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TEACHING FIRST-YEAR CIVIL PROCEDURE AND OTHER INTRODUCTORY COURSES BY THE PROBLEM METHOD

STEPHEN J. SHAPIRO[†]

I. INTRODUCTION

I have been teaching the first-year course in Civil Procedure for twenty years, first for five years at Ohio Northern University, and for the last fifteen years at the University of Baltimore, where I also teach a required second-year course in Evidence. When I first started teaching Civil Procedure, I used a fairly typical case method.¹ I was never very happy with this approach for teaching a course in which one of my major goals was getting the students to learn to read, interpret and apply the Federal Rules of Civil Procedure ("Federal Rules"). Gradually, I began to develop sets of my own problems which I used to teach some of the classes. Eventually, I developed enough problems, so that I could teach the entire first semester of the two-semester course by the problem method.² Within the last several years I have developed enough additional problems to teach both semesters of Civil Procedure and also the Evidence course entirely by the problem method.

There has been an ongoing debate within legal education as to the relative merits of various teaching methods, especially the case method and the problem method.³ Yet even some supporters of the problem method believe that it is more suited to smaller, advanced

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1. For a description of the typical form of case method which I used when I first started teaching, see *infra* notes 7-8 and accompanying text.

2. For a general description of the problem method, see *infra* notes 14-15 and accompanying text. For a detailed description of exactly how I use the problem method, see *infra* notes 34-58 and accompanying text.

3. "What is the best instructional system for teaching American decisional and statutory law? For over one century legal scholars, jurists, practitioners, and law students in the U.S. have debated the question in public and private forums." Paul F. Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. Legal Educ. 167 (1986). Teich recognizes that although the main debate has been about the relative merits of the case method and the problem method, there are other methods employed by law teachers and described in the literature, including: the adversary method, lecture-textbook method, discussion-textbook method, audio-visual methods, programmed learning, computer-aided instruction, role playing in simulated case negotiations, use of simulated trials, and the use of students as teachers. *Id.* at 171-72.

dissect, defend and/or criticize the court's opinion. When the discussion of the first case is finished, the professor moves on to the second case, usually involving the same or related subject matter, sometimes by the same court and sometimes not. The professor then proceeds to have the class discuss the second case, much like the first, sometimes with the additional task of trying to rationalize any difference of results between the two cases.

The benefits of this approach are said to be that it teaches students to read and think carefully, logically and critically—i.e., to “think like a lawyer.” It requires students to learn actively (compared to the textbook/lecture format which preceded it). In class, this means the students learn to think on their feet, and make and defend an argument. The case method also supposedly teaches students to learn to recognize the important facts and issues in a case and to separate these issues from red herrings and makeweight arguments. It also requires students to individually glean the substantive law in a particular field from the cases, rather than spoon feeding the law to students through lecture or text. It also requires the students to recognize that the law is a growing, changing body of doctrine.⁹

The case method, and the extent to which law faculty have come to rely on it, has also been subject to criticism. Critics, while admitting that the case method might do a good job of teaching students to understand and work with appellate opinions,¹⁰ have noted that this skill forms only a small part of what lawyers actually do. Most lawyers do not get involved with a case at the appellate level, but rather most become involved at the beginning of the case. The client brings a problem to the lawyer, and the lawyer's job is to determine the relevant facts, and find and apply the appropriate law in order to either advise the client or help solve the client's problem.¹¹

Students who have been taught by the case method usually get some exposure to problem solving, but often not until they take their

9. See generally James M. Dente, *A Century of Case Method: An Apologia*, 50 WASH. L. REV. 93 (1974); Hawkins-Leon, 1998 BYU EDUC. & L.J. 1; William C. Heffernan, *Not Socrates, But Protagoras: The Sophistic Basis of Legal Education*, 29 BUFF. L. REV. 399 (1980); Thomas F. Konop, *The Case System—A Defense*, 6 NOTRE DAME L. REV. 275 (1931); Pierre R. Loiseaux, *The Newcomer and the Case Method*, 7 J. LEGAL EDUC. 244 (1954); Morgan, 4 J. LEGAL EDUC. 379; Teich, 36 J. LEGAL EDUC. 167; John W. Wade, *Some Observations on the Present State of Law Teaching and the Student Response*, 35 MERCER L. REV. 753 (1984); Weaver, 36 VILL. L. REV. 517.

10. “When these students become lawyers and have occasion to explain and criticize a reported opinion for a senior partner, a judge, or occasionally a client, we can expect them to do a terrific job.” Moskowitz, 42 J. LEGAL EDUC. at 245.

11. “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. . . . Problem-solving is the single intellectual skill on which all law practice is based.” Moskowitz, 42 J. LEGAL EDUC. at 245.

exams at the end of the semester. These exams typically involve a set of hypothetical facts constituting a legal problem, and one or more questions testing the student's ability to recognize the legal issues involved in the problem and requiring the students to discuss how the law (or a lawyer or judge) would handle these issues. The divergence between how students are taught and tested has led to further criticism that the case method is not only ignoring the skills that lawyers need in practice, but also the skills that students need to succeed in law school.¹² The case method has also been criticized because it puts too much emphasis on cases as the source of substantive law, when more and more law is governed by statutes, rules and regulations.¹³

One proposed solution has been to turn, in whole or in part, to the problem method.¹⁴ In the problem method, the students are given a set of facts, similar to a real life legal dispute (or a law school exam). Although students might still read (among other sources) some appellate cases to learn the law to be applied, the problems, rather than the cases, become the focus of the class discussion.¹⁵

12. Myron Moskovitz explains this quite vividly:

Your teenage son has just signed up for a tennis class at high school. "The class seems kind of weird," he says. "The teacher told us that we will spend every class watching videotapes of tennis players playing matches, and he will lead us in a discussion of what they are doing right and wrong, and what the rules of tennis are. But we won't actually play any tennis ourselves until the final exam. Then our entire grade will depend on how we play during that exam. Does that make any sense to you?" If you teach by the case method, you should probably reply: "Of course it makes sense, my boy. That's just how we do it in law school!"

Moskovitz, 42 J. LEGAL EDUC. at 249.

13. 1966 *Annual Meeting*, 1966 ASS'N AM. L. SCH. 198, 209 (1966).

14. Literature on the problem method includes: 1966 *Annual Meeting*, 1966 ASS'N AM. L. SCH. 198, 209 (1966); *Handbook*, 1948 ASS'N AM. L. SCH. 203 (1948); *Handbook*, 1942 ASS'N AM. L. SCH. 86 (1942). Articles discussing the problem method include: W. H. Bryson, *The Problem Method Adapted to Case Books*, 26 J. LEGAL EDUC. 594 (1974); David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUMB. L. REV. 449 (1943); W. H. Charles, *What is the Problem Method?*, 40 CAN. B. REV. 200 (1962); H. F. M. Crombag, J. L. De Wijkerslooth & E. H. van Tuyl van Serooskerken, *On Solving Legal Problems*, 27 J. LEGAL EDUC. 168 (1975); Hawkins-Leon, 1998 BYU EDUC. & L.J. 1; Gordon A. MacLeod, *Creative Problem Solving for Lawyers*, 16 J. LEGAL EDUC. 198 (1963); Richard S. Miller, *A Report of Modest Success with a Variation of the Problem Method*, 23 J. LEGAL EDUC. 344 (1970); Ogden, 34 J. LEGAL EDUC. 604; Charles W. Tainter, *Required Summer Term and "Problem" Course*, 2 J. LEGAL EDUC. 347 (1950); Marlin Voliz, *The Legal Problems Courses at the University of Kansas City*, 7 J. LEGAL EDUC. 91 (1954); Bernard J. Ward, *The Problem Method at Notre Dame*, 11 J. LEGAL EDUC. 100 (1958); Weihofen, 43 COLUMB. L. REV. 423; John W. Whelan, *Experiments with Problems*, 9 J. LEGAL EDUC. 245 (1956); Leo H. Whinery, *The Problem Methods in Legal Education*, 58 W. VA. L. REV. 144 (1956).

15. As there is with the case method, there are many variations on the problem method, making it difficult to come up with one definition. In trying to define the problem method, the 1966 Association of American Law Schools ("AALS") study adopted what it called a broad or "inclusive" definition.

The problem method is more often used in advanced, upper-level classes, than in first-year courses.¹⁶ By the second and third year of law school, students have already developed a facility with legal analysis and at least a basic knowledge of the subject matter. The students can then take their basic knowledge and understanding, and learn the skill of applying these in a more realistic and complex factual situation.¹⁷ At this point many students have become disenchanted or bored with the case method and appreciate the novelty of a new approach, especially one that more closely approximates what the students will soon be doing as lawyers.¹⁸

There are probably a number of reasons why the problem method has been used less frequently to teach first-year courses. For one thing, many faculty have found that this method works better with the smaller class size that is more typical in upper-level classes.¹⁹

The basic characteristic of the problem method . . . lies in the task it poses for the student. The committee sees the method as requiring the student, in preparing for class, to focus his study on a problem or problems posed in advance of the class. His task is to wrestle with each problem, drawing on whatever material may have been assigned to be studied in connection with it. . . . It also calls for the direction of class discussion to some or all of the assigned problems and to the student's solutions to these.

