman numerals) are usually derived directly from the question in the problem. As the above problem asks the student to support a motion to suppress three statements, the outline should be organized into three subparts, one for each statement. The next level of an outline (the A's and B's) usually specifies the major rules of law which apply to that part of the question. Thus, Rippov's first statement will be suppressed if it was obtained in violation of either (A) the Fourth Amendment right against unreasonable seizures, if the stop was not based on "specific and articulable facts," or (B) the Fifth Amendment privilege against self-incrimination, if the *Miranda* warnings were required and not given. This latter issue can be broken down into a rule of law which has constituent parts, and these parts tell us how to break down our outline even further. Thus, *Miranda* warnings must be given only if two conditions are present: (1) the defendant is in custody or deprived of freedom in a significant way, and (2) the police are interrogating the defendant. These two issues give us our subissues (1) and (2) under the *Miranda* issue.

The final level of the outline lists all key facts which should be considered on a particular issue. This level is important. As every good lawyer knows, cases usually turn on the facts, and a careful examination of facts is a crucial feature of the problem method. In writing exams, students tend to skim over facts and write about the law. The problem method helps focus them on the facts.

Outlining the issues in a problem helps students learn certain things that they cannot learn as easily under the case method alone. First, it teaches the skill of outlining itself, which is essential to the practice of law, where complex disputes must be analyzed in an organized, efficient way.⁶¹ Second, it forces students to learn the correct rules of law, as these are the main parts of the outline. Third, it forces students to see how the cases relate to each other. *Berkemer* addresses one prerequisite to the requirement that warnings be given (custody, etc.), and *Innis* addresses a different one (interrogation). Reading these cases separately, the student might not see that they are independent requirements. But a student outlining the problem above is forced to try to figure this out.

The Problem Method Swallows Up the Case Method

In the above example of a class using the problem method, none of the benefits of the case method are sacrificed. To prepare a useful outline, the student must read and understand the assigned cases. In class, students must discuss and understand the cases in order to discuss the problem intelligently. In fact, a carefully constructed problem will enable the teacher to engage the students in a deeper discussion of the cases than the case method permits. While working on the problem at home, the students will be forced to consider the basic policies underlying the holdings of the cases and to find the interstices between the cases.⁶²

But hold on. There are only so many minutes of class time, and students have only so many hours to study. How can the problem method do everything the case method does, and more, within the same amount of time? There are several answers. First, since students usually enjoy the problem method more than the case method, they tend to spend more time studying under the problem method.⁶³ (Whether they take these hours from time they would otherwise spend on case method courses or from party time is beyond my ken.) Second, the problem method often forces students to learn the case holdings at home better than they do under the case method, and that shortens case discussion in the classroom. Third, if it is true for some teachers that the problem method eats up more class time and threatens course

61. Students have told me that learning outlining through the problem method helps them in exam-taking, not just in the problem method course, but in other courses. Former students have told me that this has also helped them take the bar exam and analyze problems in the practice of law.

62. See *Cavers*, *supra* note 3, at 455; see also *Charles*, *supra* note 23, at 201-02 (problem method is "more ambitious" than other teaching methods because it tries to teach three things simultaneously: (1) knowledge of legal principles, (2) application of law to facts, and (3) problem-solving).

63. Ogden noted that "[s]tudent preparation time is also greater with the problem method than with the case method." Ogden, *supra* note 44, at 664. The 1966 AALS Report described a survey of many law professors who used the problem method. The majority reported that more ground was covered under the problem method than under the case method. 1966 AALS Report, *supra* note 20, at 211, 241.

coverage,⁶⁴ this drawback can be mitigated by periodic ground-covering lectures.

Testing

Your teenage son has just signed up for a tennis class at high school. “The class seems kind of weird,” he says. “The teacher told us that we will spend every class watching videotapes of tennis players playing matches, and he will lead us in a discussion of what they are doing right and wrong, and what the rules of tennis are. But we won’t actually play any tennis ourselves until the final exam. Then our entire grade will depend on how we play during that exam. Does that make any sense to you?”

If you teach by the case method, you should probably reply: “Of course it makes sense, my boy. That’s just how we do it in law school!”

In class, we use the case method by examining a case—analyzing how lawyers and judges apply legal principles to a particular set of facts. The arguments (and how a group of arguments is structured) are set out right in the case itself; there is no need for the student to think from scratch. If we were to test what we teach, the final exam would track the class: it would consist of a court opinion the student has not seen before, with directions to criticize the arguments of the lawyers and the rulings and reasoning of the judges. (I have yet to see a law school exam that looks like this.) This is what we taught, so this is what we should test. It is unfair to test students on a skill we did not teach.

