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TEACHING REMEDIES AS PROBLEM-SOLVING: KEEPING IT REAL

TRACY A. THOMAS*

INTRODUCTION

I began teaching Remedies as a problem-solving course over a decade ago. I was then in my third year of teaching and found that the Remedies course just wasn't clicking. The students, mostly third-years, were bored with the Socratic method and seemingly resistant to the demands of this important course.¹ My teaching grew more cumbersome as I waded deeper into the mire of the complexities of a transsubstantive field. Remedies class felt like a slog in the mud for all of us. After just a few years with the course, I thought there had to be a better way. I stumbled upon the problem method, which revolutionized my pedagogy for Remedies. In my view, this teaching approach is particularly well suited for the Remedies course. Others think so too, as the most common question I get as an editor of a Remedies casebook² from faculty new to teaching the course is how to teach it using the problem method.

Problem-solving is ubiquitous as the trendy mantra of what lawyers and regular people are supposed to be learning for better dispute resolution. Everyone from kindergartners to business executives is now instructed on the basic steps of problem-solving techniques.³ Critics of legal education, like the

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1. See DAN B. DOBBS & KATHLEEN KAVANAGH, *TEACHER'S MANUAL TO ACCOMPANY PROBLEMS IN REMEDIES: DAMAGES-EQUITY-RESTITUTION 1* (2d ed. 1993) [hereinafter *DOBBS TEACHER'S MANUAL*] ("Remedies is an important course. It is a course that can launch many big ideas about justice and public policy and about the way the law works or should work On a practical level, few materials could be so useful as those found in a good remedies course.").

2. DAVID I. LEVINE, DAVID J. JUNG & TRACY A. THOMAS, *REMEDIES: PUBLIC AND PRIVATE* (5th ed. 2009). The problems I use are included in the Appendix to the Teacher's Manual and also posted electronically on the companion website through West's Law School Exchange network. See DAVID I. LEVINE, DAVID J. JUNG & TRACY A. THOMAS, *TEACHER'S MANUAL TO REMEDIES: PUBLIC AND PRIVATE* app. at 239-85 (5th ed. 2009) [hereinafter *PROBLEM APPENDIX*]; *Law School Exchange*, WEST, <http://exchange.westlaw.com> (last visited Jan. 19, 2013).

3. See, e.g., MYRNA B. SHURE, *I CAN PROBLEM SOLVE: AN INTERPERSONAL COGNITIVE PROBLEM-SOLVING PROGRAM (KINDERGARTEN & PRIMARY GRADES)* (1992); *I Can Problem Solve (ICPS)*, NAT'L REGISTRY OF EVIDENCE-BASED PROGRAMS & PRACTICES, <http://www.nrepp.samhsa.gov/ViewIntervention.aspx?id=211> (last visited Jan. 19, 2013) (describing the

influential 2007 *Carnegie Report*, have focused on problem-solving as an important aspect of teaching legal rules, contextualized with professional judgment and practical meaning for clients.⁴ Law schools have taught problem solving through problem-method approaches to traditional classes, group projects akin to a business school case model, in-role situations like clinics or trial advocacy, and dedicated problem-solving workshops like those offered at Harvard and Akron Law Schools.⁵

This Essay explains what the problem method means to me in the context of Remedies, how a professor might concretely utilize a problem-method approach, and why others see problem-solving as an important (if not critical) pedagogical approach. Part I traces my exploration of the literature on problem-method simulations in the classroom and my adaptations to the process. Part II details the value the problem method adds to a course in student interest, learning, and assessment. Part III then shows how the problem method, particularly in the Remedies course, operates as a bridge to practice, instilling deeper learning and professional competencies critical to legal education.

I. PROBLEM METHOD PEDAGOGY

The professor who is considering adopting the problem method needs concrete specifics. What is the problem method and how exactly is it done? The overwhelming majority of casebooks and teacher's manuals for doctrinal courses are devoid of any assistance.⁶ One particular article was instrumental in my conceptualization and adaptation of the problem method course for

universal school-based program that develops cognitive process and interpersonal skills in kids age four to twelve); *see also* John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000) (discussing the value of mediation as a problem-solving technique).

4. *See* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 198–200 (2007) [hereinafter CARNegie REPORT]; *see also* AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 141–51 (1992) [hereinafter MACCRATE REPORT] (arguing that a lawyer should be aware of the skills and concepts involved in problem-solving).

