

IN ADVOCACY OF THE PROBLEM METHOD

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This paper is shop talk. Worse still, it is shop talk unadorned. Law teachers when they talk shop in print usually contrive to dress up their remarks, to annotate judiciously, and to wind up with something that can properly be termed a Contribution. That this article should fall so far short of the mark testifies not only to my own discovery that price control and authorship do not mix, but still more to the hazards of editing symposia in wartime when decent editorial standards must bow to the necessity of not letting an important topic go uncovered.

I

The purpose of this paper is to advocate the problem method (a term for which I shall attempt no definition) as a rival to the casebook system of legal education. (When I write "casebook system" instead of "case system" to describe the established way of doing things, I am, of course, trying to deprive its defenders of the advantage which the term "case system" gives them, namely, the suggestion that the study of cases is an attribute peculiar to their system. At the same time, by using "problem method" assiduously, I can reasonably expect to create the impression that the "problem method" alone deals with problems. Of course, that isn't true—it's just *a* way of dealing with problems; but the job of finding a more accurate tag is one which, not unnaturally, I, as proselyter and propagandist, am loath to undertake.)

I am not about to urge that the problem method supplant the casebook method as *the* way to teach law. Indeed, one of my principal quarrels with the casebook system is that it has been used as *the* way to teach law. It seems rather clear to me that there ought to be a lot of ways to teach law, since lawyers do so many different things in the practice of their profession. Perhaps the reason why this seems clear to me while it is evidently not clear to many other law teachers, is that they want to teach students law whereas I want to teach students to be lawyers.¹

At any rate, what I advocate in this paper is not an ouster of our time-tested, time-honored technique. I urge merely that it move over and give a newcomer room. This sounds eminently reasonable, but it isn't. I don't mean to suggest simply that each faculty conjure up a

1. The apt rejoinder here is to utter those familiar words "Trade school stuff." This epithet is a very effective substitute for thought. Despite efforts, I haven't been able to think of a counter-epithet with half its stupefacent effect.

two-hour course in the second semester of the third year, aptly entitle it "Legal Problems", and assign it to the "young man in a hurry"² who has been bothering them with his proposals of problem work. On the contrary, I'm proposing that a substantial part of the time of the law student and of his teachers be devoted to the use of the problem method.

By "substantial" I mean time enough to give the method a chance to work in the student's mind—to get into his habits of thought and action. Time enough, in other words, to upset a great many comfortably settled curricular arrangements. Of course, I realize that it is difficult to upset any comfortably settled arrangement—particularly if it is one which is working pretty well. That is an obstacle which confronts any would-be subverter of law school ways. Legal education isn't regarded as a failure or even as seriously defective. Quite the contrary. Law faculties are the best paid and least worked³ on almost every campus. Moreover, nearly all law graduates look back upon their teachers with affectionate respect and are as indiscriminatingly loyal to their schools as ever a dean might hope.

II

Confronted by these facts, I am forced to the hazardous contention that in maintaining this position of esteem (which only the other faculties on the campus fail to recognize) we of the law teaching fraternity have, to put it bluntly, been getting away with something. Moreover, I have a theory to explain what seems to me to be a noteworthy achievement in collective self-deception. This theory is that most law schools have been running two educational systems concurrently, and, being unaware of that fact, their faculties and outsiders alike have extended the success attained by one system to cover the much more dubious results of the other.

The successful system is a variant of the problem method. It usually begins in the second year and is available only to a limited group of students selected largely on the basis of their first-year records. These students devote the greater part of their time to problem work, though they participate, during such time as they can spare, in the work of the other system—the familiar casebook system.

2. This phrase is culled from *MICROCOSMOGRAPHIA ACADEMICA*, that sage, illuminating, and highly amusing guide to the academic politician, by Professor Cornford of Cambridge. The dismaying discovery that this work is not in the Library of Congress deprives me of the opportunity for precise citation or exact quotation, but, at least to paraphrase, the "young man in a hurry" is a youth of thirty-five or less who thinks the fact that a thing has not been done before is not a reason why it should not be done now. He also strives to make silk purses out of sows' ears. He and his fellows gather together in dark places and gnash their teeth.