But we do. The main vehicle for testing students in law school is not a court opinion, but a set of facts. “A did this to B: * * * *. B sues A for damages. May B recover? Discuss.”

The student taking this exam has heard hypothetical questions posed in class, has tried to answer these in her mind, and has even answered a couple out loud. But those hypos consisted of a few facts in a sentence or two, and the range of possible answers was obviously limited to the topic or case being

64. Miller disagrees: “[T]he problem format permitted me to cover about as much of the material in the casebook as I would have covered using the traditional method. Although each problem raised only a few issues, students had to read all the assigned material . . . to extract pertinent authority.” Miller, *supra* note 44, at 350; see also 1942 AALS Report, *supra* note 17, at 89:

Weihofen is of the opinion that he covers about as much ground by the discussion of the problems as he would by the more usual method of following the casebook alone. The students, having a definite objective in mind and actively engaged in search for material, are apt to work harder, and are inclined to read more of the text and law review material cited instead of being satisfied merely to read the cases.

Regarding *statutes*, Professor Whaley writes:

I have found that one can cover more material using the problem method than the case method when exploring statutes. A case typically addresses only one part of a statute and then goes into far greater detail than the student needs. A problem, on the other hand, can send the student chasing around different parts of the statute (or statutes) and demonstrates how it all fits together.

Letter from Douglas J. Whaley to Myron Moskowitz (Oct. 15, 1991).

discussed. This final exam question is a page (two pages?) long! There are *twenty* facts in there, and nowhere does the exam say which of the semester's many cases might apply to which facts. If your son practiced some groundstrokes, serves, and volleys during his tennis class but was tested on his ability to put all these strokes together strategically for the first time in a match against an opponent, you would say this was not a fair test of what he was taught. But this is just what we do in law school.

Something is wrong here, but no one seems to notice. Suppose a property teacher teaches conveyancing, but not future interests. If the exam nevertheless includes a future interests question, the students will scream bloody murder, and the teacher will hear from the dean. But if the class teaches case analysis and the exam tests problem-solving, no one complains.⁶⁵

In my view, the testing is fine. The naked-fact essay exam requires students to do what they will have to do when (and if) they become lawyers: apply legal principles to a complex set of facts they have never seen before. In effect, our exams are problems!⁶⁶ We have been teaching by the case method and testing by the problem method.⁶⁷ Let's get our act together.

But—you say—why fuss about testing? The law school exam is a necessary nuisance, mandated by the ABA and the state bar, but more a hindrance than a help to good teaching. Sure, we are the gatekeepers, protecting an unsuspecting public from the hordes of incompetents who might become lawyers were they not screened out by our exams. Yes, I know that our students want some feedback, especially if it gets them onto law review or into fancy law offices. So I'll give exams because I have to, but I will not demean myself by teaching to the test.

Nonsense. If your test requires students to display skills and knowledge that you think are important, then you should teach to the test, because the test motivates students to learn. We all know that the quickest way to get the full attention of any class (even bored third-year students) is to say the six magic words: "This will be on the exam." These words usually relate to a specific rule of law. But suppose they relate to skills rather than substance: "The exam will be in a form similar to this problem I want you to read for the next class. If you can prepare a detailed outline of the issues in this problem and be prepared to argue both sides of each issue and come to a reasoned conclusion, you should do pretty well on my exam." And suppose you say this not once but regularly. And suppose you deliver on your promise, and the word gets around that you deliver: "This prof's exams are just like the problems, so work on the problems and you'll do OK on the exam."

65. As far back as 1942, however, an AALS Committee noted: "[U]nder correct pedagogical methods in the purpose and use of examinations, practice in application [of legal principles to facts] has nothing to do with the learning process but only with the measurement for grading purposes of the quantum of knowledge previously acquired." 1942 AALS Report, *supra* note 17, at 88.

66. See Ogden, *supra* note 44, at 658. Patterson saw the problem type of examination as one of the "essential devices" of the case method. Patterson, *supra* note 22, at 10, 19-20.

67. See Ogden, *supra* note 44, at 658.

Teaching and testing work best when they complement each other. Teaching should help the student take the test, and the test should help the teacher teach. This notion can work with any teaching method, including the problem method. This will also help students know how they are doing. Feedback helps learning, but students do not get much feedback when they must wait for the final exam.⁶⁸ Under the problem method, students must prepare some outline or analysis before class, and may then compare it with what the teacher presents in class. The comparison gives the student feedback—every class—without requiring any paper-grading.