1966 Annual Meeting, 1966 ASS'N AM. L. SCH. at 202-04. To the committee and to some writers, other variations, such as the complexity of the problems, whether a written answer must be prepared, and the type of in-class discussion are secondary to the main requirements that there be (1) a fact-based problem, (2) assigned to be prepared out of class, and (3) it be a main focus of class discussion. Ogden, 34 J. LEGAL EDUC. at 655. Some writers exclude problems based on simple, skeletal facts from their definition and require "several issues cutting across several cases and statutes. It is meant to resemble a complex situation that a lawyer might face in practice." Moskowitz, 42 J. LEGAL EDUC. at 250. See also, Hawkins-Leon, 1998 BYU EDUC. & L. J. at 8-9.

16. A 1966 survey by the AALS found relatively little use of the problem method in the first year and the greatest use in third and fourth year courses, with second-year courses falling in the middle. Its use in second-year courses was more likely to be on a limited scale, for special purposes, rather than for a majority of class time. 1966 Annual Meeting, 1966 ASS'N AM. L. SCH. at 221. More recently, some writers have advocated extending the problem method into first-year courses. See Charles Calleros, *Variations on the Problem Method in First-Year and Upper-Division Classes*, 20 U. SAN FRAN. L. REV. 455 (1986); Moskowitz, 42 J. LEGAL EDUC. at 261-63.

17. Ogden states that "mastery of case analysis is a prerequisite to use of problems which require case materials to find solutions." Ogden, 34 J. LEGAL EDUC. at 655; see also Moskowitz, 42 J. LEGAL EDUC. at 262, quoting from a letter from Professor Nathan Crystal, "lawyers face problems with a conceptual and linguistic framework developed from law school and practical experience. First year students don't have this framework. Thus, I think it is sounder pedagogically to develop the framework first and then proceed to the problems." *Id.* at 262.

18. 1966 Annual Meeting, ASS'N AM. L. SCH. at 210-11; Ogden, 34 J. LEGAL EDUC. at 664.

19. The intensity of the problem method and the development of skills that can result from its use require small classes for the sake of both teacher and student When the problem method is used in courses that are much larger than 40 students, the experience of developing problem-solving skills is a vicarious one for most students. It is also less workable to require all students to

There has also been a wider choice of published materials using the problem approach for advanced courses.²⁰ Another contributing factor is that first year students do not have the basic knowledge of several areas of the law, which is very helpful in working out complex problems that cut across several areas and issues. There may also be a feeling (not necessarily correct) among those accustomed to teaching by the case method, that the problem method is less efficient than the case method for teaching legal doctrine.²¹ Many teachers of first-year subjects feel a tension between trying to acquaint the students with a vast body of substantive law and teaching the students skills, such as legal reasoning and problem solving. These faculty members are less likely to use the problem method if they view it as more time-consuming.

Many law professors who use the case method also employ a technique somewhat akin to the problem method: the in-class hypothetical. The in-class hypothetical is usually a very short, simplified problem, presented to the students in class by the professor. It is usually devised by the professor, either in advance or on the spur of the moment, but presented to the students in class rather than before class. The in-class hypothetical is generally designed either to illustrate a specific point raised during the class or to show how the results might differ if the facts of the particular case under discussion were slightly different.

The in-class hypothetical does give the students at least some of the benefits of the problem method. Students are required to take the legal doctrine learned from the case law and apply it to a different set of facts. There are, however, some limitations. In-class hypotheticals, both by necessity and design, are usually based on very simplified facts and focused on one narrow issue.²² The hypotheticals do not, therefore, provide the students practice with analyzing the more com-

turn in written answers to the problems if the teacher has to read 50 to 150 answers for each problem session.

Ogden, 34 J. LEGAL EDUC. at 664-65: *See also 1966 Annual Meeting, 1966 ASS'N AM. L. SCH.* at 213-14.

20. A 1984 survey of West and Foundation Press publications found thirty-four sets of problem materials for fifteen courses normally considered part of the upper-level curriculum and only seven for five first-year courses (one each in criminal law, property, and torts, and two each in civil procedure and contracts. Ogden, 34 J. LEGAL EDUC. at 670-73.

21. The 1966 AALS study found that although course coverage was viewed as a concern by many of those who did not use the problem method and by some who did, a majority of the faculty who actually used the method found it superior in this regard. *1966 Annual Meeting, 1966 ASS'N AM. L. SCH.* at 211-12.

22. "[A] hypo is not a problem. A hypo usually raises only one or two issues. A problem raises several issues, which must be organized before each can be separately analyzed." Moskowitz, 42 J. LEGAL EDUC. at 246.

plicated factual situations they are likely to encounter in law practice, or even the slightly more complicated facts of a law school exam. Even when so simplified, however, hypotheticals do not always produce good student response, since the students have not had an opportunity to prepare for the hypothetical.²³

B. MY EXPERIENCE WITH THE CASE METHOD

When I first started teaching Civil Procedure, I used the case method, with a liberal sprinkling of in-class hypotheticals. I was not satisfied with this approach, for reasons in part the same and in part different than those for which the case method has usually been criticized. I felt this dissatisfaction more acutely during the first semester, in which I taught the conduct of a lawsuit from complaint to appeal (and for which the primary source of law was the Federal Rules),²⁴ than in the second semester when I taught such topics as jurisdiction, the *Erie* doctrine and *res judicata* (for which the primary source of law was appellate cases).²⁵

The reasons I found the case method unsatisfactory were in part related to what I was trying to accomplish in the first semester. First, I wanted to give the students a sense of the adversarial system of civil justice in the United States and the flow of civil litigation, including the tactical and ethical decisions faced by litigators. But I also wanted students to become adept at reading, understanding and applying the Federal Rules. In particular, I wanted students to be able to recognize issues that might arise in the interpretation and application of the Federal Rules in specific factual situations. I saw this aspect of the course as an exercise in learning the skill of statutory construction.²⁶

23. A 1942 AALS committee stated that "the practice obtained by the students with "hypos" is necessarily grounded in shallow consideration for want of opportunity to wrestle with the problem before class . . ." *Handbook*, 1942 ASS'N AM. L. SCH. at 88.

24. Most Civil Procedure texts use the Federal Rules of Civil Procedure as the governing law for the purposes of study. Not only are these rules applicable in all Federal District Courts no matter where the students might end up practicing, but most states have now adopted rules of civil procedure very similar to the Federal Rules. If state procedure varies greatly from federal practice, the former is often taught in a separate upper-level course.

25. Most Civil Procedure texts and the standard Civil Procedure curriculum cover the following topics: Conduct of litigation (pleadings, discovery, resolution without trial, trial, post trial motions and appeals); Jurisdiction (both subject matter and personal); Choice of Law in Federal Courts (known as the *Erie* problem) and issues of Former Adjudication (often called *res judicata*). This is a pretty ambitious undertaking, particularly for those teaching a one-semester course, and not all faculty teach all subject areas fully. I have always had the luxury of teaching a two-semester course and have been able to cover all of these topics pretty thoroughly.

26. For many first-year students, Civil Procedure is the only course that provides significant exposure to statutory or rule-based law. Torts, criminal law and property

Whatever benefits flowed from the case method when studying common law subjects such as torts (where the cases themselves provided the substantive law), are greatly diminished for an area of the law now controlled primarily by rules.²⁷ While there are certainly many cases interpreting the Federal Rules, it makes much more sense for the students to be working directly with the primary source material itself, rather than a judge's interpretation of the Federal Rules.

One of the most important, and one of the hardest things for first-year law students to understand, is that their primary task is not to learn and memorize the substantive rules of law. Rather, most first-year professors try (sometimes in vain) to show that the process of arriving at the answer (or arriving at the conclusion that there may not be one correct answer) is what students should be learning. Although the case method is supposed to be well suited for this, I have not found it so. Too many students read the cases to find the "bottom line;" that is to find, learn and memorize the "right" answer.²⁸ Students have trouble understanding that, unless they are reading a Supreme Court decision, the case is only one judge's opinion of what the law is or how it applies in a specific case.²⁹ More importantly, students do not understand that even a Supreme Court holding may not necessarily apply in another situation, which is not exactly on all fours with the earlier case.

I also found that relying mainly on the case method did not produce classes that were as lively and interesting as I would have liked. Although the students were prepared, in the sense that they had read the assigned cases, students were not really prepared to discuss the cases in a sophisticated manner. This, I think, flowed from the passive, unguided way that most law students study.³⁰ Merely reading, and re-reading the cases did not, in many instances, give students an

are mostly common-law courses. Contracts can be taught either as a common law course, or with significant reliance on Article II of the Uniform Commercial Code.

27. 1966 *Annual Meeting*, 1966 ASS'N AM. L. SCH. at 209.

28. Students often view "a case as the solution to a past problem or for its contribution to a body of doctrine." 1966 *Annual Meeting*, 1966 ASS'N AM. L. SCH. at 203.

29. Most decisions interpreting the Federal Rules of Civil Procedure do not make it to the United States Supreme Court. In other areas of Civil Procedure, especially Jurisdiction and the *Erie* Problem the cases in the textbooks are mainly Supreme Court cases. In the sections involving conduct of litigation, more of the cases are lower court opinions.

30. "[T]he Socratic Method was accepted without attention to the fact that it requires active learning by law students who will have practiced passive learning techniques for the majority of their educational lives." Hawkins-Leon, 1998 BYU EDUC. & L. J. at 7. See generally, Michael Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943 (1995-96). While the problem method also requires active learning, it provides the student a task to help in preparation for class.

understanding of what the important issues were in the case.³¹ During class discussions students often became confused by complicated facts or sidetracked by irrelevant issues.