3. A phrase to be distinguished sharply from "work least".

The conduct of the problem method devolves in many schools largely upon the students themselves. Frequently they are considerably more effective than the faculty participants since, as a rule, the supervising students give more time and gusto to the job. Under the rigorous regimen imposed by this method, students develop analytical keenness, become resourceful and articulate (on paper, at least), and occasionally develop the capacity to get below the surface of the problems they attack. Their horizons may be narrow and their range limited, but they do grow proficient.

The major concern of the law faculties is with the casebook system. Now, that system—to describe anew a system which, since it is so familiar to us, we usually describe only in terms of our aspirations—expects of those who study under it that they read for each day's classes from thirty to fifty pages of appellate decisions (edited, with varying degrees of rigor, to eliminate natural excrescences). Individually or in groups, the students write (or purchase) digests of these decisions prepared according to formulae which usually treat the cases digested as isolated units. The students also attend from twelve to fifteen hours of classes a week in groups running, as a rule, from fifty to two hundred. In class, they listen, with interruptions for digest recitals, to lecturing interspersed with questions and answers or to questions and answers interspersed with lecturing.

The questions pose problems suggested by the cases, usually in the form of hypothetical cases. The top-ranking students improvise answers which often bear witness to the edge their wits have been given by the problem method. Most students, however, can answer well only the more obvious questions without that prior deliberation for which opportunity is lacking. Consequently, except when disturbed by professorial inquiries, they tend increasingly to divide their classroom time between the inscription of lecture notes and relaxation, mental and physical.

To the work of preparing for class and the class meetings themselves, must be added the process known as reviewing. Here techniques vary considerably: "annotation", *i.e.*, the composition of outlines by marginal entries on notebook pages, may prevail at one school, while the preparation of "summaries" may dominate another. Some students simply read and reread their cases and notes. Most find occasion to resort during review to some few of the numerous treatise segments and law review articles which have been cited in the class sessions. Sometimes a student who needs further guidance ventures to read some of the profusion of authorities with which (for reasons not entirely clear to me) the casebook editor has weighted his casebook.

All this is pretty tough when first encountered by the student—his

name is legion—who has successfully skipped and dawdled through two, three or four years of college. The strange vocabulary of the cases, the unprecedented necessity for relatively close reading, the reiterated menace of the distant examinations, all induce most entering law students to work very hard. Gradually the game grows easier; but the first-year regimen remains stiff to the end. It is not until the second year that the pressure relaxes; the volume of assignments steps up, but these can now be taken in stride. The student has learned the trick of the trade.

That trick seems to be the ability to reduce the cases to propositions of law unlike Restatement blackletter only in the relative inaccuracy of their formulations. This is what the student strives for when he is reading a case. ("What does the case stand for?") This is what he is trying to capture in his notes when, after a bout of questioning, the professor clears his throat and starts a five or ten minute lecture. This is what the student is trying to wring from the reluctant law review article with which he grapples when his notes and his classmates let him down. This is "the law," to be supplemented only by some record of the crotchets of his professors.

Thus equipped, the student sallies forth to the examination, and there, for the first time in a year or a semester, he has to put to use this learning which he has been accumulating. For three or four hours he dispatches a series of from six to ten problems which, on a research basis, would keep him busy for three months. The result is, of course, dismaying. Every law teacher who has ever mentioned the matter to me has testified to the depression of spirit, the black sense of discouragement, which assails him when, each January and June, he sees his teaching mangled in the blue books. I doubt that my informants can feel any worse than I do at these times.

Yet the grip of tradition is strong. We accept the stark mediocrity in performance to which our *C* and *D* grades testify as a sort of arithmetical necessity, not as displaying the limitations of our casebook system. We take false consolation in the best papers which are submitted. These are usually the work of those students who have been so engrossed by the problem method of law study that they have become almost calculating in their neglect of the casebook system. Despite this neglect they continue to best the students who, denied recourse to problem work, have devoted much more time to casebook study.

We take consolation, too, in the success of our graduates in the bar exams and at the bar. The former is an achievement about as significant as the fact that most of our students pass our own examinations. The latter is a criterion which has demonstrated the success of every system of legal education which has ever existed so long as it was not challenged

by another and better system. Ours has yet no challenger in the field.