Using the Problem Method in Large Classes

Most of the commentators on the problem method have assumed it is appropriate only for small classes.⁶⁹ I disagree.

Small classes are best for students, no matter what the teaching method. Students in small classes receive more individual attention from the instructor, and the instructor is able to do things that are not feasible in large classes—like read papers on a regular basis. In a small class taught by the problem method, students can turn in written answers or outlines and have them criticized by the teacher.⁷⁰ But the present reality is that most law classes are large, and I take it as an economic given that the large class will remain the norm for the foreseeable future.

In my experience, the problem method works quite well in large classes. The Socratic dialogue goes on just as it does under the case method. The teacher questions one student for a while, then another. Other students follow the exchange and try to analyze the problem silently. They do not get the individual attention they would get in small classes, and they do not submit written work for critique. But they learn—as well as someone can learn in a large class.

Using the Problem Method in First-Year Classes

Several commentators have strongly endorsed the problem method for second- and third-year classes,⁷¹ but they hesitate to recommend it for first-

68. See Weihofen, *supra* note 15, at 427 (“Law students, more than any other group, are kept in ignorance of the progress they may be making. Their work is typically not tested or graded in any way except by one final examination in the course.”).

69. See, e.g., Ogden, *supra* note 44, at 664 (“The intensity of the problem method and the development of skills that can result from its use require small classes for the sake of both teacher and student.”); see also Esther L. Brown, *Lawyers, Law Schools and the Public Service* 232 (New York, 1948). There are exceptions, however. Professor Charles noted in 1962 that problems were used at Harvard in large classes, Charles, *supra* note 23, at 208, and that “[l]arge classes seem to dictate the use of oral or class problems.” *Id.* at 216.

Professor Cavers began his article with a very strong endorsement of the problem method, but finished with a fizzle, proposing that it be used “with groups of not over fifteen students, preferably in the second year, although problem work might readily be continued in third-year seminars.” Cavers, *supra* note 3, at 457.

70. See Charles, *supra* note 23, at 213.

71. “Advanced students are bored with the teaching methods that grow out of the appellate-opinion books; they want more variety and they uniformly welcome the text-problem form.” Davis, *supra* note 44, at 546; see also Charles, *supra* note 23, at 206; Miller, *supra* note 44, at 344; Ogden, *supra* note 44, at 664; Morgan, *supra* note 15, at 389.

year classes.⁷² Apparently they assume that a student cannot handle problems without first being taught how to analyze cases under the case method.⁷³

I disagree. As I've shown above, case analysis is part and parcel of the problem method. Students learn to read cases at least as well under the problem method, because they are reading in a focused way. In fact, they can gain a deeper understanding of the cases than the case method allows.⁷⁴

Even if there is any validity to the notion that students need the case method to learn to read cases, this training might be provided in *some* first-year courses. There is no need to have *all* first-year courses taught by the case method.

In my experience, most first-year students love the problem method.⁷⁵ Students go to law school not to read cases, but to become lawyers. The

72. See, e.g., Davis, *supra* note 44, at 544; Whinery, *supra* note 21, at 160 ("Many teachers believe that there is no substitute for concentrated case study during the first year of law school and that problem analysis should be reserved for the second and third years."). A majority of problem-method teachers surveyed in the 1966 AALS Report seemed to agree. 1966 AALS Report, *supra* note 20, at 213.

At one point, Notre Dame used the problem method extensively, but mostly in the second and third years. Charles, *supra* note 23, at 210. Charles recommended that students begin to be exposed to problems by the second half of the first year. *Id.* at 215.

I find it puzzling that we seem to have no reservations about *testing* first-year students under the problem method, as our first-year essay exams are usually in the same format that we give to second- and third-year students.

73. Professor Crystal puts it well:

[L]awyers face problems with a conceptual and linguistic framework developed from law school and practical experience. First year students don't have this framework. Thus, I think it is sounder pedagogically to develop the framework first and then proceed to the problems. Second, focus on problems may lead the students to read the cases less carefully than they would in a traditional case analysis class. At least at the beginning of their professional careers, I think students should focus on careful reading and analysis of the cases.

Letter from Nathan Crystal to Myron Moskovitz (Sept. 12, 1991); see also Ogden, *supra* note 44, at 655 (indicating that "mastery of case analysis is a prerequisite to use of problems which require case materials to find solutions").

