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THE PROBLEM METHODS IN LEGAL EDUCATION

Leo H. Whinery*

INTRODUCTION

In recent years, a number of lawyers have expressed concern for what they believe to be a failure of the law schools to produce graduates who are qualified to practice law. One of the most recent criticisms came late in 1952 when a prominent West Virginia attorney, Arch M. Cantrall, asked the question: "Is Legal Education Doing Its Job?"¹ His unequivocal answer was in the negative. It is understandable that this censure of contemporary educational methods and bar examinations provoked innumerable replies.² The controversy finally culminated in a panel discussion sponsored by the Section on Legal Education and Admissions to the Bar of the American Bar Association at its 75th Annual Meeting in Boston.³ The principal bone of contention throughout the entire interchange of articles and discussion was the alleged failure of the law schools to teach the so-called "practical knowledge". With this as the focal point, a second issue involved the schools' ability to meet the minimum standards imposed by Mr. Cantrall in his initial article.⁴ It would not serve a useful purpose to directly reply again to the original allegations, or to survey the various view-

³ For a transcript of these talks, see Joiner, McClain and Griswold, Legal Education: Extent to Which "Know-How" in Practice Should Be Taught in Law Schools, 6 J. Legal Ed. 295 (1954); Cantrall, Practical Skills Can and Must Be Taught in Law Schools, 6 J. Legal Ed. 316 (1954).
⁴ "... It seems to me, as a minimum, that he should be competent to examine a title; write a deed and other customary instruments; close a real estate deal; institute and prosecute suits, including the statutory proceedings of his jurisdiction; defend a criminal; prepare individual, partnership and fiduciary tax returns; work out an estate plan; prepare and probate a will; administer an estate, with the federal and state returns, etc.; and form, operate and dissolve an individual proprietorship, a partnership and a corporation, including compliance at each of these stages with all the requirements of federal, state and local laws, tax and otherwise applying to a small business. ... It goes without saying that a proper law course would include instruction on the management of a law office, the handling of clients, the development of a practice, the charging of fees, practical legal ethics and the benefits flowing from participation in professional organizations and movements." See note 1, supra, at 909.
points expressed by the participants in the controversy, or even to attempt to establish a medial position—if this is possible—which might serve as a satisfactory working hypothesis for improvements in legal education. But the nature of this controversy—as well as the frequent appearance of articles calling for more “practical training” in the law schools—invites attempts to clarify our thinking on the subject, and to offer different premises upon which to base a fair evaluation of the issue. Such attempts may, ultimately, indicate the steps which law schools may take to escape the “dilemma”, and to progress toward further improvements in their educational and curricular programs. Even so, it does not appear that the issue can be resolved merely by including more “practical courses” in the curricula. Preliminarily, inquiry should be focused upon some basic concepts which can direct and control such reforms in legal education.

It has been said that the five functions of the lawyer are counseling, advocacy, service in the improvement of law, leadership in public opinion and a preparedness to serve in public office. Without minimizing the importance of the latter three, it seems indisputable that the lawyer's professional life begins with, and centers around, the practice of law. This consists of solving legal problems—either through counseling or advocacy—which are presented to lawyers by their clients. This pragmatic concept of “problematicism” as descriptive of the work of the lawyer has been congenial to the thinking of practicing lawyers, judges and law teachers from the outset.

"The belief, often implicit, that reality begins with a problematic situation which stimulates the mind to do something by way of resolving its indeterminacy, is, for legal philosophy, the most striking common characteristic of pragmatists. To practicing lawyers the troubled client's story is the initial problematic situation; and to the Anglo-American ‘common law’ lawyer the problematic situation, with its resolution in a judicial decision, is the empirical reality from which inference to generalization—or reasoning by analogy—begins.”

The essential qualifications of the lawyer can then be expressed functionally: He must possess (1) a knowledge of the body of law applicable to the legal problem with which he is confronted; and

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6 Patterson, Jurisprudence—Men and Ideas of the Law 467 (1953). In this connection, one should not fail to consider the weaknesses of this pragmatic concept which are discussed by Professor Patterson at pages 468-469, supra.

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when relevant, (2) an understanding of the related social, economic and political doctrine; with (3) the analytical ability to apply it to that problem; and (4) resolve its indeterminacy either through counseling or advocacy.

Turning then to the objective of legal education, it should encompass a training in the essential qualifications which the lawyer needs in the practice of law. Few, if any, would quarrel with Mr. Cantrall's general formulation of the objective of legal education—to train young men and women for the practice of law in a manner that will enable them to perform "... adequate, competent lawyer-services." It does need further clarification. First, what is meant by the words "adequate" and "competent"? It has been admitted that the law schools cannot, in the three or four years available to them, offer to the public a lawyer who will necessarily be a wise and resourceful counselor, polished draftsman or skilled advocate. The law schools cannot and should not be expected to provide a substitute for experience in the practice of law. The criterion is one of maximizing the "... contribution of the student's understanding of the materials [and methods] of his study and, concurrently, to augment the continuity in the processes of education between law school and law office."

Second, a more precise statement of the objective is needed. The law school should provide the student with an educational program designed to enable him to evaluate legal problems in light of applicable legal principles and relevant extra-legal doctrine. It is the object of this evaluation to determine whether solutions which may suggest themselves are attainable within the framework of existing legal rules. This evaluation may be, and generally is, followed by such actions as the giving of advice and/or the drafting of legal documents (counseling), or the prosecution or defense of a law suit (advocacy). It will be observed that the foregoing formulation emphasizes the objective of legal education from the point of view of method. It does not at all encompass the subject matter of law studies, nor does it articulate the enumerable skills which must supplement all curricula studies. I do not intend to ignore

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7 See note 1, supra, at 907.
8 "When I hire a newly admitted lawyer I must for the benefit of my clients and for the sake of my reputation, closely supervise his work, carefully correct his drafts of letters and papers, and direct him in the way he should go. That is accepted as necessary by the young man, and by everyone..." See note 1 supra, at 972. See also, Cantrall, Practical Skills Can and Must Be Taught in Law Schools, 6 J. Legal Ed. 316, 318 (1954).
9 Cavers, "Skills" and Understanding, 1 J. Legal Ed. 395, 402 (1949); also Harno, Legal Education in the United States 122-125 (1953).
10 See Grills, The Objectives of a School of Law, 6 J. Legal Ed. 30 (1953).
the objectives of legal education as they relate to subject matter.
I do wish to focus attention upon method as an objective, useful to
us as both a core objective and one upon which to base an analysis
of the subject of this paper.
How can this objective be attained? Many have come to look
upon learning as essentially adaptive behavior. Dewey put it thus:

