WHAT IS THE PROBLEM METHOD?

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I

Within the last year, several Canadian legal journals have published articles in which reference is made to a teaching device described as the "problem method".[1] Apparently a new teaching method, and one that is unfamiliar to most Canadian law teachers,[2] it is, nevertheless, the object of stirring interest on the part of some members of the profession.[3] Those who refer to the method seem to think that it is a significant development in legal education in terms of teaching methods and student educational experience. If the problem method is a departure from existing pedagogical

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[1] LeDain, Theory and Practice of Legal Education (1961), 7 McGill L.J. 192, at p. 201; Huberman, Law Schools Should Teach Estate Planning (1961), 4 Can. B.J. 167, at p. 172. See also a description of the use of problems in the Commercial Law and Torts courses at the Manitoba Law School by R. D. Gibson, Three Experiments (1961), 4 Can. B.J. 327.

[2] This conclusion seems justified on the basis of answers to a questionnaire on teaching methods that the author recently circulated to Canadian law teachers. The majority of those professing knowledge of the method considered it to be one aspect of the case method rather than a new method.

[3] The result, I believe, of experiments with problems carried on in American law schools for the past ten years and described in a number of articles that have been published in American legal journals. The following list is representative but not necessarily exhaustive: Landman, The Curriculum of the Law School (1961), 47 A.B.A.J. 156; Singer, Harvard's New Course in the Legal Process — A Pattern for a More Comprehensive Legal Education (1959), 12 J. Legal Ed. 251; O'Neal, A Seminar in Close Corporations (1958), 11 J. Legal Ed. 237; Ward, The Problem Method at Notre Dame (1958), 11 J. Legal Ed. 100; Cunningham, A Seminar in Current Tax Problems (1958), 10 J. Legal Ed. 356; Sherman, New Approaches in the Teaching of Collective Bargaining (1957), 10 J. Legal Ed. 105; Ransom, The Harvard Seminar in Defence Policy and Administration (1957), 9 J. Legal Ed. 519; Hopson, A Seminar in Juvenile Problems (1956), 9 J. Legal Ed. 235; Whinery, The Problem Methods in Legal Education (1955-56), 58 W. Va. L. Rev. 144; Cavers, In Advocacy of the Problem Method (1943), 43 Col. L. Rev. 449; Landman, Anent The Case Method of Studying Law (1927), 4 N.Y.W.L. Rev. 139. See also: Report of the Curriculum Committee, Association of American Law Schools (1960), Annual Meeting, Program and Reports of Committees, p. 56 *et seq.*; Proceedings, Association of American Law Schools (1954), p. 76 *et seq.*; Handbook, Association of American Law Schools (1942), p. 85 *et seq.*

procedures and does provide the student with a significantly different experience in the learning process, then obviously it is a technique that should be of interest and value to every law teacher in Canada. Before an accurate evaluation of the problem method can be made however, its essential elements must be exposed for examination. What is the problem method? I hope that a closer look at some of the actual attempts by American law schools to use problems as a teaching vehicle will supply an answer to this question.

The use of problems in legal education is almost inevitable of course, whatever the teaching method used. The teacher who lectures on what the law is will ordinarily point out difficulties and inconsistencies in legal theory during his lecture. The case or casebook teacher, in a similar fashion, makes use of problems in the form of hypothetical questions asked in the classroom to test the students' understanding of a rule or principle that has been extracted from a case or series of cases. The cases themselves, which the teacher and class examine together, constitute a record of concrete problems that courts have faced. Modern casebooks now contain, in addition to cases and perhaps non-curial material, a number of simple problems designed to supplement case study.

Does the problem method merely involve a use of problems in the incidental ways just mentioned or does the technique utilize problems in a new and original way and in a manner that strains and stretches the student mind so as to provide a more complete experience in learning? Unfortunately, the tag "problem method" indicates little except that problems are used; it gives no information as to how they are used. My conclusion, after a review of the pertinent descriptive articles, is that the problem method is a distinct method of teaching law and one that provides the student with an opportunity to use his reasoning faculties in a way that is not made possible by the traditional lecture or case methods of teaching.

The problem method, it seems to me, differs from other existing teaching techniques in two ways. In the first place, the problem method is more ambitious in that it attempts to accomplish a three fold objective simultaneously: (1) to impart knowledge of legal principles to the student, (2) to develop the student's skill in applying legal principles to specific facts, and (3) to give the student practice in the technique of problem-solving and an opportunity to develop his reasoning powers.[4] Other teaching methods ordinari-

[4] Problems can be used in a more limited manner so as to accomplish

ly will attempt to accomplish (1) consistently throughout the year, (2) at examination time and perhaps sporadically throughout the year and (3) only rarely. It is the second distinguishing characteristic of the problem method, the manner in which problems are used, that permits the instructor to attain, or at least try to attain, the three objectives just mentioned. The student is required constantly throughout the year to apply his legal knowledge to problems, which are the focal point of classroom discussion, and to try to produce solutions that are well thought out.

Logically, problem-solving, requiring as it does the use of legal principles in the development of solutions to legal problems, is a natural extension of the case method. A study of decided cases furnishes the student with a fund of legal material that is potentially useful, but the problem method goes one step farther by requiring him to bring the knowledge to bear upon a particular problem. There are people who will argue that "case" teaching can be done in such a way as to give the student practice in applying law and in problem-solving. It is true that the student may receive some practice from the case method in applying the law and solving problems, but it is not sufficient to allow him to become at all proficient at either task. My impression is that the problem method tries to remedy this deficiency by giving the student constant, organized, practice in using his legal knowledge to solve problems; a difference of degree, true: a matter of emphasis, perhaps: but a significant variation in terms of a complete educative experience for the student.