Charles noted that Notre Dame and Harvard felt that the case method should be used in the first year, to give students training in case analysis before using problems. Charles, *supra* note 23, at 211.

The 1966 AALS Report stated: "It seems plain that the accomplishments of the problem method in all respects listed would be considerably less if the students exposed to it had not had, and were not continuing to have, extended and intensive work in the case method." 1966 AALS Report, *supra* note 20, at 243.

74. "I hear, and I forget. I see, and I remember. I do, and I understand." Frank R. Strong, *The Pedagogic Training of a Law Faculty*, 25 J. Legal Educ. 226, 228 (1973) (quoting an "old Chinese proverb").

75. A few—usually near the bottom of the class—don't love it because they cannot handle it. It is too intellectually demanding for them (though I do not know if these students would do any better under the case method). However, some professors using the problem method have reported that "problem work brings out abilities latent in the men who have not excelled in case study. Often, they say, these men find working with the concrete circumstances and specific issues of problems preferable to the study of doctrinal generalizations which may seem to them to dominate case study." 1966 AALS Report, *supra* note 20, at 212.

problem method lets them become lawyers—all right, play lawyers—right away! They like it, they put more work into it, they learn more.⁷⁶

Some law teachers are now using the problem method in first-year classes, using the few books that are suitable.⁷⁷ I hope this trend continues.

Switching to the Problem Method

Some teachers may be apprehensive about switching to the problem method. Of course, any change is a burden. Having invested many hours developing class notes around a particular casebook, why subject yourself to the added work required by a switch? I faced this question several years ago, and I switched. It was a lot of work in the beginning, but it was well worth it. I think I am now contributing much more to my students' education, they appreciate it, and I am helping them become better lawyers.

You may also be concerned about how to handle the problem method in the classroom: "What do I *do*?"

You might begin by appreciating the fact that you are a good problem-solver. You probably enjoy solving problems. You solved problems on law school exams well enough to get the grades needed to become a law professor. If all you do in class is analyze a problem out loud, your students will learn a lot from watching you.⁷⁸ But they will learn even more if you involve them in the process.

76. Professor LaFave reports that the problem method

does work in the first year, and it does work even in fairly large classes. (My first year course always has from 70-80 students, and the other course has anywhere from 35 to 75 students.) Over all these years, I have been asking the students what they thought of this technique, and (though admittedly there has been an occasional dissenter, who—I suspect—found his canned briefs or canned outlines less helpful in this setting) consistently the students have responded enthusiastically in favor of the problem method. The most common comments have been (1) that they felt they were dealing with real-life problems in a way that lawyers could be expected to, and (2) that they could come to class knowing in advance exactly what was expected of them (as compared to the "gotcha" technique of springing hypos in class).

Letter from Wayne LaFave to Myron Moskowitz (Sept. 13, 1991).

I appreciate Professor D'Amato's view that enjoyment is not essential to learning, and might even be antithetical to it. He argues that the best learning occurs when the student's traditional thinking patterns are disturbed—not a very pleasant experience. See D'Amato, *supra* note 21. But as he seems to acknowledge (glumly), the battle for this type of teaching has been lost: law schools have succumbed to the impact of student evaluations, which reward teaching methods which satisfy the psychic needs of traditional thinking patterns. I mourn the defeat, but I accept it. If we are now working with a lemon, let's do our best to make lemonade.

77. Professor Rabin uses the problem method in his first-year property class:

[I]n my classes I establish the pattern from the first day of making the problem central to class discussion. The first student in the first class is asked about the problem, rather than the cases. This establishes the pattern for the rest of the year. I try never to have a class that does not give considerable attention to the problem.

Letter from Edward Rabin to Myron Moskowitz (Sept. 3, 1991).

78. While students learn from the professor's expertise in the subject matter of the course, "[t]he more important aspect of the teacher as expert is his contribution to the final solution of the problem." Ward, *supra* note 44, at 109.

Here is how I usually do it.

I start the class by asking a student to read me the major issues from his outline. I write them on the blackboard, and I ask the class for criticism. This may take a bit of time, particularly at the beginning of the semester, but as the students get better at it, we get more efficient.

With the major issues on the board, I return to the first student and ask what issues are under Issue I on his outline (A, B, etc.). I write those on the board, and ask for comment. At this level of the outline, we get into the cases (and statutes, if any are assigned). If students show any trouble understanding a case, I stop discussing the problem and go through the case—pretty much as I would under the case method, though a bit more focused on issues that relate to the problem. After we get the case straightened out, we apply it to the problem, filling in the lower levels of the outline all the way down to the specific relevant facts in the problem. After we finish with Issue I, we move on to Issue II—probably with a new student—and do the same thing.

