THE NEED FOR CHANGE IN TEACHING THE LAW

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The lecture hall remains the centre of education at a law school.[1] These halls provide a constant fixed setting within which professors and students come and go. The law too changes; however, within these halls the discourse heard remains the same and the teaching of the law has changed little over the decades. Facing masses of students, professors invariably continue to adhere to a form of lecture, problem-discussion, or socratic questioning. This is how we were taught. What else do we know? What else can we do? And so the tradition is perpetuated.

We can and need to do more. We need to be more imaginative and innovative in the classroom. We need to recognize that there is no one "best" method of teaching the law.[2] Rather than adhering to a single mode of teaching, what is proposed in this article is that we use a variety of methodologies to achieve the overall objectives of legal education within the traditional classroom setting. Reference here is to classes with over thirty students in cognitive subject areas, as opposed to skill courses, which are likely to use more student-centred teaching. The size of the class or the subject taught ought not to deter us. Diversity in classroom instruction is possible. A variety of techniques is now available, but are simply not being used in the traditional classroom. In this article the case for diversity is presented along with illustrations of diverse teaching methodologies readily adaptable to the classroom.

I. Methodology and the Objectives of Legal Education

Legal education has a broad mandate and law schools are called upon to do more than train their graduates to practice law. Three broad themes of legal education emerge:[3]

(1) Cognitive Content--students are provided with fundamental knowledge of the law and are trained in legal analysis to apply the law to fact situations;

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[1]The demands imposed by costs and enrollments indicate that the lecture hall is likely to remain a mainstay of legal education for the foreseeable future. See Frank R. Strong, "The Pedagogic Training Of A Law Faculty" (1973) 25 J.Leg.Ed. 226. Professor Strong stated, "If this financial anemia can be corrected in 50 years it will be a miracle . . ." *Ibid.* at 237. Nothing has changed in the last 15 years to alter the cogency of this statement.

[2]See Paul F. Teich, "Research On American Law Teaching: Is There A Case Against The Case System?" (1986) 36 J.Leg.Ed. 167. Professor Teich provides a comprehensive review of the debate over the "best" teaching method. His conclusion is that the available research does not support the superiority of any of our standard methodologies, although enhanced performance was noted through the use of computer-aided instruction.

[3]Consultative Group on Research and Education in Law (Harry W. Arthurs, Chairperson), *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: SSHRC, 1983) at 47-54.

(2) Skills Content--students are provided with lawyer skills in legal research, writing, advocacy, negotiation and interviewing;

(3) Perspective Content--the student is encouraged to critically examine the role of the law and of the legal profession within society.

Cognitive content trains law students to "reason." Law professors,[4] lawyers[5] and law students[6] all place great worth upon the acquisition of the ability to critically analyze matters. What exactly does this involve? Benjamin Bloom, in his influential book on education objectives, identified a hierarchy of six classes of cognitive learning objectives:[7]

Class 1 Knowledge
Class 2 Comprehension
Class 3 Application
Class 4 Analysis
Class 5 Synthesis
Class 6 Evaluation

"Bloom's Taxonomy" of learning objectives applies to the study of law.[8] We arm students with the weapons of legal reasoning--*stare decisis*, *ratio decidendi*, or statutory rules of construction--knowledge. The students are expected to understand the legal principles that they use--comprehension. Then they apply the rules of law to specific cases--application. In turn, the case is dissected through which relevant facts are sorted from irrelevant, and the internal relationship of the facts and issues in the case are exposed for critical examination--analysis. Relying on various forms of legal reasoning the student then answers the problem posed--synthesis. At the end of the exercise a critical assessment of the response is conducted--evaluation. A modified form of this cognitive hierarchy is the "I.R.A.C." outline: Issue, Rule, Analysis, Conclusion, which is widely used to as-

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[4]John S. McKennirey, *Canadian Law Professors: A Report to the Consultative Group on Research and Education in Law*, based on a 1981 survey of full-time law professors in Canada, (Ottawa: Consultative Group on Research and Education in Law, 1982), Table Q-74 at 103. The table is reproduced in W.H. Charles, "Objectives of Legal Education" in *Legal Education in Canada*, Roy J. Matas and Deborah J. McCawley, eds., (Montreal: Federation of Law Societies of Canada, 1987) 186 at 208. 72% of common and civil law professors surveyed indicated that their primary educational objective was to "help students to be more reflective, critical, analytical."

[5]A survey of Chicago lawyers showed that "fact gathering" and "capacity to marshall facts and order them so that concepts can be applied" were two of the most important acquired skills for practicing law. F.K. Zemans and V.G. Rosenblum, *The Making of a Public Profession* (Chicago: 1981) at 125. For a review of other studies on legal education see E. Gordon Gee and Donald W. Jackson, "Current Studies of Legal Education: Findings and Recommendations" (1982) 32 J.Leg.Ed. 471.

[6]Law graduates from six schools rated the "ability to analyze and synthesize law and facts" as the most useful skill acquired in their legal education. L.L. Baird, "A Survey of the Relevance of Legal Training to Law School Graduates" (1978) 29 J.Leg.Ed. 264.

[7]Benjamin Bloom, ed., *Taxonomy of Educational Objectives: The Classification of Educational Goals, Handbook I: Cognitive Domain* (New York: Longmans, Green, 1956).

[8]See Andrew Petter, "A Closet Within the House: Learning Objectives and the Law School Curriculum" in N. Gold, ed., *Essays on legal Education* (1982) at 77.

sist students in formulating answers to legal problems.[9] And so law students learn to reason like lawyers.