I was also displeased with the selection of cases offered by many Civil Procedure casebooks. Some of the casebooks include cases decided fairly soon after the passage of the Federal Rules, in the nineteen thirties and forties, when many of the basic issues in interpreting the Federal Rules were decided.³² While these are important historically, and helpful for showing the students the changes in procedure which were introduced by the Federal Rules, I do not find the cases very helpful in teaching students to deal with issues that occur in litigation today. Many of the more recent cases in the casebooks may be too difficult for many first-year law students because the cases involve difficult, advanced issues of interpretation and application that can only be understood after the students have learned the basic operation of the Federal Rules.³³

C. TURNING TO THE PROBLEM METHOD

After a few years, I found myself using more and more in-class hypotheticals and putting less emphasis on the cases, at least in the first semester. Gradually, I weeded out the hypotheticals that did not work, or tinkered with the hypotheticals until they worked better. Eventually, the hypotheticals evolved into sets of problems, and I had enough problem sets that I could teach all or most of certain classes with the problems. At that point, I began handing out sets of problems in advance for certain classes, asking the students to pre-

31. Inability to respond adequately in class, could, of course be caused by failure to do the assigned reading. I do not think that this was the case with most of my students. I call on students at random, so students never know when they might be called on. This gives students the incentive to be prepared in order to avoid embarrassment. It is my personal assessment that the students had completed the reading assignment, but were not able to understand the cases adequately or to anticipate the question that might arise in class.

32. RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* (7th ed. 1997). This is the text I have been using for the last fifteen years, three of the first five cases in the first unit I teach on Pleadings date before 1945. Many of these early opinions were written by federal judges who had spent their entire careers under an antiquated system of code pleading and were struggling to come to terms with the application of a very different system of procedure.

33. For example, one case on summary judgment, *American Airlines v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949), involves the rather unusual situation where plaintiff, rather than defendant, is granted summary judgment on liability. FIELD, KAPLAN & CLERMONT at 100. It also contains a two-page discussion of an issue under the Warsaw Convention (whether "willful misconduct" is the proper translation of the French word "dol"). This is an extraordinarily difficult case for students in their third week of law school who have not yet learned the important basic concept of what constitutes a "genuine issue" of "material fact," and how this applies in the more typical case in which the *defendant* is seeking a summary judgment. FED. R. CIV. P. 56(c).

pare answers to the problems before arriving to class. I found that the classes in which I used the problems seemed to be more interesting and lively than the ones using the case method. Additionally, these classes provided more and better student responses. I therefore began a several year process of developing enough problem sets to teach almost the entire first semester by this method. I have been using this method ever since, and have expanded it to include second semester Civil Procedure and my Evidence course. In the next section of this article, I will describe, in more detail, the kind of problems I write and how I use the problems to teach my classes.

III. HOW I TEACH USING THE PROBLEM METHOD

I currently teach Civil Procedure I and II entirely by the problem method. I have a total of thirty-eight problem sets, twenty for first semester and eighteen for second semester.³⁴ Most of these problems cover one subject area, for example "Amendments to Pleadings," and most are designed to be taught in one class period, although a few take a little more or less class time. The overwhelming majority are similar in structure, format and purpose. Those that differ are the first two problems (which are drafting exercises based on a fuller set of facts) and a few second semester problems (which take the students step by step through some difficult Supreme Court decisions, rather than presenting facts of their own). I will describe those later.³⁵

Most of the problem sets fit onto one typed page, and are composed of a number (typically three to five) of shorter, individual problems. The facts of the problems are pretty bare-bones: only what is necessary to get across the concept I am trying to teach. My intention is that the students should be able to come up with a first draft answer to the problems in about an hour or two, assuming they have done the background reading first.

The students are assigned each problem set before we have covered the material in class. The students are supposed to determine the best answer, using only the Federal Rules, some explanatory textual material, and occasionally a case or two assigned from the casebook.³⁶ The students are allowed and encouraged to work together in small groups when preparing answers. Students are required to bring a written answer to class. I inform students in the

34. See app. A for a list of the problem sets.

35. See *infra* note 78 and accompanying text.

36. I explicitly discourage students from doing additional research, i.e., looking up cases on point. I want students to try to solve the problem themselves and to come up with their own arguments. I do not want students to find and rely on the arguments made in a reported case.

syllabus and during the first class that I do not normally collect and review the written answers, and never grade the problems. I do, however, inform the students that I reserve the right to collect and review their answers for sufficiency if I feel they are not making a serious effort at completing the problems. I have never felt the need to undertake such a review.

In class, I proceed through the problem assigned for that day, calling on students at random and asking the students to give me their answer for each problem. Many of the problems are designed so that the average student will not usually get each question completely right. Much of the class is spent in a modified Socratic dialogue with the selected student and others as to whether, and how, the answer could be revised to be more correct, more complete, or more sophisticated.

Each section of each problem is usually designed to illustrate only one or perhaps two points. The questions normally start out fairly easy, with a definite right answer. I use these introductory questions to teach the basics and to start a simple policy discussion of how that specific rule is designed to work. Later questions, although remaining simple in form, become more difficult. Each problem set often ends with a problem that does not have one correct answer. It contains an issue (either of the meaning or the specific application of a rule) that can reasonably be argued in more than one way.

A good example of this format is the problem set on "Counterclaims," which comes fairly early in the first semester.³⁷ The first problem describes a case in which the defendant has a possible counterclaim which is completely unrelated to the plaintiff's claim and is, therefore, a permissive counterclaim.³⁸ The second problem describes another case with a clearly related, and therefore compulsory, counterclaim. The questions not only ask the students whether the defendant may or must include the counterclaims, but also ask follow-up questions designed to get students to think about the policies behind the rule and the ramifications of the rule for both the legal system and practicing attorneys.

37. See app. B, problem 5: Counterclaims.

38. *Id.* Problem 5, question 1(a) first describes a potential counterclaim which is completely unrelated to the plaintiff's claim, and asks whether as defendant's attorney you are "*prohibited* from putting it in the answer, *permitted* to put it in the answer if you wish, or *must* you include it in the answer? Since Rule 13(b) Permissive Counterclaims reads: "[a] pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim," the answer is that defendant is permitted, but not required to include it. FED. R. CIV. P. 13(b).

The final problem in the counterclaim set poses a factual situation in which there is a valid argument that the proposed counterclaim could be either permissive or compulsory. This is the first of many opportunities throughout the course that students have to recognize and deal with an issue permitting alternative answers. Learning to recognize and explain that there may be two possible answers, rather than just picking what they think is the right one, is one of the most difficult concepts for first-year law students to grasp. I therefore try to include such an issue in most of the problem sets.

It may be useful to examine how I use several problem sets to teach an entire unit in the course; for example, the unit on discovery. I teach the discovery process in four class sessions, using four problem sets.³⁹ These problems differ slightly from the majority of the problems because I use the same basic set of facts for the whole unit. As with the other problems, however, I keep the facts simple, using a situation where someone has been injured in an automobile accident when hit by a commercial truck. She is suing both the driver of the truck for negligence and the company, both for its negligent maintenance of the truck and under a theory of respondeat superior for the driver's negligence. The four problem sets I use to teach the unit include one on the general rules and methods of discovery,⁴⁰ one on taking depositions and their use in court,⁴¹ one on mental and physical examinations in a personal injury case,⁴² and one on the work-product doctrine.⁴³

The introductory problem set asks the students to put themselves in the position of plaintiff's attorney. The problem lists items of information students would want to obtain, asks students how to obtain the information, and asks whether the efforts would be successful. The problem is designed with several purposes in mind. First, I want the students to become familiar with the various methods available for obtaining information, both under the formal discovery process and also by more informal means. I want students to consider not only which discovery devices can be used in a situation, but also the advantages and disadvantages of the various methods when more than one can be used. Second, I want to acquaint students with the general standard of what is discoverable (relevant and not privi-

39. See app. B, problems 7-10.

40. See app. B, problem 7: General Rules of Discovery.

41. See app. B, problem 8: Depositions.

42. See app. B, problem 9: Mental and Physical Exams.

43. See app. B, problem 10: Work Product.

leged).⁴⁴ Third, I want to give students a feel for the process of discovery (how it proceeds through time and the roles of attorneys and judges).

The first question asks students if and when they would be able to obtain, from the corporate Defendant (1) all eyewitnesses known to the Defendant, (2) which eyewitness the Defendant intends to call at trial, and (3) what expert witnesses the Defendant intends to call.⁴⁵ As it turns out, Plaintiff is entitled to all of this information, but each piece of the information is discoverable under a different section of the Federal Rules and at a different time in the process.⁴⁶ This requires the students to read the Federal Rules, especially Rule 26, very carefully, including several cross-references to other rules.⁴⁷

By the time students get to class, most have correctly determined which section of the Federal Rules makes each of the required pieces of information discoverable. Usually, however, students have not determined exactly how the discovery rules work, or why the Federal Rules were written and timed the way they are. For example, Rule 26(a) requires that the names of all eyewitnesses be disclosed within ten days of the initial discovery conference.⁴⁸ When I ask exactly when that conference would take place, the students (who usually have not thought this through), must then find and apply the rule on discovery conferences, which in turn refers students to the rule for scheduling conferences, Rule 16.⁴⁹ Since each piece of information must be turned over at a different time in the process, I am able to question the students as to why a certain order is prescribed. For example, why must the names of *expert* witnesses to be called at trial be disclosed considerably earlier than the names of *eyewitnesses* who will be called?