To sum up what will doubtless be thought a gross caricature, our casebook system leads to the tedious repetition of a mechanical task directed to the acquisition of a body of poorly-formulated rules which the student occasionally endeavors, with conspicuous ill-success, to apply in class and in examinations. After the first year, the system is not exacting in its demands on any but the morbidly conscientious student. Its educational limitations are concealed by the achievements of the students trained by our improvised problem method and by the fact that most of our graduates do very well that which was also done very well by most of their office-trained predecessors.

III

It may have been observed that in the course of this invidious comparison of our problem system with our casebook system, there has not been the customary invidious comparison of the Realists with the non-Realists.⁴ Rather than be guilty of so gross a departure from current practice, I shall try at least to note some distinctions.

It seems to me that, with some few exceptions, the Realists have been rather less realistic about the casebook system than the non-Realists. Perhaps this is because the Realists have been busily invoking what isn't yet, whereas the non-Realists have been wistfully evoking what never quite was. The future always gives the imagination more sea-room than the past.

At any rate, the Realists have fitted their aspirations into the framework of the casebook system. They have compiled for old courses with new names casebooks which have been lavishly enriched with citations to non-legal authorities—social, economic, scientific, and philosophical—and which have been enlarged by an ever-swelling infiltration of "materials". So lyrical are the reviews which these casebooks inspire that I almost succumb to the belief that the students who use them actually do refer to the freshly cited works and that the increment of "materials" does not fall among those casebook pages which the passage of time forces the instructor to omit—with a reluctance not unmingled with relief.

What the Realists have been trying to do is to have the non-Realists' cake and eat it too. Like the non-Realists, the Realists dearly love to talk about legal concepts, only they like to take them apart whereas the non-Realists liked to put them together. But what the Realists like to do just won't work in terms of education. The non-Realists taught a working system of magic. The Realists have been so busy destroying

4. I shan't attempt to defend this terminology. Write your own line-ups.

that magic as a preliminary to doing something else that that something else has yet to be tried.

Moreover, the old system of magic was a pretty teachable system. Probably there was a golden age of law teaching when nearly everybody believed in conjuring by words and when the business of composing blackletter annotations on notebook margins had an excitement and importance to it that simply cannot now be recreated. What the Realists now teach is exorcising. Exorcising, however, can seem important only if you have once believed in magic. Most of us law teachers have been under the spell, but our students haven't. They gain our disbelief quickly, if confusedly, and thenceforward the rites and runes which we dissect hold little fascination for them. When they give their classroom or bluebook improvisations, they talk loosely about the court's reaching the right result (without showing what result is right or why) or about the judge's doing what he wants to do (without showing why he wants to do what he does). They patter a little about balancing social and economic interests (without defining the interests at stake or showing how they can be weighed). They have substituted vapor for magic, and the deadliest thing about it is that the vapor is second-hand.

More "non-legal" citations in casebooks, more "materials" in casebooks, aren't going to cure this disease. The basic trouble is that we've gone instrumentalist in our law while we've remained conceptualist in our teaching. We shall find out that we can't overturn the basic ideas about law which underlie a method of teaching and expect that method to work well with the new set of ideas.

IV

And so I get back to the problem method. The problem method as used in our law schools has continued to flourish throughout the period which has seen the Realists come to the fore,⁵ concealing by its success the difficulties their triumph has created. But since, whatever form it takes, the problem method is organized today as an adjunct to the regular system of instruction, it is not capable of extension to a primary rôle unless there are to be major and revolutionary readjustments. If these are called for there is no reason why a fresh start should not be made.

At this point, I suppose I can no longer defer a statement of what the problem method could contribute toward remedying the state of af-

5. The problem method, I suddenly realize, is an exception of a sort to the generalization at the close of my preceding paragraph in the text. The problem method will work, whatever one's notion of law; what that notion of law will do is to determine the character of the problems one will use in employing the method.

fairs which I have depicted as so deplorable. Before doing this, however, I should make the usual deprecatory admission: I don't think the problem method is a panacea. Here, however, is what I'd hope to get from it:

First, a better understanding of law. Law, however inclusively one defines it, represents a socially organized method of solving the problems which arise among men in society. The lawyer is a professional problem-solver, using legal methods to arrive at solutions. Of course, he uses a number of other methods as well, but, for the purpose of our business of educating lawyers, it is his use of legal methods which is most significant.