Skills content trains law students to "do." Emphasis is on the teaching of professional skills required of a lawyer. Most of our students[10] intend to and do in fact become lawyers.[11] In the United States the operative phrase is "lawyer competency" training, which is defined as follows:[12]

> Lawyer competence, in most if not all areas of law practice, demands a wide range of fundamental skills including the ability to:
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> (1) analyze legal problems;
> (2) perform legal research;
> (3) collect and sort facts;
> (4) write effectively (both in general and in a variety of specialized lawyer applications such as pleadings, opinion letters, briefs, contracts or wills, legislation);
> (5) communicate orally with effectiveness in a variety of settings;
> (6) perform important lawyer tasks calling on both the communication and interpersonal skills of
> (i) interviewing,
> (ii) counselling, and
> iii) negotiation;
> (7) organize and manage legal work.

A competency model in use at Antioch School of Law identified six skill groupings:[13]

(1) Oral Competency
(2) Written Competency
(3) Legal Analysis Competency
(4) Problem-Solving Competency
(5) Professional Responsibility Competency
(6) Practice Management Competency

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[9]A simple outline of I.R.A.C. is found in Howard Gensler, "I.R.A.C.: One More Time" (1985) 24 Duquesne L.Rev. 243.

[10]Lauren Reskin, "A Portrait of America's Law Students" (May, 1985) 71 A.B.A.J. 43 . In a national survey of law students in the United States 91% responded that they intended to practice law.

[11]Baird, *supra*, note 6. 80% of the 1600 graduates surveyed from the six different schools worked as lawyers.

[12]ABA Section of Legal Education and Admissions to the Bar, *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools* (Crampton Report) (1979) at 9-10.

[13]Russell Cort and Jack Sammons, "The Search For 'Good Lawyering': A Concept and Model of Lawyering Competencies" (1980) 29 Cleveland St. L.Rev. 397. Antioch School of Law uses a "Teaching Law Firm" approach where teachers and students are all members of a law firm and the program is highly clinical. For an article on the implementing of a clinical program into a law school curriculum see, Edgar Cahn, "Clinical Legal Education From A Systems Perspective" (1980) 29 Cleveland St. L.Rev. 451.

In a 1972 survey of Canadian lawyers the following time allocations were found.[14]

(1)	Interviewing clients and telephone	30%
(2)	Drafting and dictating documents	33%
(3)	Legal research	21%
(4)	Appear in court and before tribunals	12%
(5)	Other	4%

Of the skills listed some are addressed within the traditional case-method class: analysis, problem-solving, collection and sorting of facts. Other skills are addressed within the traditional upper year seminar course: research, writing and oral presentation. Yet, a number of the skills are primarily confined to specific "skill" courses: interviewing, negotiation, counselling and advocacy. It should be noted that many of the above skills are not necessarily "lawyer specific" and would assist graduates who turn to careers in government, academia, business or social service.

The function of teaching lawyer skills in law school is not just a matter of professional training. Skills education within the law school serves a broader purpose. Professor James Hathaway, Director of Clinical Studies at Osgoode Hall Law School, cited the following benefits flowing from the clinical education of law students:[15]

> First, clinical education is a useful means of bringing students to an understanding of law as a dynamic, interpersonal process . . . Second, clinical legal education may help students to focus on the question of the interrelationship between law and justice . . . The third major field of inquiry which clinical education promotes is the examination of the lawyer's personal and professional identity. . . .

It is for these reasons that skills training has a place in our law schools and that professional development ought not to be left entirely to the professional bodies.[16]

Perspective content challenges law students to "think critically." This is achieved in three ways. First, students are invited to critically examine existing norms of the law, the legal profession and of legal education itself. The supposed rationality of the law, stressed through legal reasoning, is questioned. Critical legal studies[17] and feminist legal theory[18] present strong critiques of the alleged

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[14]The Compulex Study of Canadian Lawyers as cited in Charles, *supra*, note 4 at 195.

[15]James Hathaway, "A Structured Approach To Clinical Legal Education" in *Legal Education in Canada*, *supra*, note 4, 389 at 397.

[16]A suggestion is to leave much of the professional training to the year of articles and the bar admission program. However, a common criticism of the articling experience is that there is a lack of instruction and that the quality of the articles is very uneven. See G. Scott, "The Articling Component In Legal Education" in *Legal Education in Canada*, *supra*, note 4, 404 at 415.

[17]A concise description of Critical Legal Studies is contained in Louis Schwartz, "With Gun and Camera Through Darkest CLS-Land" (1984) 36 Stanford L.Rev. 413.

[18]Volume 38 (March/June, 1988) of the Journal of Legal Education has a series of articles on Women in Legal Education--Pedagogy, Law, Theory, and Practice.

neutrality and objectivity of the law, which was first challenged by the realist school. Instead, students are invited to consider our legal system as an instrument used to perpetuate a political or male dominated hierarchy. Second, students are asked to look at the law in a broader context. The interaction of the law and other disciplines is explored: psychology, medicine, sociology and economics.[19] Third, the ethical and professional demands of being a lawyer are presented to the students.

As can be seen the realm of perspective content deals not with knowledge but with values. Accepted legal norms and, indeed, the students' own commonly accepted notions about the law are challenged by different perspectives that reflect alternative value systems. In educational theory this is referred to as the affective domain of learning and, just like the cognitive domain, there exists a hierarchy of affective learning objectives:[20]

Class 1 Receiving
Class 2 Responding
Class 3 Valuing
Class 4 Organization
Class 5 Characterization

The hierarchy describes the degree of internalization of values or attitudes.[21] For some professors perspective content consists merely of making students aware of contrary views. Other professors strive for more. They encourage students to deal with particular values in more depth, appreciate the worth of the value and ultimately to encourage the students to accept and integrate that value into their own character. In terms of professional ethics I am of the view that this is precisely what we ought to do. It is not sufficient simply to make the students aware of the code of conduct expected. We need to endeavour to train professionally responsible lawyers.[22] With respect to other areas of value education we may not agree as to the degree of instruction; however, it is essential that students are at least exposed to competing values in order to better assess their own value systems. Not to confront students with alternative perspectives results in the perpetuation of the existing system by default.[23]

Legal education must be all of the above. *Law and Learning* referred to the "humane professional,"[24] a broad and nebulous ideal that reaches for a middle

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[19]There can be little doubt that the most persuasive influence on legal theory has been through the application of economic theory. A summary of "law and economics" theory is found in Posner, "The Economic Approach to Law" (1975) 53 Tex.L.Rev. 757.