The second question in this introductory set asks how the plaintiff's attorney would obtain a version of the accident from several

44. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" FED. R. CIV. P. 26(b)(1).

45. See app. B, problem 7, question 1.

46. The names of all known eyewitnesses must be turned over without request, fairly early in the process, pursuant to Rule 26(a)(1)(A). FED. R. CIV. P. 26(a)(1)(A). The names of which witnesses the party intends to call must be provided, but not until thirty days before trial. FED. R. CIV. P. 26(a)(3)(A). The names of expert witnesses to be called must be disclosed ninety days before trial. FED. R. CIV. P. 26(a)(2).

47. FED. R. CIV. P. 26.

48. "[T]hese disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f)." FED. R. CIV. P. 26(a)(1).

49. Rule 26(f) requires the parties to meet and develop a discovery plan "as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)." FED. R. CIV. P. 26(f). Rule 16(b) requires that the scheduling order be issued within ninety days after the appearance of the defendant. FED. R. CIV. P. 16(b).

sources, including the police, an eyewitness, the Plaintiff and the Defendant.⁵⁰ This question focuses more on the tactics of discovery than on interpretation of the Federal Rules. I use it to encourage the students to think not only about whether a formal discovery request (i.e., deposition, interrogatory, request for documents) would be allowed, but whether it might be better to use an informal request or interview outside the rules of discovery. We also discuss which of the various discovery methods (i.e., deposition versus interrogatories) would be better in certain circumstances.

The final discovery questions in the first set introduce simple examples of what is relevant and what is privileged. The questions also illustrate the difference between relevance and admissibility. The first problem set on discovery usually takes somewhat longer than one class period and leads directly to the next set of questions which deals with depositions.

The first part of the deposition problem set involves a more detailed look at the mechanics of taking a deposition and how mechanics vary depending on the identity of the deponent.⁵¹ The second part of the deposition problem set focuses on Rule 32, which governs when a deposition may be introduced at trial. The problem posits the deposition of four different persons and asks whether each deposition would be admissible.⁵² The problem set is designed to get the students to make a careful and precise application of a difficult and technical rule, Rule 32(a).⁵³

The final question in the deposition problem set goes one step further by asking whether the corporate Defendant could have the co-Defendant driver's deposition admitted.⁵⁴ Since Rule 32 allows a party's deposition to be admitted by "an adverse party,"⁵⁵ the problem requires students to grapple with the conceptually difficult issue of whether, and in what situations, two co-Defendants can be considered "adverse" parties. The final question is again designed to give students practice dealing with questions that have no clear right or wrong answer.

The third problem set covers mental and physical examinations.⁵⁶ It explores how and why the procedures and standards for mental and physical examinations differ from all the other discovery devices. This

50. See app. B, problem 7, question 2.

51. See app. B, problem 8, question 1.

52. See app. B, problem 8, question 2.

53. FED. R. CIV. P. 32(a).

54. See app. B, problem 8, question 3.

55. FED. R. CIV. P. 32(a)(1).

56. See app. B, problem 9.

also allows for a fuller discussion of privilege: how and under what law a privilege can be created or waived.

The fourth and final problem set on discovery addresses what kind of protection from discovery is provided for "work-product," that is documents prepared in anticipation of litigation.⁵⁷ This last problem, on work product, clearly illustrates the difference between the case method and the problem method. The main case on work product is *Hickman v. Taylor*,⁵⁸ a United States Supreme Court opinion from 1947. *Hickman* determined just how much protection would be granted to work product material, and in what situations. In 1970, the Federal Rules were amended to codify *Hickman*.⁵⁹ When I taught this material by the case method, I began with an extended discussion of *Hickman*, and then concluded the class with a shorter discussion and some hypotheticals designed to show how the law of this case was codified into the Federal Rules, and how the rule applies in different situations. Now, although I have the students read *Hickman*, the problem (and our class discussion) asks the students to address how certain requests for attorney work-product would be handled under the Federal Rules. Although *Hickman* comes into play, it is mostly an aid to help define the purpose and meaning of the Federal Rules when there is some question regarding their application. This more closely replicates how an attorney would go about solving a work-product issue in real life.

IV. AN EVALUATION OF THIS METHOD

In this section I will review the benefits and shortcomings of my own brand of problem method. I will concentrate mostly on what I perceive to be the benefits of this teaching method. Although I will mention some of its shortcomings, I must state, up front, that I am, for the most part, very pleased with this approach and consider its good points to far outweigh its detriments. I will base some of this assessment on my own, admittedly biased, personal perceptions, but I will also include some student assessments made on their regular course evaluation forms,⁶⁰ as well as the results of some empirical research I have conducted.

57. See app. B, problem 10.

58. 329 U.S. 495, 67 S.Ct. 385 (1947).

59. FED. R. CIV. P. 26(b)(3) (amended 1970).

60. Sometime during the last week of classes, students in every class fill out anonymous course evaluation forms. Students are asked to give comments and numerical grades to various aspects of the course, the professor, and the teaching materials. These are available for the faculty member to see, but only after student grades have been submitted.

The empirical research involved comparing my Spring 1998 Evidence class, which I taught by the case method, with my Spring 1999 Evidence class, which I taught using the problem approach.⁶¹ Unfortunately, I was not able to make this direct comparison for my Civil Procedure class, since by the time I started this study I was using the problem method exclusively for this course and did not want to give up its benefits, even for one section, in the name of research. I did, however, conduct a comparative study of two different ways of using my problem approach in Civil Procedure. For my Fall 1997 class, I followed my normal procedure and required the students to prepare and bring an answer to the problems to class. I encouraged, but did not require students to revise their answers after class. I did not collect or review the written answers. The following year, I required the students to turn in a revised, typed version of their answers one week after we covered each problem set in class. I then reviewed the problems, made significant written comments and corrections, and returned the problems to the students approximately one week later. I will incorporate the results of these studies at the appropriate places in the article.

A. BENEFITS

For me, the greatest benefit of the problem method is that classes are more lively and interesting. First, students are more willing and able to participate. Students almost never ask to "pass" because they are unprepared. For years I bemoaned the fact that although my first-year students answered my questions quite willingly, if not always enthusiastically, trying to get responses from most of my Evidence students seemed like pulling teeth. Getting students to respond was so difficult that in some years I abandoned my normal practice of calling on students at random and began relying mainly on volunteers. I attributed this difference to the eagerness of first-year students and the fact that by the time students reach second year, most students have been beaten down by the law school system and are much less enthusiastic.

61. Most of my explanations so far focus on how and why I use the problem method for teaching Civil Procedure, rather than Evidence. Most, if not all of what I have said also applies to the Evidence course. Although Evidence is a second, rather than first-year course, in most other respects it is more similar to a first-year than to most other upper-class courses. It is a required course, not an elective; it is usually taught in large class sections; it is the first (introductory) course in the area; and the substantive law is mostly governed by a set of federal rules. The problems I have developed for teaching Evidence and how I use the problems in class are very similar to those I use to teach Civil Procedure. Unfortunately, for the two years covered by my study, due to a quirk in scheduling, my Evidence classes were much smaller (twenty-six and twelve students respectively) than the usual number of fifty-seventy.

Between my 1998 and 1999 Evidence classes, however, I managed to write problems for all the Evidence classes and taught the 1999 class by the problem method. To me at least, the difference was astounding. The students were much more willing to respond, and their responses were greatly improved. I actually began to look forward to teaching Evidence (as I do with Civil Procedure) rather than dreading it, as I had come to do.

Earlier, I had found a similar, albeit more gradual improvement in my Civil Procedure class as, over the years, I added to the number of classes I taught by the problem method. This improvement showed up, not only in the increased willingness of the students to answer, but also in the quality of their responses. While students do not always, or even usually, give me a correct and complete answer at first (and the problems are mostly designed so that students will not), the number of times that a student completely "misses the boat" is much fewer under the problem method than with the case method. The fact that my problems tend to keep the student focused on the right issue is for me a very important factor in its success.

When a student gives an answer that is completely off track (and first-year students are remarkably inventive in coming up with numerous ways of trying to answer a question while avoiding the real issue), the professor is presented with a real dilemma. Do you try to lead this student back (while others in the class sit uninvolved, or worse yet roll their eyes in impatience), or just go on to another student? When a student, however, has understood the question and found the right rule governing the situation but misinterpreted, or misapplied the rule (especially when he or she has done so in a way similar to that of many other classmates), the professor is presented with a good teaching opportunity. The hope is, of course, that creating a dialogue with the student that gets him or her to correct or improve the answer will prove helpful to the many students with the same, or similar answers.

The problem method helps in this regard by affording me somewhat more control and predictability as to what the students' initial answers will be. When a student is answering a question based on a long, complicated case with several issues, there are many ways that a student can get off track, including getting the facts wrong or misunderstanding the substantive law involved. While helping the student correct these mistakes might prove personally helpful to the student, helping the student will not improve the class if the mistake has nothing to do with the area under study, or if the mistake is totally different than the mistakes made by most of the other students.