5. *See* Keith H. Hirokawa, *Critical Enculturation: Using Problems to Teach Law*, 2 DREXEL L. REV. 1, 36 (2009) (describing problem-based learning classrooms); Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 99 (2010) (noting that problem-based learning is the “quintessence of skills-based law courses”); Shirley Lung, *The Problem Method: No Simple Solution*, 45 WILLAMETTE L. REV. 723, 766 (2009) (providing basic principles for teachers who adopt the problem method); *Problem Solving Workshop*, HARV. L. SCH., <http://www.law.harvard.edu/academics/registrar/winter-term/problem-solving-workshop.html> (last visited Jan. 24, 2013) (stating that a “Problem Solving Workshop” is required for all first-year students).

6. *But see* PROBLEM APPENDIX, *supra* note 2.

Remedies: Myron Moskowitz's *Beyond the Case Method: It's Time to Teach with Problems*.⁷ Moskowitz outlines the reasons why law professors should use the problem method and how to use this approach in class as he does in Criminal Procedure. His synthesis convinced me, and I then adapted his general principles to Remedies.

A. *Why Problem-Solving*

Moskowitz explained that he thought the problem method should be the primary method of teaching in all large law school classes because it taught students to do exactly what lawyers do—solve problems. “Problem-solving is the single intellectual skill on which all law practice is based.”⁸

[S]ince the main purpose of legal education today is to train lawyers (rather than to examine “the science of law”), we should adopt the problem method. It is designed especially to train professionals. Other professional schools—in medicine and business—use it, and we should too. It has everything the case method has to offer, and more.

...

... [M]ost lawyers spend most of their time trying to solve problems. Those problems consist of raw facts (not yet distilled into the short, coherent story laid out in an appellate court opinion)—facts presented by clients, along with some question like “Legally speaking, how do I get myself out of this mess?” or “How do I plan my affairs to avoid getting into a mess in the first place?”

If our job is to train students to “think like lawyers,” then we should train them to solve such a problem, because that is the kind of thinking that lawyers must actually do.⁹

Moskowitz argued that practice in application of the law was required. “[M]astery of doctrine’ is not sufficient. Most students can learn to apply

7. Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992) [hereinafter Moskowitz, *Beyond the Case Method*]; see also Myron Moskowitz, *From Case Method to Problem Method: The Evolution of a Teacher*, 48 ST. LOUIS U. L.J. 1205 (2004) [hereinafter Moskowitz, *From Case Method to Problem Method*] (detailing one teacher's transition from the case method to the problem method).

8. Moskowitz, *Beyond the Case Method*, *supra* note 7, at 245 (citing Gordon A. MacLeod, *Creative Problem-Solving—For Lawyers?!*, 16 J. LEGAL EDUC. 198, 198 (1963) (“A lawyer might best be described as a professional problem-solver.”)); see also Anthony D’Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 470 (1987) (“Lawyering is preeminently problem-solving.”); Leo H. Whinery, *The Problem Methods in Legal Education*, 58 W. VA. L. REV. 144, 145 (1955) (stating that the practice of law “consists of solving legal problems—either through counseling or advocacy—which are presented to lawyers by their clients”).

9. Moskowitz, *Beyond the Case Method*, *supra* note 7, at 241–45 (footnotes omitted).

doctrines to new situations only by *practicing* such application, in law school classes.”¹⁰ He analogized learning law to learning to play the piano:

To learn to play the piano, it probably helps to study Van Cliburn. But that is no substitute for playing the piano yourself. Remember your music teacher? “Practice, practice, practice!” While the case method shows the student how others solve problems, the problem method lets students learn to solve problems by actually finding, framing, and analyzing issues themselves.¹¹

Lawyers need to know how to do more than just analysis. A recent *ABA Journal* article listed twenty-six factors that influence lawyer effectiveness.¹² The four key intellectual and cognitive factors were analysis and reasoning, creativity/innovation, problem-solving, and practical judgment.¹³ Other factors for effectiveness included organization, client relations, and the ability to see the world through the eyes of others.¹⁴ The problem method helps legal educators move away from a dramatic overemphasis on analysis and reasoning, highlighted by the *Carnegie Report*’s critique, and begin to integrate many of the other factors important to lawyering.

B. *The Moskowitz Approach*

As I began considering the problem method for Remedies, I honed in on two approaches documented in the literature: Myron Moskowitz’s problem method and Dan Dobbs’s Remedies text, *Problems in Remedies*.¹⁵ Dobbs’s materials are set up so that students read the Dobbs treatise with the rules of law and then apply those to a series of long hypotheticals that isolate the key elements of the rules.¹⁶ This rules-based approach, however, was not exactly what I was looking for. The treatise readings eliminated the value of the case method approach altogether and the problems were shorter and more narrow in focus than I desired.

