VALUE OF VARIETY: AN ORGANIZING PRINCIPLE TO ENHANCE TEACHING AND LEARNING

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Variety matters. Variety in educational goals, teaching methods, materials, feedback, and evaluation can enhance legal education. This article explains the value of variety as an organizing principle to build on the strengths and address some weaknesses of traditional legal education.

Law school is filled with routine, consistency, and tradition. Many law professors focus their courses on legal doctrine, theory, and analysis. They choose a casebook, assign readings, and conduct class via questioning, lecture, and large group discussion. Diligent students read their assignments and attend class, where they take notes and occasionally respond to questions or contribute to a discussion. Students prepare outlines in anticipation of their final exams, which consist of essay questions, multiple-choice items, or both. Professors assign grades for the course based on their students' performance on that exam. This process repeats itself in many courses over three years of law school. Over time, professors become comfortable with their teaching styles and law students learn to play their role in the legal education system. Students graduate, enter the profession, and new students take their place.

The goals, materials, teaching methods, student preparation, and final exam in a traditional law school class can lead to significant learning. But a law school course can do so much more. It can integrate the learning of professional knowledge, skills, and values. Students

can use print and electronic resources to actively participate in meaningful exercises in and out of the classroom. Throughout the course, students can receive feedback from themselves, their peers, and their teachers. Finally, students can demonstrate their learning in multiple, varied ways.

The first section of this article grounds the value of variety in basic principles from two education disciplines: learning theory and instructional design. The second section applies the concept of variety to every element of a law school course: learning objectives, materials, teaching and learning methods, and assessment.

I. Why Variety Matters

Variety is important only if it leads to significant student learning of the knowledge, skills, and values at the heart of effective legal education. Principles of learning theory and instructional design provide educational underpinnings to support the central role of variety in law school courses.

A. *Learning Theory*

A primary goal of legal education should be to maximize student learning. The term "learning" can be defined as change in students' knowledge, behavior, or attitude that persists over time.[1] Learning theories "attempt to describe, explain, and predict learning."[2] Four learning theories are briefly outlined below: behaviorism, cognitivism, constructivism, and multiple intelligences. Together, these four learning theories have significant implications for variety in legal education.[3]

Behaviorism was the predominant learning theory in the first half of the twentieth century.[4] According to behaviorists, learning takes place when the student gives the appropriate response to an environmental stimulus.[5] The association between stimulus and response can

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[1] Patricia L. Smith & Tillman J. Ragan, Instructional Design 25 (John Wiley & Sons, Inc. 3d. ed. 2005) (1992) [hereinafter Smith & Ragan].

[2] *Id.*

[3] For a comprehensive discussion of learning theories, instructional design principles, and their application to legal education, *see* Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347 (2001).

[4] Smith & Ragan, *supra* note 1, at 25.

[5] *Id.*

be strengthened through feedback and appropriate reinforcement.[6] Behaviorists pioneered the notion of programmed instruction—that learning could be facilitated by written material, electronic media, or a machine, rather than a live teacher.[7]

Cognitive learning theories currently dominate instructional design practice.[8] Cognitivists explain learning by focusing on the development of cognitive structures and processes in the human brain.[9] Humans receive information from the environment through our senses.[10] These sensory inputs are stored for less than a second in the sensory register.[11] A few of these inputs receive attention through a process of selective perception to be processed further in the brain's working memory.[12] The working memory can retain five to nine bits of information for up to twenty seconds.[13] For cognitivists, the critical step in learning is the transfer of information from the working to long-term memory.[14] Four characteristics of long-term memory are key to cognitive learning theory.[15] First, not all information from the working memory is transferred to the long-term memory.[16] To be transferred into long-term memory, information must be meaningful and integrated with prior knowledge.[17] Second, the more deeply we process information, the more likely we are to remember it.[18] Third, the long-term memory is organized into schemata or mental models,[19] where concepts ("burglary") and skills ("problem solving") are categorized and stored.[20] Finally, the long-term memory has nearly unlimited

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[6] *Id.*

[7] *See id.* at 25-26.

[8] *Id.* at 26.

[9] *Id.*

[10] *Id.* at 27.

[11] *Id.* If we paid attention to every environmental stimulus, the sights, sounds, smells, and feelings that reach us every second we are awake would overwhelm us. *Id.*

[12] *Id.* Our prior experience, values, and beliefs influence the stimuli to which we pay attention. *Id.*

[13] *Id.* Working memory can be analogized to a workbench (limited space where work is done) or the RAM in a computer (limited size but everything must reside there for a short period in order to be processed). *Id.*

[14] *Id.*

[15] *See id.* at 27-28.

[16] *Id.* at 27.

[17] *Id.* We can store relatively trivial, nonsensical information in the long-term memory by artificially making it meaningful, for example, by associating digits in a telephone number with an important date in our lives. *Id.*

[18] *Id.* at 28.

[19] *Id.*

[20] *Id.*

capacity[21] and can store knowledge, experience, strategies, and feelings permanently.[22]

Constructivism is an emerging theory of learning.[23] Four basic tenets of constructivism are relevant to variety in legal education.[24] First, learners construct, rather than "passively receive," knowledge.[25] Second, constructivists view learning as a process in which students actively construct meaning based on experience.[26] Third, learning is collaborative;[27] knowledge is created through discussion and negotiation from multiple perspectives.[28] Fourth, learning should occur in realistic settings because thinking is closely linked to the real-life situation in which it will be applied.[29]

The fourth learning theory with implications for variety is multiple intelligences,[30] which grew out of the work of Howard Gardner in the 1980s.[31] Gardner defines "intelligence" as "the capacity to solve problems or to fashion products that are valued in one or more cultural settings . . . . "[32] Based on an exhaustive review of cognitive and cultural research,[33] Gardner identified seven types of intelligence:

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[21] *Id.*

[22] *Id.*

[23] Frances K. Stage, et al., *Creating Learner-Centered Classrooms: What does Learning Theory Have to Say? in* 26(4) ASHE-ERIC Higher Educ. Rep. 35 (Jonathan D. Fife ed., 1998). Smith and Ragan characterize constructivism as an educational philosophy, rather than a learning theory because they believe it lacks the "explanatory power" of a learning theory. Smith & Ragan, *supra* note 1, at 18.

[24] The four tenets summarized in this article fall under the broad concept of constructivism. They are derived from several schools of thought within constructivism, including individual constructivism, social constructivism, and contextualism. Smith & Ragan, *supra* note 1, at 19-20.

[25] Stage, *supra* note 23, at 35; Smith & Ragan, *supra* note 1, at 19.

[26] Stage, *supra* note 23, at 37; Smith & Ragan, *supra* note 1, at 19.

[27] Stage, *supra* note 23, at 37-38; Smith & Ragan, *supra* note 1, at 20.

[28] Stage, *supra* note 23, at 37-38; Smith & Ragan, *supra* note 1, at 20.

[29] Stage, *supra* note 23, at 42; Smith & Ragan, *supra* note 1, at 20.

[30] Howard Gardner & Thomas Hatch, *Multiple Intelligences goes to School: Educational Implications of the Theory of Multiple Intelligences in* 18(8) Educational Researcher 4, 5 (1989). Gardner published his multiple intelligences theory in the book *Frames of Mind* in 1983. *See* Howard Gardner, Frames of Mind (Basic Books, Inc. ed., 1983).