Using short, focused problems with simple facts allows me much greater control and predictability as to what kind of mistake a student is likely to make. If I write question properly, many students will encounter similar difficulties when answering the problem, which is designed to help students understand the issue under study. If some students seem to be led off track by an extraneous element, or confused by certain facts, I can change the problem, so that during the following year students are more focused on the relevant principle of law.

Several examples of this "learning by mutual mistake" technique occur in the problem on "Amendments to the Pleadings."⁶² Under the Federal Rules, some amendments may be made "as of course" and some only "by leave of court or permission of the adverse party."⁶³ The first question posits a situation in which the plaintiff wants to amend the complaint twenty-five days after its service and ten days after receiving the defendant's answer. In part A, the students are asked to determine whether the plaintiff needs permission to amend. Most students reach the correct result (that permission is needed), but some students reach the right answer for the wrong reason. This allows me to discuss the two different situations where a party will need permission to amend and why this fits into one, rather than the other.

Part B of the question asks the students, whether as defendant's attorney, they would give their consent to plaintiff's request to amend, or would they force the plaintiff to get leave of court from the judge. Most students, striving to be tough litigators, decide that they would require the plaintiff to go before the judge (even though the facts are such that the judge would almost surely grant the requested leave). When I get this expected answer in class, I can, through role play (where I play the annoyed judge), show why it might not be such a good idea to force an adverse party before a judge to make a request that will almost certainly be granted. The role play technique seems much more effective than merely explaining the reasoning to the class.

Of course, one reason that students are both more willing and more adept at answering the questions in class is that the students have already done so outside of class. Unlike the case method, where the students usually do not know in advance what the questions about the case will be, my students have already tried to answer, outside of class, the same ones that they will have to answer in class. Some students have followed my suggestions by discussing the problems with other students. It is not surprising then, that their answers are better

62. See app. B, problem 6: Amendments.

63. FED. R. CIV. P. 15(a).

the second time through. It also makes sense that students are more willing to answer a question in class if they have had the opportunity to test that answer with a small group of their colleagues first.

It is also likely that students learning by the problem method spend more time preparing for class.⁶⁴ With the case method, students read the assigned cases, but then do not have any specific assignment. Students may re-read the case or brief it, but at that point, most students consider their preparation complete. With the problem method, however, a student's main task still lies ahead after having completed the assigned reading. The most significant results I found in my study of the differences between my Evidence classes taught by the two methods was in out-of-class preparation time. I asked both classes to keep an anonymous daily record of the amount of time spent preparing for class. Students in the class taught by the problem method spent more than twice as long preparing for class, which presumably helped the learning process and improved their in-class performance.⁶⁵

This brings us to the question of what the students think about the problem method. Do students consider this extra work helpful, or is it an unwanted burden? The latter is certainly possible, since in most of their other substantive courses, students are asked to do little or no outside work beyond than reading the assigned material. Year after year, student response to the problem method has been overwhelmingly positive. On the official student evaluation forms, one question asks the student to comment on the teaching materials. An overwhelming majority of students comment on how helpful the problems have been,⁶⁶ often using superlatives that you do not typically hear from law students, such as the problems were "fabulous" or "wonderful," and that they "loved" the problems.⁶⁷ There are virtually

64. "All this [preparing for class under the problem method] takes more time and effort than studying for class under the case method . . ." Moskowitz, 42 J. LEGAL EDUC. at 254.

65. Students in the class taught by the case method reported spending an average of 103 minutes per week preparing for class, while students in the problem-method class reported spending an average of 234 minutes per week. This difference was significant to the .05 level. See tbl. 1.

66. In my Fall 1998 Civil Procedure class, of the fifty-four students who gave any written comments at all, forty-five commented positively about the problems and only one negatively. In my Fall 1999 Civil Procedure class, fifty-three of sixty-five students commented positively about the problems and none negatively. In my Spring 1999 Evidence class, twelve of thirteen commented positively about the problems.

67. Student Civil Procedure Evaluations from 1997-1999 (anonymous). Some other typical comments about the problems in the evaluations were: "very effective," "very helpful," "very useful," "great," "an excellent way to learn the material and be able to test your knowledge by answering the questions," and "the problems really allowed me to be able to explore the material and learn the subject matter." My personal favorite, however was "Problems rock!"

no negative comments about the problems⁶⁸ or the problem method itself.⁶⁹ When I used to teach only the first semester by the problem method, many second semester students commented to me personally that they wished there were problems to do in the second semester as well.

B. DOES IT IMPROVE STUDENT EXAM PERFORMANCE?

At this point, I can sense that the reader might be saying: "O.K., so classes seem more interesting, students are working more and performing better in class, but are students learning the material and skills any better than with the case method?" For better or worse, we generally measure student performance in law school, especially in large first-year courses, by their grades on a final examination. So the question becomes whether teaching the same material by the problem method produces higher exam scores than teaching the same material by the case method. I certainly expected that it would. One of the criticisms of the case method is that it does not provide students with sufficient practice at the skills needed for law school exams or for the practice of law. It is my intention when I write the problems to provide students with as much practice as possible at the same tasks they will be asked to perform on the final exam. My final exams are practically identical in format and very similar in content to the problems the students have worked on all semester. I do not hide this fact from the students, but rather I make it clear to the students right from the first day of class. While I change the facts just enough so that students cannot merely recognize the problem and spit back the same answer as in class, my exam questions are often not much more than the issues from two or three problems put together into one fact pattern. It seemed intuitively obvious, therefore, that the students taught by the problem method would outperform students taught by the case method. In fact, the students who had worked all semester on problems so similar to the exam would seem to have had such an advantage that any performance enhancement might not fairly be attributed to the superiority of the teaching method, but merely familiarity with the exam material and format.

68. I have received only three negative comments in the last three years on the Student Evaluations from 1997-1999. Each student commented that the problems were "circular," "too difficult," and "vague." Student Evaluations from 1997-1999.

69. Some students complain that I sometimes change the facts of a problem while we are working on it in class. Although I try not to do this too often, it often seems necessary to illustrate a point or answer a student's question. When I switched from the case method to the problem method, my overall performance rating for teaching Evidence went up from 3.29 to 3.67 (on a 4.0 scale) This difference was not quite statistically significant, possibly due to the unusually low number of students in the class these years. *See* tbl. 2.

Yet to my great surprise, when I compared the performance of my 1999 Evidence students (problem method) with that of my 1998 class (case method) on exactly the same exam, there was no difference.⁷⁰ Even more surprisingly, when I compared my 1998 Civil Procedure class which had done the problems twice and received feedback from me, to the 1997 class, which had done the problems only once and received no written feedback, there was also no difference.⁷¹

I tried to find a plausible explanation for what seemed like an entirely implausible result. It was not caused by the fact that the students in the classes that were expected to do better were less able. In both Evidence and Civil Procedure the students in the two classes were very well matched on a number of important indicators.⁷² I was baffled and somewhat disappointed until I became more familiar with the educational research into teaching methods.

There is a consistent body of findings, both in higher education in general and in legal education, which shows that, if subject matter and professor remain constant, differences in teaching methods do not normally result in differences in student performance.⁷³ These findings hold true, even if (as in my study) one of the two methods results in students spending more time on tasks which are closer to those tested on.

70. The mean exam score (out of 100 points) was 54.9 for the case method-class and 57.5 for the problem-method class. This small difference was not statistically significant. See tbl. 3.

71. The no-feedback class had a mean exam score of 62.2, which was actually higher than the feedback class mean of 58.9, but this small difference was not statistically significant. See tbl. 4.

72. I compared the first-year law school grade point average for the students in the two evidence classes, and found that the averages were virtually identical. For the first year students, I compared their Law School Admission Test ("LSAT") scores and their undergraduate grade point averages. Again, these were virtually identical for the two classes. I also tried to control for any differences in the way I graded from one year to the next by mixing in blindly and re-grading a number of the first year's exams while I was grading the second year. I realize, of course, that proper experimental design would have had students randomly assigned to the two classes in the same year. This was just not practicable under the circumstances.

73. For an excellent article describing and explaining this phenomenon, see Teich, 36 J. LEGAL EDUC. at 168-69, who states:

Recent research results concerning law teaching have been consistent with results in higher education generally. Both traditional and specially developed experimental group law-teaching systems have recently been shown to function equivalently in terms of teaching effectiveness in several studies where effectiveness has been evaluated by a method's impact on group wide achievement.

Teich, 36 J. LEGAL EDUC. at 168-69. Teich also reported that a limited number of studies have shown, however, that highly *individualized* instructional methods such as computer-aided instruction can have a positive effect on student test achievement. *Id.* at 184. This is consistent with the results of an earlier study I conducted showing that use of CALI computer programs by students in my Evidence class increased their scores on my exam. Stephen Shapiro, *The Use and Effectiveness of Various Learning Materials in an Evidence Class*, 46 J. LEGAL EDUC. 101 (1996).