[20]David Krathwohl *et al.*, *Taxonomy of Educational Objectives: Handbook II* (New York: McKay, 1964).

[21]See Petter, *supra*, note 8 at 88.

[22]Victor Rosenblum, "Legal Education and Professionalism," President's Address, Association of American Law Schools, January, 1987 n. 87-1.

[23]For a scathing critique of how our law schools perpetuate certain values see Duncan Kennedy, "How the Law School Fails: A Polemic" (1970) 1 Yale Rev. of Law and Social Action 71.

[24]*Law and Learning*, *supra*, note 3 at 47.

ground between professional development and intellectual thought. That this middle ground is what most law schools endeavour to achieve is manifested in the diverse course offerings found in the typical law school curriculum.[25]

This article, however, is not about the objectives of legal education.[26] It is about methodology. The two topics, of course, are related. Methodology is the means through which desired learning objectives are achieved. No matter how meritorious the objective it will not be learned by students unless it is effectively taught. This is why *how* a subject is taught is important, regardless of the objective sought. "Technique" and technique alone was listed in a survey of law students as the most common attribute of "great" teachers.[27] Let us now consider what are the objectives being achieved, and not being achieved, in the classroom through the use of traditional techniques--socratic method, problem method and lecture.

A. The Socratic Method

There is no one socratic method and much depends upon the personality of the individual professor. On the one hand there is the archetypical Kingsfield, as depicted in *The Paper Chase*, teaching through intimidation and engaged in a contest of wills with his students.[28] On the other hand others adopt a humane approach where students and professor work together in a joint exploration of the law.[29] No matter the approach, a common thread of the socratic method is that it requires active learning on the part of students. Indeed this is the pedagogical strength of the socratic method in that students must "do" the learning. An old Chinese proverb is apropos:[30]

> I hear, and I forget
> I see, and I remember
> I do, and I understand

Most of the "doing" occurs outside of the classroom in the student preparation of case briefs. The in-class dialogue provides a test for students to assess the accuracy of their own consideration of the case read, and through discussion principles of law emerge.

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[25]Dean James Vorenberg of Harvard Law School in a recent article espoused the diversity in students, faculty, programs and research available at Harvard. "Diversity Remains One of our Primary Goals" Harvard Law School, supp. to Harvard University Gazette, April 8, 1988 1.

[26]For a more thorough review of the objectives of legal education see, e.g., Strong, *supra*, note 1 at 230-231; Charles, *supra*, note 4; *Law and Learning*, *supra*, note 3 at 47-54; and Petter, *supra*, note 8.

[27]Robert Stevens, "Law Schools And Law Students" (1973) 59 Virginia L.Rev. 551 at 666.

[28]For a critique of the "Kingsfield method" see J.T. Dillon, "Paper Chase and the Socratic Method of Teaching Law" (1980) 30 J.Leg.Ed. 529.

[29]An excellent description of such an approach including a transcript from a sample class is contained in Charles Kelso, "Teaching Teachers: A Reminiscence of the 1971 AALS Teachers Clinic and a Tribute to Harry W. Jones" (1972) 24 J.Leg.Ed. 606.

[30]Quoted in Strong, *supra*, note 1 at 228.

In the "doing," what is it that the socratic method attempts to achieve? All too often the response is that it trains students to "think like lawyers."[31] Emphasis is on cognitive learning and the development of legal reasoning. At the knowledge level students through the study of cases are introduced to and expected to remember legal doctrine, terminology and principles. Beyond this level the intellectual demands become more rigorous and how far the students are called upon to ascend the cognitive hierarchy depends upon the rigour of the socratic exercises.

Even within the cognitive domain the socratic method is ill suited to impart legal knowledge to students. Yet, without a foundation of knowledge students cannot be expected to engage in legal reasoning. Karl Llewellyn wrote:[32]

> The pressure to expand the amount of "just plain law" "covered in class" has of course greatly increased the tendency in case teaching to concentrate upon subject matter at the expense of training in craft-skills. Nor could anything be a less happy development. For it is obvious that man could hardly devise a more wasteful method of imparting *information about subject matter* than the case-class. Certainly man never has. We face a crisis when we find the curriculum being drowned in an unthinking effort to use such a method as the sole means, or the main means, for accomplishing an end so vital.

We see this "crisis" in casebooks that in order to cover ever expanding subject content include a multitude of cases devoid of facts and culled to present the law and not the case.[33] This is not what the study of cases was designed for. What needs to be recognized is that the acquisition of knowledge is a distinct learning objective and, therefore, requires a different methodology. Independent readings from textbooks or lectures are more appropriate modes.

To socratic purists it may be heresy to suggest the use of lectures to augment the socratic method, but what is wrong with introducing a section by way of lecture in order to provide a framework for the students to refer in their study of the cases to follow?[34] Used in this way the lecture is a means for students to organize the law in their minds and in their notes. Compare this to their collection of case briefs, which to many students appear to be unconnected globs of law.[35] Similar-

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[31] For a discussion of this phrase see *Law and Learning*, *supra*, note 3 at 50.

[32] Karl Llewellyn, "The Current Crisis in Legal Education" (1948) 1 J.Leg.Ed. 211 at 215.

[33] See, e.g., Anthony D'Amato, "The Decline and Fall of Law Teaching in the Age of Student Consumerism" (1987) 37 J.Leg.Ed. 461 at 487.

[34] Llewellyn, *supra*, note 32 at 215; Edwin W. Patterson, "The Case Method In American Legal Education: Its Origins and Objectives" (1951) 4 J.Leg.Ed. 1 at 18.