If a student gives me something weak or wrong to put on the board, I usually put it up anyway. The class then chews it up (with my help), and we fix up the outline. I don't mind bewildering the students a bit during the class, but I like to leave them with a pretty clear outline at the end. This is not to say that every issue will be clearly resolved, or even that the outline we end up with is necessarily "correct." If the problem raises issues that fall between the cracks of the cases, the outline may have to reflect this. Even if the outline is not open to much dispute, there will always be lingering uncertainty about the resolution of some issues: a well-drafted problem will have several very close issues, where reasonable people may disagree about how the law applies to those facts.

There are variations. Sometimes I begin the class with a lecture on the history of the topic we will discuss. Sometimes I interrupt the outlining to give a brief lecture.⁷⁹ On occasion, if the topic or the problem is particularly difficult, I begin the class by going through a case or two, using the old method. And sometimes I assign certain students ahead of time to argue a problem in class. There are a lot of ways to use the problem method, but always the three essential features are there.

For me, this is a lot of fun. I like playing lawyer, and I like to see my students enjoying themselves by doing the same. I also learn a lot. Hardly a class goes by without at least one student raising some issue or some angle on an issue that I haven't thought of, even if I have used the same problem for years. On occasion, I've been forced to revise an entire outline after a class.

This may sound scary. "How can I let the students see that I don't have all the answers, or—worse yet—that I was wrong about something I already told them?" You can, and you can look good doing it. The key is to become immersed in the process of problem-solving. You are there to teach the process, not the answer to the problem, which is only incidental. Part of the process is to make mistakes, especially those involving oversight.⁸⁰ In a class of

79. Lectures were used to supplement the problem method at Notre Dame. See *id.* at 110.

80. Copeland quoted baseball great Ty Cobb: "If we had won there wasn't much to talk about, nobody ever learns from winning a game. But if we had lost, we could always put our fingers on the mistakes." Copeland, *supra* note 29, at 270-71.

sixty students, someone is bound to see something that one teacher can overlook. The practice of law is an art, not a science. Few lawyers, even the most brilliant, work alone. They need to bounce ideas around with colleagues. This is what you are doing with your students, and this is one of the things you want them to learn.

Besides, you'll get most of it right, and you'll be way ahead of your students no matter what you do. If you make a mistake once in a while, you'll just look a little more human.

I have seen others switch to the problem method and find it exhilarating. In 1966, when an AALS committee surveyed law professors who had used the problem method, the overwhelming majority said they planned to continue using it.⁸¹

Writing Problems

To teach by the problem method, you need good problems.⁸² Where do you get them?

You can write them yourself, but it's not easy.⁸³ It's like writing an essay exam question, except that the exam question usually calls for knowledge of general principles rather than specific cases, because the cases are usually not right at hand during the exam. A problem must be carefully constructed to bring out the important issues in the particular cases (and statutes) assigned for a particular class.

Some teachers have written problems by simply summarizing the facts of decided cases. That is definitely less taxing on the imagination, and it takes less time. But it does have its down side. The facts of a decided case might raise issues not addressed adequately by the assigned materials, and—conversely—the facts might not raise issues that are important in the assigned materials. And even if you never tell the students that the facts come from a reported case, it is just a matter of time before some Westlaw whiz uncovers it and spreads the news. Students will read the court's opinion and decide that they have now found the Right Answer to the problem.⁸⁴ Maybe you can avoid this difficulty by changing names and a few facts.⁸⁵

81. 1966 AALS Report, *supra* note 20, at 247. One professor, however, reported that he was giving up the problem method because his course was becoming too popular! Enrollment was becoming too great to allow him to supervise the written work he had been requiring. *Id.* at 213.

82. See 1942 AALS Report, *supra* note 17, at 89.

83. See Charles, *supra* note 23, at 216; Ogden, *supra* note 44, at 664; Ward, *supra* note 44, at 108; Robert Whitman, Conducting Contract Negotiations: A Seminar on Legal Problems Exercise, 15 J. Legal Educ. 72, 73 (1962).

84. Even worse, the professor might tell the class of the court's holding, conveying the impression that the purpose of the problem method is to find the "right" answer, which good research would have uncovered anyway. This apparently happened at Notre Dame. See Ward, *supra* note 44, at 106-07; see also Whinery, *supra* note 21, at 157.

85. Professor LaFave reports that he does this, and his students have yet to uncover the source of his problems (at least, they haven't told him about it!). Letter from Wayne LaFave, *supra* note 76.