"Processes of instruction are unified in the degree in which
they center in the production of good habits of thinking. While
we may speak, without error, of the method of thought,
the important thing is that thinking is the method of an
educative experience. The essentials of method are therefore
identical with the essentials of reflection. They are first that
the pupil have a genuine situation of experience—that there
be a continuous activity in which he is interested for its own
sake; secondly, that a genuine problem develop within this
situation as a stimulus to thought; third, that he possess the
information and make the observation needed to deal with it;
fourth, that suggested solutions occur to him which he shall
be responsible for developing in an orderly way; fifth, that
he have the opportunity and occasion to test his ideas by ap-
plication, to make their meaning clear and to discover for
himself their validity." (Italics supplied.)

When Professor Dewey speaks of a "genuine situation of experience"
his does not mean, for example, that the law student would neces-
sarily have to be confronted with a real client and a real problem.
What he does mean is that the educative experience must "... call
to mind the sort of situation that presents itself outside of school
..." In other words, the efficiency of the method depends upon
the degree to which it has a direct reference to the circumstances
which produce reflection out of school in professional life. This
has more meaning when we compare graphically the general fea-
tures of his method with the objective of legal education which,
as suggested, is co-extensive with the functions of the lawyer in
practice.

11 Dewey, Democracy and Education, An Introduction to the Philosophy
of Education (1929).
12 This is Professor Dewey's summary of educational method in Chapter XII,
"Thinking in Education". Dewey, op. cit. supra note 11, at 192.
13 Dewey, op. cit. supra note 11, at 181.
The preceding analysis should not be interpreted as suggesting that there is a separation in existence between subject matter and method. Thus, when solving the legal problem of whether the principal is liable for the negligent act of his agent in running down a pedestrian while operating the principal's vehicle during the agent's lunch hour, the lawyer does not divide his act into solving and problem. However, if a critical examination of the act is made, this distinction is readily observed. First, the lawyer would observe the properties of the legal problem itself. There are facts. There are principles of law governing the liability of the principal for the negligent acts of his agent. There may be policy considerations determinative of whether the principal should be responsible. There is a solution to the problem which can be taken legally. Second, the lawyer would examine the acts he performs in arriving at a solution. He analyzes the legal problem in light of applicable legal principles and relevant extra-legal doctrine to determine the possible solutions which will resolve the indeterminacy through counseling or advocacy. Thus, while there is unity in subject matter and method, it is important to observe that there is a distinction in thought. In other words, a reflection upon experience gives rise to a distinction between what is experienced and how it is experienced. This distinction is drawn for the purpose of controlling the direction which the unity of experience (what and how) takes. While there is no way of solving the legal problem beyond solving it, there are certain elements in the act which provide the means to its effective control.14

Finally, the problem will call for action either in the form of giving advice or the drafting and filing of documents (counseling) or in the prosecution or defense of a law suit (advocacy). This raises the second point in Mr. Cantrall's formulation of the objec-

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14 For a more elaborate discussion of this distinction, see Dewey, op. cit. supra note 11, at 193-200.
tive of legal education which needs further clarification. To what extent should law schools devote their attention to the teaching of “practical skills”? In the current literature, the intended meanings of the terms “theory” and “practice” are not always clear. Clarification is necessary.

First, these terms may suggest a distinction between the functional method that has been described (theory) and the final act of giving advice, drafting and filing of documents or prosecuting or defending a lawsuit (practice). In other words, the terms describe a difference in the what that is taught in the law schools. If this is the true distinction, then I am not convinced that a failure of the law schools to teach “practical skills” in counseling is necessarily responsible for incompetency at the bar. The final act in counseling is the verbal (advice) or written (legal documents) manifestation of everything that has preceded the final act. If there has been an opportunity for the student to experience accurately each of the essentials of method in the subject matter of law study, then the basis for an adequate and competent disposition of future legal problems has been laid. Oral and written expression are essential, and I do not suggest that the student should not have an opportunity to receive some training in these matters. However, counseling is the end result of what should be a far more important process in legal education from the point of view of both the practitioner and the law schools.

However, further clarification is necessary as the suggested method relates to the final act of advocacy. The method is just as applicable to training in advocacy as it is to the analysis of the legal problem preliminary to the initiation and prosecution of the lawsuit. By this method, the law schools can acquaint the student—as most, if not all of them do—with trial and appellate procedure and give him an opportunity to try his hand at it in moot court. They cannot make a trial lawyer out of him. It has been said that the only way to learn how to try law suits is to try law suits. So far as this relates to proficiency, it cannot be accomplished in the law school program. To attempt it would be to sacrifice what is the far more important objective of training in the essentials of method as they relate to the substantive and procedural law.

Second, the terms “theory” and “practice” may describe the what (subject matter of law practice) that is taught as combined with how (application of the subject matter in law practice) it is

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15 See pages 164-166, infra.
16 See page 166, infra.
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taught. It is submitted that this is the only accurate definition of
the terms in this context.\footnote{Theory: "the general or abstract principles of any body of facts real or assumed". Practice: "Actual performance or application of knowledge; distinguished from theory . . . ." WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed., Neilson, Knott, & Carhart 1947). Compare Calhoun, Law Schools and Practical Training, 55 W. VA. L. REV. 83, 84 (1953).} In this sense, the terms are far more
descriptive of the lawyer-function than the more narrow and in-
accurate connotations previously considered. They are far more
descriptive of what should occur in the educational process, placing
the proper emphasis on the unity of subject matter and method.
Our inquiry is then properly directed to the extent to which the
described essentials of method are employed in the law school cur-
ricula. The problem methods in legal education afford a useful
framework for a consideration of this question.\footnote{For two earlier articles on this subject, see Welhersen, Education for Law Teachers, 43 COLUM. L. REV. 423 (1943); Cavers, In Advocacy of the Problem Method, 43 COLUM. L. REV. 449 (1943). See Mueller, There is Madness in Our Methods, 3 J. LEGAL ED. 93 (1950); but compare, Stansbury, On Teaching Law Teachers To Teach, 3 J. LEGAL ED. 429 (1951).}