[35] The level of student that we teach to is an important consideration for the instructor. Professor Addison Mueller wrote, "Legal education should not be designed to appeal to the poor student." Addison Mueller, "There is Madness in our Methods" (1950) 3 J.Leg.Ed. 93 at 95. While this is true, we also cannot afford to target the superior few at the expense of the many. In this regard we ought to be concerned if it appears that many of the students are not grasping what is being taught.

ly, what is wrong with providing a summary of the case law at the end of a section or of a class? We should not be proud of confusing students. Certain areas of law are confusing and may be very technical and complex for students to readily grasp through the study of a series of contradictory cases. Why waste valuable class hours in a futile exercise of reconciliation? There is nothing wrong with clarity. Professor Kenneth Elbe in his excellent book on college teaching observed, "A teacher, if it can be managed, should leave a student as little confused at the beginning of a class hour as at the end."[36] What is to be lamented is the perversion of the case method to accommodate the learning of subject content; something for which it is not suited to do. The consequence is dilution of the true value of the case study exercise and waste of class time.

A second critique of the socratic method is that it does little to provide students with insight into the realities of the practice of law. Rather, a narrow judicial sense of reality is served to the students concentrating upon the rarefied atmosphere of the appellate courts. The irony in this is that one of the original arguments advanced in support of the socratic method was that students were provided "real cases" and thereby could experience the pragmatic realities facing lawyers.[37] Unfortunately, too often our analysis of cases is from the perspective of the judiciary and not from the perspective of the lawyers handling the case. Karl Llewellyn referred to this as approaching the case from the "rear" where concentration is on how the court reached its decision. Professor Llewellyn advocated approaching the case "from the front," as a problem for solution by the lawyers and the court.[38] Regardless of approach, the focus of study in the socratic method is confined to the cloistered walls of the courtroom. Little regard is given to how or why the matter proceeded to the court. The personal dimension is missing. Jon Richardson, in a thoughtful critique of legal education put it this way, "Lawyers deal with rules and people. Law schools deal with rules."[39]

The emphasis on the law is not surprising given that one of Christopher Columbus Langdell's premises for the case method was that it was a "scientific" study of the law where reason and logic were to be applied to individual cases in the pursuit of guiding legal principles. Reason dominated over the accidents of litigation.[40] The personal dimension was not part of the Langdell formula for legal education. Jerome Frank attacked the Langdell model in scathing terms:[41]

> This philosophy of legal education was that of a man who cherished "inaccessible retirement." Inaccessibility, a nostalgia for the forgotten past, devotion to the hush and quiet of a library, exclusion from consideration of the all-too-human clashes of personalities in law office and courtroom, the building of a pseudo-

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[36] Kenneth Elbe, *The Craft of Teaching* (San Francisco, 1976) at 38.

[37] Patterson, *supra*, note 34 at 7.

[38] Llewellyn, *supra*, note 32 at 213.

[39] Jon Richardson, "Does Anyone Care for More Hemlock?" (1973) 25 J.Leg.Ed. 427 at 430.

[40] Patterson, *supra*, note 34 at 2-5.

[41] Jerome Frank, "A Plea for Lawyer-Schools" (1947) 56 Yale L.J. 1303 at 1304.

> scientific system based solely upon book-materials--of these Langdell compounded the Langdell method.

Consideration of the human dimension of the law is a valid objective of legal education. Afterall, the impetus for each and every case rests with a client, a personality, seeking redress through the law.

One response is to augment case instruction with "whole cases." These cases go beyond the reported case and provide detailed information on the participants and the external situation surrounding the case. A full context is presented within which to study the reported case.[42] Richard Danzig referred to these realities as "capability problems" and he described their impact as follows, "If values are the quiet engines of our legal system, the capability problems are the frictions, the ruts and the biases of the road. The machinery of Justice responds as much to the road as to the engine."[43]

Professor Melvyn Zarr outlined the whole case method as applied to a criminal law class.[44] Criminal law is especially suited to such an approach in that it is a most personal area of the law. A person stands accused by the state of a crime. Who is that person? What happens to that person? It is incumbent upon us when teaching criminal law to relate the law to the accused; otherwise the person is lost in the propositions of law. Why not take a person and place that person before the class along with the law? Then as we progress through the criminal process the impact of the law on that person can be readily portrayed. Personal injury actions represent another receptive area for use. Students can be given an opportunity to see through the eyes of an accident victim the litigation trauma and the impact of delay within the legal system and to grapple at a personal level with the issue of adequate compensation. So too for other areas of the law: the individual or group bringing a constitutional challenge, the businessman incorporating a company, the insured filing an insurance claim, the parent seeking custody of a child. The personal dimension has a place in the classroom and enriches and puts into proper perspective the case law as adjudicated by the appellate courts.

The use of a whole case also provides an avenue for the introduction of other sources of relevant information. Undue emphasis on the case law as being "the authority" for the law is misleading. Social science studies, demographic surveys, and government reports assist in understanding the social context of the case assigned.

Another serious void inherent in the case law method is that legislation is not adequately studied and students are poorly prepared to engage in statutory inter-

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[42]Such an approach has been long used by the Harvard Business School. See Llewellyn, *supra*, note 32 at 215.

[43]Richard Danzig, *The Capability Problem In Contract Law* (Mineola, N.Y.: Foundation Press, 1978) at 2.

[44]Melvyn Zarr, "Learning Criminal Law Through The Whole Case Method" (1984) 34 J.Leg.Ed. 697.

pretation.[45] As a result case law takes on skewed importance over statute law. This imbalance can be readily redressed through the addition into the course of a subject area involving statutory change. For example, torts is a classic case law course. Cases build upon precedent to delimit the causes of action. On occasion, however, an impasse is reached in the case law and statutory reform is demanded. The history and passage of the legislation can be examined to provide insight into the legislative process. Finally, the legislation itself must undergo scrutiny in the courts and is subject to judicial interpretation. Using this approach a natural progression is presented to the students vividly illustrating the relationship of the common law, statute law and the role of judicial construction.