Instead, I gravitated to Moskowitz’s problem-method approach. He applies the problem method as a supplement to the use of a traditional doctrinal casebook. He identifies three key components of a problem-based class: problem, cases, and lecture.¹⁷ This approach makes the problem the

10. *Id.* at 243.

11. *Id.* at 246 (footnote omitted).

12. Marjorie Shultz & Sheldon Zedeck, *26 Factors That Influence Lawyer Effectiveness*, A.B.A. J., July 2012, at 39, 39.

13. *Id.*

14. *Id.*

15. DAN B. DOBBS & KATHLEEN KAVANAGH, *PROBLEMS IN REMEDIES: DAMAGES-EQUITY-RESTITUTION* (2d ed. 1993).

16. See DOBBS TEACHER’S MANUAL, *supra* note 1, at 1–2 (describing Dobbs’s problem-text method); see also Norman Otto Stockmeyer, *Equity/Remedies Syllabus* (on file with author) (following Dobbs’s approach).

17. See Moskowitz, *Beyond the Case Method*, *supra* note 7, at 264.

centerpiece of the class discussion to which everything builds. It retains the value of the case method in deconstructing the origins of the rules and the policy reasons in support of those rules.¹⁸ It adds the value of the problem method of placing those rules in context, and ending each class with a summary of that particular issue of law and a feedback assessment for the students of what they learned.

I adapted this basic three-step process to Remedies. The first part of every class makes the rules transparent through a basic introduction of definitional terms and tests laid out through lecture in black and white on PowerPoint slides posted to the course website in advance of class. The rules are presented clearly, avoiding the need for distracting supplemental aids like Gilbert's or Emanuel's law outlines, and illustrating the point that the art of lawyering is in the application. The rules of Remedies themselves are not particularly hard. For example, the scope of the injunction equals the scope of the harm.¹⁹ The challenge is in applying that rule, seeing how the courts interpret that rule, and how conceptualizations of "harm" and proper scope lead to variable results.²⁰ Part two of the class then explores how the rules work in the cases through the traditional case method, focusing on how the courts reason through the cases, the policies driving the decisions, and the strategies used by lawyers effectively or ineffectively to achieve client results.

The third part of the class then highlights the problem. This immediately sends the message that the rules are not abstract, but rather, practical realities. "The assigned cases, statutes, and other materials become tools for helping to solve the problem."²¹ Simply parroting the primary case won't answer the question presented, and instead the students must work with and apply the rule. The method itself moves students away from the absolutes of rules and the notion that there is always a right answer. The problems provide a beautiful demonstration of common law reasoning and make transparent the theory that the rule in the case depends on the facts. The problems quickly move students beyond the rule, avoiding entrenchment in absolutes. It provides a deeper understanding of how rules work, when they make sense, and what elements become operative in the legal debate.

18. *Id.* at 258 ("In the above example of a class using the problem method, none of the benefits of the case method are sacrificed.").

19. See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.4(6), at 83-84 (abr. 2d ed. 1993).

20. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995) (holding that "harm" of unconstitutional school segregation did not include white flight and thus injunction inappropriately targeted white flight in its magnet school plan); *Winston Research Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134 (9th Cir. 1965) (holding that the harm must be defined by the contours of the law and that an injunction which gave more protection to a trade secret than that permitted by law was improper).

21. Moskovitz, *Beyond the Case Method*, *supra* note 7, at 250.

In this third phase, it is important to let the students guide the discussion. Begin by asking a student “where did you start,” and then follow where she leads. Or you can ask a student to put her outline of the problem on the board and work from there.²² When the first student has exhausted her answers, move on to a second student, asking what he would add or change about the answer developed so far. You can and should stop a student who provides an incorrect response and ask, for example, does everyone agree that this is a rescission case? Did anyone instead consider quasi-contract? Or call on another student to apply a quasi-contract analysis, and clarify why rescission is an inappropriate answer for the problem.

The discussion will be circular. Even if the three part test is staring at them from a PowerPoint slide, few students will start with issue number one. Instead they will often start with the most glaring fact in the problem. No two classes will go in the same order. The professor can manage this by the use of a checklist, a sheet of linear analysis with each element and fact needing to be discussed that can be checked off when adequately addressed by that class. Elements not yet checked can be triggered with more direct questions to the class, for example, “Is there any possible equitable defense here that the client might be able to raise?” At the end of the discussion, the professor can use the checklist to make sure no issues have been overlooked and that the solution to the problem is complete.