It is not the purpose of this paper to advocate any particular
method. The personality of the teacher, ability of the students,
facilities and subject matter vary too greatly. No one problem
method can be said to be the proper one under all circumstances.\footnote{See Mueller, There is Madness in Our Methods, 3 J. LEGAL ED. 93 (1950); but compare, Stansbury, On Teaching Law Teachers To Teach, 3 J. LEGAL ED. 429 (1951).} I am concerned with the following questions. What are the problem
methods? How have they been utilized in legal education? In appli-
cation, to what extent do they employ the essentials of methods?
What are the possibilities for ensuring their greatest efficiency

THE CASE METHOD AS A PROBLEM METHOD

Although the case method is not characteristically thought of
as a problem method, it seems useful to so classify it. Indeed, in
the hands of a skillful teacher, it is a device which can be used with
a great deal of success in applying two of the essentials of method
previously considered. Professor Morgan has presented a thought-
ful and thorough analysis of the case method and its use for great
educational efficiency.\footnote{Morgan, The Case Method, 4 J. LEGAL ED. 379 (1952).} He concludes that the method—when
properly used—has important advantages to the law student:

". . . . It gives him training in the analysis of states of fact
and in distinguishing the legally material from the immaterial.
It enables him to recognize, and aids him in learning to state
accurately, the legal problem involved and the procedure by
which it is presented for decision. It gives him a perception of
the kind of argument which appeals to the judicial mind, of
the extent to which logical reasoning is checked by practical
considerations and judicial experience, and of the importance
of what may superficially appear to be an immaterial variance
between the facts of one case and those of another. Further-
more, it requires him to do some independent thinking and to
form his own judgments upon legal questions. This tends
to encourage him to have a good measure of confidence in his
judgment, but makes him realize that in most controversies
there may be, and usually are, good arguments on both sides,
for he learns that trial judges are frequently reversed, and
that the decisions of courts of last resort which were once
regarded as the essence of wisdom itself have been overruled.”

Finally, I should add that it affords the student the best possible
means of acquiring a knowledge of the legal principles necessary to
a thorough analysis of legal problems. He is learning them in the
actual context in which they arise. Thus presented, we have little
difficulty in observing the relationship between these advantages of
case study and Professor Dewey's second and third essentials of
educational method—that the student should possess the information and make the observations needed to deal with a legal problem.
Each case—or series of cases—presents a problem in analysis. It
would be useless to expect a student to analyze a legal problem
before he can discern legally operative facts, recognize a legal ques-
tion, or appreciate the arguments for or against that question in
light of the applicable legal principles. He can only acquire this
ability by studying the manner in which such questions are actually
handled by the courts in deciding controversies. It seems indis-
putable that case study provides a far superior means than any
other method, of equipping the student with the information and
providing him with the analytical ability necessary to make the
observations needs for coping with legal problems.

It has been said that the case method as a problem method is
pedagogically sound.

"The chief pedagogical presupposition of the case method
was that students learn better when they participate in the
teaching process through problem-solving than when they are
merely passive recipients of the teacher's solutions..."  

So far as this relates to the preceding discussion it is true. I doubt,
however, that the case method as a "casebook method" is the most

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21 Id. at 384.
effective means for training the student to exercise the type of independent thinking necessary to the formulation of his own judgment on legal questions. To this extent, one wonders at times, whether the students do not become the "passive recipients" of courts' solutions. I do not suggest that this is not important so far as it relates to the learning of legal principles and technique; I do believe that the "casebook method" fails to provide a convenient medium by which students are given an opportunity to receive training in the independent analysis of legal problems which have not been the subject of an available judicial decision. Thus, at this point, the efficiency of the method—at least in terms of Professor Dewey's first and fourth essentials of educational method—is at its lowest. To provide the complete educative experience it is necessary to employ the legal problem, either hypothetical or real. The suggested solutions will then be tested by application to the controlling statutory and case authorities.

We can also find in this departure from the case method one means for obviating the natural tendency "... for an instructor, in the process of 'discovering' the law of a case, to focus his attention on the 'strictly legal' elements that influence courts in their decisions and to apply those elements, logically rather than sociologically, without accent on accepted ideals, and with little or no stress on the function of the court in bringing the law, interstitially and in the long run, into harmony with changed economic and social conditions."23 I do not contend that it is impossible to give consideration to these elements with the "casebook method"—many law teachers do consider the cases in such a context. However, the cases are often selected for only their doctrinal content. Further, the opinions do not always articulate the social, economic and political elements involved. When utilized with legal problems the emphasis on these elements is changed. The problem is constructed in a social, economic, or political environment. It is then a question of the application of legal principles in light of these factors. It gives the student an opportunity to think about the purposive quality of law and is training for participation in professional organizations and movements.

THE HYPOTHETICAL PROBLEM

To what extent is it possible and practicable to supplement the case method with the use of hypothetical problems in teaching

23 Hardman, A Challenge in Legal Education, 43 W. Va. L.Q. 253, 259 (1937); see also Landman, Anent the Case Method of Studying Law, 4 N.Y.U.L. Rev. 139, 158 (1927); page 154 infra.
law? Two possible media are suggested: by the teacher in connection with "lecture courses," or in supplemental curricular programs.

In Lecture Courses. Preliminarily, it should be recognized that the use of hypothetical questions in the classroom by the skillful teacher will accomplish something toward completing the educative experience. However, this is a spontaneous practice which does not afford the student an opportunity for thorough practice. Professor Patterson lists this as one of his ten demerits of the case method and comments that it can be corrected partly "... by editorial notes and problems, in the casebook, which the student is asked to read in advance of the class discussion." Spontaneity might be regarded as desirable because much of a lawyer's thinking is done under circumstances requiring immediate decision. However, I do not believe that preliminary analyses of hypothetical problems will prevent this type of student thinking in the classroom. Furthermore, it is difficult to pose questions which require a discriminating analysis of varying factual information in the form that it is first presented to the lawyer.