How does the problem method attempt to give the student continuous experience solving problems? As has already been indicated, the problem method utilizes class time not for note-taking or for case discussion (although cases may be incidentally considered), but for a discussion of student solutions to unsolved, written problems that have been distributed to the students before the class meets. In order to solve the problem, the student must read, understand and apply the legal, and sometimes the non-legal, material he has been given, or to which he has been referred, or which he has discovered as a result of his own independent research. Cases usually comprise part of the reference material and it is expected that the student will read the cases, extract the relevant legal principles and proceed to use the principles and other avail-

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some of the outlined objectives rather than all of them. For example, problems are apparently not used at the Manitoba Law School in the Torts and Commercial Law courses to communicate legal knowledge (objective 1). See Gibson, *op. cit.*, footnote 1.

able information to produce a solution, but, unlike the usual case or casebook method, the emphasis is upon the problem and its solution and the cases are subordinated to the position of useful information to be used in solving the problem. Problems vary in complexity but usually a reasonably complicated problem is given to the student which may in certain cases, require the student to draft various kinds of documents. Simple problems, however, also have their place. Whatever type of problem is used, the student is forced to concentrate his attention in a sustained manner upon a problem and, by using the principles of law and other information he has acquired, to find a solution. It is the emphasis upon problem-solving by the student's application of legal knowledge that is the most important characteristic of the problem method and that feature which sets the method apart from other teaching techniques. A more detailed examination later in this article of applications of the problem method in different law schools will, it is hoped, make this distinction clear.[5]

II

Why should law teachers in particular be interested in the problem method? I can think of two reasons. Firstly, a law teacher, although a member of two professions, is primarily a teacher and should be concerned with teaching methods of all kinds, new and old.[6] Secondly, it is generally agreed that the law school's function is to prepare law students for the competent performance of a lawyer's work.[7] A large and important part of the average lawyer's work consists of finding or constructing the solutions to problems that have been brought to him by clients.[8] If the student as a lawyer

[5] See *infra.*

[6] See, for example, Kelso, Science and Our Teaching Methods: Harmony or Discord? (1960), 13 J. Legal Ed. 183; Groves, Towards a More Effective Program in the Small Law School (1959), 12 J. Legal Ed. 52, at p. 58; Rand, Legal Education in Canada (1954), 32 Can. Bar Rev. 387, at p. 402; Wiehofen, Education for Law Teachers (1943), 43 Col. L. Rev. 423.

[7] Questionnaire answers indicate general agreement upon this broad objective. See also: Cohen, Objectives and Methods of Legal Education (1954), 32 Can. Bar Rev. 762; Harno, Legal Education in the United States (1950), p. 122; Report of the Committee on Curriculum, Association of American Law Schools Handbook (1944), p. 159.

[8] Overton, The Law School's Role in Developing a Lawyer, a paper delivered at the 1959 Conference on Legal Education at Ann Arbor, Michigan; Morton, Academic Preparation for the Practice of Law, a paper given at the Conference of British, Canadian and American Law Teachers in New York, 1960; Milner, One Canadian View of the Case Method (1955-56), 3 J. Soc. of Public Teachers of Law 32; Wright, The University Law Schools (1950), 28 Can. Bar Rev. 140; Whinery, *op. cit.*, footnote 3; Rand, *op. cit.*, footnote 6.

will be performing the function of a problem-solver, should he not be given some practice in this difficult task while at the law school? The answer is obvious.

III

What is involved in solving a problem? The American educator and philosopher, John Dewey, has expressed the opinion that an individual proceeds through five phases of mental activity while trying to solve a problem.[9] The five theoretical stages suggested by Dewey may be listed as follows:

(1) realization of a problem,
(2) search for clarity,
(3) the proposal or hypothesis,
(4) rational application,
(5) experimental verification.[10]

The first and one of the most important steps in the procedure of problem-solving is for the individual to realize that a problem exists. Once aware that a problem is contained in a given set of facts before him, the individual then examines the facts and attempts to classify them as relevant or irrelevant having reference to the legal principles of which he has knowledge, thus narrowing the problem to its issues. In other words, the problem is outlined as clearly as possible. With the problem now defined as clearly as he can, the problem-solver searches for a solution in the fund of knowledge he already has or can acquire. The information may enable him to produce more than one solution, and if it does, each solution must then be tested by application to the problem. On the basis of the forecasted results of the application of each solution, a choice is made and the solution thus chosen is adopted.

In Dewey's view, all learning is basically the mental effort required to find a solution to a new problem. An individual learns by thinking and acting his way through emergencies and other situations that represent problems or obstacles in his path. The first time he is confronted with a problem and attempts to solve it, he will go through these five stages of mental activity, though probably not in the order suggested by Dewey.[11] In most cases his mental machinery will not function in a smooth, orderly or

[9] Dewey, How We Think (2nd ed., 1933), p. 106 *et seq.*

[10] Thorpe and Schmuller, Contemporary Theories of Learning with Application to Education and Psychology (1954), p. 363 *et seq.* See also Dewey, Democracy and Education, An Introduction to the Philosophy of Education (1936), p. 192 *et seq.*

[11] Dewey did not suggest that the sequence of the five phases is fixed: *op. cit.*, footnote 9, p. 115.

logical manner, but Dewey's thesis is that continued exposure to new problems will result in the individual thinking more efficiently, more logically and in a more orderly way about the problem. The mental processes will begin to work more smoothly and solutions will be found more readily. It is not Dewey's suggestion, nor is it mine, that there is only one method of solving problems. What is suggested is that there is a definite mental activity that can be stimulated in the individual by making him solve problems and that, in so doing, he can be made to develop an orderly thought-pattern. We learn by solving problems; we learn by doing. The lawyer when he tries to solve a legal problem is engaged in the basic learning process, using legal information to reach his solution. Should we not also give the student an opportunity to learn in the same way?