Perhaps the best example of this phenomenon is a study conducted with students in a Business Law course at Ohio State University.⁷⁴ In the study, 643 students were randomly divided into four groups. All of the groups were assigned the same textbook. Two of the groups received instruction in a standard lecture format. The other two groups were taught using an integrative approach. For each class, students were required to hand in written answers to previously assigned problems. The in-class lecture made use of the problems in presenting the material. The students were given a quiz on each section's subject matter at the end of the session and were given the correct answers to the quiz before leaving the class. At the end of the semester, all students were given a fifty-question multiple-choice examination similar to the in-class quizzes that the two experimental groups had taken throughout the semester. The researchers found no significant differences among the four groups in performance on the final examination.⁷⁵

My findings, therefore, although surprising and disappointing to me, were not out of line with other research. Moreover, I am not entirely convinced that even though a difference does not show up in an exam at the end of the semester, that some additional learning is not taking place in the problem classes, which will benefit the students in the long run. I have long felt that the learning curve for many law students is not one of gradual improvement over time. Rather, it often seems like there are long periods without much movement and then rather sudden and steep increases in a student's ability. This seems particularly true of first-year students, who for varying lengths of time do not seem to have a clue as to what is expected of them. Then, at some point, for the quicker students during the first semester and later for others, a light bulb seems to go on and the student begins to understand how to "think like a lawyer." It may be that the problem method does not increase the number of students who "get it" during the first semester, but may have more long-term benefits. Such a question would be interesting to study, but is beyond my capacity as a dilettante researcher.

While I was disappointed that the problem method did not seem to improve student performance on the exam, the fact that performance is unchanged will not affect my decision to continue a method, that both the students and I like, gets students to willingly spend more time on the subject, and improves the quality of class time.

74. John Blackburn & Edward Niedzwiedz, *Do Teaching Methods Matter? A Field Study of an Integrative Teaching Technique*, 18 AM. BUS. L. J. 525 (1981).

75. Blackburn & Niedzwiedz, 18 AM. BUS. L. J. at 525.

C. SOME SHORTCOMINGS AND HOW TO MINIMIZE THEM

The most obvious drawback to the problem method compared to the case method is that the problem method neglects the important skill of learning to read, analyze, and use case law. This might be a serious problem if all or most first-year faculty used the problem method exclusively. That, however, is not the case at the University of Baltimore, or at most other law schools; nor is there a danger of it happening anytime soon. All of the other faculty who teach the same first-year section that I do primarily use some version of the case method. Many of the other first-year subjects, especially torts and criminal law, lend themselves more readily to this method. While such common-law based subjects could also be taught by the problem method, these subjects are not quite so easily adapted as statutorily based courses such as Civil Procedure, Evidence, Commercial Law and Tax.⁷⁶ Thus, I can ignore the skill of case reading with a clean conscience, leaving it to my esteemed colleagues.

Even in Civil Procedure, however, there are certain areas of the course that do require the analysis of case law. The *Erie* doctrine and personal jurisdiction are each governed by a series of United States Supreme Court opinions delivered over a number of years. As far as I know, no one has come up with a satisfactory means for teaching this material other than having the students read, analyze, distinguish and harmonize these decisions. For many years, even after I was using the problem method for other parts of the course, I kept using the standard case method for these areas. Then I realized that I could even adapt the problem method for use here. Rather than have the students read the cases before class, and then merely question students about the cases in class, I wrote down, in a systematic way, each question that I wanted students to think about as they read through the cases and the questions I would ask students in class. I put these into a problem format and asked students to prepare answers and bring the answers to class. Not surprisingly, I noticed an improvement in their preparedness to deal with my questions in class.

The kinds of problems I use (with very simple facts and directed toward one issue at a time) might be subject to criticism by proponents of a more typical problem approach (where the problems are more complex, with fuller and more realistic facts).⁷⁷ Students would argue that lawyers are never confronted with legal problems involving sim-

76. 1966 Annual Meeting, 1966 ASS'N AM. L. SCH. at 209.

77. "Wouldn't it be just as effective to give the students a set of short hypos before class? No. A problem is more than a collection of hypos. It is an integrated story with elements that must be identified, extracted, and organized into a coherent structure." Moskowitz, 42 J. LEGAL EDUC. at 256.

ple facts and one issue.⁷⁸ My problems do not help students learn the important skills of sifting through the facts to separate the relevant from the irrelevant in solving a more complex, multi-faceted problem. This is certainly true. I think the kind of integrational skills taught by more complex problems are important ones for law students. I agree with those who advocate the use of such problems in advanced courses. I do not, however, think that a first-year Civil Procedure course, where students still have not learned more basic skills of legal reasoning and statutory construction, is a good place to teach these more complex skills. It is possible that, as a matter of personal preference, my problems are simpler and more compartmentalized than they need to be. I can imagine someone else using somewhat more complex problems to accomplish many of the same goals. I do try to include at least a few of these kinds of problems, especially at the conclusion of some units, like the *Erie* doctrine and personal jurisdiction. I also use a few problems with fuller facts in areas of the law like declaratory judgments, where the legal rule is simple, yet leaves a great deal of room for argument about whether a specific situation sits on one side of the line or the other.

I do realize that by keeping my problems simple and directed at only one rule or area of the law (and with that area identified at the top of the problem), I may not be giving my students enough practice at recognizing when a certain issue needs to be addressed. I sometimes see this deficiency on their final exams. Here is an example:

As I described earlier, one of the problems is supposed to teach the difference between permissive and compulsory counterclaims.⁷⁹ On a recent exam, I gave the students a question in which the plaintiff sued the defendant in state court. Defendant had a claim that was somewhat related to the original claim (and could arguably have been a compulsory counterclaim). Instead of bringing it in the state court lawsuit, however, defendant brought it as a new lawsuit in federal court. The question posited that the plaintiff asked the federal judge to dismiss the defendant's suit, arguing that the claim could only be brought in the ongoing state court lawsuit. A significant number of students wrote only about whether federal subject matter jurisdiction (diversity) existed for the claim and ignored the real issue of whether it was closely related enough to have been a compulsory counterclaim in the original lawsuit. Most of these students probably knew the difference between a compulsory and permissive counterclaim, and had I

78. "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." Moskowitz, 42 J. LEGAL EDUC. at 256.

79. See *supra* notes 37-38 and accompanying text.

asked students directly which the defendant's claim was, could have given a reasonable answer. However, students were not able to identify that this was the issue. The reason is perhaps that students did not have enough practice at the skill of finding the correct rule to apply.

I note, however, that among the students who did realize that the issue was whether the counterclaim was permissive or compulsory, a significant number merely concluded that it was one or the other, when the facts clearly gave the students enough leeway to explain why it could reasonably be argued either way. This mistake was certainly not caused by a lack of familiarity with spotting this kind of situation where there are two possible results, since this was a central theme of many of the problems students had done, including the one on counterclaims. It may be that certain skills are difficult for students to master no matter how much practice we give them.

Another problem that I sometimes worry about is whether my classes are a little *too* programmed and predictable. The problems are so directive, and at this point so well-tuned, that there is sometimes little variance from year to year in the class discussion. This in itself may not be too bad, since the students in each class do the problems only once and there are enough differences and challenges that I do not get bored doing the problems once a year. I do wonder, however, whether the students should have a little more opportunity to think outside the box and to be a little more creative. First year law school might do too good a job at forcing students to think linearly and deductively. I suppose that another teacher with more tolerance for unpredictability could write problems that allowed the students more opportunity for creativity and still accomplish many of the same goals that I seek to achieve.

For me there is no turning back. At this point I could not imagine teaching Civil Procedure or Evidence by anything other than the problem approach. I have already begun thinking about changing my last remaining course, Civil Rights Litigation, to a problem format. If after reading this far, you think you would like to try this approach in some of your classes, I will present, in the next section, some practical tips for getting started.

V. SOME HELPFUL HINTS

The kind of approach to teaching by the problem method which I have described will work for nearly any course. I think it is most useful in first-year courses and in other introductory courses where students will be learning the basics of a subject area, such as Evidence, Commercial Law, Introductory Income Tax, etc. If you want to use the

problem method for more advanced courses, I think it would be better to use longer, more complex and more realistic problems.

I also think that my approach works best with a statutory, as opposed to a common-law or constitutionally based subject area, especially for first-semester, first-year courses. This is because in statutory courses, the students can go to one source that states the currently applicable law of a specific jurisdiction, and answer the problem based on that law. With common-law courses, it is much more difficult for the students to find and apply the same law. There will often be conflicting cases from several jurisdictions. Even when the law is from one jurisdiction (i.e., federal) there are usually changes in the law over time. This means that students may have to read several cases before they have an idea of what the current status of the law is. This is not to say that the problem method cannot be used for common-law courses, and in fact, I now use it for the common-law parts of Civil Procedure, such as the *Erie* doctrine, personal jurisdiction and res judicata. I put these subjects off until second semester, however, when the students are a little more adept at harmonizing conflicting cases, and even then I do not think it works as well as with the statutory material.

If you are going to try my approach (or one similar to it) for teaching a first-year course, then I would advise you to try writing the problems yourself. Although writing your own problems involves a large amount of work, I think it is worth it in the long run. Doing so allows you to teach exactly the subject areas, issues and skills that you want. It also allows you to tailor the problems specifically to the ability of the students in your class. The average student varies quite considerably throughout the range of law schools in the United States. Many of the teaching materials for law students are written by faculty members at elite law schools. Since these are usually developed from materials that the professors have used in their own classes at these schools, many of casebooks contain problems that I consider too difficult for many law students.