At any rate, these considerations—together, no doubt, with the influence of modern educational theory—have led a number of law school teachers to experiment with a variety of devices centering around the use of hypothetical problems to give the student an opportunity to apply acquired legal principles and technique to specific factual problems.

"... Although the exact methods vary considerably ... they agree in their fundamental premise that it is advantageous to have students apply to new-type situations the principles derived from the studied cases. No doubt all instructors agree in this desideratum, and strive for it to the extent at least of asking students to apply the rules to new situations put by the instructor in class as hypothetical questions, and on the final examination. The [hypothetical problem], however, carries outside the classroom the concept of student practice in making such applications. ..."

As of the year 1954, of the seventy-six law schools responding to a questionnaire submitted to them by the Committee on Law Teaching and Examination Methods, sixty-three indicated that hypothetical problems are used in teaching at their schools to a lesser or greater degree. The conclusions reached by the committee were

24 Morgan, supra note 20, at 384-385 (1952).
25 Patterson, supra note 22, at 22.
26 HANDBOOK, ASSOCIATION OF AMERICAN LAW SCHOOLS 86-87 (1942).
that the majority of the law schools no longer employ the "casebook method" as the exclusive method; that many of the schools are experimenting with problem methods in law teaching; and that they utilize skills and make demands on the students which are not otherwise possible.27

The use of hypothetical problems in the classroom has been proposed by various persons for at least forty years, beginning with Professor Ballantine's suggestion on the teaching of contracts with the aid of problems.28 One of the most comprehensive proposals came in 1927 from Jacob H. Landman which he has again advocated more recently.29 His proposal includes giving the student a working knowledge of the law of the course through a critical and judicious use of textbook materials and devoting the remainder of the time to a study of hypothetical problems based upon legal, economic and social factors. He recommends appending a legal bibliography to each problem which the students would be expected to consult in making their analyses of the assigned problems. In the illustrative project which he presents in his first article, there are citations to case material, law review articles and materials of an economic, sociological, historical, and philosophical nature relating to the particular problem. I then assume—which is not made explicit—that the remainder of the class periods would be devoted to a discussion of the problems.

Among the merits of the proposal which Mr. Landman enumerates are: (1) an approximation of the mental procedure that the practicing attorney would follow when confronted with a legal problem; (2) the requirement placed upon the students to consider problems which require independent analysis before confirming the resulting inference by research in the appended bibliography; (3) training in the law of the jurisdiction wherein the student intends to practice; (4) training in legal bibliography; (5) incorporation of extra-legal knowledge; and (6) a means for demonstrating unity of law.

It is quite true that the first two advantages enumerated express the most important value of utilizing hypothetical problems in teaching law. The third merit has little value, particularly for the national law school. Even on the local level, a student is not

27 PROCEEDINGS, ASSOCIATION OF AMERICAN LAW SCHOOLS 78-80 (1954).
28 Ballantine, Teaching Contracts with the Aid of Problems, 4 AM. L.S. REV. 115 (1916).
always sure of his eventual locality for practice upon graduation. Admittedly, references to local law are desirable and should be emphasized at the local law schools.

Mr. Landman would also include citations to the authorities in the bibliography which he recommends should be appended to the problems.\textsuperscript{30} Therefore, training in legal bibliography would be practically non-existent unless he intends that this should merely be a starting point. This raises another objection to the proposal. The complexity of the issues presented—at least in the illustrative problem—is not proportionate to the extensive bibliography suggested. An important criteria involves some reasonable balance between the complexity of the issues and the amount of research or study of source material required for application and verification—a balance that will provide some degree of analytical development of the issues and, at the same time, still afford a medium for covering the subject matter of the course.

It is also recommended that the student acquire his initial familiarity with legal principles in the early hours of the course through the lecture and textbook method. This ignores the fundamental value of case analysis and the integration of this technique with problem solving which would facilitate the process of learning legal principles. Further, the more time consuming problem method would be complemented by the case method in those areas of the course where the use of problems might not be feasible or desirable.\textsuperscript{31}

\textsuperscript{30} For an example, see Landman, \textit{Anent the Case Method of Studying Law}, 4 N.Y.U.L. Rev. 139, 156-157 (1927).

\textsuperscript{31} Mr. Landman’s bibliography does include cases bearing upon the assigned problems. My disagreement with his proposal at this point is primarily one of emphasis with regard to both the integration of case study and teacher participation in the analysis. For example, see Mueller, \textit{Contract in Context} (1952) and the discussion at page 158 \textit{infra}.

One should also compare Professor Heinrich Kronstein’s comments on the disadvantages of the continental deductive method of legal education and whether the “exercises” (Ubungen) or problems overcome them. “These disadvantages are in no way overcome . . . where the student has to prepare written answers to questions of law presented in a set of facts. Actually, these facts are usually made up only to have them fit one of the statutory concepts. The “Ubungen” present the same conceptual problems as the lecture only they approach the same problems from application rather than from statutory art. . . . Even in the “exercises” the student does not feel the responsibility of the judge toward justice and social order. Even there he does not learn sufficiently to understand the details of judicial technique and the background of such technique. Even there the code remains in control of the mind whereas the code should be understood as an instrument for higher aims.” Kronstein, \textit{Reflections on the Case Method—In Teaching Civil Law}, 3 J. Legal Ed. 265, 267-268 (1950).

The foregoing observations are based upon Professor Kronstein’s experience in teaching German contract and tort law by the case method at the Johann Wolfgang Goethe University of Frankfurt in 1949.

A fortiori, is not the integration of case study in American common-law
It is true that an educational approach of this type affords a greater opportunity to incorporate data from other disciplines and emphasizes their relationship to the problems under consideration. Also, as the education of the student progresses, the problems can be designed to include materials from other areas of the law, counteracting the logical tendency of the student to think in terms of one theory of liability, one remedy, one applicable legal principle and so on. Pedagogical necessity requires classification in the curriculum, but we can correlate various subjects in the law—as well as principles within a given course—more effectively through the use of problems.\textsuperscript{32}

Another interesting experiment involves the problem method utilized by Professor Arthur Larson in teaching Agency and Torts (including Workmen's Compensation) at Cornell University.\textsuperscript{33} His "'inductive'" approach involves the substitution of the hypothetical problem for the case as the core of legal instruction. It consists of assigning in advance, a set of facts of an actual case. The students are asked to think the problem over and reach a decision on it based on their common sense and conscience. They are then required to prepare a written opinion developing their reasons for the conclusions. A discussion is then held in class based on several student opinions representing opposing points of view. Before the next class period, the students read the actual opinion of the court to determine to what extent their pre-developed conclusions and reasons coincide with the view of the court. At the ensuing class period, the reasons for the variance in the court's decision and the common sense conclusions are discussed and the principle is fitted into the general scheme of the course. Thus, each class period is in two parts. One is devoted to a discussion on points left open in the previous class session and the other to reading student opinions on a new topic. The students' preparation is also in two parts. One is devoted to reading the case deciding the point involved in the students' opinions and the other to preparing a written opinion on a new problem.