No doubt the emphasis of modern educators like Dewey upon problem-solving as a concept of learning has been one reason for the development of a teaching method in law schools that stresses student participation in the solution of problems.[12] But I think that modern educational theory is only one of several influencing factors that have in combination contributed to the development of the problem method. One additional factor I have in mind is the prevalent opinion that law schools should include in their curricula practical courses that emphasize the development of lawyers' skills and that law should be taught in a setting resembling as closely as possible the atmosphere of a law office.

Another factor contributing to the development of the problem method is the belief of many legal educators that the case method has inherent defects which require correction. Criticism of the case method is usually directed to its narrow emphasis upon the adjudicative process and, in particular, appellate decisions; its concentration upon legal, to the exclusion of pertinent non-legal, material; and its failure to provide the student with an opportunity to do independent research and deal with raw facts.[13] Problems can be so constructed as to give the student some experience in drafting in the non-litigious aspects of law practice, such as counselling and planning, and in such a way that the student will have to consider the relevance of non-legal information to the problem he is facing. Practice in sifting facts can also be given. The problem method is

[12] For a survey of other contemporary theories of learning, see Thorpe and Schmuller, *op. cit.*, footnote 10.

[13] For example, see Patterson, The Case Method in American Legal Education: Its Origins and Objectives (1951), 4 J. of Legal Ed. 1; Milner, *op. cit.*, footnote 8, at p. 37; Carusi, A Criticism of the Case System (1908), 2 (#5) Am. L. School Rev. 213.

an attempt to remedy some of the gaps that have been left in the student's legal education by the case or casebook method of instruction.

One final reason for the development of a novel teaching approach can, I think, be found in the desire of some law teachers to combat a usual attitude of third-year students. Most students in their final year seem to suffer from acute boredom. They lack the enthusiasm that characterizes the majority of first-year students and, instead, approach their law studies with something approaching indifference. A different teaching method in certain second and third-year courses is considered essential if this apparent disinterest is to be dispelled.

Theories of modern educators, the desire to give the student more practical training, the need to correct some of the inadequacies of the case method and the hope that a change of pace in the second and third years will maintain student interest have all combined to produce, particularly in the United States, a variety of experiments involving the hypothetical problem.[14] The value of the unsolved problem has been recognized for some time, by American legal educators,[15] but it is only in recent years that any large-scale use of it as a teaching device has been attempted.[16]

IV

The use of hypothetical problems allows great flexibility in the type of fact situation that can be constructed. It is possible, for example, to formulate a problem that will require for its solution only cases that have been studied in part of a given course.[17] If a problem were given at the conclusion of the portion of the course in contracts covering offer, the student, in order to answer the

[14] See *supra*, footnote 3, for a list of articles describing some of these experiments. The hypothetical problem is also used by English legal educators as part of the tutorial system. For a description of the tutorial system as conducted at Cambridge and Oxford, see Parry, The Cambridge Supervision System (1954-55), 7 J. of Legal Ed. 1 and Carter, Law at Oxford: Miscellaneous Comments (1960), 5 J. Soc. of Public Teachers of Law 124.

[15] Early advocates included: Frederick W. Doring, The Newer Law School Education (1910), 2 (#8) Am. L. School Rev. 360; Carusi, *op. cit.*, footnote 13; Ballantine, Adapting the Casebook to the Needs of Professional Training (1908), 2 Am. L. School Rev. 135.

[16] For example, in 1954, sixty-three out of seventy-six American law schools replying to a questionnaire indicated that they made use of unsolved problems in various courses. Courses in Taxation, Estate Planning and Corporations were preferred for utilization of the problem method. See, Proceedings, Association of American Law Schools (1954), p. 87 *et seq.*, for additional information.

[17] Problems of this kind can be found in Braucher and Sutherland's casebook, Commercial Transactions, Cases and Problems (2nd ed., 1958).

question posed by the problem, would have to reconsider each case he had previously read in which the question of offer had been discussed, attempt to extract from the cases one or more rules or principles of law, and apply the principles thus synthesized to the problem in order to reach a solution. In this extremely simple problem, the issue would be quite clear and the only question presented for the student's consideration would be whether or not an offer had been made. It would be possible to formulate additional problems involving more than one aspect of contract law as the course in contracts progressed. A problem could be constructed that would raise several separate issues relating to offer, acceptance, mistake and consideration, the existence of which would have to be recognized by the student and dealt with by him. This kind of problem would demand not only that the student synthesize principles of law from the cases and apply them but, in addition, that the student recognize that a given fact situation (problem) raised certain legal issues. A further step in the building of a more complex problem would involve the introduction of another field of law and possibly non-legal information.