My first advice for those of you who would like to try a problem approach to teaching would be to start slowly. Pick one or a few class sessions that you think would benefit from the problem method and try these first. You can try to write the problems either before or after the class in question. If you are writing it before class, go over your notes from last year and try to come up with a hypothetical that illustrates each of the points that you cover for that class. In some cases I have found it easier to write a problem set immediately after teaching a class. I then have fresh in my mind what the real issues were, which hypotheticals or factual situations worked best, and where students

seemed to need more work. The downside to this approach, of course, is that you will not be able to use the problems until the next year (although you might find the problems helpful when preparing that year's exam).

There are a number of sources you can use to help develop your problems. First, there are your own hypotheticals that you have been using in class. It obviously helps if you are the kind of person who has been writing the good ones into your notes. If not, and you, as I did, often rely on spur-of-the-moment hypotheticals to clarify a point in class, then begin to immediately write the hypotheticals down at the end of class.

Another source of your own problems is your old exam questions, or parts of the exams. If you used the questions to test the students, then the questions obviously covered issues that you wanted students to learn. Another source can be the facts of cases, modified or simplified to meet your needs. Be careful about basing problems on the facts of cases that you assign your students to read. If the facts of the case and the problem are similar, but not exactly the same, the students may get the facts confused when trying to do the problem. Also, the closer the facts of a problem are to a case that the students have read, the more likely students are to just give the court's opinion rather than answer the question themselves.

An additional source of problems can be Center for Computer-Assisted Legal Instruction ("CALI") exercises.⁸⁰ At least in the subjects with which I am familiar, Civil Procedure and Evidence, I find many of the CALI problems to be quite similar in design to the kind of problems I use.⁸¹ Even if you do not want to use any of the CALI problems themselves (which would be allowed if your law school is a member) the problems can provide you with some ideas for your own problems.⁸²

80. The Center for Computer-Assisted Legal Education is a not-for-profit corporation which produces more than 120 "Computer-Based Lessons" in twenty-eight subject areas. See CALI-2000: THE CALI CATALOG, CENTER FOR COMPUTER-ASSISTED LEGAL EDUCATION (1999).

81. The kinds of exercises available varies widely, including collections of short hypotheticals (see, e.g. The Concept of Hearsay), problems based on a complex factual situation (Drafting a Complaint) and games where students conduct litigation against one another (Buffalo Creek: A Game of Discovery). CALI-2000: THE CALI CATALOG, CENTER FOR COMPUTER-ASSISTED LEGAL EDUCATION.

82. The only exercise that I actually use in class is "Drafting a Complaint," which helps the students through the process of drafting a complaint in a libel case. I use this at the beginning of the Civil Procedure class, since it is self-contained (it provides all the law, both substantive and procedural, that the students need to know) and its fact pattern lends itself well to in-class discussion. I have found that reviewing several of the Evidence problems has given me ideas for my own problems and exam questions.

Once you have written some problems, how should you use them? I have found that the problems work best when I give them out to the students at least one class period before we cover the material. I also find that it is necessary to require the students to bring in a written answer to the questions. Whether and to what extent you allow or require the students to work together on the problems is another question you need to decide. I always encourage the students to work in small groups, although I have never measured to what extent students have done so. For several years, I required the students to form themselves into groups of three. Students were supposed to work on the problems together, come up with one answer for the whole group and bring this to class, where they all sat together. I gave this up because the University of Baltimore is a commuter school, with many students driving from different areas. Many students also have significant outside responsibilities including parenting and working part time. It seemed to be a hardship for many of the students to find the time to meet with the same group of their classmates on a regular basis. I still think, however, that this is an interesting idea and might work better in another setting.

I would not encourage grading, or even collecting the original answers that the students bring to class. First of all, you cannot expect most students to come up with very good answers when they prepare answers before the material is covered in class. Second, the problems are much better received when the students view the problems as learning aids for their own benefit rather than a graded assignment. Also, if you grade the problem, you probably cannot allow students to work together and you have to worry about cheating (either working with each other or obtaining a copy of another student's answers).

Obviously, I do not worry about students working together, since I encourage students to do this. I would be concerned if students were merely copying other students' answers (either from their class or a previous year). At the beginning of the semester, I explain to students why this would only be cheating themselves of an important learning tool, since neither their written answers nor their class performance has any effect on their grade. I also tell students that I would consider it an honor code offense if they did obtain and copy another student's answer. I am reasonably certain that students are doing their own work.

I always encourage the students to go back and rework the problems after class. I tell students to do this as soon after class as possible, and not to wait until the end of a unit or the end of the semester. The procedure I suggest to students is after each class, and before the next problem is prepared, the student should review the

class notes and the answer to the previous problem. Students should then put both their original answers and their class notes aside and answer the problem from scratch using only the Federal Rules. I do not know how many students are following this regimen and to what extent. Several years ago, when I required students to revise and turn in their answers, I got about eighty percent compliance, even though I told students that there would be no negative consequences for non-compliance.

Whether you should require the students to revise and turn in their answers is another choice. If you require the students to turn the problems in, then I think you owe it to the students to give the problems back with at least some comments and suggestions. I found it very enlightening the year I did this, but it was an incredible amount of work: twenty problem sets, times three to five problems per set, times seventy-five students. Had this significantly improved their performance I might have felt some obligation to continue, but it did not seem to have any such effect.⁸³ Now, I merely collect and review one or two selected problems near the beginning of the semester so the students can have some feedback. In addition, I have always been willing to review student's work if they are industrious enough to ask me to do so, but this does not often happen.

VI. CONCLUSION

I have developed my own variation of the problem method which seems to work very well for me and my students. I have described my approach in this article with the hope that it might start others thinking about how to integrate some form of the problem method into their law school teaching method. The form may turn out to be quite different from the one I use. The point is that I have, after some trial and error, and a lot of work, found an approach with which both the students and I are reasonably satisfied. I encourage other faculty, especially those who are not satisfied with the case method, to try using some version of the problem method.

83. See *supra* note 70 and accompanying text.

APPENDICES:

(APP. A) LIST OF PROBLEM SETS

- Problem 1: The Complaint
- Problem 2: The Answer
- Problem 3: Service and Time Limits
- Problem 4: Raising and Waiving Defenses
- Problem 5: Counterclaims
- Problem 6: Amendments
- Problem 7: General Rules of Discovery
- Problem 8: Depositions
- Problem 9: Mental and Physical Exams
- Problem 10: Work Product
- Problem 11: Summary Judgment
- Problem 12: Provisional Remedies
- Problem 13: Trial by Jury
- Problem 14: Motions During and After Trial
- Problem 15: Amount of Judgment
- Problem 16: Declaratory Judgments
- Problem 17: Appeals
- Problem 18: Introduction to Federal Subject Matter Jurisdiction
- Problem 19: Federal Question Jurisdiction
- Problem 20: Diversity Jurisdiction
- Problem 21: Joinder of Parties Under the Rules
- Problem 22: Permissive v. Compulsory Joinder
- Problem 23: Interpleader
- Problem 24: Supplemental Jurisdiction
- Problem 25: Class Actions
- Problem 26: *Erie R.R. v. Tompkins*
- Problem 27: Applying the Erie Rule
- Problem 28: York, Byrd, and Hanna
- Problem 29: A Modern Day Erie Case
- Problem 30: *Pennoyer v. Neff*
- Problem 31: Challenging Personal Jurisdiction
- Problem 32: Quasi-in-rem Jurisdiction
- Problem 33: *International Shoe Co. v. Washington*
- Problem 34: Long Arm Statutes
- Problem 35: *Mullane, Hanson, and Shaffer*
- Problem 36: *World Wide Volkswagen v. Woodson*
- Problem 37: *Burger King and Burnham*
- Problem 38: Federal Venue
- Problem 39: Transfer of Venue
- Problem 40: Former Adjudication Generally
- Problem 41: Claim Preclusion

Problem 42: Issue Preclusion

Problem 43: Issue Preclusion and New Parties

(APP. B) TEXT OF PROBLEMS 5-10

PROBLEM 5: COUNTERCLAIMS

1. Paula and Diana are law students. While driving into Baltimore the first week of school, Diana hit Paula's parked car, doing significant damage. Later that quarter, Paula thinks she sees Diana cheating and publicly accuses her of that. It turns out that the accusation is untrue. Some months later, Paula sues Diana in tort for damage to her car. As Diana's attorney, you are preparing an answer. You must decide whether to bring Diana's libel claim as a counterclaim in her answer.
 - a. As to that claim, are you *prohibited* from putting it in the answer, *permitted* to put it in the answer if you wish, or *must* you include it in the answer?
 - b. What do you think are the policy reasons that led to the rule being written this way? Do you agree? Are there arguments that the result should be otherwise?
2. Owner advertises a house in Florida as being in A-1, top condition. Based on the advertisement, buyer signs a contract to buy the house for \$50,000, and makes a \$5,000 deposit. Buyer then visits the house. While on the visit, buyer falls through a floorboard, injuring himself. He then refuses to carry through with the sale. Owner sues buyer for breach of contract, asking for specific performance (an order requiring buyer to go through with the sale). As Buyer's attorney you are preparing an answer. As to each of the following claims, indicate whether you are *prohibited* from putting it in the answer, whether you are *allowed* to put it in the answer if you wish, or whether you *must* include it in the answer to avoid losing it.
 - a. Buyer's breach of contract claim for damages (his expenses in buying and visiting the house and return of down payment).
 - i. What happens to this claim if Buyer does not include it? May Buyer add the claim later through an amendment? May the claim form the basis of a later, separate suit?
 - ii. What is the policy behind this rule? Do you agree?
 - b. Buyer's tort claim for damages (personal injuries) due to his fall while visiting the house.
 - i. Is the right answer in this case as clear-cut as in 2(a)? How do you deal with this uncertainty as a law student? How would you deal with it as Buyer's attorney?
 - ii. If Buyer includes either of these counterclaims, what pleading must Owner file? What will this pleading look like?