Professor Larson believes that the method is a means by which

\textsuperscript{32} Compare the discussion of Professor Mueller's casebook, \textit{Contract in Context} (1952) at page 158 infra.

\textsuperscript{33} Larson, \textit{An "Inductive" Approach to Legal Instruction}, 1 J. Legal Ed. 287 (1948).
the student can learn to trust his own sense of justice, unless the case falls within one of the exceptional circumstances that he has discovered, identified and classified; affords a means for achieving a better understanding of the relation of "fairness" to law; facilitates an intelligent analysis of facts and cases; provides a greater opportunity for integrating historical, sociological and economic materials; and promotes facility in writing and oral expression. This method does involve an endeavor to achieve a balance between the use of the case method and the hypothetical problem with both an awareness of the objective of legal education and educational theory. Professor Larson tells us in his descriptive article that, by the new method, the difference in student interest and participation was marked and the results on the final examination showed a decided improvement.34

With this method, all of the problems are based upon the actual facts of decided cases. The effect of this procedure is to give the student at the outset an inaccurate conception of the relation between facts and law—that is, that there is always a case in point.35 On the contrary, the process is often one of analyzing, co-ordinating and applying legal principles derived from a variety of sources to the problem at hand. There may be some justification for this approach before the neophyte acquires a working knowledge of the basic principles of a course. However, to utilize this approach rigidly is to ignore one of the usual characteristics of a legal problem and the educational objective which it is designed to attain. Further, the student has convenient access to the opinion of the court on which the problem is based. This could be a serious defect. Professor Larson discounts it, believing that the students will not consult the opinion of the court beforehand.

Finally, the value of a preliminary analysis based upon common sense justice is debatable. It is essentially a negative approach to the study of law which is dependent upon the individual subjective—and most likely, varying—views of the students rather than upon the objective standards established by the courts. While actual experience with such an approach is the only test for determining its usefulness to the teacher, it seems at most, a nebulous basis upon which to predicate an analysis of hypothetical problems.

34 This conclusion is based upon an experiment in which he taught half of the course by the traditional (case) method and half by the new method. Id. at 296.
35 In this connection, compare the viewpoint of James S. Savage, Book Review, 6 J. LEGAL ED. 435, 441 (1954).
A much safer—and more realistic—approach is analysis based upon applicable legal doctrine.

An interesting application of the use of hypothetical problems which combines the advantages and minimizes the disadvantages of the two methods considered above is exemplified by Professor Addison Mueller's casebook, *Contract in Context*. The casebook is organized around a series of problems portraying the contractual difficulties of an individual in building an apartment house. Each chapter in the book begins with a statement of facts and is followed with a background of case and related source material bearing upon the solution of the problem. The author has departed from the traditional doctrinal organization of contracts casebooks to (1) present contractual problems in a more realistic setting, avoiding "(t)he capsule-like and technically worded statements of fact in the cases . . . ") and (2) "... to break as completely as possible with the artificial one-concept-at-a-time organization of the traditional course." Legal questions are dealt with as they characteristically arise and confront the lawyer in practice.

"... This scheme gives a student the opportunity to design and to test various ways to cope with a problem at all levels of practice. More important, it drives home to him what he must grasp if he is ever to appreciate the flexibility of the common law—how each fact and the rule that it suggests modifies and is in turn modified by every other fact and rule." At the same time, the value of case study is preserved and effectively integrated with the problem approach.

Professor Mueller's method has been criticized because it concentrates too much on contractual problems as they arise in the building industry. The cases which are incorporated in the book dealing with family arrangements, employment, sales and other matters are used only for their doctrinal content and not in connection with the problematic situations to which the principles enunciated in the cases are also applicable. The gravity of this observation could only be determined with actual experience in using the materials. The casebook does exemplify an attempt to provide a framework for the effective accomplishment of the objectives of the author as well as the application of the essentials of educational method.

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37 *Id.* at ix.
38 *Id.* at x.
Many authors, in recent years, have incorporated hypothetical problems in their casebooks which teachers can use to supplement case study and give the students an opportunity to exercise their faculties in independent analysis. Illustrative of these are Professor Patterson’s book on insurance, Professor Fuller’s on contracts, Professors Casner and Leach’s on property, and Professors Braucher, Sutherland and Willcox’s on commercial transactions.

One of the most striking features of Professor Fuller’s casebook is the emphasis which has been placed on practical problems of negotiation, draftsmanship and techniques of proof. After reading a review of the casebook, one wonders whether the charge that law teachers are “ivy-towered specialists” can always be substantiated.

“In 1941 an unpublished study of 500 contract cases decided in the year 1940 was made under my supervision. Among other things, we wanted to find out what contract problems were involved in ‘run-of-the-mine’ litigation. We noted that about 25 per cent of litigated cases covered by the study and reaching appellate courts revolved about problems of interpretation of language. A good part of the difficulty, we concluded, was traceable directly to incomplete negotiation by the parties and poor draftsmanship either by the parties or their counsel. In many of the cases the courts bluntly said so. The emphasis given throughout Fuller’s book to the practical problems of negotiation . . . draftsmanship . . . and techniques of proof . . . should do much to correct what has been in the past serious curricular deficiency.”

Professor Fuller has also confirmed these observations with respect to the value of the problems in actual classroom use.