At first glance, the use of the very simple problem would not seem to be much more effective or beneficial than the traditional posing of oral classroom questions. A moment's reflection will show that the simple written problem, given to the student before the class session, provides more time in which to review the previously acquired legal information and to apply the legal principles in an unhurried and considered manner. The additional time for reflection should result in the student producing a well thought-out solution to the problem and should provide him with a more complete understanding of the legal principles he has just used. An extremely complicated fact situation will present the student with many difficulties not to be found in the simple problem. The problem may be only vaguely defined, in which case the student must, first, find and outline the problem; secondly, apply the legal theory he has acquired in one or more fields of law and, perhaps, non-legal knowledge as well; thirdly, make a choice among several equally feasible solutions; and, fourthly, participate in counselling, planning or negotiating as a preliminary step to the drafting of the solution in the form of a will, contract or statute.[18] The use of this comprehensive problem permits the law

[18] Some of the problems used in the third-year Business Planning and Estate Planning courses at Harvard are of this type. Columbia Law School offers a seminar in governmental administration and selected legal problems in which comprehensive problems are employed. For a detailed

school to cure some of the defects in the students' legal education that result from an emphasis upon the case method of instruction.

Between the simple and the complex problem exist all manner of variations, the advantages and disadvantages of which can only be appreciated on a closer examination. Problems can be divided roughly into two main types. One type we can call the "class problem", because only an oral answer or solution, without research, is required of the student in the classroom. The second type, requiring a written answer prepared in advance of the class, and possibly independent student research, can be referred to as the "written problem".[19] The instructor who uses the class problem asks the students to outline orally the solutions to problems that have been previously assigned and then proceeds to monitor a classroom discussion of the answers.

Several Harvard courses with heavy student enrolment use class problems. The Legal Process course, given in the second year, is an example. It involves a "study of law as an ongoing, functioning, purposive process and, in particular, the study of the various institutions, both official and private, through which the process is carried on".[20]

The course is designed to give the student some knowledge and understanding of the operation and interrelation of legal and social institutions by presenting him with problems that involve, not issues of particular substantive law, "but rather issues common to the law as a whole".[21] The problems are designed to cover topics such as the differences between enacted and decisional law, the interrelation between the major law-making institutions, the role of the private lawmaker and the function of custom and precedent in the law. The fundamentals of the legal process are explored through a series of sixty problems. One phase of the legal process, private law-making, is examined by asking the student to solve problems involving a percentage lease, collective bargaining, arbitration and the liability of common carriers for lost or damaged goods. Other parts of the legal process, including law-making, adjudication and legislation, executive and adminis-

description of the problems used at Columbia, see Esther Lucile Brown, Lawyers, Law Schools and the Public Service (1948), p. 190 *et seq.*

[19] Both types of problems are used in small classes, which are the favoured setting for the problem method, but there have been a few attempts to use the problem method in large classes by utilizing the class problem.

[20] Hart and Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tentative ed., 1958), p. iii. For a more detailed description of the course, see Singer, *op. cit.*, footnote 3.

[21] *Ibid.*, at p. 255.

trative action, and judicial interpretation of legislation are dealt with in a similar way.

The student in the Legal Process course at Harvard performs as a decision maker. Sometimes he will find himself in the position of a private person engaged in private law-making, while in other instances he will act as an official law-maker, such as a judge, legislator, administrative official or lawyer in litigation, actual or potential. The problems are used to create situations where decisions have to be made before and after disputes have arisen. The problems do not require research on the student's own initiative, the relevant information being provided with the problems. All the student is asked to do, after he has read the material, is to think, solve and discuss. The materials include, in addition to many stimulating questions, court opinions, administrative regulations and legislation, legislative history, statistical information, office memoranda, portions of case records and excerpts from a variety of law-review articles and other scholarly writings.

Unlike the Legal Process course, the course in Business Planning is not designed to furnish the student with a knowledge of the operation and interrelation of legal and social institutions. Its purpose is to acquaint the student with the legal principles of two fields of law, taxation and corporations, and to show him how to use the law in planning his client's future conduct.[22] As a result, the entire course is conducted from the point of view of the business man who is contemplating a business venture. The problems in the Business Planning course are constructed around typical transactions, such as the selling or merging of existing businesses or the financing of an entirely new enterprise, and involve tax and corporation law rather than theories of jurisprudence, as is the case with the problems in the Legal Process course. Students are referred to two casebooks, one in corporations and one in taxation.[23] They are also supplied with references to the Internal Revenue Code and to other statutes, both state and federal. Frequently, general business information is provided by the use of mimeographed material. Although one purpose of the course is to impart knowledge of substantive legal rules and principles, the substantive law is referred to only in order to solve the problems. Problem-

[22] The practical difficulty presented by a simultaneous coverage of two fields of law is overcome, at Harvard, by using two teachers, one to cover the taxation aspects of the problems and the other the company-law side.

[23] Baker and Cary, Cases and Materials on Corporations (3rd ed., 1958), and Surrey and Warren, Cases and Materials on Federal Income Taxation (1960).

solving, from a preventative point of view, remains the important aim of the course.