[31] Gardner & Hatch, *supra* note 30, at 5.

[32] *Id.*

[33] Gardner reviewed the research literature on "the development of cognitive capacities in normal individuals; the breakdown of cognitive capacities under various kinds of organic pathology; the existence of abilities in 'special populations,' such as prodigies, autistic individuals, idiots savant, and learning-disabled children; forms of intellect that exist in different species; forms of intellect valued in different cultures; the evolution of cognition across the millennia; and two forms of psychological evidence-the results of

- Linguistic intelligence – the ability to effectively use written and spoken language for creative expression or rhetoric;
- Logical-mathematical intelligence – the capacity to perform logical analysis, mathematical operations, and scientific investigation;
- Musical intelligence – the ability to perform, compose, and appreciate pitch, tone, and rhythm;
- Bodily-kinesthetic – the ability to coordinate body movement and skillfully handle objects;
- Spatial intelligence – the ability to recognize and use patterns;
- Interpersonal intelligence – the capacity to understand the intentions, temperaments, motivations and desires of other people; and
- Intrapersonal intelligence – the capacity to understand one's own feelings, fears, motivations, strengths, and weaknesses.[34]

Learning theory has numerous implications for legal education.[35] The following eleven implications relate to instructional design and the role of variety in law school courses:

1. Learning objectives should play an important role in instruction.[36]
2. Legal education should address all types of intelligences that prepare students to be successful professionals, including linguistic, logical, interpersonal, and intrapersonal intelligences.[37]
3. Instruction should be sequenced so that students can master prerequisite content and skills before encountering more sophisticated concepts and analysis.[38]

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factor-analytic studies of human cognitive capacities and the outcome of studies of transfer and generalization." *Id.*

[34] *See id.* at 6; Mark K. Smith, *Howard Gardner and Multiple Intelligences*, THE ENCYCLOPEDIA OF INFORMAL EDUCATION (2008), *available at* http://www.infed.org/thinkers/gardner.htm.

[35] *See* Schwartz, *supra* note 3, at 368-71 (implications of behaviorism), 375-79 (implications of cognitivism), 380-82 (implications of constructivism).

[36] *See* Schwartz, *supra* note 3, at 375; SMITH & RAGAN, *supra* note 1, at 26. Behaviorism and cognitivism both emphasize the importance of learning objectives. *Id.* at 25-26.

[37] *See* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 90 (2007) [hereinafter BEST PRACTICES] ("Law schools should describe the specific educational goals of each course . . .in terms of what students will know, understand, and be able to do, and what attributes they will develop. . ..").

[38] *See* Schwartz, *supra* note 3, at 368-69, 375. Behaviorism and cognitivism both value sequenced instruction. *Id.*

4. Learning is enhanced when students practice skills (analytical and performance skills) and get feedback on their performance.[39]

5. Learning activities should enable students to connect new material to prior learning.[40]

6. Instruction should present concepts to be learned in multiple ways (e.g., orally and graphically) and through several different examples.[41]

7. Students should learn in real-life or lifelike settings, working on complex, realistic, authentic problems.[42]

8. Teachers should design learning activities that facilitate students' active effort to construct understanding and learn skills.[43]

9. Students need opportunities to learn through dialogue and collaboration with other students.[44]

10. Teachers should use out-of-class activities, such as computer exercises and course web pages, to aid student learning when a live teacher is not essential to the instruction.[45]

11. In classroom learning exercises and when evaluating students, teachers should employ methods that allow students to perform and demonstrate competence in multiple ways.[46]

B. *Instructional Design*

Instructional design is the process of systematically planning teaching and learning.[47] Components of instructional design include

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[39] *See id.* at 370-71, 375. Behaviorism and cognitivism both value practice and feedback. *Id.*

[40] *See* SMITH & RAGAN, *supra* note 1, at 29; Schwartz, *supra* note 3, at 375. The link between new and prior learning comes from cognitivism. *Id.*

[41] Schwartz, *supra* note 3, at 379. The notion of multiple modes of presentation comes from cognitivism. *Id.*

[42] *See* SMITH & RAGAN, *supra* note 1, at 20; Schwartz, *supra* note 3, at 380-81. The idea that learning should be grounded in real life problems arises out of constructivism. *Id.*

[43] *See* SMITH & RAGAN, *supra* note 1, at 19, 26. The need for students to actively engage in their learning comes from both cognitivism and constructivism. *Id.*

[44] *See* Stage, *supra* note 23, at 37-40; Schwartz, *supra* note 3, at 381. Collaboration and dialog are hallmarks of social constructivism. *Id.*

[45] *See* Schwartz, *supra* note 3, at 369-70; SMITH & RAGAN, *supra* note 1, at 25-26. Programmed instruction arose out of behaviorism. *Id.*

[46] *See* Stage, *supra* note 23, at 68-69. Multiple modes of performance are an implication of multiple intelligences theory. *Id.*

[47] *See* SMITH & RAGAN, *supra* note 1, at 8.

learning objectives, teaching and learning methods, instructional materials, feedback, and assessment.[48]

Instructional design is based on a set of underlying assumptions,[49] which are supported by the learning theories described above. Three of the foundational constructs of instructional design are especially relevant for variety in legal education: the roles of learning objectives, the concept of congruence, and the characteristics of effective instruction.

Learning objectives play a critical role in instructional design. To effectively design instruction, the teacher must clearly articulate what the students should learn.[50] Teachers should write learning objectives for courses they teach and for individual class sessions.[51] In the context of legal education, learning objectives should identify the important doctrine, theory, thinking skills, performance skills, and values that students should learn in a course or class session.[52]

There should be congruence between learning objectives, teaching and learning methods, instructional materials, and assessment. Put another way, objectives should drive the teacher's decisions about methods, materials, and assessment.[53] For example, assume that an important course goal is that students will be able to make persuasive arguments by using elements of statutory analysis. Appropriate methods would include having students identify elements of statutory analysis in cases, discussing statutory arguments in class, and drafting arguments. Corresponding materials would be cases that illustrate elements of statutory analysis and problems that facilitate class discussion and the drafting assignment. Feedback could consist of oral feedback on student responses in class and written comments on draft arguments. Finally, a portion of the grade in the course would be based on a statutory analysis essay on the final exam. For a different course

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[48] *See id.* at 8-9; WALTER DICK, LOU CAREY & JAMES O. CAREY, THE SYSTEMATIC DESIGN OF INSTRUCTION 6-7 (6th ed. 2005) [hereinafter DICK & CAREY]. The instructional design process described by both Smith & Ragan and Dick & Carey involves additional components, including analysis of learners, learning tasks, instructional contexts as well as evaluation and revision of instruction. Further, Smith & Ragan and Dick & Carey sometimes use different terminology than used in this article; for example, they use the term "instructional strategies" instead of "teaching and learning methods."

[49] *See* SMITH & RAGAN, *supra* note 1, at 22-23.

[50] *See* SMITH & RAGAN, *supra* note 1, at 22; DICK & CAREY, *supra* note 48, at 6.

[51] SMITH & RAGAN, *supra* note 1, at 97.

[52] *See* BEST PRACTICES, *supra* note 37, at 65-91.

