

FROM CASE METHOD TO PROBLEM METHOD: THE EVOLUTION OF A TEACHER

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This is the story of a law teacher's odyssey—from case method to problem method—and why.

I. IN THE BEGINNING

Many a year ago, while peacefully practicing law, I was lured into a law professorship by a wily professor who turned my head with three persuasive arguments: June, July, and August.

My mother was not enthused about my new career plans. “You learned to be a lawyer by going to law school. But who taught you how to teach? You’ve never taken any education classes.” Mothers. I laughed. “Mom, you don’t get it. I’m not teaching third grade. This is law school, graduate school. I’ll be teaching grown-ups. They already know how to put away their crayons.” She gave me the look. “So, Perfesser? How will you teach them?” Good question—to which I hadn’t given much thought. “Well, the same way I was taught, I guess. The case method.”

Though I had attained a bit of prominence in Property Law, the dean assigned me to teach Criminal Law and Criminal Procedure. I had little experience in these areas, but the dean was short of teachers in those courses that year. Such are the ways of deans.

I perused the various casebooks. They seemed quite similar to each other: a case, then a few notes, maybe a “hypo” or two, then on to the next case. The cases in each chapter were from various jurisdictions and were not presented chronologically. They were pretty much the same type of casebooks I used in every course I took in law school (Boalt Hall, during the 1960s) and were well-suited to the case method of instruction.

So I chose a criminal law book and a criminal procedure book and taught my courses by the case method, dutifully marching from case to case in the time-honored way. My students seemed OK with it, as this is what they were getting in their other courses. This was, to them, “law school”—a rather peculiar hurdle to jump on their path to doing what they really wanted to do: practice law. After they passed the bar exam, *then* they would learn what

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lawyers *really* do. Reading cases would be part of this, but only a small part. Many students already knew from their clerking jobs that lawyers don't spend much time reading cases the way we go through them under the case method. This is one reason why second- and third-year students become bored with classes. They humor us, while chomping at the bit to get law school behind them.

After a couple years of this, I became increasingly uncomfortable. "I *know* what lawyers really do—and it's *not this*," I mulled to myself. Lawyers read cases, of course, but mainly *as tools* to help solve their clients' problems. *That's* what I should be teaching my students to do. That's what they need, and that's what they'd like.

But how could I replicate in the classroom what lawyers do in their offices?

II. PREPARING THE PROBLEMS

I could not, of course, bring a real client into a classroom of eighty students. But I could bring in an imaginary client with a story I made up. In a way, this is even better than a real client. While clients ramble on in all directions, I could control the story. I could invent a tight little tale that raised only the issues I wanted raised, in a way that challenged the students to organize and analyze the issues as a good lawyer might.

To develop the story, I started by reading each case in a chapter of the criminal law casebook I was using, noting the key issues. I then wrote a rather complex story that raised those issues, ending with a tag line such as, "Our client has asked us whether he should spend a lot of money to appeal his conviction. He wants to know whether an appellate court would affirm or reverse. Please tell me what to advise him. Assume the court will base its decision on the cases set out in Chapter 4 of the casebook." This problem was more than a "hypothetical." It raised not one but several issues, cutting across the entire chapter. An analysis of the problem required sorting out the issues and organizing them into an outline, and the outline had to be based on a pretty good understanding of the cases.

I found it important to write my own answer, or at least a detailed outline of an answer, to each problem before giving it to the class. This helped ensure that the problem raised the issues I wanted to raise (some of them close or complicated) and avoided issues I did not want to raise. My foresight was not perfect, of course, and I often found myself readjusting the problem (or the answer) before giving it to next year's class. This project took some time and mental energy, but, as things turned out, it was well worth it.

III. IN CLASS

I gave the problem to the students a few days before the class in which I intended to discuss it. I told them how to do their homework: read the problem *first* and then read the cases in the chapter to which the problem related. I told them to draft an outline of an answer to the problem as they went along, changing and refining the outline as they came across new cases and rules. They should bring their final outline to class—not to turn in, but as a possible basis for discussion.