Professor Braucher of the Harvard Law School, who teaches a second-year course in Commercial Transactions, uses a casebook that includes problems at the end of each section of cases.[24] The problems are numerous, relatively short, and generally stated in the form of a court's statement of facts, concluding with a question such as, "What result?" The student is expected to solve each problem by an application of the legal principles he has extracted and synthesized from the cases in the casebook. In terms of Dewey's analysis of what is involved in problem-solving, the short problem offers the student an incomplete experience.[25] Because the problem is simple and the relevant legal material usually points to one obvious solution, the student does not have to search for the problem in a mass of facts, clarify it and then choose among possible solutions for the one he thinks best, as he would have to do in a more complex problem. Although Professor Braucher still uses class time to discuss the problems and their solutions, he does so, not to develop the student's ability to solve problems, but to test his skill in extracting legal principles from the cases, his ability to synthesize them, and the student's understanding of the law thus discovered. In contrast to the Business Planning and Legal Process courses, where problems are employed to develop the student's skill in problem-solving, the emphasis in the "Transactions" course appears to be upon transmitting knowledge of legal principles. Practice in solving problems becomes a mere by-product.

Notre Dame Law School has recently embarked upon a programme of legal education that makes an extensive use of problems in the second and third years.[26] As far as I am aware, the experiment at Notre Dame represents the only organized attempt so far made to introduce the problem method of teaching into a law school on a large scale. In this respect it differs from the Harvard use of the method. Both schools, however, seem to be using problems to accomplish the same objectives: to afford students training in the skills involved in preventative law practice; to test the understanding of assigned readings; to provide training in the use of legal rules; and to demonstrate the lawyer's role in the law-making process.

[24] *Op. cit.*, footnote 17. [25] *Op cit.*, footnotes 9 and 10.

[26] A more detailed description of the use of problems at Notre Dame Law School is provided by Ward, *op. cit.*, footnote 3, and O'Meara, The Notre Dame Program: Training Skilled Craftsmen and Leaders (1957), 43 A.B.A.J. 614.

Two kinds of problems are used at Notre Dame: class problems and written problems. Class problems are distributed in advance of the discussion period and their solution depends upon the student's mastery of the legal rules and principles contained in reading assignments provided with each problem. Teachers encourage the students to sketch tentative conclusions in advance of the class. The problems range in form from single questions to extended fact-recitals, but are always presented to the student as a lawyer's problem. Apparently, the experience at Notre Dame has been that fairly complex problems stated in the form of a client's recital of raw facts to the lawyer are best suited to achieve the purposes for which the problem method is used.

Notre Dame and Harvard normally employ the case method of teaching and, because they do, insist that the student be given at least one year of intense training in case analysis before being exposed to the problem method. If cases are to be used as the basic material from which the student is expected to gather the legal information he will subsequently use to solve problems, some training in case analysis, they argue, is necessary. A different approach has been advocated by Jacob H. Landman, who would omit the training in case analysis and use the problem method exclusively in all years and in all courses.[27] Mr. Landman suggests that the student should be introduced to and made familiar with the law of each course at the beginning of the course by lectures and references to appropriate text books. In this way, he thinks, the student would quickly become acquainted with the relevant fundamental concepts and rapidly acquire the necessary background for his later efforts at problem-solving. The problems presented for solution would each contain a legal bibliography consisting of citations to case material, law-review articles, and materials of an economic, sociological, historical and philosophical nature. The main disadvantage of this approach, at least in the eyes of devotees of the case method, seems to be that the student is not given preliminary training in case analysis. In the result, he will have to read the cases referred to in the bibliography without experience in dissecting cases for their doctrinal content.

The second general type of problem tried in American law schools, the "written problem" as I have called it, requires that the student supply a written answer to each problem. The answer

[27] Landman, *op. cit.*, footnote 3. For additional comments by Mr. Landman on the problem method see: The Case Method of Studying Law (1930); The Problem Method of Studying Law (1935), 5 J. Legal Ed. 500.

most frequently takes the form of an office memorandum, but some problems are so constructed as to require a final solution in the form of a contract, will or legislative bill. Drafting may be considered by some people to be a practical skill that need not be taught in law schools, but it should be remembered that the written solution is merely a manifestation of everything that has preceded the final act. The important thing is not the final act of expression, although the ability to express oneself is important in itself, but the whole process of solving the problem. Some written problems, like class problems, provide the student with references to the relevant materials, while other problems, accurately called research problems, merely turn the student loose in the library with his problem.

Written problems are used in legal-writing courses where an attempt is made to develop, among other things, the student's ability to think about legal matters in a sustained and rational way and to transform his thoughts into written form by the accurate and precise use of language.[28] Before the actual exercise in

[28] Professor Nicholls of Dalhousie Law School, in a memorandum to the Dean and Faculty dated March 21st, 1960, relating to the curriculum inquiry currently under way at Dalhousie, describes the Dalhousie course in Research, Writing and Bibliography as aiming at "discipline in the sustained development of co-ordinated legal thought". This course is a first-year, full-credit course designed to familiarize the student with legal materials and to permit him to use them in the solution of legal problems. Lectures are kept to a minimum and the student is usually required to complete four written assignments that vary in complexity and involve legal research. Student answers are discussed by the instructor with the students in personal interviews. See Nicholls, A Course on Legal Research and Writing (1959), 13 U. of T.L.J. 88. Some minor changes have been made in the course since Professor Nicholls wrote his note, but the work required of the student has not been reduced. Courses in legal writing are given at several other Canadian law schools:

University of Toronto. A course is given one hour a week during the first term of the first year. Group discussions relating to Canadian and Commonwealth statutes and law reports are conducted. Students are required to complete written exercises that are designed to demonstrate their skill in using library facilities and in solving legal problems. See Abel, Introduction to Legal Writing (1957), 12 U. of T.L.J. 81. I understand that the course described by Professor Abel has, since his note, been reduced in scope.