Students sometimes ask for a written model answer to be provided online after the class. This is part of the “just give us the answer” syndrome. I resist it because it is counter to the objectives of the problem method and seeing alternatives and weighing best strategies for clients with the rules. I did try this once—and lived to regret it. It incentivized the students to opt out during class, knowing that the answer would be posted later; they didn’t have to listen carefully or be a part of the discussion. The model answers also got passed on to the next year’s class (which can be minimized by adopting two problem sets, Year 1 and Year 2). Developing the outlines together in class, with the final oversight check of the professor for completion, ensures that all of the goals of the problem method are met.

Fear is usually mentioned as the main deterrent to adopting the problem method.²³ Professors are fearful that this is a new, unwieldy method and that it leaves too many different possible answers for problems. They are afraid they will look like they don’t have the answers, or they won’t know how to guide students during discussion. That has not been my experience. The professor is

22. *See id.* at 256.

23. Remedies is already a challenging course for a professor due to its transsubstantive breadth that includes fields like Constitutional Law, Antitrust, Employment, Securities, as well as Torts, Property, Contracts, and Civil Procedure. *See* Gregory L. Ogden, *Challenges in Teaching Remedies*, 39 BRANDEIS L.J. 611, 611 (2001).

still the expert in the room. “[Y]ou’ll get most of it right, and you’ll be way ahead of your students no matter what you do.”²⁴ The checklist prepared in advance will ensure that you get the substance right, though you will still get new answers and questions as in any class.²⁵ The advantage of this group discussion though, is that students will learn to rely less on the professor for “the answer,” and instead appreciate the collective wisdom of the group and their peers.

Ultimately, a professor must embrace the process of problem-solving, which is not about the finite knowledge. As Professor Moskowitz explained:

This may sound scary. “How can I let the students see that I don’t have all the answers . . . ?” You can, and you can look good doing it. The key is to become immersed in the process of problem-solving. You are there to teach the process, not the answer to the problem, which is only incidental. Part of the process is to make mistakes, especially those involving oversight. . . . The practice of law is an art, not a science. Few lawyers, even the most brilliant, work alone. They need to bounce ideas around with colleagues. This is what you are doing with your students, and this is one of the things you want them to learn.²⁶

C. *Designing Problems*

The most fundamental point about designing problems is that they are not hypotheticals. Hypos are too short and too shallow to permit the mastery of application of legal principles:

A hypo usually raises only one or two issues. A problem raises several issues, which must be organized before each can be separately analyzed. A hypo has to be short: it is sprung on the students during class. There’s not enough class time to think about and analyze a long set of facts—i.e., a problem Clients come to lawyers with problems, not hypos. A lawyer trained to analyze a hypo has not been trained to analyze a longer problem.²⁷

A problem is longer, usually about two-thirds to a full page in length. A problem is complex, resembles a situation a lawyer might face in practice, and

24. Moskowitz, *Beyond the Case Method*, *supra* note 7, at 265.

25. *See id.* at 264 (“Hardly a class goes by without at least one student raising some issue or some angle on an issue that I haven’t thought of, even if I have used the same problem for years.”).

26. *Id.* at 264–65 (footnote omitted).

27. *Id.* at 246. One key distinction with the Dobbs approach is that Dobbs’s problems are more like long hypothetical questions. They isolate one or two elements of a rule, or three factors of a three-part test to hone the students’ understanding of the rule. *See id.* at 267 (explaining how many books labeled “problems” are more akin to hypos and will not support the type of problem recommended for the problem method).

involves several issues cutting across multiple cases and rules.²⁸ It may be framed in the context of litigation (What damages can your client seek?), negotiation (prepare to negotiate a settlement of property and tort damages incurred in the car accident), drafting (draft an injunction for a class action discrimination case),²⁹ or planning (recommend a liquidated damages clause for the pending contract).³⁰

The problems I use come mainly from my prior exam questions, from new cases, and from the bar exam. These are available for instructor use for those professors adopting my West casebook, *Remedies: Public and Private*.³¹ Prior exams are easy to adapt because they have already tracked the rules of the course and you have developed a grading rubric or checklist. I also use short essay problems from the bar exam, many from Ohio which has published its questions and model answers for over twenty years,³² as well as other states that have started to post model questions and answers online. I also use two Multistate Performance Tests (MPT) from the bar exam over the course of a semester, one that focuses on reparative and prophylactic relief for noisy neighbors and one that explores the measure of restitution in an employment setting.³³ The better the problems reach student interest, the more staying power the exercise. For example, one favorite in my Remedies course here in Cleveland is a problem about an injunction to stop the Cleveland Browns franchise from relocating to Baltimore (an issue I dealt with in practice at a law firm representing the National Football League).³⁴ I get lots of comments and reaction, and the football comments can be molded to fit the appropriate part of the equitable balance.