I would begin each class with a very short lecture introducing the topic, and then go straight to the problem. I'd ask a student to orally present an outline, which I would write on the board. Invariably, there was some mistake—major or minor. I would ask the class what was right or wrong about the outline, and the mistakes would be revealed. I would ask for some “authority” for their position, and they would respond by leading us to the relevant case. We would then discuss the case, in a manner similar to the case method.

Ironically, this case method portion of problem analysis worked *better* under the problem method. When teaching using the case method, professors are often frustrated. Profs want students to understand the facts and the court's rationale. But many students want just the holding—the “black letter rule” that they “need to know for the exam.” When we examine cases under the problem method, students see a need to understand the case on a deeper level—they can't solve the problem (i.e., predict how a court will rule) unless they really understand the case. Students realize that the “black letter” rule is often not clear enough to enable them to predict how a court would resolve the problem. They must also “distinguish facts” and consider whether a rule's rationale would be furthered or impeded by a ruling in our client's favor.

After discussing a case, we would come right back to the problem and adjust the outline. When we get a major section of the outline about right, we then apply that section to the facts of the problem. This often requires us to go back and examine the cases even more carefully, because the bottom line we are seeking—a prediction of how a court would resolve the problem—might be revealed only by seeing exactly what the courts have done before and why they did it. We must take a good look not only at what the court said (often in vague language), but also at what it said it about. The specific facts of the case are often the meat that give meaning to the fuzzy bones of the court's holding. Then we move on to the next section of the outline and do the same.

There are missteps and confusion along the way. I permit these to happen, and lead students to discover the error of their ways. This is frustrating for some, but most see the value in the struggle. I occasionally remind them that when they get out in practice, I won't be there to hold their hands, so they'd better learn how to solve the problems on their own. At the end of the class,

however, I present them with a pretty clear picture of how I would analyze the problem—although if the bottom line (the “conclusion”) is not clear, I tell them so. Sometimes that’s just the way the world is. And that’s how I wrote some parts of the problem—deliberately.

IV. WRITING A PROBLEM METHOD BOOK: CRIMINAL LAW

After a few years of this, I decided to take the next logical step—writing problems for a case-method casebook, which was like putting a lawnmower motor on a bicycle. It works, sort of, but you can’t really call it a motorcycle. I would write my own criminal law book specially designed for the problem method.

My goal was to present students with the task of a prosecutor, criminal defense lawyer, or judge, within the natural limits imposed by the need to teach a large group of law students within a finite number of classes. My first job was to select the cases. I’ve been blessed (or cursed) with a rather bizarre imagination, so I can invent any type of problem. But I can’t invent good, interesting cases. So I’d adapt a problem to a group of cases rather than the other way around.

How does a lawyer select cases? By looking mainly within the jurisdiction in which the crime occurred because the court is more likely to consider those cases as precedent. So on any given topic, I looked for the most interesting and instructive cases within a single jurisdiction. I scanned the entire country, looking for the best cluster in a single jurisdiction on a given topic (attempt, self-defense, etc.). For example, after a bit of work, I chose New York as the site of my chapter on larceny because that state had some rather recent cases applying the old elements of larceny (taking, asportation, intent to steal, etc.) to some modern situations, such as whether turning on a car’s ignition is “taking” the car, whether a shoplifter “takes possession” of an item in a supermarket when he removes the item from the shelf but before he leaves the store with it, and whether a money-counting firm “takes” a bank client’s money by investing it for a few hours before returning it to the bank. For contrast, I included a few notes summarizing relevant, interesting cases from other jurisdictions, but the focus was on New York. To give students the full picture, I set out some New York statutes on larceny.

The problem, then the statutes, then the cases are presented in chronological order with notes, so that students can see how the law developed. I set up every chapter of the book this way. As I told my students, “You have pretty much everything a real lawyer has to work with. I’ve done your legal research for you, but the rest is up to you.” Then on to the next chapter—another topic, another jurisdiction. The robbery chapter focuses on Pennsylvania cases, the felony murder chapter on California cases, the attempt

chapter on federal cases, and so on. Every chapter begins with a problem.¹ To help professors who decided to use my book (including, of course, me), I wrote a teacher's manual. Each chapter of the manual begins with my rather detailed outline of an analysis of the problem, followed by summaries of the major cases in the chapter.