What the problem method can do is to give the student an opportunity to learn law by using it. In the casebook study of cases, the student is studying solutions of problems, not how to solve problems. The difference is important, however successfully we may have obscured it. Past legal solutions are important to use in solving new problems, but studying solutions is not learning how to use them.

Here I realize I may seem to be slipping into an argument on behalf of the problem method distinct from the one which I stated as its first goal. I may seem to be arguing only that the problem method imparts a skill, whereas I began by declaring that it would impart understanding. But I insist that I have not abandoned my point. However narrowly you define law, I think it remains true that you can come to understand law best by putting it to use.

The skill which may be acquired as one gains in understanding is not an inconsiderable by-product of the primary process. I know the old argument—your student will get his skill after he gets a job or a client—and so, in time, he does. Let us be thankful, however, that our medical brethren do not reason in like manner. Moreover, a growing sense of craftsmanship or, more accurately, a sense of craftsmanship growing, is likely to stimulate in the student a livelier thirst for understanding.

Here, however, I am reaching my third expectation: more intellectual drive among our students. Today we debate whether apathy reaches serious proportions in the second, or not until the third year of law study. That it exists and grows as the course goes by is denied by very few. What is needed and what the problem method can do is to give the student an active part in his own education. To make him cease to be an automaton grinding out notes, briefs, and summaries in which he redistills other people's thinking. To make him sweat, mentally and physically. To drive him and make him like it.

There's another contribution that I think the problem method can make. It may, I believe, provide a solution to that extremely difficult pedagogical question of how to present the economic or social aspects of legal problems to law students without reducing them to reading and learning and repeating what various writers have had to say in treatises and monographs. Students who have been freed from this regurgitatory process when they enter law school do not return to it willingly. Yet if such material became relevant to a problem on which they were at work, there is a real likelihood that they would endeavor to use it and hence come to an appreciation of its possibilities and limitations.

V

So much for hopes. How about implementation? There are a number of half-measures available, especially if you measure the half indulgently. Here is one: Problems can be assigned in connection with casebook study. The student can be held responsible for the preparation of solutions to them based on cases in the book. Discussion in class can be centered on the problems and the cases introduced as they become relevant to the problems under discussion.

This technique obviously does not deviate far from familiar ways of doing things. Yet, even using a casebook not constructed with this in view, I have found the method productive of encouraging results. Carnahan, who developed a Conflicts casebook for this very purpose, testifies to a very gratifying student response. However, whenever work is held so closely to the pattern of the casebook system, the habits of thought and work established under the latter are likely to prevail. Where circumstances permit, it seems to me that a much bolder tactic is indicated.

In the suggestion which follows I am cutting almost entirely from whole cloth. Since it is sound educational policy never to try anything until it is well established in experience, clearly my suggestion should be looked upon with distrust, if indeed it is not dismissed out of hand. Be that as it may, what I should like to see tried would be something of this sort:

Take a field of law which has grown around a central core of familiar, related transactions; develop a sequence of those transactions presenting problems; and teach the law of the field, or so much of it as needs teaching by trying to solve those problems. The problems might sometimes be strung on the thread of a single course of imagined dealings: for example, much of Vendor and Purchaser, Conveyancing, and Mortgages could be developed around the acquisition of a tract of farm land, its sub-division for a suburban development, the sales of the

lots and their financing, and the ultimate foreclosure. Such a problem course could be confined to the consideration of only those matters which conventionally have been treated in the casebook courses named above, or there might also be considered questions of land use and credit policy which we have heretofore found difficult to do other than ignore.

How could the study of such a series of problems be organized? Here I am forced to specification of detail and to the prescription of one particular way of going at a job which, no doubt, might be tackled in any one of a variety of ways. My proposal looks to working with groups of not over fifteen students, preferably in the second year, although problem work might readily be continued in third-year seminars. I should make sure that the students were free to devote a substantial portion of their working week to the job. Then, having blocked off the field into as many problem assignments as there were weeks in the course and having subdivided these into jobs for individual students or groups of two or three students, I should start shooting the facts of the situation to them.