PROBLEM 6: AMENDMENTS

1. P files and serves a complaint on day one. D files and serves an answer on day fifteen, containing a defense of failure to state a claim. On day twenty-five, P, realizing his complaint is faulty, wishes to file an amended complaint.
 - a. May P amend "as of course," or must P obtain "leave of court or written consent" of D?
 - b. If you were D's attorney and received a call from P's attorney asking for consent to allow P to amend, would you give it?
 - c. If you were the judge and received a request from P for leave of court to amend, would you grant it?
 - d. Same facts as above, but after receiving the Answer on day fifteen, P immediately tries to amend on day sixteen. May P amend "as of course," or would he still need permission?
2. P serves D with a complaint on day one. D files and serves a Motion to Dismiss for Failure to State a Claim on day fifteen. On day twenty-five, before the motion is ruled upon by the judge, P, realizing his complaint is faulty, wishes to file an amended complaint.
 - a. May he amend "as of course," or must he obtain "leave of court or written consent" of D?
 - b. Compare the answers to 1(a) and 2(a). Are these answers the same or different? If the answers are different, should they be? Is it fair to treat the two plaintiff's differently? Does the difference really matter?
3. D files and serves an answer to a complaint. The answer does not contain a counterclaim. Fifteen days later D realizes he has left out the defense of improper venue. May D, either with or without leave of court, file an Amended Answer containing the defense?
4. D files and serves an answer to a complaint. The answer does not contain a counterclaim. Thirty days later D realizes he has left out the defense of improper venue. May D, either with or without leave of court, file an Amended Answer containing the defense? Compare this result with 1(a) and 3. Is the difference fair and justified?
5. P serves a complaint on D on day one. On day five, P serves an Amended Complaint on D. On what day must D plead to the Amended Complaint?

PROBLEM 7-10: DISCOVERY

The following facts are applicable to Problems 7 through 10:

Paula is injured when her automobile is struck from behind by a truck, owned by Mom's Catering Service Inc., driven by Denny, an employee of Mom's Catering. Paula sues Denny, alleging negligent driving. She also sues Mom's, on both a theory of (1) respondeat superior (that as Denny's employer they are responsible for his negligence),

and (2) their own negligence in failing to maintain the truck properly. Paula claims to have severely injured her back, leaving her in constant pain and unable to work. Denny denies negligence. Mom's defends by denying that Denny was negligent, by denying that Denny was engaged in his employment duties for Mom at the time of the accident, and by denying negligence in the maintenance of the truck.

PROBLEM 7: GENERAL RULES OF DISCOVERY

FED.R.CIV.P. 26(a), 26(b)(1) and (2), 30(a)(1), 33(a), 34(a)

Assume you are the attorney for Paula, and have determined that you need the following information to prepare for trial. For each piece of information listed, indicate:

- A. Will either of the Defendants have to supply this information to you without your having to make a request, and if so, when?
 - B. If not, how will you go about getting the information? What methods will you use? Might the defendants argue that it is not discoverable? What would be their anticipated argument, and how would you respond to it?
1. The names of:
 - a. All eyewitnesses to the accident.
 - b. The eyewitnesses Mom's intends to call at trial.
 - c. The expert witnesses Mom's intends to call at trial.
 2. The version of the accident of:
 - a. The police.
 - b. Bob Bystander (an eyewitness).
 - c. Paula.
 - d. Denny.
 3. Maintenance records of the truck for the two year period before the accident.
 4. As to Mom's Catering:
 - a. Their net worth.
 - b. Whether they carry liability insurance.
 5. Did Denny make a confession to his priest, asking to be absolved of guilt for the accident?
 6. Were the brakes on the truck replaced after the accident? (Under the Federal Rules of Evidence, evidence of post accident repairs are generally not admissible in a negligence action.)

PROBLEM 8: DEPOSITIONS

FED.R.CIV.P. 30 and 32

1. Paula would like to take an oral deposition of the following persons. As to each, would a deposition be allowed? What steps must, or should, the plaintiff take to procure the deposition?
 - a. Denny.
 - b. Bob Bystander (an eyewitness).

- c. Whichever of Mom's employees is responsible for truck maintenance.
2. Assume that Paula has taken the deposition of Denny, Bob Bystander and Flora Fixit (chief mechanic for Mom's.) The case is now set for trial and Paula is presenting her evidence at trial. Denny, Bob and Flora are all present at the trial, but none have testified yet. Paula would like to introduce into evidence portions of each of their depositions. May Paula introduce portions of the following depositions at this time?
 - a. Bob Bystander (who is present and has not yet testified).
 - b. If your answer was no, what would have to change or be different for Paula to have Bob Bystander's deposition admitted?
 - c. Denny (who is present and has not yet testified).
 - d. Flora Fixit.
3. Assume that Paula has finished presenting her case and it is now Mom's Catering's turn. Again, Denny is present, and has not testified yet. May Mom's Catering have a portion of Denny's deposition introduced into evidence at this point, or must Mom's wait until Denny has testified to see if his testimony is consistent with his deposition?
 - a. If the portion relates to whether he was driving carefully?
 - b. If it relates to whether he was delivering food or running a personal errand at the time of the accident?

PROBLEM 9: MENTAL AND PHYSICAL EXAMS

1. Mom's would like to have Paula examined by their doctor.
 - a. What steps would Mom's have to take to require Paula to take such an examination?
 - b. How and why is this different, both in the standard and the procedure for obtaining other discovery?
 - c. Do you think Mom's could make the required showing for a court ordered examination?
2. Assume the court orders Paula to take a physical examination by Mom's doctor, who makes the examination and delivers a copy of the examination report to Mom's.
 - a. Can Paula obtain a copy of the report? How does Paula go about this? Does she have to make any special showing of need in order to get the report?
 - b. Does Paula have to give up anything to get a copy of the report?
 - c. Is Paula really giving anything up that she has not already given up by now?
3. Paula would like to have Denny undergo a physical examination.
 - a. Do you think Paula could make the required showing for a court ordered examination?

- b. If not, what additional facts might enable Paula to obtain the order?
- 4. Assume that Paula has some evidence that Flora Fixit is a homicidal maniac who may have purposely fixed the truck's brakes so they would not work. Could Paula obtain an order subjecting Flora to a mental examination?

PROBLEM 10: WORK PRODUCT

FED.R.CIV.P. 26

Several days after the accident, before Paula brings suit, Mom's Insurance Company sends Irving Attorney to investigate the cause of the accident. Attorney visits the scene of the accident, and interviews Paula (in the hospital) and Bob Bystander (an eyewitness). Attorney obtains written statements from Paula and Bob, takes a photo of and prepares a sketch of the accident scene, and drafts a memo to Mom's containing all facts he has learned about the accident and his theory and conclusions as to the cause of the accident.

For each of the following discovery requests, indicate whether it would be:

- A. Not covered by Rule 26(b)(3) and the *Hickman* work-product doctrine (i.e., normally discoverable upon a showing of relevance).
 - B. Protected from discovery by Rule 26(b)(3) unless Paula can make the special showing required under the Rule. If this is your choice, be sure to discuss what arguments Paula could make that she could meet the special showing.
 - C. Completely protected from Discovery by Rule 26(b)(3).
- 1. Interrogatories to Mom's requesting various facts learned by Attorney during his investigation. (i.e., what was the length of the skid marks of the catering truck?)
 - 2. A request for copies of the following documents:
 - a. Attorney's photograph and sketch of the accident scene.
 - b. Written statements (a signed statement in their own words) given by:
 - i. Bob Bystander.
 - ii. Paula.
 - c. Attorney's memo containing his theory and conclusion as to the cause of the accident.
 - d. What if instead of asking for a copy of the memo, Paula sent an interrogatory to Mom's asking them to state Attorney's conclusion as to the cause of the accident.
 - i. Would this technically be covered by 26(b)(3)? Why not?
 - ii. What would be Mom's argument that it should be barred anyway?

3. Would your answers to any of the above questions change if the Insurance Company had hired a private detective, rather than an attorney, to do the work?

TABLES:

(TBL.1)

Weekly Preparation Time per Student for Evidence Class

Teaching Method	Minutes per Week
Case Method (1998 Class)	103
Problem Method (1999 Class)	234
$t = .002$	

(TBL. 2)

Student Evaluations of Evidence Class

Teaching Method	Score (on 4.0 Scale)
Case Method (1998 Class)	3.29
Problem Method (1999 Class)	3.67
$t = .064$	

(TBL. 3)

Exam Scores for Evidence Class

Teaching Method	Score (one 100 point scale)
Case Method (1998 Class)	54.9
Problem Method (1999 Class)	57.5
$t = .27$	

(TBL. 4)

Exam Scores for Civil Procedure Class

Teaching Method	Score (on 100 point scale)
Problem, No Feedback (1997 class)	62.2
Problem, with Feedback (1998 class)	58.9
$t = .087$	