V. AN EXAMPLE

Here is how the problem method operates:

The chapter on voluntary manslaughter begins with the following general definition: voluntary manslaughter is an intentional homicide committed while the defendant is acting in a state of passion induced by a provocation that would induce a reasonable person to lose self-control, where neither the defendant nor a reasonable person would have cooled off between the provocation and the killing.

Next comes the problem, which reads as follows:

To: My law clerk
From: New Mexico District Court Judge Luke Warm
Re: *State v. Berkowitz*

I am in the middle of trial in this case. Defendant Brenda Berkowitz is charged with the second-degree murder of Ron Ruiz. The prosecution's evidence showed that Ruiz was killed by a stab wound in the chest, inflicted by Berkowitz.

Berkowitz testified in her own defense. The transcript of her testimony is attached. Her lawyer wants me to instruct the jury that, if they believe her testimony, they may return a verdict of guilty of voluntary manslaughter, instead of murder.

Please review the transcript and the attached authorities, and advise me as to whether I should give such an instruction and, if so, how the instruction might read.

1. See MYRON MOSKOVITZ, *CASES AND PROBLEMS IN CRIMINAL LAW* (4th ed. 1999). Also see the accompanying teacher's manual to this textbook. See also MYRON MOSKOVITZ, *CASES AND PROBLEMS IN CALIFORNIA CRIMINAL LAW* (1999). Also see the accompanying teacher's manual to this textbook.

Transcript of Berkowitz's Testimony

Q. Ms. Berkowitz, what was your relationship with Mr. Ruiz?

A. We were lovers for about two years, though we did not live together. We had planned to get married next year.

Q. What happened on the evening of May 8?

A. Ron and I were having dinner at his apartment in Santa Fe, and we were drinking wine. Wine doesn't relax me, but usually makes me rather anxious. Over our tamales and chopped liver, Ron told me that he had slept with Joan, my best friend. He also said that he did not want to marry me.

Q. Did he say why?

A. Yes. He said he didn't think our ethnic backgrounds went well together, as Mexicans were hot and Jews were cold. I started to cry and protest, and he called me a "whining Jewish princess."

Q. What did you do then?

A. I am very proud of my Jewish heritage, so I became very upset. I got up and walked out. I walked around the neighborhood for a couple of hours. When I returned to Ron's apartment, he was asleep on the couch, from drinking the wine, I guess. I went into his bedroom and looked in his desk drawers. I found a short letter to Ron from a woman, dated a couple of years ago, saying how much she loved him. I thought it was from Joan. I went back into the living room, and Ron was still asleep. I looked at his face. He seemed so calm, even though he had hurt me so much. This really infuriated me, so I picked up a knife from the kitchen sink and stabbed him. Later, I found out that the letter had been written by Ron's mother.

Next come the cases (and a statute, which says little). All of the cases in this chapter come from New Mexico, and that is where the problem arises.

Here is a summary of the cases: In *State v. Nevares*, the court held that the victim's rejection of the defendant as a lover could not furnish adequate provocation, because "words alone, however scurrilous or insulting, will not furnish the adequate provocation" necessary for voluntary manslaughter.² The court also held that the defendant's "peculiar, even defective, state of mind" (because of a head injury) was irrelevant, because a defendant seeking

2. 7 P.2d 933, 935 (N.M. 1932).

mitigation to voluntary manslaughter is held to the standard of an “ordinary man of average disposition.”³

In *Sells v. State*, the court held that “informational words [here, a wife’s confession of adultery], as distinguished from mere insulting words, may constitute adequate provocation,” where “a sudden disclosure of an event (the event being recognized by the law as adequate) may be the equivalent of the event presently occurring.”⁴ The court also stated “the substance of the informational words spoken, the meaning conveyed by those informational words, the ensuing arguments and other actions of the parties, *when taken together*, could amount to provocation.”⁵