The first meeting in a given week might be devoted to a consideration of the facts presented in some detail in that week's assignment. A preliminary awareness of the questions of law and policy (private or public) lurking in those facts should be developed. Further facts might be wanted. An examination of their relevance might itself be illuminating. So, too, might be some consideration of how the needed information could be obtained by an attorney. Finally, however, individual jobs would be assigned, and the students set to work on their own.

The assigned questions should be delimited so as not to require protracted research. Frequently they might be directed to matters on which the law was reasonably well settled. It may be remarked that the well settled law of a casebook seldom seems quite so well settled when it must be dug from the reports and applied to a proposed course of action. Preferably the problem would be laid in an actual jurisdiction so that the student would get the feel of law in its natural form, *i.e.*, the law of a single state, wherein the case law of other states plays a part subordinate to the indigenous product and wherein statutes may be maltreated but cannot be ignored.

When the group reassembled, the ambit of discussion would not have to be restricted by the precise limits of the problem. The problem would, however, provide a point of reference, even if discussion were directed to some matter of broad jurisprudential significance or to some economic consequence of the established legal pattern. The instructor would, I believe, be wise to avoid so far as possible the report technique which so generally reduces a seminar to a lecture course conducted by a series of ill-qualified lecturers—the students.

Students learn little from the reports of other students concerning matters as to which they themselves have little prior knowledge and often they are slow to discuss such matters when reported on. To provide the necessary common store of knowledge to support group discussion there are at least two methods, both of which might be resorted to. One way would be to interlace the problems individually assigned so closely that the student in doing research on his own problem would inevitably attain some grasp of the law relating to his fellows' problems. The other way would be to provide a background of law pertinent to the week's assignment for all to share. This might be done by lecture, or by assigning certain leading cases or a chapter or two of text relating to the field, or by all three means. (Incidentally, some or all of these same methods might be employed to cover certain aspects of the subject not falling within the scope of the problems, yet too important to ignore.)

Research in the law books would not be the only work to which the students would be put. The problems should be so devised as to require the students to determine the courses of action indicated for their hypothetical clients and, where that action required it, to prepare the necessary legal instruments. Research, case study, counseling, drafting, would be intermingled in rather the same way, if not in the same proportions, as they are intermingled in the practice of law.

VI

Clearly any such program would be gluttonous in its demands. To get adequate coverage, the pressure on the student would have to be unrelenting. But give the *C* student jobs which permit him to learn by doing, give him a chance to use good sense and resourcefulness and not solely dialectical skill, and I am confident he will respond to pressure in a way comparable to the *A* and *B* students' response to law review demands.

Pressure on the students would mean pressure on the teachers. They could not compress their instructional duties into a well-regulated six- or eight-hour weekly stint and thus be free to add more citations to those already unread in the casebook footnotes or to write more articles to be read by other article writers. Pressure on the students to use law would mean pressure on the library to provide law books. The cost of equipping and maintaining a library for use would curtail the funds available for books which are not used, but fortunately the supply of these is already ample.

Work on problems requires substantial periods of time free from other demands. Very possibly it would be wise to schedule definite blocks of hours, such as five afternoons a week from 1:30 to 5:30, or

Thursday, Friday and Saturday morning. Within these blocks, there would be no need for a schedule fixing the number and length of class sessions. Instead, sessions could be held as frequently—and for as long—as the week's work required. A session lasting over an hour might be followed later in the same afternoon by a twenty-minute session called to clear up a point that had been raised in the interval. At all times the instructor should be available for consultation, and he should encourage recourse to him. In some respects, problem work in law study would resemble laboratory work in the study of natural sciences. In others, it would resemble the working relation of the lawyer and his apprentice when that relation was most fruitful.

Incidentally the method would facilitate drawing upon practitioners to participate in the group discussions. The disappointments which have generally attended the part-time employment of the practicing lawyer in law teaching have typically resulted from the fact that he was not put to work for which his experience had suited him. As adviser and critic of students who are attacking problems of the sort with which the lawyer daily deals, he can add values which the professional law teacher cannot well be expected to contribute.