[53] SMITH & RAGAN, *supra* note 1, at 24; DICK & CAREY, *supra* note 48, at 124.

goal—students will be able to critique the Supreme Court's jurisprudence in a particular area—the teacher should make different choices about methods, materials, and assessment.

Good instruction is effective, efficient, and appealing. Effective instruction results in students learning the doctrine, theory, skills, and values the teacher identifies as important for the course or class. Efficient instruction requires the least time for students to achieve the course or class goals. Students can learn from many sources, so the most efficient method may be a CALI exercise or other out-of-class learning activity rather than in-class interaction with the teacher. Appealing instruction motivates and interests students so that they will put forth the effort required for meaningful learning and will persist when the going gets tough.[54]

II. VARIETY IN LAW SCHOOL COURSES

Principles of instructional design and learning theory support the value of variety in each element of a law school course. The sections below explore the role of variety in learning objectives, teaching and learning methods, instructional materials, and assessment.

A. *Learning Objectives*

A learning objective is a clear statement of what the student should be able to do after completing the instruction.[55] Instructional design identifies several types of learning that should be reflected in learning objectives.[56] Likewise, legal education literature advocates the inclusion of different types of learning outcomes in law school courses to prepare students for professional practice.

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[54] SMITH & RAGAN, *supra* note 1, at 22.

[55] *Id.* at 96; DICK & CAREY, *supra* note 48, at 125. Instructional design describes in detail the process of writing learning objectives. *See* SMITH & RAGAN, *supra* note 1, at 97-98; DICK & CAREY, *supra* note 48, at 131-32. For a discussion of the process of writing learning objectives for law school courses and class sessions *see* MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 38-42, 68-71 (2009) [hereinafter, TEACHING LAW BY DESIGN]. The process of writing learning objectives is beyond the scope of this article.

[56] SMITH & RAGAN, *supra* note 1, at 78.

1. Types of learning applicable to law school learning objectives

Instructional design identifies many types of learning.[57] Six types of learning are particularly relevant to legal education: declarative knowledge, concepts, principles, procedures, problem solving, and attitudes.

Declarative knowledge is the student's ability to recall, paraphrase or summarize information or ideas.[58] In legal education, declarative knowledge requires understanding of the black-letter law;[59]for example, the student's ability to identify the elements of first-degree murder or to define the "arbitrary and capricious" standard of review. Declarative knowledge is a prerequisite to more sophisticated types of learning.[60]

Concept learning requires students to move beyond stating knowledge to applying knowledge.[61] Concept learning includes the ability to classify, give examples, and apply knowledge in new situations.[62] An example of concept learning in legal education is a student's ability to read a hypothetical and identify potential tort claims and defenses.[63]

Principles are relational rules that help learners predict or explain an outcome.[64] In the context of legal education, principle learning includes the skill of applying and distinguishing cases.[65] A student has acquired the principle of personal jurisdiction if the student can synthesize the analysis from a line of cases and apply that analytical framework to a new situation to determine which states may have personal jurisdiction over a potential lawsuit.[66]

Procedural rules focus on the analytical steps or sequence.[67] For example, procedural learning includes the sequence of questions appropriate to determine whether evidence is admissible hearsay or the

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[57] Types of learning include declarative knowledge, discriminations, concepts, principles, procedures, problem solving, cognitive strategies, attitudes, and psychomotor skills. *See id.* at 79-82.

[58] Id. at 79; Schwartz, *supra* note 3, at 395.

[59] *See* TEACHING LAW BY DESIGN, *supra* note 55, at 41.

[60] SMITH & RAGAN, *supra* note 1, at 80; Schwartz, *supra* note 3, at 395.

[61] SMITH & RAGAN, *supra* note 1, at 80.

[62] *See* id. at 80-81; Schwartz, *supra* note 3, at 395-96.

[63] *See* TEACHING LAW BY DESIGN, *supra* note 55, at 41.

[64] SMITH & RAGAN, *supra* note 1, at 81.

[65] Schwartz, *supra* note 3, at 396.

[66] TEACHING LAW BY DESIGN, *supra* note 55, at 41.

[67] SMITH & RAGAN, *supra* note 1, at 81.

legal research steps to determine whether there is a statute or regulation on point.[68]

Problem solving involves the ability to select appropriate principles and procedures and to apply them to analyze a new situation.[69] In the context of legal education, problem solving learning would include the student interviewing a client to understand the factual and interpersonal context, identifying the relevant legal and non-legal issues, applying the applicable law and policy, making coherent arguments on behalf of the client, predicting how a court would rule on the legal issues, and describing for the client the available options for resolving the dispute.[70]

Attitude learning involves a mental state that predisposes a student to act in a certain way.[71] Attitudes have cognitive, affective, and behavioral components.[72]

> Cognition refers to knowing how to implement the new attitude. To implement the value of providing public service, for example, students need to know what types of public service they can provide as law students and lawyers and need the skills and knowledge necessary to perform those services. Affect refers to knowing why the behavior is valuable and therefore worthy of adoption.[73]

The six types of learning described above relate to core goals of legal education to teach students professional knowledge, skills, and attitudes. Although not every type of learning will be appropriate in every law school course, law teachers should articulate course objectives that reflect the different types of learning relevant to the course.

2. Preparation for practice reflected in learning objectives

The different types of learning identified by instructional design are reflected in the legal education literature, which articulates a complex set of knowledge, skills, and values that prepare students to be effective, responsible lawyers. Three major studies of legal education by the bench, bar, and legal educators over the past twenty years evaluated the effectiveness of legal education and recommended changes to better prepare graduates for professional practice: the MacCrate Re-

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[68] *See* TEACHING LAW BY DESIGN, *supra* note 55, at 41.
[69] SMITH & RAGAN, *supra* note 1, at 81.
[70] *See* TEACHING LAW BY DESIGN, *supra* note 55, at 41.
[71] SMITH & RAGAN, *supra* note 1, at 82.
[72] Id.
[73] TEACHING LAW BY DESIGN, *supra* note 55, at 95.

port (1992),[74] Best Practices (2007),[75] and the Carnegie Report (2007).[76]

The MacCrate Report, Best Practices, and Carnegie Report each contain two themes that address variety in law school learning objectives. First, a central goal of legal education should be to prepare students for professional practice.[77] Second, the reports identify professional knowledge, skills, and values as essential elements of effective preparation for law practice.[78] The Carnegie Report phrases these elements as three apprenticeships: "(1) cognitive, which focuses on academic knowledge of the profession, research, analytical thinking, and reasoning; (2) practice, including the set of skills shared by competent, practicing lawyers; and (3) identity or professionalism, encompassing the purposes, values, roles, and responsibilities of the profession."[79]

All three reports agree that knowledge and understanding of core principles of substantive and procedural law is an essential ingredient of lawyer competence.[80] For each course, the teacher must identify the legal and non-legal concepts and principles critical to fundamental understanding of the subject matter.[81] For example, in a Remedies course, the teacher could articulate the types of remedies (compensatory damages, punitive damages, restitution, injunctions, declaratory

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[74] American Bar Association SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, *Legal Education and Professional Development-An Educational Continuum* (1992) [hereinafter MACCRATE REPORT] (the chair of the task force was Robert MacCrate).