In *State v. Munoz*, Donna told the defendant (her husband) that Hatfield had molested her more than nine years ago.⁶ This allegedly drove the defendant to kill Hatfield. The court held that the defendant was entitled to a voluntary manslaughter instruction even though the information came from Donna, not Hatfield, because the actual provocation came from Hatfield, and Donna only communicated the information.⁷

I begin the class with a brief introduction to the new topic—voluntary manslaughter—and then go straight to the problem. “Ms. Smith, what are the main topics in your outline to today’s problem?” She tells us, and I write them on the board. I then ask the class, “Does everyone agree with this?” Usually someone doesn’t, and we discuss the criticism. I’ll ask Ms. Smith and her critic which case or cases support their positions. This leads to a discussion of those cases, along lines pretty similar to what happens under the case method. But then we come back to the problem.

After we settle on the major issues, we fill in the submajor issues—again discussing the relevant cases that students think support the inclusion of these issues at this place in the outline. When done with this (or sometimes in the middle), we apply the rules to the facts of the problem. At the end of the class (or maybe two classes), I will have steered them (gradually, with a struggle) to the outline I think works best.

Here, the jury should be instructed on voluntary manslaughter only if the defendant’s testimony shows substantial evidence of each of the four elements of voluntary manslaughter. Thus, the outline might look something like this:

3. *Id.*

4. 653 P.2d 162, 164 (N.M. 1982).

5. *Id.* (emphasis added).

6. 827 P.2d 1303, 1304-05 (N.M. Ct. App. 1992).

7. *Id.* at 1306.

I. Was there a “*reasonable provocation*”?

A. What goes into “reasonable person” standard? *Nevares* says standard is “the ordinary man of average disposition.”

1. Intoxication would seem to be irrelevant. See reasoning of *Nevares*.

2. Is “ordinary man . . .” sensitive to ethnic slurs?

B. Were R’s words sufficient to provoke reasonable person?

1. Insulting words (“Jewish princess”) not enough. *Sells*.

2. Informing words “may be equivalent of the event itself.” *Sells*.

a. Info re R not marrying B would not seem to be enough, under *Nevares*.

b. Would info that R was sleeping with J be enough? Note that this was not adulterous, as in *Sells*.

C. R’s calm look while sleeping?

D. Letter from R’s mother? Not written by Ron, but perhaps it “counts” anyway, as part of accumulation of events. Compare *Munoz*.

E. If each act alone insufficient, is a *cumulation* of acts sufficient? *Sells* suggests yes.

II. Was B *in fact* provoked to heat of passion? Seems so, from her testimony that she was “infuriated.” (Note that her drinking might be relevant to show *actual* provocation, even though not relevant to *reasonable* provocation.)

III. Would a reasonable person have *cooled off* in the hour B walked around neighborhood?

A. Treatise says that after cooling off, new event may “rekindle” the passion of a reasonable person.

B. Here, “new events” were the letter and R sleeping.

IV. Did B *in fact* not cool off?

VI. MORE BOOKS: CRIMINAL PROCEDURE

I followed pretty much the same pattern with Criminal Procedure. I started by writing problems for use with someone else's casebook for a few years, then wrote my own books—one on police practices and the other on the adjudicatory phase. I followed the same scheme described previously, beginning each chapter with a problem, followed by cases to be applied to the problem. The police practices book is entirely constitutional law, so it includes no statutes.⁸ The adjudicatory phase book includes some federal rules and statutes (for example, regarding bail, speedy trial, and plea bargaining).⁹

VII. FEEDBACK

Does the problem method “work”?

Before examining this question, a couple of caveats. First, I have not been able to conduct a proper scientific study—with a control group and test group, double blind tests, and the like. The results I'll report are pretty impressionistic. Second, it is not easy to test the method as distinct from the professor who uses the method. Feedback about my teaching—positive and negative—might say more about me than my method. It's safe to say, however, that most students do not see me as the cuddly, nurturing type, so most positive feedback is probably due more to my method than to my sparkling personality.