University of Western Ontario. This school has a legal-writing course aimed at developing the student's skill in the selecting, collation and critical analysis of legal materials. In order to give the student practice in legal research and exposition, written exercises are required.

University of Alberta. The course is described as a study of recent cases and legislation. It is given one hour a week, both terms, in the third year and involves presenting the student with a series of practical problems, solutions for which the student is required to outline in an opinion or brief. The problems usually involve statute as well as case law. The statutes are studied from the standpoint of statutory construction as well as content. Each student is also required to write a case comment on a recent Canadian case. See Bowker, Legal Writing at the University of Alberta (1959), 13 U. of T.L.J. 85.

writing, the student is given training and practice in finding the relevant legal information and then is asked to use this skill as part of an assignment that may require the solution of a legal problem. Written problems permit the instructor to test the student's ability to do independent research, his ability to exercise independent judgment, his analytical skill and his success in combining all these qualities in the production of a piece of thorough, accurate and well thought-out legal writing.

The law school is expected to help the student develop legal skills that he, as a lawyer, will need, but usually the skills are developed in isolation from each other. The legal-writing course is an attempt to give the student an opportunity to use his skills in combination, "in a unified treatment, in the round, of a complicated subject with interlocking elements".[29]

The practice in the United States has been to use written problems, with their requirement of a written solution, only in small classes or seminars where it is possible to have the participation of all students in problem-solving.[30] In seminar work, the students, either singly or in groups, are assigned topics or problems that will lead them into a more intensive study of some relatively narrow area of the law, which usually has not been covered in a basic course already given.[31] Students are expected to cover the pertinent material in greater depth and in more detail than they are able to do in the larger classes. The written results of the student's independent examination of the problem or topic are discussed by the class. Student participation is at a maximum in this environment, which allows each solution or report to be carefully considered and criticized by the entire group and defended by its writer.

Some of the artificiality of an academic one-concept-at-a-time presentation can be avoided by grouping the problems around a single transaction or series of transactions crossing more than one field of law. Professor Addison Mueller of Yale Law School in his casebook has attempted to present the law of contracts through the problem method by looking at the contractual difficulties faced by an individual engaged in building an apartment house

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[29] This is the way Professor Nicholls explains the purpose of the course at Dalhousie in his memorandum referred to in footnote 28.

[30] The practice is described more fully in: O'Neal, Cunningham, Sherman, Ransom and Hopson, *ops. cit.*, footnote 3.

[31] It is not suggested that all teaching in seminars is conducted by the problem method. Many teachers prefer to have students do research on a given topic and produce a paper, which is then discussed by the group.

and portraying them as a series of problems.[32] 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. Legal questions are dealt with as they characteristically arise and confront the lawyer in practice. The author describes his treatment as an attempt to avoid "the capsul-like and technically worded statements of fact in the cases".[33] Another approach, more ambitious than Professor Mueller's, is the one proposed by Professor D. F. Cavers, of Harvard Law School, which involves the selection of a field of law, covering more than one course, that has grown up around a central core of transactions.[34] For instance, the law of vendor and purchaser, conveyancing and mortgages would be developed around the acquisition of a tract of farm land, its subdivision for suburban development, the sale of lots and their financing. The course could, according to Professor Cavers, be confined to the consideration of only those matters that conventionally have been treated in the casebook course, but it provides an opportunity to examine, in addition, the questions of land use and credit policy.[35]

The organization of a course around a series of transactions has the obvious advantage of realism in the simulation in the law school of a law-office atmosphere, but requires the instructor to spend much time preparing for class. Familiarization with and reasonably complete mastery of the law in one course takes much of the teacher's time. To double or triple the ground that must be mastered in order to teach one course would seem to call for some sort of redistribution of teacher work-load, or the use of more than one teacher for the course.

Many law schools try to give their students some experience in advocacy, on both the trial and appellate level, by requiring participation in mock trials and moot courts. Usually, the student is assigned a problem in the form of a disputed set of facts and told to act like a lawyer. At the trial level various devices have been developed to unfold the facts as realistically as possible. One method involves a hypothetical client, who tells his story to the student.[36] Motion pictures are another way of outlining the facts.[37] Still a third method elicits the help of people who have been involved in minor legal controversies in which no legal action

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[32] Mueller, Contract in Context (1952).
[33] *Ibid.*, p. ix. [34] *Op. cit.*, footnote 3.
[35] Professor Cavers has not carried out his proposal, as far as I know.
[36] Mueller and James, Case Presentation (1948), 1 J.Legal Ed. 129.
[37] Hunter, Motion Pictures and Practice Court (1949), 1 J.Legal Ed. 426.

will be taken.[38] The most common device, both on the trial and appellate level, is the use of factual statements that pose the controversial situation. All these devices are directed towards reproducing for the student, as realistically as possible, the lawyer's experience in a law office.

V

The use of problems poses many practical questions. At what stage in the student's legal training should they be used? Should simple or complex problems be used? Should the problems require written or oral answers? To what extent should the relevant materials be drawn to the student's attention? American experience with the problem method indicates that a conclusive answer to questions of this sort is not possible. Except for Professor Mueller's course in contracts, and a few legal-writing courses that use problems, the American law student is ordinarily not introduced to problem-solving until the second year of his studies. It is my own suggestion that, if possible, the second half of one course in the first year be organized and taught by the problem method. The legal-writing course, if one is given, would seem to be a suitable place in which to introduce the student to the technique of solving problems. The problems would have to be simple, designed merely to accustom the student to the difficulties of constructing solutions, so that he will be prepared in his second and third years to wrestle with more complex problems.