[75] BEST PRACTICES, *supra* note 37.

[76] WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW [hereinafter CARNEGIE REPORT].

[77] BEST PRACTICES, *supra* note 37, at 39 ("Law schools should demonstrate their commitment to preparing students for practice."); MACCRATE REPORT, *supra* note 74, at 330 ("[E]ducation in lawyering skills and professional values is central to the mission of law schools. . .."); CARNEGIE REPORT, *supra* note 76, at 88 ("[E]ducation for practice is moving closer to the center of attention in the legal academy – a positive development and a trend to be encouraged.").

[78] *See* CARNEGIE REPORT, *supra* note 76, at 28; MACCRATE REPORT, *supra* note 74, at 138-48; BEST PRACTICES, *supra* note 37, at 79-91

[79] Earl Martin & Gerald Hess, *Developing a Skills and Professionalism Curriculum: Process and Product*, 41 U. TOLEDO L. REV. 327, 329 (2010) (citing CARNEGIE REPORT, *supra* note 76, at 28).

[80] *See* MACCRATE REPORT, *supra* note 74, at 124-25; BEST PRACTICES, *supra* note 37, at 73-74; CARNEGIE REPORT, *supra* note 76, at 13, 28-29.

[81] *See generally* MACCRATE REPORT, *supra* note 74; BEST PRACTICES, *supra* note 37; CARNEGIE REPORT, *supra* note 76.

relief, etc.) and defenses (laches, waiver, unclean hands, etc.) students must understand to succeed in the course and in practice.

Both the MacCrate Report and Best Practices identify specific skills essential for competent representation of clients.[82] Those lawyering skills include practical judgment, problem solving, legal analysis, legal research, fact investigation, oral and written communication, counseling, negotiation, litigation process, alternative dispute resolution procedures, management of legal work, working cooperatively as part of a team, using technology to store and retrieve information, and resolving ethical dilemmas.[83] Surveys of practicing lawyers confirm the importance of these skills in successful law practice.[84]

The MacCrate Report and Best Practices also address specific professional values, attitudes, and attributes.[85] The MacCrate Report sets out four professional values: (1) providing competent representation; (2) promoting justice, fairness, and morality; (3) working to improve the profession; and (4) engaging in professional development.[86] Best Practices sets out a number of aspects of professionalism, including honesty, integrity, civility, ethics, reliability, empathy, diligence, and respect for the rule of law, the court, lawyers, clients, witnesses, and unrepresented parties.[87] Surveys of lawyers confirmed the importance of these values, attitudes, and attributes in successful law practice.[88]

The MacCrate Report, Best Practices, and Carnegie Report do not advocate that every law school course attempt to teach all of the skills

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[82] *See* MacCrate Report, *supra* note 74, at 138-41; Best Practices, *supra* note 37, at 67-72, 77-79.

[83] *See* MacCrate Report, *supra* note 74, at 138-41; Best Practices, *supra* note 37, at 67-72, 77-79.

[84] *See* Bryant G. Garth & Joan Martin, *Law Schools and the Construction of Competence*. 43 J. Legal Educ. 469 (1993) (surveys of Illinois lawyers in the early 1990s); John Sonsteng & David Camarotto, *Minnesota Lawyers Evaluate Law Schools, Training, and Job Satisfaction*, 26 Wm. Mitchell L. Rev. 327 (2000) (surveys of lawyers in Minnesota in the late 1990s); Stephen Gerst & Gerald Hess, *Professional Skills and Values in Legal Education: The GPS Model*, 43 Val. U. L. Rev. 327 (2009) (surveys of Arizona lawyers in 2005).

[85] *See* MacCrate Report, *supra* note 74, at 140-41; Best Practices, *supra* note 37, at 79-88.

[86] MacCrate Report, *supra* note 74, at 140-41.

[87] *See* Best Practices, *supra* note 37, at 79-88.

[88] *See* John O. Mudd & John W. LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 Mont. L. Rev. 11, 17-19 (1988) (surveying Montana lawyers in the 1980s); Gerst & Hess, *supra* note 84, at 523-26 (surveying Arizona lawyers in 2005).

and values relevant to effective law practice.[89] Instead, teachers should make thoughtful choices about the professional skills and values that should be part of the course they are teaching. However, to prepare students to be effective, ethical lawyers, most law school courses should include learning objectives that address professional knowledge, skills, and values.

3. Examples of variety in law school learning objectives

The first example is a set of objectives for a lesson titled "Express Conditions" in a Contracts course. It provides learning objectives geared towards knowledge of substantive law, concept learning, principle learning, problem solving, and drafting skills.

> By the end of this lesson, you will be able to:
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> a. Distinguish contract terms that unmistakably are promises from contract terms that raise an issue as to whether they are express conditions;
> b. Analyze whether possible express conditions are, in fact, express conditions;
> c. Analyze whether an express condition has occurred;
> d. Articulate the rules dealing with the legal significance of the occurrence or non-occurrence of a condition;
> e. Apply the rules dealing with the legal significance of the occurrence or non-occurrence of a condition to the facts of a case;
> f. Draft a contract term that unmistakably would be treated as an express condition; and
> g. Draft a contract term that unmistakably would be treated as a promise.[90]

The second example is a set of learning objectives for a Torts course. It includes objectives for the content, skills, and values a student should learn in the course.

> At the end of the course, you should be able to show me in writing and orally how lawyers solve problems in the area of torts—what laws they use, how they apply them to new facts, and how they use those facts to make arguments to judges or juries.
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> Specific goals include the following:
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> A. Affective. Students and teacher will have a challenging and enjoyable learning experience.

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[89] *See* CARNEGIE REPORT, *supra* note 76, at 194-97; MACCRATE REPORT, *supra* note 74, at 242-45. *C.f.* BEST PRACTICES, *supra* note 37, at 93-94 (using curriculum and co-curriculum mapping to efficiently teach the skills and values relevant to the effective practice of law).

[90] TEACHING LAW BY DESIGN, *supra* note 55, at 194.

B. Values. Students will:
1. Demonstrate respect for students, staff, and faculty.
2. Develop an attitude of cooperation with students, faculty, lawyers, and judges.
3. Develop on-going investment and monitoring of professional development.
4. Identify ethical issues involved in tort issues.
5. Demonstrate honesty, reliability, responsibility, judgment, self-motivation, hard work, and critical self-reflection.

C. Skills.
1. Case Analysis. Students will master the following skills:
a. Identifying the elements of a reported opinion: procedural facts, legally relevant facts, issue(s), holding(s), reasons and policies, legal rules, and disposition.
b. Synthesizing a line of related opinions.
2. Legal Problem Solving. Students will master these problem-solving skills:
a. Identifying legal issues in simple and complex fact situations.
b. Identifying the relevant legal authority and policy.
c. Identifying potential alternatives to achieve the client's goals.
3. Legal Argument. Students will be able to make an effective legal argument by:
a. Identifying the legal issues.
b. Identifying the relevant facts, authority, and policy.
c. Supporting the client's position with facts, authority, and policy.
d. Distinguishing unfavorable facts, authority, and policy.
4. Legal Drafting. Students will draft legal documents that communicate clearly, are persuasive, and comply with applicable rules.
5. Critical Thinking. Students will:
a. Evaluate cases, statutes, arguments, documents, and attorneys' actions on their effects on (1) clients, (2) the tort system, and (3) society.
b. Evaluate the strategy and ethics of applying different torts causes of action.
c. Challenge assumptions made by judges, legislators, attorneys, students, professors, and themselves.
6. Lawyering Skills. Students will experience basic lawyering skills, such as fact investigation and oral argument.