In a review of the Braucher, Sutherland, and Willcox casebook on commercial transactions, the following opinion was expressed about the authors’ use of legal problems:

“[The] problems in Professor Braucher’s earlier book have proven excellent for promoting good classroom discussion, and

41 Patterson, Cases and Materials on Insurance (2d ed. 1947).
42 Fuller, Basic Contract Law (1947).
43 Casner and Leach, Cases and Text on Property (1950). See also, Leach, Property Law Taught in Two Packages, 1 J. Legal Ed. 28, 45 (1948).
44 Braucher, Sutherland and Willcox, Commercial Transactions, Cases and Problems (1953).
45 Harold Shepard, Book Review, 1 J. Legal Ed. 151, 154 (1948).
47 See “Have students engage in actual drafting problems, either whole contracts or clauses. One year I distributed a problem and had attorneys for each side prepare drafts to pass across the table to the other side. These were mimeographed and distributed to the class. The class was invited to criticize the drafts. All this occurred before the negotiation session at which a final joint draft was arrived at.”
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for achieving something frequently lacking in a traditional course in either Sales or Bills and Notes—namely, a feeling of coming to grips with reality. In the process, the students gain greater insight into legal techniques, a better understanding of the judicial process—particularly as it operates on statutes—and a fuller appreciation of the present rules and their shortcomings . . .

"... I have only one quarrel with [the authors]. I feel that the citations to the problems should not be included. . . . I feel that there is too much temptation to 'look it up' rather than to dig out the solution from the cases in the section, the cases and materials previously covered, the relevant statutory material and the text material. One of the things that the law student must learn is the ability to bring together material from different sources and bring it to bear on the problem at hand. It gives a false sense of security to think that a given solution can always be solved by finding a ready-made solution to an already decided case."47

These, together with the foregoing observations made by teachers who have actually utilized problem methods in teaching substantive law courses confirm—in part at least—the theories of educational method. Those that have been selected for consideration in this paper should not be considered exclusive. Many other teachers are equally aware of the value of the legal problem and are—in one way or another—endeavoring to incorporate it in classroom methodology.48

Four additional questions remain to be considered in connection with the use of hypothetical problems. At what stage in the educational program should they be introduced? Should the problem require library research? Should oral or written answers be prepared? Can problems be utilized in large classes? Many teachers believe that there is no substitute for concentrated case study during the first year of law school and that problem analysis should be reserved for the second and third years.49 I believe that some emphasis should be placed upon problem analysis early in the student's education. Otherwise, the student will be deprived of the opportunity for this training in those subjects offered during the

47 See note 35 supra. Also, compare the critique of Professor Larson's problem method at pages 156-158 supra.
48 See comments made by various law teachers on the use of hypothetical problems in the classroom. PROCEEDINGS, ASSOCIATION OF AMERICAN LAW SCHOOLS 179-187 (1951). The textual comment is also substantiated in part by a recent survey of the Committee on Law Teaching and Examination Methods of the Association of American Law Schools. PROCEEDINGS, supra note 27.
49 For example, see Morgan, The Case Method, 4 J. LEGAL ED. 379, 387 (1952); see note 40 supra at 126 for Professor Havighurst's views as they relate to Professor Mueller's Contract in Context (1952).
first year. Furthermore, it prepares the student—on a more elementary level—for dealing with the more complex problems which will confront him later in the curriculum. It seems to me that that can be accomplished without preventing or rendering ineffective the necessary training in case analysis as illustrated by Professor Mueller's method.

Both the recommended and the actual use of hypothetical problems has varied widely. With perhaps the exception of Mr. Landman's proposal, they do appear to have one thing in common. The problems should not be so complex as to require extensive—if any—library research. Rather, the student should be expected to analyze and formulate answers to the problems on the basis of relatively few assigned materials. This seems to be a sound approach. Otherwise the work involved would become disproportionate to that required in other courses; a decided disadvantage if the method were employed throughout the curriculum.

There is probably no unanimity of opinion among law teachers on the question of whether oral or written analysis should be required. Professor Larson considers written analysis one of the advantages of his "'inductive'" method. On the other hand, the preparation of written answers can consume time which should be devoted to the analysis of problems and related source materials. The issue is one which only the individual teacher can answer satisfactorily and then, perhaps, the desirable solution is one of utilizing both depending upon the type of problem involved.50

Finally, the effectiveness of any method which involves individual student participation is proportionate to the number of students in the class. It is just as true of the "casebook method" as it is with a problem method. Even in a large class, where there is infrequent opportunity to recite, the benefit to be derived from preparation still exists.51 Admittedly, there are advantages to be gained from utilizing problem methods in smaller groups—tutorial or seminar sessions.

In Supplemental Curricular Programs. One of the best illustrations of this pedagogical technique is the "Cambridge Supervision System".52 The students are required—in addition to attending lecture courses for ten or twelve hours each week in five subjects—to attend from three to five supervision classes. Each class consists of three to five students. They are assigned a series of hypothetical

50 See page 164 et seq. infra.
51 See note 33 supra at page 294.
problems for preparation each term, some of which must be written up and others used as a basis for discussion in the supervision classes. The material covered in the supervision classes by the use of problems corresponds to the subjects in which the students are enrolled, but close correspondence between supervision and lectures is precluded. The purposive features of the usual problem are "... (1) that it be shortly stated, (2) that it be not too involved as to its facts, and (3) that it require both analytical ability and knowledge of the law for its solution." The problems may require research of an elementary nature but care is taken to avoid infringing upon the student's time in preparing for the lecture courses.

It is also interesting to observe that a similar program, certainly in objective, is in use in continental legal education. Developed by Rudolph von Jhering at about the same time Langdell inaugurated the case method, it is still an important phase of legal education in the German-speaking countries. Commenting on the system in 1938, Professor Rheinstein described it as follows:

"... Whenever a field of law has been systematically surveyed in a lecture course, it is regularly worked over again in a different method. ... The students have to apply what they have learned before theoretically. They have to solve problem cases in classroom discussion as well as in term papers, which are to be worked out in the library, usually within two weeks...."

In application, the system, as compared to the Cambridge method, would appear to have one serious disadvantage. The classes are attended by all students. In pre-National-Socialist years in Berlin, up to 500 students were enrolled in any one such class. Now their number is often smaller than twenty. Even so, as compared to the Cambridge method, individuality in supervision is lost. Likewise, the opportunity for student participation in class discussions is minimized. Nevertheless, the program is very popular because "[t]he students are eager to do work which bears the same features as that which they will be called upon to do in their future careers. They are zealous to apply so soon the theoretical information fed to them in the lecture courses."