Typically, I expect that the students will prepare an outline of the answer for discussion in class. The students can then “grade” their answers by adding comments, striking wrong responses with different color (pen or font), or

28. See *id.* at 250, 253–54 (providing an example of a problem from a criminal procedure class of a memorandum from lawyer to law clerk regarding a motion to suppress defendant’s statements made to police, consisting of a transcript of testimony by the officer).

29. See, e.g., DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 827–28 (4th ed. 2010).

30. See Moskowitz, *Beyond the Case Method*, *supra* note 7, at 250; see also *id.* at 266 (providing a detailed example of how to draft a problem in litigation posture).

31. LEVINE ET AL., *supra* note 2.

32. See *Ohio Bar Examination*, SUPREME CT. OF OHIO & OHIO JUD. SYS., <http://www.su.premecourt.ohio.gov/AttySvcs/admissions/barExam.asp> (last visited Jan. 21, 2013).

33. See NAT’L CONFERENCE OF BAR EXAM’RS, THE MULTISTATE PERFORMANCE TEST: *IN RE MADERT* 17–33 (2002) [hereinafter MPT: *IN RE MADERT*] (injunctions), available at http://www.ncbex.org/assets/media_files/MPT/MPT-Point-Sheets/Feb02MPT.pdf; NAT’L CONFERENCE OF BAR EXAM’RS, THE MULTISTATE PERFORMANCE TEST: *PROFFET V. DINSDALE INSTRUMENTS, INC.* 16–33 (2000) [hereinafter MPT: *PROFFET*] (restitution), available at http://www.ncbex.org/assets/media_files/MPT/MPT-Point-Sheets/MPT022000PS110408.pdf.

34. PROBLEM APPENDIX, *supra* note 2, at 243.

reorganizing as necessary. Once a semester, students prepare their outline for use in a negotiation. This is a longer problem comprised of deposition transcripts, where students represent one party involved in a car accident and attempt to negotiate tort and property damages.³⁵ Twice a semester students write out an answer fully as a lawyer work product, following the MPT problems mentioned above. One asks students to draft a letter to the opposing attorney,³⁶ and the other asks students to draft a motion in support of proposed jury instructions on unjust enrichment and the proper measurement of restitution.³⁷ These three longer exercises are used as summary classes that pull together all the material on a particular unit (damages, injunctions, or restitution) with no new reading material assigned for that class.

D. *Doing the Problems in Advance*

An essential feature of the problem method is doing the problems in advance of the discussion of the rules in class. The problems are not reviews of the prior class rules assigned after the class discussion, but instead work in tandem with the assigned readings as the homework preparation for a class. The students first read the cases, typically fifteen to twenty pages and shorter than a case method class assignment, guided by PowerPoint slides of the skeletal rules provided online on the class website, and then work the problem. “It is not enough to understand the cases and rules in isolation. The student must see how they relate to each other.”³⁸

As Moskovitz explains, this second feature of the advance distribution of the take-home problem gives the student time for “in-depth, well-organized legal analysis” in contrast to the hypothetical that is sprung during class.³⁹ The problem requires sorting and processing of information because:

It is an integrated story with elements that must be identified, extracted, and organized into a coherent structure. A lawyer in practice does not receive a list of hypos from the client. The lawyer gets a story, and must sort out interrelated issues based on the questions to be resolved and the rules of law that apply. These issues must be organized before they can be analyzed.⁴⁰

This outline reinforces organization—one of the identified twenty-first century competencies of intrapersonal skills that are important to professional

35. ANTHONY J. BOCCHINO & RONALD L. BEAL, *MCLAIN V. BARBER: PROBLEMS AND CASE FILE* (3d ed. 1997) (personal injury action for auto accident purchased from the National Institute for Trial Advocacy).

36. MPT: *IN RE MADERT*, *supra* note 33.

37. MPT: *PROFFET*, *supra* note 33.

38. Moskovitz, *Beyond the Case Method*, *supra* note 7, at 254.

39. *Id.* at 250.

40. *Id.* at 256.

and life skills.⁴¹ “For a law professor this outline may seem obvious and easy to prepare, but most students find it a difficult exercise—at least when they start out.”⁴² In Remedies, students often put the cart before the horse. They analyze a defense before the entitlement to remedy is established. Or they argue about the ability of damages to achieve the rightful position first, making their subsequent argument for injunctive relief more difficult. They are not used to being pushed for such organization in class, though of course we seek this organized analysis on the exam.