D. Content. Students will learn:
1. The basic law and policy of torts: negligence, intentional torts and products liability.
2. Which tort issues are decided by judges, which by juries (or judges sitting as fact finders.)
3. The interrelationship of different torts causes of actions.[91]

B. *Teaching and Learning Methods*

Variety in learning objectives should lead to variety in teaching and learning methods. When planning courses and individual class

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[91] *Id.* at 192-93.

sessions, law professors can choose from an extensive menu of teaching and learning methods. Depending on the nature of the course or class, appropriate methods include Socratic dialogue, large group discussion, small group discussion, problem and hypothetical analysis, lecture, simulation, writing, experiential exercises, student presentations, and electronic exercises and discussions.[92] When choosing teaching and learning methods, teachers should consider five issues: (1) congruence, (2) depth of learning, (3) interest and motivation, (4) grouping strategies, and (5) inside or outside of the classroom activities.

1. Congruence calls for a variety of methods

The primary factor teachers should consider when choosing teaching and learning methods is congruence—select methods appropriate to help students achieve learning objectives.[93] Different types of objectives are best achieved through different teaching/learning methods. No single method is appropriate for every kind of learning objective.[94] Consequently, if law professors articulate a variety of learning objectives for their courses (doctrine, analytical skills, performance skills, values, etc.), they should use a variety of teaching and learning methods to pursue those objectives.

Common law school teaching and learning methods are particularly suited to different learning objectives.

Socratic dialog. The law school Socratic or case method has proven to be an effective way for students to learn legal doctrine and analytical skills.[95] Through Socratic dialog, students can learn legal rules, how to apply those rules in new circumstances, how to resolve conflicts among legal rules, and the policies that underlie those rules.[96] Further, students sharpen analytical skills, including sifting relevant facts, spotting issues, articulating applicable law, weighing conflicting policy considerations, and predicting how courts would resolve a dispute.[97]

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[92] *See generally* GERALD F. HESS & STEVEN FRIEDLAND, TECHNIQUES FOR TEACHING LAW (1999) [hereinafter HESS & FRIEDLAND]; Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401 (1999) [hereinafter Hess].

[93] *See* BEST PRACTICES, *supra* note 37, at 130-31.

[94] *Id* at 130; DONALD A. BLIGH, WHAT'S THE USE OF LECTURES 258-59 (Masoud Yazdani & Jennifer Proverbs eds., 5th ed. 2000).

[95] BEST PRACTICES, *supra* note 37, at 211-12. See *Id.* at 213-24 for helpful suggestions for teachers to maximize the effectiveness of the Socratic method.

[96] *Id.*

[97] *Id.*

Lecture. Lecture can be an effective method for the teacher to transmit information to students.[98] Well-constructed lectures can elaborate on assigned material, add important content, give examples, put doctrine in context, and address student misconceptions about concepts, principles, and strategies.[99]

Discussion. Discussion is an appropriate method to achieve learning objectives dealing with thinking, analysis, attitudes, and values.[100] "During discussion, students practice thinking through problems, formulating arguments, and dealing with counter-arguments. Good discussions result in students using higher-level thinking skills: applying information in new contexts, analyzing issues, synthesizing doctrines, and evaluating ideas."[101] In addition, discussion can expose students to "diverse viewpoints, which helps students develop values and change attitudes."[102]

Simulations. Role-playing and simulation can help students integrate doctrine, theory, and practice.[103] Simulations are appropriate to help students learn professional practice skills, including interviewing, counseling, negotiation, oral advocacy, and drafting.[104] In addition, simulations can be an effective vehicle for students to learn judgment, values, ethics, and professionalism.[105]

Experiential (real-life) learning. Experiential learning in legal education includes clinical courses, externships, service learning, field trips, as well as real-life in the classroom via photos, videos, news stories, and legal documents.[106] Experiential methods can help students learn substantive law, problem solving, performance skills (such as legal re-

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[98] *See* BLIGH, *supra* note 94, at 3-4.

[99] *See* BEST PRACTICES, *supra* note 37, at 232-33; TEACHING LAW BY DESIGN, *supra* note 55, at 119. For suggestions to maximize the effectiveness of lectures, *see* BEST PRACTICES *supra* note 37, at 233-34; TEACHING LAW BY DESIGN, *supra* note 55, at 119-20.

[100] *See* HESS & FRIEDLAND, *supra* note 92, at 55-56; BLIGH, *supra* note 94, at 8-14. See HESS & FRIEDLAND, *supra* note 92, at 57-64, for advice on conducting effective discussions.

[101] *Id.* at 55.

[102] *Id.* at 56.

[103] *Id.* at 194; BEST PRACTICES, *supra* note 37, at 181. For information about designing and delivering effective simulations, see HESS & FRIEDLAND, *supra* note 92, at 196-99; BEST PRACTICES, *supra* note 37, at 184-88.

[104] *See id.* at 181-82; TEACHING LAW BY DESIGN, *supra* note 55, at 126.

[105] *See* BEST PRACTICES, *supra* note 37, at 181-83.

[106] *See* HESS & FRIEDLAND, *supra* note 92, at 105-106.

search, fact investigation, interviewing, and counseling), and professional attitudes, values, and habits.[107]

Writing exercises. A wide variety of writing exercises take place in law school, including research papers, document drafting (pleadings, motions, contracts, wills, etc.), outlines, journals, and short written responses in class to problems and hypotheticals.[108] Writing exercises can help students understand substantive law, develop thinking skills, hone written communication skills, and explore their values.[109]

2. Variety in methods leads to deeper learning

A second issue for teachers to consider when choosing teaching and learning methods is how deeply students should learn a concept, skill, or value. In every course, some goals are more important than others. Active teaching and learning methods that involve multiple senses are appropriate for the most important aspects of a course.[110]

Empirical research establishes the effectiveness of multiple-sense, active methods of learning.[111] Students' long-term learning is lowest if they only read an assignment or hear a lecture.[112] Learning improves if students see and hear, such as when a lecture is supported by a visual aid (prop, slide, picture) or a demonstration.[113] Students deepen their understanding when they talk about concepts, for example, in a small group discussion.[114] The deepest learning occurs when students actively use the doctrine (produce a graphic or outline synthesizing a part of the course), practice a skill (conduct a simulated client interview), or teach other students (make a presentation in class).[115]

For example, if deep understanding of personal jurisdiction is an important goal in a Civil Procedure course, it may be appropriate for students to read cases on personal jurisdiction, discuss the cases in class, apply the doctrine to a set of problems, and do a simulated oral

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[107] *See* BEST PRACTICES, *supra* note 37, at 167-71. For ideas to design and deliver effective experiential learning, see HESS & FRIEDLAND, *supra* note 92, at 109-10; BEST PRACTICES, *supra* note 37, at 172-78.

[108] *See* HESS & FRIEDLAND, *supra* note 92, at 224-25.

[109] *Id.* at 223; Hess, *supra* note 92, at 408-09.