As can be seen the case method has a narrow cognitive focus. In contrast, practical skills content is virtually ignored in a socratic class except for incidental exposure to the presentation of a position orally in class. Perspective content *may* be included if the professor reaches the apex of cognitive learning, critical evaluation. For the most part, however, socratic discussion focuses on the case assigned and the law as revealed within that case. The importance attached to legal reasoning cannot be challenged, but what must be conceded is that in concentrating upon this objective the socratic method achieves only one of the broad themes of legal education. This is the primary weakness of the socratic method that must be recognized and addressed by law teachers. In order to achieve a broader range of educational objectives the socratic teacher needs to augment the case instruction with different subject content and different teaching strategies.

B. The Problem Method

The problem method has been described as "the method whereby students learn law by *using* it in working out concrete legal problems."[46] It consists of three stages: (1) distribution of the problem and reference reading, (2) independent student work on solving the problem, and (3) in-class discussion of the problem.[47] The argument can be made that this differs little from the socratic method in that a problem is merely substituted for a case. Indeed the "front end" case approach advocated by Karl Llewellyn does appear to approximate the problem method. Another writer speaks of a merger of the case and problem method and certainly in most socratic classes hypothetical problems are posed to the students for consideration.[48] However, there is a significant difference between the two approaches. The case method prepares the appellate lawyer; the problem method trains the trial lawyer. In the case method class a student deals with filtered facts and set issues pre-determined by the judge rendering the decision. In comparison, the problem method confronts students with raw, unfiltered facts. One

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[45]Patterson, *supra*, note 34 at 23.

[46]Joseph O'Meara, "The Notre Dame Program: Training Skilled Craftsmen and Leaders" (1957) 43 A.B.A.J. 614 at 616.

[47]Gregory Ogden, "The Problem Method in Legal Education" (1984) 34 J.Leg.Ed. 654 at 655.

[48]W. H. Bryson, "The Problem Method Adapted to Case Books" (1976) 26 J.Leg.Ed. 594.

proponent of the problem method put it in these terms, "But our task is to train lawyers, not appellate judges, and our problems ought to require the student to do the lawyer's work."[49]

It is suggested that because students must find their own solutions the problem method demands more advanced analytical skill than required under the case method.[50] If we apply the levels of cognitive learning, the problem method does reach for the higher levels of analysis.[51] Students are called on to build upon their knowledge and comprehension of the required reference material and then apply the law to the problem posed. Analysis is essential to separate the relevant from the irrelevant facts. The student must then consider a response--synthesis and evaluation.

The case method is less direct. Here the court has already gone through the above analysis. The student takes on the function of recorder and critic. Further student analysis is promoted in class by the professor's questions and pressing of hypothetical positions. A weakness of this format is that students do not have adequate opportunity in class to fully digest the significance of the discussion, whereas in the problem method the situation is clearly presented to the students for consideration. In the problem method the in-class discussion, therefore, tests the reasoning of the student and not the reasoning of the appellate court.

However, to successfully employ the problem method the students need to have acquired the fundamentals of legal reasoning. For this reason the problem method is seen as an upper year methodology.[52] The case method is still viewed as the mainstay of the first year curriculum. Immediate use of the problem method in first year would definitely be inappropriate. Yet its total exclusion seems equally unwise. After all, we expect our students at the end of the first year to write essentially problem based examinations. If we evaluate on this basis then it surely is incumbent on us to begin training of this skill in the first year.

The attraction of the problem method is its flexibility. There is flexibility in the problem itself. Extra-legal facts can be created for the students to consider tactics or the handling of the people involved. There is flexibility in reference materials. Students are not confined to the reading of cases. Problems can be structured to consider legislation. Non-legal materials from other disciplines can be applied to fashion a broader context for the study of the law. There is flexibility in approach. By emphasizing practical lawyer problems the skills of lawyering can be introduced. Problems can be designed to address the skills of interviewing, negotiation, trial preparation or trial advocacy.

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[49]Bernard Ward, "The Problem Method at Notre Dame" (1958) 11 J.Leg.Ed. 100 at 102.

[50]Ogden, *supra*, note 47 at 655.

[51]*Supra*, note 7.

[52]This was and is the position taken at Notre Dame Law School. First year courses concentrate upon the development of legal reasoning through the case method, which then gives way to a problem oriented approach in years two and three. See O'Meara, *supra*, note 46; Ward, *supra*, note 49; Bulletin of Information, University of Notre Dame Law School (1986-87) at 4.

The problem method, although being able to fulfil broader educational goals than the socratic method, is not without its limitations.[53] A basic one is that of coverage. Like the case method, the problem method is an inefficient dispenser of knowledge. Resort to lectures, once again, is recommended.[54] There is also sacrifice in case analysis; the assumption being that students will already have acquired this skill in earlier courses. Class size presents another difficulty. The problem method is advanced for use primarily in smaller classes.[55] In larger classes individual student participation is reduced and more vicarious learning is relied upon, with little or no means to ensure student preparedness.[56] A final consideration is the effort and time required to create new problems for students. An entire course devoted to the problem method necessitates a great deal of advanced preparation on the part of the instructor.

C. The Lecture

Many law professors lament a perceived trend towards lecturing in the law school.[57] Pressure to lecture continues to increase in response to the expansion of subject content and the lecture is the most efficient means to cover a great deal of material. Professor Joseph O'Meara, former dean of the Notre Dame Law School, observed:[58]

> So the pressure is very great to lecture, for this makes it possible to get over a lot of ground. Law teachers like to talk, anyway; and, of course, it is a great deal easier to expound one's own views than to ask those penetrating questions which provoke that very rare activity--original thinking.

To lecture is not only easier for the instructor, it is safer. It is predictable. Nothing is left to the chance of open discussion. A passive learning environment is

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[53]For a detailed assessment of the problem method see Ogden, *supra*, note 47.