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53 Id. at 14.
54 Id. at 13-14. See the illustrative problems in the Appendix. Id. at 22-27.
56 Id. at 22-23. See also, Professor Kronstein's observations on "the exercises" (Ubungen) or problems in German legal education. See note 31 supra. However, these remarks do not disparage the value of the problem method. He is concerned with the advantages of case study in continental legal education.
The counterpart in American legal education is the seminar, still not fully developed in all law schools. Some of these proceed by the problem method. For the most part, they are advanced programs and confined to the second and third years of law school. Very little has been accomplished toward providing training by the problem method on the freshman level. Many seminars cut across traditional course boundaries, employ extra-legal materials and require considerable library work. This type of training for the advanced law students—particularly if a problem method is employed—places them in the type of an environment they will encounter in law practice. It affords a convenient means for meeting the demands placed upon the lawyer in what appears to be an advancing era of specialization in the law.

The individuality in supervision and participation which the foregoing methods afford is their most striking characteristic. This is an advantage which it is difficult—if not impossible—to achieve in the classroom. From the point of view of the freshman student, the possible lack of co-ordination between the supervision or tutorial classes and the "lecture courses" could be a disadvantage. To this extent, the use of hypothetical problems in the classroom might very well provide an opportunity for more effective integration and facilitate an organized presentation of the relationship between cases, principles and problems. Certainly, in the bewildering early stages of the student's education, this should be an important goal.

An additional obstacle to the supervision or tutorial approach involves the question of manpower. To provide a sufficient number of man-hours—not to mention financing—to operate the method, is a virtually insurmountable task for many schools. Cambridge solves the problem by relying on graduate students and the junior bar in London in addition to faculty. I have the impression that this system works well and offers possibilities should the method, or

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A similar method is in use in France through the medium of the seminar. However, it does not appear to have been developed as thoroughly as the Cambridge or German systems. *Tung, Modern Developments in the Preparation for the Bar in France, 2 J. LEGAL. ED. 71, 73-74* (1949).

*7 Two good examples are the seminars conducted by Professor Walter Gellhorn at Columbia University in governmental administration and selected legal problems. Columbia Law School Bulletin, 55th Ser., No. 6, pp. 28, 30-31 (February 12, 1955).

*8 Some schools have been experimenting with programs on the freshman level. Examples of these are the "research and writing program" at Chicago, the "associate program" at Columbia, and the "group work program" at Harvard. See Kalven, Law School Training in Research and Exposition: The University of Chicago Program, 1 J. LEGAL. ED. 107 (1948), and Cavers, The First Year Group Work Program at Harvard, 3 J. LEGAL. ED. 39 (1950).
one similar to it, be considered seriously for American legal education.

Some Special Applications of the Hypothetical Problem. These are the type of problems which call for final action either in the preparation of legal memoranda, the drafting of legal documents or moot court work on both the trial and appellate levels. The first of these is normally utilized either in courses in legal research or in seminars. The objective of the preparation of legal memoranda is directed toward presenting the student with the type of complex problem often presented to the lawyer and requiring him to utilize research and writing techniques in analysis and evaluation. Most of the courses in legal research fall into a similar pattern: the preparation of case notes, law office memoranda and student comments of the type that are usually found in law reviews. Some are more elaborate than others, also requiring exercises in drafting and statutory interpretation and some are integrated with the appellate moot court programs.

In recent years, drafting courses have also found a place in the curricula of the various law schools. They are inspired in

\[\text{Whinery: The Problem Methods in Legal Education}\]

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59 For example, see Mandeker, Legal Writing—The Drake Program, 8 J. Legal Ed. 589 (1951). This course is offered in the second year for two credits and requires the preparation of three assignments: (1) a short statement of explanation on one or two recent cases; (2) a law office memorandum; and (3) a law review case note. I have also taught a similar course at the University of Kansas City Law School.

60 The following programs are illustrative:

Northwestern University. A three credit course and, in addition to training in legal bibliography, five papers are required: (1) a short memorandum on an elementary hypothetical problem involving one issue; (2) a law office memorandum; (3) a law review comment or note; (4) a problem involving the interpretation of statutes; and (5) an appellate brief. Shestack, Legal Research and Writing: The Northwestern University Program, 3 J. Legal Ed. 126 (1950).

The University of Southern California. This school has a three year program. In the first year it is devoted to instruction and problems in legal bibliography and the preparation of a legal memorandum and a case note. The second year is devoted primarily to drafting: a lease, a memorandum on a collection letter, then the letter and the negotiation and preparation of a business contract. In the third year, the students are required to prepare two law review comments. Horowitz, Legal Research and Writing at the University of Southern California—A Three Year Program, 4 J. Legal Ed. 95 (1951).

Western Reserve University. A four semester program, Legal Writing I is devoted to the preparation of an appellate brief; II, to the preparation of a law office memorandum; III is devoted to the drafting of documents; and IV, to the preparation of law review notes and comments. Cook, Teaching Legal Writing Effectively in Separate Courses, 2 J. Legal Ed. 87 (1949).

61 Volz and DeWitt, Summer Work in Legal Problems, 1 J. Legal Ed. 596 (1949); Volz, The Legal Problems Courses at the University of Kansas City, 7 J. Legal Ed. 91 (1954). These are cited as illustrative of similar programs in other law schools throughout the country. The program at the University of Kansas City is a three semester program. Legal Problems I is devoted to the drafting of documents, II to jury trials, and III to the preparation of law office memoranda based on hypothetical problems submitted by practicing attorneys who also participate in the class discussions.
part, no doubt, by demands made by practicing lawyers that the law schools should provide more "practical training" for the student. Although the courses vary from school to school they are, in large part, devoted to exercises in drafting based on hypothetical problems. It is difficult to determine to what extent the objectives of the various courses are attained. They certainly provide a medium for familiarizing the student with the types of instruments, their form, and correct procedures in drafting and afford an opportunity for experience in this type of written expression.