[110] TEACHING LAW BY DESIGN, *supra* note 55, at 73.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See id.* at 73-74; ELIZABETH F. BARKLEY, STUDENT ENGAGEMENT TECHNIQUES: A HANDBOOK FOR COLLEGE FACULTY 138-39 (2010).

argument on a motion to dismiss for lack of personal jurisdiction. Likewise,

> [i]f a significant learning objective is for students to have deep under-
> standing of the law, policy, and strategy involved in creating security
> agreements, we may ask students to read applicable sections of the Uni-
> form Commercial Code, discuss cases or problems applying these sec-
> tions, review a sample security agreement, and draft a security agreement
> for a hypothetical or real client.[116]

3. Variety fosters student interest and motivation

Effective instruction requires that teachers gain students' atten-
tion and maintain students' interest and motivation.[117] Using a variety
of teaching and learning methods helps maintain students' atten-
tion.[118] Students have different preferred modes of learning, so a
course with a variety of teaching methods is more likely to capture
most students' interest throughout the course.[119] Active learning and
authentic experiences in which students are acting like lawyers en-
hance motivation and interest for most students.[120] Simulations, draft-
ing, and experiential learning techniques motivate students because
they help students connect what they are learning to their career
aspirations.[121]

4. Variety in grouping strategies

A fourth factor for teachers to consider when designing teaching
and learning activities is grouping—whether the activity will be done
by individual students, in small groups, or in the large group of the
class as a whole.[122] For example, if we decide to have students analyze a
problem in class, "we could have students generate an individual re-
sponse, ask students to work with a partner or in a small group, or
conduct a large group discussion or Socratic dialog exploring the
problem."[123]

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[116] Teaching Law by Design, *supra* note 55, at 73.

[117] Smith & Ragan, *supra* note 1, at 133, 135.

[118] *See* Bligh, *supra* note 94, at 254-55; Teaching Law by Design, *supra* note 55, at 90.

[119] *See* Teaching Law by Design, *supra* note 55, at 72-73 (applying Fleming and Mills' sensory-based learning style model to legal education).

[120] *See id.* at 90-91.

[121] *Id.*

[122] *See id.* at 73-75.

[123] *Id.* at 73.

Many teaching and learning methods are designed to be completed by individual students, including reading assignments, drafting, outlining, and responding to a quiz or problem. Other common law school instructional methods take place in a large group setting—Socratic dialog, debate, discussion, or lecture.[124] Many teaching and learning activities are appropriate for small group work; for example, discussion, problem solving, simulations, and experiential exercises.[125]

Hundreds of studies demonstrate the effectiveness of cooperative, small group learning.[126] Cooperative learning enhances interest and motivation for many students. Further, cooperative learning helps students master complex concepts and learn analytical skills, critical thinking, and problem solving.[127] Additionally, cooperative learning fosters positive relationships among students and increases their willingness to consider diverse perspectives.[128]

5. Inside or outside of the classroom activities

The final consideration is whether the learning activity will take place inside or outside of the classroom. Many methods fall naturally into one category. Out-of-class activities often include reading assignments, outlining, research and writing, field trips, externships, and CALI exercises. Other methods usually take place in the classroom, including Socratic dialog and lecture. However, many teaching and learning methods could take place in either inside or outside of the classroom. For example, large and small group discussion could happen in class or via a course web page; simulations could occur in the classroom or elsewhere, such as the moot courtroom; student responses to problems and hypotheticals could be generated in or out of class.

Teachers' choices about whether activities will occur in or out of the classroom should be guided by efficiency and the need for the

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[124] *Id.*

[125] *See* HESS & FRIEDLAND, *supra* note 92, at 142-48.

[126] *See id.* at 15, 137.

[127] *See id.* at 137.

[128] Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 94 (2002) (citing DAVID W. JOHNSON ET AL., COOPERATIVE LEARNING: INCREASING COLLEGE FACULTY INSTRUCTIONAL PRODUCTIVITY 40-46 (1991); Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201, 218 (1999)). For advice on structuring small group exercises *see* HESS & FRIEDLAND, *supra* note 92, at 133-42; TEACHING LAW BY DESIGN, *supra* note 55, at 74-75, 116-18.

teacher's presence.[129] For example, the most efficient ways for students to learn some doctrine may be though reading assignments and CALI exercises outside of class.[130] On the other hand, the teacher may be essential to guide students and provide feedback in the classroom as students develop skills in analysis or negotiation.[131]

6. Variety in teaching and learning methods – summary

Law teachers have choices to make in several dimensions of teaching and learning methods: type of method (Socratic dialog, discussion, simulation, writing, etc); grouping strategy (students working individually, in small groups, or in a large group); and setting (inside or outside of class). Those choices should lead to variety in teaching and learning methods in law school courses for three reasons. First, different methods are appropriate to help students to achieve different learning objectives. Second, a variety of active and collaborative methods increase interest and motivation for most students. Finally, a variety of methods can lead to deeper student learning of important concepts, skills, and values.

C. *Variety in Instructional Materials*

A vast amount of material is available to teachers and students to facilitate teaching and learning in law school. In the context of course and class planning, instructional materials include both print and electronic resources that students will use outside of class or that teachers and students will use during class.[132]

Print materials for many law school courses include a textbook with cases and problems, a statutory supplement, and a supplement created by the teacher. Some courses include a non-fiction book that illustrates the operation of doctrine, skills, and values in real life, such as *A Civil Action* in a Civil Procedure course.[133] Other print material includes legal documents (pleadings, motions, briefs, contracts, wills, bankruptcy forms, etc.), news stories, and handouts (problems, charts, diagrams, hypotheticals, etc.).[134]

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[129] *See id.* at 50-52.

[130] *See id.*

[131] *See id.*

[132] *See id.* at 77.

[133] *See* BEST PRACTICES, *supra* note 37, at 98-99.

[134] *See* TEACHING LAW BY DESIGN, *supra* note 55, at 45, 80.

Electronic resources are ubiquitous.[135] A course webpage provides a platform for several uses of electronic resources.[136] Teachers can use the webpage to distribute electronic versions of instructional material such as handouts, articles, legal documents, and a teacher-created supplement.[137] The webpage discussion board can facilitate asynchronous large or small group discussion.[138] A "live chat" feature can facilitate a class where the teacher and students interact on-line.[139] The course webpage can host a wiki, in which students collaborate to produce a document, such as a course outline.[140] Other electronic instructional materials include CALI lessons, pictures, videos, slides, podcasts, and websites.[141]

Variety in instructional materials is promoted by two criteria that should guide teachers' selection of print and electronic resources. First, there should be congruence between learning objectives, teaching and learning methods, and instructional materials.[142] When choosing materials for the course as a whole or for an individual class session, the primary consideration should be whether the material will help students achieve the applicable learning objectives, aid student preparation for class, and support the accompanying teaching/learning methods. Different objectives and methods call for different material.[143]

The second reason for variety in instructional materials is to grab students' attention and maintain their interest and motivation.[144] In modern life and law practice, we get information from both print and electronic resources, so our instructional materials should reflect that. Rather than merely slogging through a casebook, teachers can make their classes more interesting by incorporating relevant stories and images.

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[135] *See id.* at 61.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 61-62.

[139] *Id.* at 61.