Students are sometimes frustrated by the requirement of doing the problem in advance of class and may press for using the problems as a summary of material in the following class. I caved into the pressure one year, testing the theory of the essential feature of the problem method, to significantly disastrous effects. Doing the problem later loses much of the value of the problem method. It turns the learning process into regular Socratic method and taking notes, memorizing the three-part test, and applying it on a summary problem just like an exam. Delaying the problem converts the problem from formative assessment of understanding the material into summative assessment of a test, losing much of the teaching power of the problem. Logistically, it also splits classes into two subject matters, the summary of the prior class and the lessons for the next class, which is less effective than one class period devoted to fully exploring one topic.

This experience matches the science that shows that the point of doing the problem with the reading assignment is to enhance the depth of learning. A 2012 report by the National Research Council emphasized one study that showed how students’ deep learning is enhanced by presenting key concepts in advance of the main lesson.⁴³ In another study led by Harvard physicist Eric Mazur, it was discovered that students better understand the relevant concepts when they predict the outcome in advance of a demonstration.⁴⁴ “When their predictions turned out to be wrong, the resulting confusion motivated them to consider the concept more deeply, and they learned more.”⁴⁵ Indeed, a study conducted by Kurt VanLehn concluded that “deep learning may be *unlikely* to happen without the experience of confusion.”⁴⁶ Working the problems alongside the reading materials allows the students to make predictions. These

41. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, EDUCATION FOR LIFE AND WORK: DEVELOPING TRANSFERABLE KNOWLEDGE AND SKILLS IN THE 21ST CENTURY 29, 33 (James W. Pellegrino & Margaret L. Hilton eds., 2012) [hereinafter NRC REPORT].

42. Moskovitz, *Beyond the Case Method*, *supra* note 7, at 257.

43. NRC REPORT, *supra* note 41, at 163.

44. Annie Murphy Paul, *What Do Emotions Have to Do with Learning?*, MINDSHIFT (July 6, 2012, 10:01 AM), <http://blogs.kqed.org/mindshift/2012/07/what-do-emotions-have-to-do-with-learning/>.

45. *Id.*

46. *Id.*

predictions are often exposed as wrong when they come to class, but it is that process that facilitates the deeper learning of the Remedies knowledge.

II. THE ADDED VALUE OF THE PROBLEM METHOD FOR REMEDIES

Problem method can incorporate all of the value of the case method while providing significant additional advantages. A 1966 Association of American Law Schools (“AALS”) report listed five virtues of the problem method: (1) it approximates the lawyer's approach to the law; (2) it affords training in planning and advising; (3) it broadens the range of matters open to the student's consideration; (4) it increases the effectiveness of instruction where case law is inadequate (primarily where legislation is involved); and (5) it provides a stimulus to student interest.⁴⁷

Remedies is a perfect class to seek these virtues and other advantages as bored upper-level students begin the transition to lawyer. It offers pedagogical benefits for student interest, enhanced learning, and assessment.

Students Love It. Well, “love” might be a strong word, but student interest is certainly relatively enhanced by the use of problems. The problem method itself is a novelty, stimulating some interest.⁴⁸ The fact patterns are interesting and create characters they can remember and associate with the rules. It's fun to talk about LeBron James's TRO or the Occupy Wall Street protests rather than *A* conveying property to *B* and seeking compensation for consequential harm. “[A]nalyzing the problem is playing lawyer, and playing lawyer is fun. Learning by problem analysis is usually more fun than learning concepts in the abstract.”⁴⁹

Storytelling. This is what lawyers do. They begin with the client's story. The problems tell those stories, summarizing client facts in a way that might be done after initial interviews and discovery in a case. As in real life, the student-lawyers, or their clients, can become distracted by what they see as the equities of the case—an unfair employer, a cheating boyfriend, or a drunk driver. The lawyer must work to use the law as a tool to sort through the various facts and issues to satisfactorily solve the problem. The lawyer does not discuss law in a vacuum, dissecting an appellate opinion from an objective view, merely identifying rules devoid of their human context and consequences.

47. See Committee on Teaching Methods, *The Problem Method, 1966: Survey and Appraisal*, in ASS'N OF AM. LAW SCHOOLS, ANNUAL MEETING PROCEEDINGS, pt. 1, at 198, 207–10 (1966).

48. See DOBBS TEACHER'S MANUAL, *supra* note 1, at 2 (noting that the students' enhanced interest from a departure from the tiresome case method and an identification with the lawyer's role in the problem “gives you an extra advantage in teaching” in that it gets the students' attention not as an end in itself but as an opportunity to direct them where you want to go).