[54]Professor Bernard Ward in commenting on the problem method experience at Notre Dame Law School wrote:

> What has been said thus far about the role of the teacher assumes that the class hour will be given over exclusively to the discussion of the problem. There is no reason why, in the majority of courses at least, most hours ought not to be so used. But our own experience and reflection indicate that there is still need for occasional lectures. Lectures can be used to supply background material necessary to a full understanding of a problem area; they can be used to insure understanding of especially complex and important material.

Ward, *supra*, note 49 at 110.

[55]For example, Notre Dame Law School endeavors to maintain small classes in upper year courses, Notre Dame Bulletin, *supra*, note 52 at 4.

[56]Professor Ogden concludes that the problem method is "unworkable" in large classes, Ogden, *supra*, note 47 at 664-665. Yet the problem posed of student participation in large classes exists for any mode of teaching. This is where the craft of teaching is required to motivate students to participate and to be prepared for class. Further consideration will be given to this point in Part III of this article.

[57]See, e.g., O'Meara, *supra*, note 46 at 616.

[58]*Ibid.*

created where few demands are made of the students, who really are not actively involved in the learning process. The lecture can reach large numbers and cover volumes of information, but at a superficial level. The student's training in legal reasoning is lost in the accumulation of course content. In terms of cognitive development the students are doing little more than recording and retaining knowledge with little of their own analysis. The wrong person is working--the professor instead of the student.[59]

As has been argued the lecture is a valid adjunct to the socratic and problem methods. When necessary it is the most efficient way to cover subject content. Used as an introduction or summary, the lecture has a definite place. The lecture may also provide a way to broaden the context of a course by presenting new and challenging perspectives on the law. What is to be avoided is over-reliance on this tempting mode.

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The planning of a course begins with the instructor considering the educational objectives to be achieved within that course.[60] Methodology is the instrument for achieving them. For virtually all courses these objectives are sufficiently varied to meet many of the broad goals of a law school education. From the foregoing it is apparent that not one of our traditional methodologies, standing alone, can fulfil the wide ranging objectives. Once this is recognized then the need to diversify instruction becomes evident. Ideally the lecture, socratic class and problem method should be combined to provide a balanced, comprehensive education. For example, a unit on a particular subject could begin with an introductory lecture designed to provide a threshold of knowledge. Case studies follow demanding that the students analyze the relevant law. The students then are called upon to apply their knowledge and reasoning to problems as presented. The different methodologies complement and build upon one another.

II. Diversity as a Means to Integrate Theory and Practice

Traditionally in substantive and procedural "content" courses the law is taught. What to do with the law is not taught; that will be left to practical "clinical" courses.[61] Theory is divorced from practice and so legal education is divided. Unfortunately, real problems rarely are so conveniently compartmentalized. Most problems facing a lawyer demand acumen in both the law and in applying the law. Why not, therefore, replicate reality and mix law and practice in the classroom? The idea is not new. Jerome Frank, writing over forty years ago, pleaded for lawyer schools:[62] "An interest in the practical should not preclude, on

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[59] *Ibid.*

[60] See Andrew Pirie, "Objectives In Legal Education: The Case for Systematic Instructional Design" (1987) 37 J.Leg.Ed. 576.

[61] Richardson, *supra*, note 39 at 428.

[62] Frank, *supra*, note 41 at 1321.

the contrary it should invite, a lively interest in theory. For practices unavoidably blossom into theories, and most theories induce practices, good or bad." Frank's ideal epitomizes a holistic view of legal education and the objective to educate a "lawyer" in the fullest sense of the word. Legal *process* is intertwined with learning of the law. Law devoid of process presents an unrealistic world view for our students.

Ready opportunities exist in many of the pure theory courses to introduce practical insights by having the students use the law. Students can be invited to learn by experiencing the law in action. The experiences or tasks presented need not be elaborate.[63] At a minimum asides or postscripts to cases studied can provide some background into the practical dimension of the law.[64] At a more formal level is the simulation. With little organization simulations can be readily used in large class settings. Simulations are used in torts,[65] administrative law,[66] commercial law,[67] criminal law,[68] contracts,[69] and constitutional law courses.[70] Nor need the simulation expend a great deal of class time. True, in some instances course content may have to be sacrificed; however, often as not all that is required is for the professor to teach the same content in a different fashion. The gain is a broader overall educational experience for the students.

Oral advocacy exercises are most adaptable to content classes. One proposal is the adversary model.[71] Students are called upon to be adversaries and to defend and advocate their client's position in the case being studied. Such a strategy is not far removed from having students informally within a typical socratic class assume the perspective of the respective counsel before the court.[72] Yet, by formalizing the presentation a vehicle is provided for consideration of oral advocacy skills.

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[63]See William McAninch, "Experiential Learning in a Traditional Classroom" (1986) 36 J.Leg.Ed. 420.

[64]One suggestion is to employ a research assistant to examine each casebook and textbook for references to a case being used in class. In this way the study of the case is greatly enhanced by the accumulated background information. Douglas Newell, "Ten Survival Suggestions for Rookie Law Teachers" (1983) 33 J.Leg.Ed. 693 at 695.

[65]Joseph Little, Skills Training in the Torts Course" (1981) 31 J.Leg.Ed. 614; Harvey Zuckman, "Non-Fault in the Classroom: Involving Law Students in the Great Automobile Accident Compensation Controversy" (1971) 23 J.Leg.Ed. 598.

[66]Michael Botein, "Simulation and Roleplaying in Administrative Law" (1974) 26 J.Leg.Ed. 234.

[67]Donald King, "Simulated Game Playing in Law School: An Experiment" (1974) 26 J.Leg.Ed. 580

[68]McAninch, *supra*, note 63 at 424.

[69]Kenney Hegland, "Fun and Games in the First Year: Contracts by Roleplay" (1981) 31 J.Leg.Ed. 534.

[70]David Day, "Teaching Constitutional Law: Role-Playing the Supreme Court" (1986) 36 J.Leg.Ed. 268; Robert P. Davidow, "Teaching Constitutional Law and Related Courses Through Problem Solving and Roleplaying" (1984) 34 J.Leg.Ed. 527.