Whether a method is successful should be measured by how well it helps to reach certain goals. Here are the law teaching goals I've identified: one is to keep students reasonably “happy” during the course itself. Another is to help students succeed in law school, by passing enough of their courses to graduate. A third goal is to help students pass the state bar exam. And a final goal—in my view, the most important—lies in the future: to help them practice law at the highest possible level. To do this, they need to “think like a lawyer.” In my humble opinion, the problem method is better suited than the case method to teaching them this skill.

VIII. TEACHING TO “THINK LIKE A LAWYER”

Law professors are a peculiar breed—half lawyer, half scholar. Well, maybe not half and half. Most are more scholar than lawyer. I fall nearer to the lawyer end of the spectrum. While I have scholarly interests, at heart I'm a lawyer. Whether it's genetic, environmental, or cosmic, I can't seem to help it. Even though I carry a full-time teaching load and publish on a regular basis, I

8. MYRON MOSKOVITZ, *CASES & PROBLEMS IN CRIMINAL PROCEDURE: THE POLICE* (3d ed. 2000). Also see the accompanying teacher's manual to this textbook.

9. MYRON MOSKOVITZ, *CASES & PROBLEMS IN CRIMINAL PROCEDURE: THE COURTROOM* (3d ed. 2000). Also see the accompanying teacher's manual to this textbook.

also handle appeals, consult for lawyers, and even get involved in the occasional trial. This helps my teaching and supplements my meager academic income; but if truth be told, I just can't bring myself to abandon my true calling.

This explains a lot about how I choose to teach. I teach my students to think like I think when I practice law. I often hear case-method professors say that they teach students to "think like a lawyer," but I find this puzzling. If a lawyer were called upon to analyze an appellate opinion objectively, she might do something similar to what law professors do under the case method: summarize the facts, discern how the case arrived at the appellate court, find the holding, etc. But this is a small part of a lawyer's job, and the lawyer rarely does this for its own sake, rather than as one of several vehicles employed to solve a client's problem. True, when the lawyer does analyze an appellate opinion, the skills learned under the case method can be quite useful. But "thinking like a lawyer" usually means thinking about how to *use* the case, a skill case-method profs don't teach much.

In a way, this is not surprising, because the founder of the case method saw himself as a scientist, not a lawyer. Dean Langdell sought to raise Harvard Law School's prestige to the same level as Harvard's science departments. The biology department dissected frogs to understand how the body works, so Langdell decided to dissect cases in order to understand how "the law" works, using Socratic engagement with his students. Incidentally (and, probably, unintentionally), this happened to enhance students' lawyerly skills in critical analysis, quick thinking, and public speaking. The legal community realized that the case method seemed to produce better lawyers than the old method (lectures from treatises), so this new method spread throughout the country's law schools.¹⁰

Langdell had fled from law practice. Many of today's law professors have done the same, in varying degrees. Tired of "thinking like a lawyer," they prefer to "think like a law professor"—and that's what they teach their students through the case method. Most do a good job of this, adding real value to their students' potential as lawyers. But "teaching them to think like a lawyer"? Not quite. That's what *clinical* professors do, but large, required classes are not suitable for the labor-intensive teaching we reserve for clinics. The best way to teach students in the bigger classes to "think like a lawyer" is the problem method.

10. These events are described in Myron Moskovitz, *Beyond the Case Method: It's Time To Teach with Problems*, 42 J. LEGAL EDUC. 241, 242-44 (1992).

IX. CONCLUSION

Since seeing the light, I have been propagating the faith,¹¹ with only marginal success, and generally making a nuisance of myself. Despite my efforts, the great majority of American law professors continue to teach using the case method. This is slowly changing, as more problem-method books become available and more professors become aware of how the problem method can better help their students. Some day, I hope, the majority of law profs will indeed teach their students to “think like lawyers.”

11. See Moskowitz, *supra* note 10. See also Myron Moskowitz, *The “Problem Method” of Teaching Law*, 17 J. JUD. REFORM JAPAN 45 (2001) (in Japanese), translated in 4 WASEDA PROCEEDINGS OF COMPARATIVE LAW 75 (2001).