49. Moskowitz, *Beyond the Case Method*, *supra* note 7, at 254.

Legal Judgment. The problem method is the best way I have found for teaching legal judgment. As I expressly explain on the first day of class, legal judgment is about recognizing the outliers (the absolutely wrong arguments for a particular case), understanding the spectrum of possible choices, and then understanding why one argument might be better or more likely to succeed in a given case. The bar exam does this on the multiple choice section of the exam. Problem method does this in the way the professor reacts to the student responses. A professor must be specific in categorizing a response, not just saying “not exactly.” Instead, she must be explicit when the answer is wrong, for example, saying, “No, this is not a rescission case because there is no contract for which cancellation could be sought.” She must be clear about identifying outliers, for example, saying, “That is a possible argument given these facts, but we saw the court reject that measure of punitive damages in *Exxon Shipping Co. v. Baker*.⁵⁰” A professor has to be disciplined about placing the student response in the proper place along the spectrum, by indicating, “That is likely the strongest argument here,” or “That is likely the most common measurement of damages we have seen the courts uphold.” If you let everything go, trying to be gentle, with a “well, maybe,” or “I suppose one could argue that,” the students will get lost and lazy. If any answer suffices, then there are no right answers, and the upper-level student bias that assumes one can always argue anything is ratified.

Formative Assessment. The problems provide immediate feedback on the students’ learning.⁵¹ They require students to apply the knowledge, to use the rules rather than placing the rules into a vacuum waiting to be regurgitated on an exam. This type of formative assessment supports students in learning, and educational theory suggests that it significantly enhances learning.⁵² Yet legal education tends to overly focus on summative assessment, evaluations which sort and select students competitively for determining basic competence.⁵³ The *Carnegie Report* criticized law schools for making “little use” of formative assessment and instead called for formative to be the “primary form of assessment in legal education.”⁵⁴ The problem method easily allows for this to be done on a constant and efficient manner, providing that formative assessment daily and without need for time-consuming handwritten comments or written feedback.

50. 554 U.S. 471 (2008).

51. See Moskovitz, *Beyond the Case Method*, *supra* note 7, at 261 (“Feedback helps learning, but students do not get much feedback when they must wait for the final exam. Under the problem method, students must prepare some outline or analysis before class, and may then compare it with what the teacher presents in class. The comparison gives the student feedback—every class—without requiring any paper-grading.” (footnote omitted)).

52. See CARNEGIE REPORT, *supra* note 4, at 7.

53. See *id.*

54. *Id.*

Exam Practice. Every class reinforces the exact skills and questions students will need and can expect on the final exam in the class. The daily routine of evaluating a new problem, applying and integrating the rules, and outlining a logical response is precisely the format and response required on the summative assessment. The final exams then will look the same as traditional law school exams. The typical exams we use are, in effect, problems. “We have been teaching by the case method and testing by the problem method.”⁵⁵ The problem method restores assessment integrity by matching the form of testing with the form and goals of teaching.

Bar Exam. One ancillary benefit from the use of bar problems as class problems is that students will have tremendous bar exam confidence and, hopefully, success. After seeing ten or more bar problems in Remedies class, they have a good familiarity with the format and expectations of the essay and MPT portions of the bar. They know how to approach a seemingly-dense fact pattern, how to isolate clues, and how to let the call of the question guide them, all while reinforcing Remedies knowledge. This develops students who are significantly less anxious about the bar exam and confident of their abilities. And it is the number one comment I get from former students and alumni: that Remedies helped them get ready for and feel good about the bar exam. What it does not mean is acting like a BARBRI course or lecturing to ensure short-term knowledge. It does require professors to be aware of the subject matter tested on the bar exam, the format of the questions, and advice and teaching as to how to navigate the two.

III. THE BRIDGE TO PRACTICE

The big-picture benefit of using the problem method in Remedies is that it provides the kind of bridge to practice that gets students thinking like lawyers.⁵⁶ It moves them away from the typical legal education, the result of which is “to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.”⁵⁷ “Thinking like a lawyer,” from a practical lawyering aspect, means that students are client-centered in their strategies and recommendations.

The problem method provides an integrated approach to the Remedies curriculum that allows the professor to blend analytical, practical, and professional thinking into solving problems. This integrated approach has been the focus of critiques of legal education. The *Carnegie Report*'s first two of seven recommendations demanded this type of integrated curriculum.⁵⁸ It

55. Moskowitz, *Beyond the Case Method*, *supra* note 7, at 260.

56. See Moskowitz, *From Case Method to Problem Method*, *supra* note 7, at 1214.

57. CARNEGIE REPORT, *supra* note 4, at 6.

58. See *id.* at 8–9.

called for law schools to “[j]oin ‘lawyering,’ professionalism and legal analysis from the start.”⁵⁹ In order to “build on their strengths and address their shortcomings,” law schools should offer a three-part curriculum that (1) teaches legal doctrine and analysis; (2) introduces facets of practice and acting with responsibility for clients under the rubric of “lawyering;” and (3) explores values and dispositions of professionalism and justice.⁶⁰ This type of theoretical integration can be done structurally through the problem method, which teaches the law and reasoning of Remedies in the context of a new applied case that requires students to act on behalf of a client, to think about practical strategies, and to grapple with the implications of business, fairness, and other social values.