However, it is regrettable that complaints about young lawyer's inability to find their way around a law library or to know how to write well, result in adding a course on legal research and writing; or that their inability to draft documents and prepare legal memoranda results in the addition of legal drafting courses to the curriculum. I am somewhat fearful of what has, in recent years, become a tendency, namely to solve all of our problems in legal education by the addition of another course, without a preliminary inquiry as to the relationship which the new development bears to the existing curricular program, and what the best means are for integration within the existing framework. Professor Fuller has successfully taught the negotiation and drafting of contracts in his course on contracts. It has also been demonstrated that the drafting of pleadings can be effectively integrated in a course in code pleading.

It is difficult to dispute the view that this provides an effective transition from the study of principles and analysis to the final action of drafting appropriate documents. Is not the same approach equally applicable to property, conveyancing, wills and probate and other substantive law courses? Admittedly, we cannot solve all of our problems by expecting more and more of the teacher without giving him more time in the curriculum. However, if the time devoted to research, writing and drafting in separate courses were added to substantive and procedural courses, more
time would be available for integrating this training far more effectively.\textsuperscript{67}

Numerous problem methods have been devised for training the student in advocacy. On the trial level, they have varied in degree from the use of factual statements posing the controversial situation,\textsuperscript{67a} the staging of a controversy by briefing the "client",\textsuperscript{68} or the use of motion pictures,\textsuperscript{69} to the securing of "real cases" by soliciting the participation of people who have been involved in minor legal controversies in which no legal action will be taken.\textsuperscript{70} On the appellate level a statement of facts has been the usual problem approach. One interesting method is the practice at some schools of requiring the students to prepare their appellate briefs from an actual record on appeal.\textsuperscript{71} All of these present interesting variations on the use of the hypothetical problem in which exceptional genuinity are all directed toward providing the student—as nearly as possible—with the type of environment he will have in advocacy in professional life. That they have been singularly successful in training the student in this phase of legal education speaks well of the efforts of those who have been experimenting.

THE REAL PROBLEM

The foregoing survey of the use of the hypothetical problem as a means of fulfilling the described essentials of educational method demonstrates what is and can be done in the law school to give the student a good basic training. Admittedly, complete realism can only be achieved with the real problem. However, it is doubtful if it is needed throughout the educative experience. It can be used with success in providing a transition from law school to law practice.

The Legal Aid Clinic has provided perhaps the best means yet devised for giving the student the opportunity of dealing with a problematic situation in a realistic setting. Where such programs are available, the student has been afforded an opportunity to

\textsuperscript{67} In this respect I am reversing a position I once maintained in connection with the course in Legal Research and Writing at the University of Kansas City. After having considered the question for some time, I believe the view expressed in the text is more sound.

\textsuperscript{67a} An application of this technique is illustrated by the comprehensive trial practice program offered at the University of California at Los Angeles. See Mathes, \textit{The Practice Court: Practical Training in Law School}, 42 A.B.A.J. 333 (1956).

\textsuperscript{68} Mueller and James, \textit{Case Presentation}, 1 J. LEGAL Ed. 129 (1948).

\textsuperscript{69} Hunter, \textit{Motion Pictures and Practice Court}, 1 J. LEGAL Ed. 426 (1949).

\textsuperscript{70} Green, \textit{Realism in Practice Court}, 1 J. LEGAL Ed. 421 (1949). See also, Wilson, \textit{More About Realism in Practice Court}, 1 J. LEGAL Ed. 569 (1949).

\textsuperscript{71} XLI University of Buffalo Bulletin 14 (1953-1955).
come to grips with some of the problems that he will face in the practice of law. Looked upon as a program designed to teach method (how to handle a real problem), rather than to work with problems involving all types of people from all levels of the economic scale, the arguments of the cynics are tempered. Within the law school program, a better substitute could not be found. To what extent a large scale post-graduate clinical program would afford a desirable means of bringing the student in contact with the real problem remains to be seen.

CONCLUSION

Irrespective of whether the student is ultimately confronted with the real problem through the Legal Aid Clinic or an apprenticeship plan, he must be prepared for it. This preparation involves experience in each of the essential qualifications of the lawyer which are coextensive with the essentials of method. A complete educative experience cannot be attained without the use of the hypothetical problem. The case method is essential for providing the student with the information and mental ability requisite to the solution of legal problems, but the legal problem is essential for the application of acquired knowledge and reasoning ability. Through the proper integration of the hypothetical problem in the curricular program, either in the classroom or in tutorial or seminar sessions, the student acquires the needed ability for counseling. He receives a more thorough basis for training in advocacy which is an additional application of the essentials of educational method to a specific technique. There would probably be no unanimity of opinion as to how and when the fulfillment of the essentials of method should occur. This depends upon a great many factors revolving around subject matter, teacher and students. My conclusions can be summarized as follows:

(1) The hypothetical problem should be introduced in the classroom at the beginning of the educative experience. It should not be the subject of an available court decision. The problems should be assigned to the students in advance of the class period in which they will be discussed. The complexity of the issues involved should be proportionate to the current level of the students' training. The students' analyses of the problems should be based on a study of assigned statutes, cases and related materials.

72 Bradway, "Case Presentation" and the Legal Aid Clinic, 1 J. Legal Ed. 280 (1948).
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(2) The use of hypothetical problems in the classroom should be coordinated with related exercises, such as the drafting of documents and legal memoranda.

(3) The curricular program should include provision for seminars in the second and third years designed to cut across course boundaries and provide further, but more comprehensive training in problem analysis; library research; the preparation of legal memoranda and documents; and incidental thereto, training in legal writing.

(4) Moot court problem courses should run parallel to the program of courses and seminars.

(5) Where possible, the Legal Aid Clinic should be used to supplement the above training in a realistic setting.

Consequently, the program would encompass training in both counseling [(1), (2) and (3)] and advocacy (4).

The preceding survey of educational method and its application to legal education should demonstrate that an unwarranted emphasis on "practical skills", as descriptive of what is taught, tends to obscure the placing of proper values on each of the essentials of method. Further, it ignores the more fundamental question of the application of legal principle and technique to problematic situations. The survey has also demonstrated that the problem methods are currently a phase in the educational process. The experimentation by law teachers in the use of problem methods indicates they are aware of their responsibilities to the legal profession, the job they have to do and an understanding of educational method as a means to a desired end. The criteria for the future seems to be one of integration and maximizing the respective contributions which the problem methods can make to the learning process.