When I set out to prepare problems, I first read the cases and statutes that I intend to assign for a week of classes. These might appear in a traditional casebook that I have assigned.⁸⁶ I write down the most important principles from each case or statute, looking particularly for “cutting-edge” principles that will distinguish one case from another. I then dream up a story which raises issues involving each of those principles. Usually, especially for first-year students, I try to write the story so that the issues arise in pretty much the same order as in the assigned materials. That makes it easier for students to organize the issues, and if the problem is to be discussed over more than one class period, it makes it more likely that students will be prepared to discuss the issues arising in a particular class.

I often create short “transcripts” for my problems, in order to present the facts in a raw, unfiltered form—the way facts show up in the practice of law, not as packaged by the case method.⁸⁷ (Space and time limitations preclude my giving students the 100+ page transcripts common in the real world.)

If I put the problem in a litigation context, I pose the question in procedural terms: “Defendant moves for directed verdict. Should the court grant the motion?” Or: “Defendant appeals, claiming that the evidence was not sufficient to support the verdict. What arguments can we make for the defendant, and how should the court rule on them?” To analyze such a problem properly, you must know the rule on directed verdicts or the appellate court’s standard of review on challenges to the sufficiency of evidence. Teachers seldom get into such matters except in a civil procedure course, but I think this is a mistake. In the practice of law, substantive issues arise not in a vacuum, but in a particular procedural context, and they must be analyzed with the proper procedural rule in mind. I want my students to get into this habit, so I include these issues in the problems.⁸⁸ The procedural issues I include are simple ones, and the rules on them are explained in the cases I have assigned.

I usually ask the students to assume the role of law clerk, because they relate to it pretty well. Some of them are currently working as law clerks, and many will be doing so in the near future. The law clerk is usually assigned to work for a practicing lawyer, but sometimes works for a judge or legislator.⁸⁹

86. I used to write problems for use with casebooks written by others, but I found this awkward, as the professor who wrote the casebook did not assemble the cases with an eye toward their use in this way. It can be difficult to build a problem around a coherent cluster of cases and end up with a reading-problem assignment of an appropriate length. Now, I write my own books. This has improved the process considerably, as I select materials partly for their suitability for use with problems.

87. See Ward, *supra* note 44, at 101-02:

The facts with which he must work are not the raw facts which confront the lawyer at the beginning of *his* work, but the refined facts which are the residue of counsels’ skill in selecting from the mass available and of judicial picking and choosing from those presented to the court—the whole neatly arranged with careful regard for order and relevancy. . . . [T]he statement of the problem in the reported case presents it at a very advanced stage, at the stage where the lawyer’s work has been done and where the work of the appellate court begins.

88. See *id.* at 102-03 (emphasizing the usefulness of the problem method in teaching the application of procedural rules).

89. See Charles, *supra* note 23, at 209.

I find that I heighten student interest when I pose a problem in a litigation context, asking the student to play or advise a Clarence Darrow type rather than a solicitor giving advice on how to stay out of trouble. But many teachers find the problem method most useful in courses where issues are likely to arise in the context of planning or advising, such as tax, commercial law, and trusts and estates.⁹⁰ For such courses, a problem should put the student in the role of planner or advisor rather than litigator.

Each problem is a lot of work to write but usually lasts me for several years. So perhaps writing problems is no harder a task than adopting a new casebook.

I am constantly revising and fine-tuning my problems. A new U.S. Supreme Court case comes down, making a tough issue now easy. A difficult issue I included is so difficult that no one in the class sees it. My facts raise an issue I did not see—but the students do—and it's one I would rather not spend class time on. Facts intended as "a very close call" instead produce near unanimity for one side. After every class, I make any necessary revisions, so that next year's students won't have to endure this year's mistakes.

Books Using Problems

If writing problems seems too much work, here is another possibility: We now have books that contain problems.⁹¹

But be careful. Some books say they use problems—even using the word "Problems" in the title—but they don't contain the type of problem I have been discussing. Some authors or publishers call hypos "problems." Short, simple hypos will not permit you to teach by the problem method.⁹²

There are several types of problem books. What follows is a sample, not an exhaustive survey. My comments are not meant to be disparaging; any of these books might do an excellent job of serving the purposes intended by the authors. I am considering only the books' suitability for use with the problem method as I have defined it.