Through this process of the problem method, students gain a tangible understanding of how law operates as a means to an end. As early as 1942, the AALS was highlighting this advantage of the problem method:

[U]nder the “problem method” deduction of legal principles becomes not the end of legal education, but the means to an end—that, the adequate solution of the legion of problems which a dynamic society precipitates in ever-new combinations The “problem-method” recommends itself as a pedagogical device for re-orienting legal education to its major, basic task.

. . . The merit of the problem method is that it more effectively forces the law student to reflect on the application of pertinent materials to new situations and accustoms him to thinking of case and statute law as something to be used, rather than as something merely to be assimilated for its own sake.⁶¹

The problem method works to facilitate a deeper learning of the law. As the NRC Report concluded, deeper learning is or should be the goal of all education.⁶² “Deeper learning” is defined as “the process through which an individual becomes capable of taking what was learned in one situation and applying it to new situations (i.e., transfer).”⁶³ “While other types of learning may allow an individual to recall facts, concepts, or procedures, deeper learning allows the individual to transfer what was learned to solve new problems.”⁶⁴ Students today need to learn more than substantive content; they need to learn what have been called “21st century competencies” of cognitive skills of critical thinking and problem-solving, intrapersonal skills of organization and responsibility, and interpersonal skills of communication and

59. *Id.* at 9.

60. *Id.* at 8.

61. REPORT OF THE COMMITTEE ON TEACHING AND EXAMINATION METHODS, HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 85, 87–88 (1942).

62. *See* NRC REPORT, *supra* note 41, at 8.

63. *Id.* at 5.

64. *Id.* at 6.

collaboration.⁶⁵ These additional competencies “will require systematic instruction and sustained practice. It will be necessary to devote additional instructional time and resources to advance these sophisticated disciplinary learning goals over what is common in current practice.”⁶⁶

The problem method in Remedies helps build professional competencies—broad based skills for practice and life. These transferrable competencies of cognition and knowledge, organization, and communication can be taught within the basic structure of the problem method. Indeed, the NRC Report urged educators to teach students to “reason within disciplines instead of general problem-solving.”⁶⁷ In concrete terms, the report recommended that educators: (1) use examples, (2) connect topics to student interest, and (3) provide guidance and feedback.⁶⁸ This is the Remedies problem method in a nutshell. The problems provide examples beyond the primary case that are connected to topics of student interest, and provide immediate guidance and feedback on that aspect of the law.

This transference of professional competencies is particularly important to an upper-level course like Remedies in that it helps to create a course that builds on the first-year courses and bridges the gap to practice. It gets students thinking like lawyers—lawyers who begin and end with their client, lawyers who must appreciate the desired ends of the client, and lawyers who use the law as a tool or means to accomplishing that objective.⁶⁹ In practice, lawyers must appreciate the consequences of making certain arguments, for example, that the result of winning a rescission argument might cancel an existing long-term contract. It places the legal rules in immediate context in which common sense, empathy, and good faith have a role in representation. Remedies is approached as a set of options and strategies available to lawyers to assist clients with business, social, and personal problems. Students learn to proactively ask: Why would we choose this remedy? What can it do for the client? What does it accomplish? And most importantly, is this what your client wants?

65. See Elise Young, *More Than Facts and Formulas*, INSIDE HIGHER ED (July 11, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/07/11/report-deep-learning-requires-more-attention-policy-makers-and-institutions> (summarizing NRC report).

66. NRC REPORT, *supra* note 41, at 7.

67. See Young, *supra* note 65.

68. *Id.*

69. See CARNEGIE REPORT, *supra* note 4, at 6 (criticizing law schools for reinforcing the “habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients”).

CONCLUSION

At the end of the day, the problem method for Remedies takes an important doctrinal course and allows it to accomplish many of the larger objectives of legal education and professionalism. It teaches about legal judgment, lawyering, and client interests in a way that effectively conveys a sense of thinking like a lawyer in practice. It is not just about toying with yet another “innovative” teaching style. Problem method has much to offer in the transference of knowledge and the achievement of lawyering competencies. And it can sometimes be fun—for students, and the professor.