[140] David Thompson, *Using a Wiki to Increase Student Involvement in an Administrative Law Course*, LAW TEACHER 5 (Fall 2008), *available at* http://lawteaching.org/lawteacher/2008fall/lawteacher2008fall.pdf.

[141] *See* TEACHING LAW BY DESIGN, *supra* note 55, at 61-62, 80.

[142] *See* DICK & CAREY, *supra* note 48, at 242-43.

[143] *See* TEACHING LAW BY DESIGN, *supra* note 55, at 77-78. In addition, instructional material should facilitate feedback to students, which is the subject of section II.D. below. *See id.*

[144] *See id.* at 78.

Each time we shift material in the classroom, we grab attention. When we distribute a handout, project a picture, show an object, [or] run a video, most students are alert and on task. However, most students' attention will wane if we proceed through a dozen slides or show a forty-minute video.[145]

Finally, since students have different learning styles, some will be especially motivated by a CALI lesson, others by a news story, and still others by working with an actual will or brief.[146]

D. *Assessment*

Assessment is an aspect of legal education that has significant problems but great potential as well. The types and purposes of assessment, characteristics of effective assessment, and problems with current legal education feedback and evaluation practices all illustrate the need for variety in assessment.

1. Types and purposes of assessment

Assessment plays an important role in fostering learning, measuring student achievement, and evaluating the effectiveness of instruction.[147] Assessment processes significantly affect how and what students learn.[148] In professional education, assessment and grades also determine which students are allowed to continue their education, graduate, and sit for an exam to enter the profession.[149] In every educational setting, assessment results can guide teachers to modify instruction to enhance student learning.[150]

Enhancing student learning during the course is the primary purpose of formative assessment.[151] Formative assessment provides students an opportunity to perform (for example, a practice exam, paper draft, first attempt at an oral argument) and get feedback (e.g., a score sheet or comments).[152] Summative assessment is designed to evaluate

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[145] *Id.*

[146] *Id.*

[147] *See* Best Practices, *supra* note 37, at 235; Smith & Ragan, *supra* note 1, at 9.

[148] *See* Best Practices, *supra* note 37, at 235-36.

[149] *Id.* at 235.

[150] *See* Teaching Law by Design, *supra* note 55, at 136-37.

[151] *See id.*

[152] *See* Best Practices, *supra* note 37, at 255-56; Gregory S. Munro, Outcomes Assessment for Law Schools 72-73 (2000) [hereinafter Outcomes Assessment]; Martin & Hess, *supra* note 79, at 332.

student achievement and assign grades.[153] Final exams and papers are examples of summative assessment.[154] Both formative and summative assessments provide teachers with feedback about their students' learning.[155] Teachers can use that feedback to make adjustments during the course to ensure students are learning the important content and skills.[156] Likewise, teachers can use that feedback to redesign the course to improve student learning the next time the course is taught.[157]

2. Characteristics of effective assessment

To be effective, assessments must be valid and reliable.[158] Validity means that an assessment measures what it purports to measure.[159] Valid assessments have congruence and completeness.[160] Congruence means that the assessment measures student achievement of the learning objectives for the course.[161] Completeness requires that all of the relevant objectives are assessed in ways that measure a range of difficulty.[162] In the context of legal education, different types of assessment may be necessary to validly assess legal doctrine, analytical skills, performance skills, and professionalism.[163]

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[153] *See* BEST PRACTICES, *supra* note 37, at 255.

[154] *See id.*; OUTCOMES ASSESSMENT *supra* note 152, at 72; Martin & Hess, *supra* note 79, at 332.

[155] *See* BEST PRACTICES, *supra* note 37, at 255.

[156] *See* TEACHING LAW BY DESIGN, *supra* note 55, at 44-45, 62, 136-37.

[157] *Id.* at 63.

[158] SMITH & RAGAN, *supra* note 1, at 108; OUTCOMES ASSESSMENT *supra* note 152, at 105. Smith and Regan add "practicality" as a third element of effective assessment. *See* SMITH & RAGAN, *supra* note 1, at 111. Practicality means that the assessment can be accomplished with a reasonable amount of effort by the teacher within a reasonable time. *Id.* Munro adds "fairness" as a third characteristic of effective assessment. *See* OUTCOMES ASSESSMENT *supra* note 152, at 109-10. "[P]rimary areas of unfairness [include] unequal access to all relevant information by reason of multi-section classes; private discussion with the professor before student performance; the use of prior exam questions; inconsistent policies regarding makeup performances and postponements; inadequate information about the logistics, format, and scope of exams; lack of information about what learning the teacher thinks is important; and testing for skills and abilities not taught in the course." *Id.*

[159] SMITH & RAGAN, *supra* note 1, at 108; OUTCOMES ASSESSMENT, *supra* note 152, at 106.

[160] Schwartz, *supra* note 3, at 406.

[161] *Id.*

[162] SMITH & RAGAN, *supra* note 1, at 108; Schwartz, *supra* note 3, at 406.

[163] *See* BEST PRACTICES, *supra* note 37, at 243.

An assessment is reliable if it consistently measures what it claims to measure.[164] A test is reliable if we have confidence that students "who scored high on the test did so because they possess the tested skills and knowledge and that they would score high again if retested."[165] Reliability depends on scoring consistency, which is an issue in grading essay responses.[166] Another threat to reliability is insufficient content sampling.[167]

> If the exam samples too little of the course content, then student performance may not reflect the extent to which the student met the goals and objectives for the course, but may only demonstrate that the student excelled or failed in learning the aspect which is the subject of the exam. For example, testing a student on a single tort defense will not reliably reflect whether the student learned the tort defenses.[168]

3. Problems with legal education's assessment practices

Assessment of student performance in many traditional law school courses consists of a single, three-hour, essay exam at the end of the course, graded on a curve.[169] The primary purposes of this evaluation system is to weed out students least likely to succeed on the bar exam and to rank remaining students for potential employers.[170] The law school assessment tradition is subject to harsh criticism.[171]

Traditional legal education lacks adequate formative assessment and feedback to students to enhance their learning.[172] Students do not get sufficient opportunity to practice the skills on which they will be tested and get feedback to help them gauge their learning and their level of preparation for the final exam.[173] In simulation courses, students may be graded on every performance, without getting the chance to practice and get formative feedback before the summative assessment.[174]

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[164] SMITH & RAGAN, *supra* note 1, at 109.

[165] Schwartz, *supra* note 3, at 407.

[166] OUTCOMES ASSESSMENT, *supra* note 152, at 108. Teachers can reduce scoring inconsistency when grading essay exams by using checklists, scoring guides, and specific grading criteria. Schwartz, *supra* note 3, at 407.

[167] *See* OUTCOMES ASSESSMENT, *supra* note 152, at 107.

[168] *Id.*

[169] CARNEGIE REPORT, *supra* note 76, at 162; BEST PRACTICES, *supra* note 37, at 236.

[170] BEST PRACTICES, *supra* note 37, at 236-37.

[171] *See infra* text accompanying notes 173-82.

[172] *See* BEST PRACTICES, *supra* note 37, at 255.

[173] CARNEGIE REPORT, *supra* note 76, at 165-67.

[174] BEST PRACTICES, *supra* note 37, at 238.