Of course, where the field of instruction was not restricted to "private" law, there would be occasion also to enlist the aid of the social scientist and the administrator. Here again, efforts at cooperation have generally been sterile because we have not been in a position to tap the cooperator's *expertise* but have had to be content with his generalizations. These have usually seemed to lack pertinence to the law student's concerns, probably because the gap between generalization and concern was too wide for the student (and his instructor) to bridge.

VII

So far I have been putting off two of the hardest problems: How, if the problem work must be handled in small groups, can a small faculty instruct a large student body? What is to be done with the rest of the curriculum to make room for the problem work?

These are matters which are difficult to discuss in generalities. But take, for example, a hypothetical, venturesome school with a faculty of nine and ninety second-year students.⁶ It may be safely assumed that

6. My figures of 9 and 90 are hypothetical but not atypical. A school with 90 second year students would have an enrollment totaling close to 300. By standards prevailing in all other branches of higher education, such an enrollment would sustain a much larger faculty. Yet we cannot readily justify enlarging faculty numbers so long as our teaching methods make such slight demands on the individual instructor's time. The problem method would both generate and justify pressures for larger, more pyramidal law faculties, or, alternately, for smaller

at least three of the nine instructors either could not or would not be parties to problem work. The remaining six could each handle one or two groups of fifteen students. However, if the system were to be as exacting in professorial time and energy as I have suggested, it is doubtful that a teacher could be expected to devote more than one semester out of two to teaching by this method. If each teacher could swing two groups, it would be possible to offer work of this sort throughout the second year. Instructors *A*, *B* and *C* could work with their groups in the first semester and instructors *D*, *E* and *F*, with theirs in the second. Or the two semesters might be divided into quarters (four of them) and the load alternated. Incidentally, calculation as to the allocation of time is rendered all the more speculative by the possibility that we have seen the last of the three months' vacation.

Doubtless it would be found desirable to offer a certain amount of casebook study along with the problem work.⁷ However, it should be recognized that such inter-mixtures have their hazards. Competition between methods is likely to develop, to the detriment of the work done under one or both of the rivals. Since the problem method is the likelier to engross more than its share of the students' time, this would constitute an additional reason for trying to channel that work very largely into "laboratory" or "office" hours.

Perhaps the maximum load of casebook courses practicable would be eight hours per week. This would mean that the problem work in the second year would absorb the equivalent of from twelve to fourteen semester hours per year, a figure which represents rather less than one-sixth of the total number of semester hours normally completed by the law student in three years of study. Those who may think that the use of an experimental technique in one-sixth of a student's course is not very revolutionary in character, do not know law schools. And obviously they have never served on a law school curriculum committee.

A law school curriculum is an intricate structure of custom and compromise, maintained, by a skilful counterpoise of forces, in a state of uneasy equilibrium. Lay hands upon one-sixth of the program, and the whole edifice totters. Fortunately, however, what I have proposed does not require, as do so many current proposals, the addition of new subject matter to the overloaded curriculum. On the contrary, I think it important that the problem method be applied to subjects now taught by the case-

student bodies. The latter can scarcely be hoped for until after the legal "reconversion boom" has passed. Then I suspect (and hope) that they can scarcely be escaped.

7. I hope we may find still other substitutes for casebook courses until they are reduced to, say, not more than half the student's program. However, in this paper I am endeavoring to gallop off in only one direction.

book system. Unless this is done, the problem method will be regarded merely as training for skill. Law will be "learned" in the traditional fashion, and the conflict between our philosophy and our pedagogy left unresolved.

VIII

I should be more pessimistic as to the prospects for major curricular change were it not for the pressures which the growth of public law is engendering. We cannot continue indefinitely to accommodate this growth by minor readjustments. Inevitably, after the war, we shall be forced to face accumulated difficulties squarely.

Then will come a hey-day for curriculum committees! There will be plotting and planning; there will be declarations and manifestos; there will be intrigues and injuries. No doubt here and there will come business for the A. A. U. P. But underneath the surface agitations will be the steady pull of habit and inertia toward compromise and the way things used to be.

Plus ça change, plus c'est la même chose. Within the framework of the casebook system, there can be new courses, new cases, new citations, and still the students will busy themselves composing little collations of black-letter law and the professor's crotchets. We need new means if we are to realize new goals. The problems of the problem method are many, but it is a flexible instrument and, I submit, by far the likeliest that lies within our reach.