[71]Professor Howard Oleck has long advocated the adversary method of teaching law: Howard Oleck, "The Adversary Method of Law Teaching" (1952) 5 J.Leg.Ed. 104; Oleck, "Thirteen Years of the Adversary Method" (1960) 13 J.Leg.Ed. 83; Oleck,"Adversary Method of Law Teaching Summarized" (1975) 27 J.Leg.Ed. 86.

[72]For example see the sample socratic class conducted by Professor Harry Jones in Kelso, *supra*, note 29 at 612-627.

A second example is taken from torts. In tort law students are constantly dealing with the scope of possible causes of action; just how far will the law go? A new potential cause of action can be given reality by placing it within a real law context. Give the students a statement of claim outlining a new cause of action and simulate in class the defendant's motion to strike the claim on the ground that it discloses no reasonable cause of action. Students represent the plaintiff and the defendant and formally present their case to the court. The professor presides and fellow students are required to render a decision. Oral advocacy is demanded. Procedural aspects of the law are introduced. At the same time the law itself is critically examined and a hypothetical has been turned into reality.[73]

In criminal law, why discuss principles of sentencing in the abstract? Assign students real cases to pass sentence upon.[74] Or simulate a sentencing hearing. Students assume the roles of prosecutor, defence counsel and judge and the law of sentencing is introduced using a real forum.[75]

Simulations are also adaptable for other purposes. Simulation games can be used to emulate lawyers involved in the passage of legislation.[76] Fact finding skills can be developed through simulation interviews, and in this way the class as a whole can see what factual underpinnings are necessary to support given propositions of law.[77] Simulations can bring to life the role of negotiation.[78] For example, in a class on damages pose to the students an injury situation and have the students negotiate a settlement. Non-legal role plays are also suggested to reinforce everyday social experiences.[79]

The recommendation to incorporate practical skills learning into a content course is not without opposition. Jon Richardson presented a number of possible reasons for the reluctance to change: [80]

> One possibility is that many members of law faculties do not know themselves what it is that lawyers do, and how they do it. . . . There are other possibilities. It could well be that some law professors know perfectly what is involved in the practice of law and find the whole business distasteful. . . . Another possibility, more palatable because it has the appearance of humility, is that old game called "that's out of my field."

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[73]This illustration is taken from a torts class conducted by the author. The actual problem involved public disclosure of a private fact and the possible acceptance into Canadian law of this tort.

[74]McAninch, *supra*, note 63 at 424.

[75]The author has used this sentencing exercise successfully in teaching first year criminal law and procedure.

[76]King, *supra*, note 67.

[77]The fact finding simulation was used by the author in teaching first year torts.

[78]Little, *supra*, note 65.

[79]Paul Bergman, Avrom Sharr and Roger Burridge, "Learning From Experience: Non-Legally Specific Role Plays" (1987) 37 J.Leg.Ed. 535.

[80]Richardson, *supra*, note 39 at 429.

All of the above are possibilities, but none are valid to justify the exclusion of practice considerations in teaching the law. Replacing of the emphasis on legal theory in traditional content courses is not suggested. Enhancement is advocated.[81] Practical input will help to teach students the law and the process of the law in its fullest sense. A final observation by Jon Richardson is appropriate:[82]

> Law school is not impractical or irrelevant because of what it does, but because of what it fails to do. If we cannot throw out what we have been teaching in order to make room for endeavors that will answer the need for practicality and relevancy, perhaps the standard time for legal education must be extended. But if there is another way to do a job, surely it would be preferable. The problem is to add without subtracting and still not change the sum. It can be done--not by changing what we teach, but by changing how we teach it.

III. Diversity and Motivation

The tragedy of legal education is what we do to students. The enthusiasm and expectation of first year quickly gives way to upper year apathy and cynicism.[83] The students "mark time," as they wade through what has become to them legal drudgery.[84] One cause of the upper year malaise is the diminishing returns derived from continued reliance on the case method.[85] The objectives of the case method ought to have been achieved by the end of first year, yet use of the socratic method persists. By second year the novelty of the study of cases is lost. What this underscores is that sameness of method is counterproductive. In reviewing legal education at Harvard Law School a faculty committee on educational planning and development noted, "We do not doubt that the decline in student engagement over the three years is partly caused by the repetitiousness, as students find it, of much of the classroom experience."[86] Obviously, change is needed from year one to two to three, with each succeeding year building on and progressively developing new learning experiences for the students.

A second cause of student disenchantment with law school is that we, the instructors, are not doing enough to motivate our students. The study of the law may be a serious exercise, but it does not have to be a boring one. On the con-

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[81] See, e.g., Little, *supra*, note 65 at 614.

[82] Richardson, *supra*, note 39 at 434.

[83] See, e.g., Walter Gellhorn, "The Second and Third Years of Law Study" (1964) 17 J.Leg.Ed. 1; David Robertson, "Some Suggestions on Student Boredom in English and American Law Schools" (1968) 20 J.Leg.Ed. 278; Quintin Johnstone, "Student Discontent and Educational Reform in the Law Schools" (1970) 23 J.Leg.Ed. 255. For a survey on student attitudes toward their law school education see Carl Auerbach, "Legal Education and Some of its Discontents" (1984) 34 J.Leg.Ed. 43.

[84] Charles Reich, "Toward the Humanistic Study of Law" (1965) 74 Yale L.J. 1402.

[85] The questionable value of continued use of the socratic method in upper years is noted even by users and supporters of the method. See Llewellyn, *supra*, note 32 at 216; Edmund Morgan, "The Case Method" (1952) 4 J.Leg.Ed. 379 at 388.