The first type might be called the true problem-method book. Rabin's property book is a good example (even though the title gives no hint that the book contains problems).⁹³ Each chapter begins with a problem, followed by a group of cases which the students are supposed to read in order to solve the problem. The cases in each chapter are taken from a variety of jurisdictions.⁹⁴

90. See 1966 AALS Report, *supra* note 20, at 220-21, 231.

91. There have been problem books in the past, though not many. Charles described Addison Mueller, *Contract in Context* (Brooklyn, 1952), as follows: "Each chapter of the casebook begins with a statement of facts, followed by background material in the form of cases, statutes and related material with a bearing upon the solution of the problem." Charles, *supra* note 23, at 214.

92. See Charles, *supra* note 23, at 210.

93. Edward H. Rabin & Roberta Rosenthal Kwall, *Fundamentals of Modern Real Property Law*, 3d ed. (Westbury, N.Y., 1992).

94. See also Howard Fink & Mark V. Tushnet, *Federal Jurisdiction: Policy and Practice* (Charlottesville, 1984); Caleb Foote, Robert J. Levy & Frank E. A. Sander, *Cases and Materials on Family Law* (Boston, 1985). These books begin most chapters with problems.

My criminal law book is similar, but all the cases and statutes in each chapter come from a single jurisdiction. The larceny problem arises in New York, so all of the cases and statutes in that chapter are from New York. Students can see how the cluster of statutes and cases interrelate, and can apply them just as a lawyer does.⁹⁵

Another true problem-method book is the latest edition of Crump, Dorsaneo, and Perschbacher's civil procedure book. This book begins most chapters with excellent "summary problems," which require application of the important principles of law arising in the cases that follow.⁹⁶ Other problems appear within the chapters, and many of these include real-world documents.

Broun, Meisenholder, Strong, and Mosteller's evidence book contains very good problems, though some have only one issue and might be better characterized as hypos.⁹⁷ The book contains no cases or statutes, but refers the student to particular sections of a hornbook and the Federal Rules of Evidence. Cost and convenience aside, this system should work pretty well.

Morgan and Rotunda's book on professional responsibility is similar: good problems and some "readings," to be used with a separately bound statutory supplement.⁹⁸ Each problem is followed by a series of rather specific questions which give the student quite a bit of guidance as to what issues to look for in the problem. This is more guidance than I like to give, but maybe the nature of the topic (which I have never taught) makes it appropriate.

Whaley's negotiable instruments book contains many problems, along with cases, to be used with a separate book of statutes.⁹⁹ The problems in the first part of the book are short and simple—more hypos than problems. Those farther along in the book are more complex. This makes pedagogical sense.¹⁰⁰

Henderson and Pearson's torts book contains some excellent problems.¹⁰¹ This is one of the few books I have seen with problems in the form of transcripts—a very good way to expose students to the way facts are actually presented in court.

The second type I'll call the almost-problem-method book. Knapp and Crystal's contracts book, for example, places problems at the end of a chapter or section, apparently to enable the teacher to test what the student has

95. Myron Moskovitz, *Cases and Problems in Criminal Law*, 2d ed. (Cincinnati, 1991).

96. David Crump, William Dorsaneo III, Oscar G. Chase & Rex R. Perschbacher, *Cases and Materials on Civil Procedure* (New York, 1992).

97. Kenneth S. Broun, Robert Meisenholder, John W. Strong & Robert P. Mosteller, *Problems in Evidence* (St. Paul, 1988).

98. Thomas D. Morgan & Ronald D. Rotunda, *Professional Responsibility: Problems and Materials*, 5th ed. (Westbury, N.Y., 1991).

99. Douglas J. Whaley, *Problems and Materials on Negotiable Instruments*, 2d ed. (Boston, 1988).

100. See also Daan Braveman, William C. Banks & Rodney Smolla, *Constitutional Law*, 2d ed. (New York, 1991).

101. James A. Henderson, Jr., & Richard N. Pearson, *The Torts Process*, 3d ed. (Boston, 1988).

already learned from reading the cases and statutes.¹⁰² I think this diminishes the effectiveness of the problem method: it implies that the problem is a useful afterthought, rather than the focal point of the class.¹⁰³ More important, it sacrifices one of the great benefits of the problem method—having the student read cases at home with the purpose of solving the problem. Of course, a teacher could direct the students to read the problem before reading the cases.