Many law school assessments have validity and reliability problems.[175] A common problem is a lack of congruence.[176] For example, many law teachers spend considerable class time on case reading skills and legal theory, but rarely test those.[177] Few law teachers assess their students' performance on all of the course's learning objectives.[178] Likewise, in many externships and clinical courses, grades are based on the subjective opinion of the student's supervisor as to the student's overall performance as a lawyer, rather than on specific criteria or what students learned in the course.[179]

Grading in traditional legal education is norm-referenced.[180] In other words, students are graded on a curve by comparing their relative performance rather than assessing whether each student has successfully achieved the goals of the course.[181] The lack of formative feedback, validity and reliability problems, and competition spurred by the curve have the result of quashing motivation to learn for many students, especially after the first year of law school.[182]

4. Need for variety in assessment

Although some current assessment practices in legal education are problematic, assessment can be a critical tool in improving teaching and learning in law school. Legal education would benefit from a clearer focus on three types of assessment: (a) formative assessment to foster student learning; (b) formative assessment to improve teaching; and (c) summative assessment. Variety can enhance the effectiveness of all three types of assessment.

Formative assessment can significantly enhance student learning and, therefore, should be the primary focus of assessment in legal education.[183] Formative assessment should occur throughout the course.[184] The Carnegie Report sums up the value of formative assessment:

[T]he essential role of professional schools must be to form practitioners who are aware of what it takes to become competent in their

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[175] Schwartz, *supra* note 3, at 406.

[176] *Id.*

[177] *Id.*

[178] *See id.* at 406-07.

[179] BEST PRACTICES, *supra* note 37, at 238-39.

[180] *Id.* at 243.

[181] *See id.* at 243; CARNEGIE REPORT, *supra* note 76, at 168.

[182] *See* CARNEGIE REPORT, *supra* note 76, at 165-67.

[183] *Id.* at 189; BEST PRACTICES, *supra* note 37, at 255-56.

[184] *See id.*

chosen domain and to equip them with the reflective capacity and motivation to pursue genuine expertise. They must become 'metacognitive' about their own learning . . . . This is why effective means of formative assessment are so important in training professionals.[185]

Effective formative feedback to students has four characteristics: specific (based on explicit criteria); positive (identifies student strengths); corrective (points out weaknesses and strategies for improvement); and timely (before the next assessment).[186] Different types of formative assessment are appropriate to help students attain different core objectives of legal education (knowledge, skills, and values).[187] Formative feedback could come from the teacher, other students, a computer program, or the student herself.[188] Formative assessment can take many forms, including group feedback on practice exams and quizzes, individual comments on paper drafts or on student performances, computer feedback on CALI lessons or quizzes posted on the course webpage, and conferences with students.[189]

Formative feedback is important for teachers as well as students. Classroom assessment techniques provide teachers with feedback about their students' learning.[190] Teachers then use that feedback to make appropriate adjustments in the course to maximize student learning.[191] Many classroom assessment techniques are appropriate for legal education.[192] For example, minute papers and simple student surveys allow teachers to gather written feedback from every student in a few minutes in class.[193] Other classroom assessment techniques are more elaborate, such as a student advisory team to provide feedback by meeting periodically with the teacher throughout the course,[194] or

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[185] Carnegie Report, *supra* note 76, at 173.

[186] Teaching Law by Design, *supra* note 55, at 143.

[187] *See* Carnegie Report, *supra* note 76, at 171-79.

[188] Hess, *supra* note 92, at 106-07. *See* Best Practices, *supra* note 37, at 256-57.

[189] Hess, *supra* note 92, at 106-08*;* Best Practices, *supra* note 37, at 256-57.

[190] *See* Outcomes Assessment, *supra* note 152, at 99.

[191] Thomas A. Angelo & K. Patricia Cross, Classroom Assessment Techniques: A Handbook for College Faculty 3-4 (2nd ed. 1993) (setting out the purpose and need for classroom assessment, describes fifty classroom assessment techniques, and evaluates the costs and benefits of classroom assessment).

[192] For descriptions of classroom assessment techniques in law school *see* Best Practices, *supra* note 37, at 257-59; Teaching Law by Design, *supra* note 55, at 149-54; Outcomes Assessment, *supra* note 152 at 131-37; Hess & Friedland, *supra* note 92, at 261-83; Hess, *supra* note 92, at 108-110.

[193] Teaching Law by Design, *supra* note 55, at 150-53; Hess, *supra* note 92, at 109.

[194] Teaching Law by Design, *supra* note 55, at 174-76 (describing how to use student advisory teams to improve teaching and learning; Gerald F. Hess, *Student Involvement in*

small group instructional diagnosis in which a colleague gathers feed-back from students.[195]

Summative assessment in law schools has high stakes. Grades determine which students are allowed to stay in law school, are eligible for law review and moot court, and qualify for interviews with employers.[196] Consequently, law school courses should embrace the characteristics of effective summative assessments—multiple, varied, and fair.[197] Multiple and varied means that grades are based on several types of assessment throughout the course, rather than solely on a final exam.[198] Teachers can choose from many types of assessment instruments, including exams (midterm, final, essay questions, multiple-choice questions), quizzes, papers, document drafting (pleadings, contracts, wills, etc.), participation in class or on the course webpage, presentations, and performances (interviewing, negotiating, conducting a trial, etc.).[199] Fairness in summative assessment means teachers test what they teach (which improves validity), provide students with grading criteria in advance of the assessment, give students an opportunity to practice and get feedback (formative assessment) before the graded event, and use explicit criteria to improve consistency (reliability) in grading.[200]

CONCLUSION

The simple concept of variety can be a vehicle to transform legal education. The literature on learning theory, instructional design, and law school pedagogy establishes the value of variety. Legal education would be much different if teachers incorporated variety in all aspects of their courses. Teachers could articulate important learning objectives, including doctrine, theory, thinking skills, lawyering skills, values, and professionalism. Then teachers could employ a range of teaching/learning methods and instructional materials (print and elec-

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Improving Law Teaching and Learning, 67 UMKC L. REV. (1998) (empirical study of the effect of students advisory teams on the course, the teacher's effectiveness, students' learning, and students attitudes about the course, teacher, law school, themselves, and other students).

[195] OUTCOMES ASSESSMENT, *supra* note 152, at 136-37; TEACHING LAW BY DESIGN, *supra* note 55, at 178-79.

[196] BEST PRACTICES, *supra* note 37, at 235.

[197] TEACHING LAW BY DESIGN, *supra* note 55, at 155; BEST PRACTICES, *supra* note 37, at 253.

[198] TEACHING LAW BY DESIGN, *supra* note 55, at 155-58.

[199] *Id.* at 139.

[200] *Id.* at 158-59.

tronic) to help student achieve those objectives. Finally, teachers could provide students with formative feedback throughout the course and assess student performance in multiple and varied summative assessments.

Transforming legal education is exciting for some teachers, but daunting or threatening for others. Immediate transformation of legal education via variety is unlikely, and probably not desirable. Instead of making wholesale changes to their courses, teachers should make small adjustments each semester—be more explicit about skill objectives, try a new teaching method for one class session, or add a component to the grading scheme. Over time, small bits of variety can add up to a significantly different experience for law students, enhancing the quality of their learning and their level of preparation for the profession.