The size of the student work-load is a consideration that must always be kept in mind when teaching methods are discussed. Student time is precious and faculty demands upon it should, of course, be such that the time is utilized effectively. The time requirement should be an important factor in deciding whether to use a simple or complex problem. Naturally, problems should not be so complex as to require an amount of work on the part of the student that is out of proportion to the value of the problem, but it should be realized that solving simple problems is more time consuming than briefing a single case.

In order to solve a problem, the student must necessarily first brief the relevant cases before he can make use of them. Even simple problems covering only a section of a course require more time of the student than would an equal number of cases covering the same ground. All kinds of problems can be used, as we have

[38] Mathes, The Practice Court: Practical Training in Law School (1956), 42 A.B.A.J. 333.

seen. Simple problems, presumably, will allow greater course coverage. Complex problems will tend to slow down the instructor in his presentation of material, but will afford the student the benefits of a more complete educative experience in terms of modern educational theory. The type of problems used will also depend upon what the instructor hopes to accomplish in the given course.

Large classes seem to dictate the use of oral or class problems. The class problem, requiring only an oral answer, ordinarily will consume less of the student's time than will the written problem, but it has the disadvantage of not forcing the student to develop his answer as carefully as he would have to do in a written answer. Unless he is required to do so, his natural tendency is to think about the problem in a rather vague and general way, but never quite to reach the point of crystallizing his ideas so that they can be critically viewed by the student himself. A serious and thoughtful consideration of the problem and its solution is more likely when a written answer is required. The written solution has the added advantage of permitting the student to practise legal writing and possibly drafting as well.

The question of student guidance in problem-solving is governed to some extent by the need to conserve the student's time as much as possible. The provision of a bibliography ensures an effective use of the student's time and energy but has the disadvantage of being an artificial aid that will be unavailable to him when he becomes a lawyer. It seems to be fairly uniform practice in the United States to use a bibliography with class problems, and even with some written problems, and to restrict independent student research to the kind of problems that are used in some seminars[39] or in legal writing courses where one purpose is to develop the students ability to conduct an independent investigation of a topic.

Perhaps the greatest difficulty presented by the problem method is the enormous demand upon the time and energy of the instructor. The actual construction of suitable problems itself poses a practical problem that is not easily overcome. The simple, examination type problems or those based upon actual court cases can be developed without too much trouble, but the more complex problems that cover more than one field of law and include a variety of non-legal material are not constructed without the expenditure of much time, effort and ingenuity by one or more professors. Not only must the problem be formulated, but it must be analyzed

[39] Problems are not used in all seminars. See *supra*, footnote 31.

and all possible solutions outlined prior to the class by the instructor himself. Finally, the use of problems requires a wise and subtle control of the classroom discussion by the teacher, who has to ensure that all the important issues in a problem are raised (preferably by the students) and all the possible solutions put forward and discussed. The discussion must be controlled by the teacher so that a very minimum amount of classroom time is spent exploring blind alleys, a matter of discretion for the individual teacher, the exercise of which will vary greatly depending upon individual personalities. Other teaching methods are clearly less demanding upon the teaching personnel.

VI

How does the problem method differ in technique and effectiveness as a teaching device from the case or casebook method, to which I have frequently referred, and which itself has been described as a problem method or approach.[40]

The term "case method", has been used most frequently to describe a method of instruction introduced at the Harvard Law School by Christopher Columbus Langdell, in which class discussion centers around reported cases and the problems they present. The term now is used to describe a method with almost infinite variations, the only common feature of which seems to be a consideration of cases in the classroom.

In the hands of its originator the method involved studying a series of cases, so that from them might be revealed the development of certain legal principles. In Langdell's opinion, a true lawyer was one who had mastered the principles so that he could apply them competently.[41] Implicit in such a statement is the fact that Professor Langdell saw the purpose of legal education in two major aspects: first, to give the student a knowledge of legal principles and, in the process of doing so, to show him how they grow, develop and take shape; and, secondly, to enable him "to apply them with constant felicity and certainty to the ever tangled skein of human affairs".[42] It was Langdell's contention that this twofold objective could best be achieved by "studying the cases in which it [the doctrine] is embodied",[43] but it is difficult to imagine

[40] See, for example: Whinery, *op. cit.*, footnote 3, at p. 150; Milner, *op. cit.*, footnote 8, at p. 32; Griswold, Observations on Legal Education in Australia (1952-53), 5 J. Legal Ed. 139, at p. 149.

[41] Langdell, Selection of Cases on the Law of Contracts (2nd ed., 1879), p. viii.

[42] *Ibid.*, p. viii.

[43] *Ibid.*, p. viii.

how the student could become skilled in applying the doctrine without performing the function himself. We are told, however, that Professor Langdell approached the cases from the lawyer's point of view as a problem to be solved and that he made copious use of the briefs of counsel.[44] If he did, can we therefore say that he was in fact using the problem-solving approach to legal education and conclude that the problem method is little more than a return to Langdell's original case method?