[86] Harvard University Law School, Committee on Educational Planning and Development (Frank Michelman, Chairman), Report 1982 at 31.

trary, learning of the law should be an interesting and pleasurable experience.[87] However, we take students for granted. We assume that they would not be at law school unless they were motivated to learn the law. We have a captive audience. Why toady to them? So we do not. What is not appreciated is that students must be specifically motivated to study our particular subject or to do our specific assigned tasks.[88] The study of the law ought to stimulate and excite law students. This should be striven for and if the classroom experience is not stimulating then we have failed as teachers.[89]

This is not to say that we all need to become entertainers. A starting point is enthusiasm.[90] We cannot expect the students to be interested if we do not, in turn, appear to be interested. The students will respond to our attempts to spark interest. In so doing they will become willing participants in the learning experience, as opposed to balking subjects.

Diversity is one means to stimulate. Hence the need to plan for diversity within each class and within each course. Diversity in the class hour begins with the class outline--presuming that the professor has one. The outline lists the objectives for the class and the methodology to be used in achieving each objective. At this juncture consideration needs to be given to the organization of the class time. Change needs to be planned for. Pace is especially important in a lecture.[91] The rationale for a lecture is to personalize and to personify the written word. If all that is being done is to recite prepared class notes, why bother? Reproduce and distribute the notes and save your voice. The lecture is more than written words put into audio form; it needs to be a stimulator and reinforcer of knowledge. Far too often it is not. Too often the lecture is used to force feed students content.[92] Instructors become enthralled with what they have to say and ignore how they say it.[93] The result is that the message is lost in the presentation. Change within the class can be easily introduced: the voice used to emphasize a point, a pause, posing a problem to the students, allowing students time to resolve the problem in small buzz groups, personal illustrations bring life to the law,

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[87]Elbe, *supra*, note 36 at 3.

[88]Charles Kelso, "Science and Our Teaching Methods: Harmony or Discord?" (1960) 13 J.Leg.Ed. 183 at 188.

[89]See Stanford Ericksen, *The Essence of Good Teaching* (San Francisco: Jossey-Bass, 1985) at 30.

[90]A number of writers on education begin with this proposition: see, e.g., Paul Baier, 'What is the Use of a Law Book Without Pictures or Conversations?" (1984) 34 J.Leg.Ed. 619; Newell, *supra*, note 64 at 693.

[91]Heather Dubrow and James Wilkinson, "The Theory and Practice of Lectures," in Margaret Gullette ed., *The Art and Craft of Teaching* (Cambridge, Mass.: Harvard University Press, 1984) 25 at 30.

[92]Professor Gellhorn vividly describes the force feeding of content in the following terms: "The motivation is unexceptional. The result has been deplorable. The curriculum swells, as do all the courses that comprise it. The swelling resembles that of lungs threatened by suffocation. Students acquire an over-stuffed feeling. They gag rather than swallow when more nutriment is offered them." Gellhorn, *supra*, note 83 at 4.

[93]Professor Addison Mueller expressed the view, "The emphasis in teacher training ought to be on encouraging a teacher to develop something to say and not on worrying about how he chooses to say it." Mueller, *supra*, note 35 at 95. I submit that both knowledge and presentation are essential if a matter is to be taught successfully. A reply to Professor Mueller is contained in Dale Stansbury, "On Teaching Law Teachers To Teach" (1951) 3 J.Leg.Ed. 429.

anecdotes provide a breather for the note-taking students, use of the blackboard, use of an overhead. The lecture is not just content; it is organized presentation of that content.

Change, virtually any change, is refreshing. Change for the sake of change is not suggested. As we have seen the diverse methodologies available each present different opportunities to achieve a variety of learning objectives. Interspersing of lectures, socratic method and problem solving is one way to maintain interest and at the same time achieve a wide gamut of objectives. The simulation used in a large class is an excellent energizer. Professor Alan Dershowitz, a well known teacher at Harvard Law School, recounted in his book *The Best Defense* that a simulated court hearing prompted "an aura of excitement" in his first year criminal law class.[94] The simple reality is that no matter how interesting we are, or we think that we are, a change is refreshing, especially one that invites the active participation of students.

One virtually untouched stimulant is audio-visual materials.[95] We continue to rely far too much on the written or oral word at the expense of the visual. Why do we persist in telling or having our students read about a fact situation when we have the means to show them? The videotape is a most untapped resource for use in the classroom. Documentaries, movies, television programs abound that deal with legal themes or stories. Excerpts from these could be used to enhance the class. For example, legal ethics could well be taught based upon "L.A. Law" episodes.[96] Audio-visual presentations offer clarity, variety, vividness and speed.[97] They also offer interest to our students. Professor Kenneth Elbe, in presenting his view of teaching, observed, "I have never encountered any evidence that a dull and stodgy presentation necessarily carries with it an extra measure of truth and virtue."[98] So true.

IV. Conclusion

This article calls for legal educators to consider the form as well as the content of their classes and courses. Variety is suggested as a means to broaden the learning experience for students and best utilize education time. The greatest obstacle to such change rests with ourselves. There is an "inertia" to continue with what has been done in the past.[99] This is not to say that what we traditionally have done is bad. Much of what we teach and how we teach is pedagogically sound; only that it can be improved. Education within the traditional law school

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[94]Alan Dershowitz, *The Best Defense* (New York, 1983) at 113.

[95]See Baier, *supra*, note 90; Vincent Johnson, "Audiovisual Enhancement of Classroom Teaching: A Primer For Law Professors" (1987) 37 J.Leg.Ed. 97.

[96]This suggestion was raised at a meeting of the Professional Responsibility section of the Canadian Association of Law Teachers Annual Meeting held at Hamilton, Ontario, June 2, 1987.

[97]Johnson, *supra*, note 95 at 101-105.

[98]Elbe, *supra*, note 36 at 11.

[99]Johnson, *supra*, note 95 at 122.

classroom has stagnated. In comparison, the needs of the students have grown. In order to meet their high and diverse expectations no one method will suffice. Diversity is needed and a rationalization of reliance on the socratic method, problem method or lecture. Within the class and course time frames we need to apportion teaching time more wisely. This does not mean a dilution of the traditional strengths of a legal education but, on the contrary, diversity will only help to enhance the educational experience--for all.