The third type is the most prevalent—the casebook-with-hypos book. Vernon's contracts book contains excellent "extended hypos," but I would not call them problems.¹⁰⁴ They are usually placed after each case, raising issues posed by a single case rather than by a series of cases. This lessens the number of issues in a problem, so the student need not perform the organizational task important in the problem method. Many casebooks follow a similar format.¹⁰⁵

The fourth type is the book of problems. Cohen and Gobert's book in criminal law contains excellent problems.¹⁰⁶ Each is accompanied by one or more statutes and citations to the relevant pages of some hornbooks, but no cases. The book enables a teacher to glean all the benefits of the problem method, except for case analysis. Grano's problem book in criminal procedure has good problems, with facts taken (mostly) from decided cases; citations to those cases appear in the back of the book.¹⁰⁷ Again, I think this is a mistake. The author indicates that the book's organization follows that of a particular casebook.¹⁰⁸ If each problem was written to fit with a specific cluster of cases, the book should work fine with that casebook. The author asserts that the book is easy to use with any other casebook, but I wonder. Issues might arise which are not covered by the assigned cases, and the cases might raise issues not covered by the problem.

A fifth type might be called the specialized problem book, suitable for use in a small third-year seminar, but not for a large class or for beginning

102. Charles L. Knapp & Nathan M. Crystal, *Problems in Contract Law*, 2d ed. (Boston, 1987). The same format is used in Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence*, 2d ed. (St. Paul, 1982) (calling the problems "review problems"); see also Robert Brousseau, *Civil Procedure* (New York, 1982); Ira Mark Ellman, Paul M. Kurtz & Katherine T. Bartlett, *Family Law: Cases, Text, Problems*, 2d ed. (Charlottesville, 1991).

103. About his property book (see note 93 *supra*), Professor Rabin writes, "By placing the problem before the cases in the text, we make it easier for both students and teachers to take the problem seriously." Letter from Edward Rabin, *supra* note 77.

104. See David H. Vernon, *Contracts: Theory & Practice* (New York, 1983). Vernon's *Conflict of Laws: Theory & Practice*, 2d ed. (New York, 1982), contains both "questions" (hypos) and "problems" (true problems), though the problems are placed after the cases rather than before them.

105. See, e.g., Paul F. Rothstein, *Evidence: Cases, Materials and Problems* (New York, 1986); Eric D. Green & Charles R. Nesson, *Problems, Cases, and Materials on Evidence* (Boston, 1983).

106. Neil P. Cohen & James J. Gobert, *Problems in Criminal Law* (St. Paul, 1976).

107. Joseph D. Grano, *Problems in Criminal Procedure*, 2d ed. (St. Paul, 1981).

108. See, e.g., *id.* at xxii n.b (book follows the organization in Yale Kamisar, Wayne LaFare & Jerold Israel, *Modern Criminal Procedure*, 7th ed. (St. Paul, 1990)).

students. Berger, Mitchell, and Clark's book on pretrial advocacy contains text about tactics, followed by good practical problems to work through.¹⁰⁹

In short, while there may seem to be a lot of law books containing "problems," in fact only a small number are now ready for use by one who wishes to use the problem method. As more express interest in the method, more suitable books should appear.

Conclusion

According to Professor Teich, it has yet to be proven whether one method of teaching law is any better than any other, at least insofar as the results are measured by performance on law school exams.¹¹⁰ Perhaps he is right.¹¹¹ But life and law school go on, and law professors must choose one teaching method or another.

I think it's time we chose the problem method. Instead of tinkering with the case method, which was never designed to train better lawyers, we should use a method which has such training as its central purpose.¹¹²

A medical professor has said, "The most persistent and in many ways the most powerful impediment to progress in problem-based learning has been the widespread conservatism of academics in regard to innovation in teaching."¹¹³ Conservatism has its place, but if our mission in teaching is to help our students become better lawyers, we should not let conservatism stand in the way.

109. Marilyn J. Berger, John B. Mitchell & Ronald H. Clark, *Pretrial Advocacy* (Boston, 1988). James H. Seckinger & Kenneth S. Broun, *Problems and Cases in Trial Advocacy*, 2d ed. (St. Paul, 1981), and Thomas A. Mauet & Warren D. Wolfson, *Materials in Trial Advocacy*, 2d ed. (Boston, 1987), are similar.

110. Paul F. Teich, *Research On American Law Teaching: Is There a Case Against the Case System?* 36 *J. Legal Educ.* 167 (1986).

111. Perhaps he isn't. In a small study conducted at Buffalo, students taught by the problem method showed greater improvement in grades than did other students. MacLeod, *supra* note 21, at 202.

112. See note 2 *supra*. Of course, those professors who remain true Langdellian scientists of the law—if there are any—should continue to use the case method.

113. Birch, *supra* note 40, at 74.