It seems clear that in both Langdell's case method and in the problem method the focal point of legal study is a problem, but in the case method an answer is provided in the form of a court opinion and in the problem method it is not. Is this difference important? If we agree with John Dewey that the basic learning, educative process involves finding solutions to problems, and that one step in the process is the application of available knowledge to the problem, then the answer is "Yes", for, while the case may be so approached and the information so supplied that it approximates an unsolved problem of similar complexity, the student still has no opportunity to apply his knowledge to the problem and to work out his own solution free from the influence of a court solution to the problem. The case method leads him to the problem in the hope that he will drink, but with a ready-made solution from the courts to rely on, his thirst, in the case of most students, will not be great. It is this practice in applying legal principles and actually producing original, independent solutions that seems to distinguish even the use of simple, unsolved problems from the reported case as an educational experience.

The problem approach to the cases and the problem method are alike in that they are both attempts to promote student participation in the learning process and to prevent passive reception of information, but the two methods differ in the manner in which the attempt is made. Even the most favourable use of cases, like the case studies of the Yale Law School or the problem approach to cases, places the student in the role of a spectator, in which he watches while the lawyer analyzes the facts, outlines the problem by defining the issues, finds the law, applies it to the problem and proposes a solution or solutions, selects one solution and uses it to solve his problem.[45] The student, whether at Yale or at some

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[44] This conclusion was expressed by Professor Karl Llewellyn in a speech delivered at a meeting of law teachers in 1944, reported in the Association of American Law Schools Handbook (1944), p. 27.

[45] "Case Studies" were described in the 1952-53 Yale Catalogues as follows:

other law school where the problem approach to cases is employed, does not learn by performing these functions himself (except at examination time), but only by watching others. He learns fact discrimination by watching other people make decisions about the legal relevance of certain facts and in this way builds up a backlog of instances where certain facts have been given legal significance by the lawyers and by the courts. He sees how a difference in facts can result in a different principle being applied and is given additional practice in this process of recognition by the instructor's use of hypothetical questions in the classroom. In all this, however, the student is not given the opportunity to perform these functions for himself, except in so far as he is asked to criticize what the lawyer did or did not do, or what the courts decided; the problem method, by providing the student with his own unsolved problem, gives him this opportunity and in so doing establishes itself as a distinct method of teaching.

If I am correct in concluding that there is a difference between the problem approach to cases and the problem method, it should be obvious that a teaching method that treats a case as a solved problem, a datum to be put together with other decisions into a system of principles, with emphasis upon the rule of the case and the reason for the rule, cannot possibly be identified with the problem method. Yet this was the approach to cases adopted by those who followed Langdell[46] and is still used by a large number of teachers in the United States and Canada today.[47] It is this method of using cases that has drawn the bulk of the criticism directed against the case method.

The solved-problem approach involves the student in an accurate analysis of the court's judgment, in that he is urged to determine the *ratio decidendi* of the case, to define the scope of the legal rule or principle contained in it and to discover the reasons for judgment, both expressed and implied, so that he may gain some understanding of how courts approach a problem. The student is forced to work only with a refined fact situation that

"Each case study will include an analysis of the legal problems which appeared as it first came to counsel; a review of the modus operandi determined upon by counsel for handling the case; a consideration of what business problems of the client were involved; an analysis and review of the case as it was prepared for original trial, and then on appellate proceedings; a study of the case as it was finally disposed of; and a review of such business adjustments as may have been required by the client as a result of the final decision."

This passage is quoted in Shepherd, Learned in the Law (1953), 39 Va.L. Rev. 163, at p. 177.

[46] *Op. cit.*, footnote 44, p. 27.

[47] See Milner, *op. cit.*, footnote 8, at pp. 32 and 33.

has been the object of scrutiny by counsel and court, where the issues have been determined by the lawyers for both sides and narrowed even further (sometimes) by the court, with the arguments of counsel (sometimes) and with the court judgment. If a casebook is used, the material will be limited even further by abbreviating the facts and eliminating the arguments of counsel.[48] The most that can be said for the solved-problem approach is that it gives the student practice in analyzing court opinions and in extracting legal information from cases. In terms of Dewey's five stages of problem-solving, the student is given practice in unearthing legal principles from the cases for possible future use, but that is all.

VII

I have tried to outline what the problem method involves and in what way it can be considered a distinctive teaching technique. Once again I should like to express my belief that the method differs from existing teaching methods, not simply because problems are used as a teaching device, but because of the particular way they are used. The shift of emphasis from case analysis to problem-solving permits the law school to give the students valuable experience in grappling with novel situations and an opportunity actually to use the legal principles with which they have been made familiar. If all learning is basically a matter of solving problems, it is clear that the utilization of legal problems in an effective manner will allow the student to participate in the fundamental learning process. A teaching method that stresses problem-solving has the additional advantage of providing the student with experience in what will be his important task as a lawyer, at the same time permitting him to participate in some of the more practical activities like drafting and counselling; to this extent, the method may well appeal to those persons who favour practical training in the law school.

I do not suggest that it is either feasible or necessary to adopt the problem method of teaching on a grand scale so as to exclude all other techniques. A variety of teaching methods is both desirable and, in some cases, depending upon course aims and objectives, necessary. What I am suggesting is that because the problem method exercises the mental machinery of the student in

[48] Professor Milner has pointed out that shortened fact recitals permit the student to be exposed to more novel problems than would otherwise be possible: *ibid.*, at p. 36. For a very complete review of the development of American casebooks, see Ehrenzweig, The American Casebook: "Cases and Materials" (1944), 32 Georgetown L.J. 224.

a way that is not possible using other teaching methods, it deserves the thoughtful consideration of all Canadian law teachers. There is room in legal education for new and effective teaching methods. Why not the problem method?