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IMPROVING LEGAL EDUCATION BY IMPROVING  
CASEBOOKS: FOURTEEN THINGS CASEBOOKS CAN DO  
TO PRODUCE BETTER AND MORE LEARNING

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Most law professors want to help their students learn. All things considered, most of us want to provide our students with rich, formative assessment experiences,<sup>1</sup> and to evaluate our students' learning using multiple summative assessment mechanisms.<sup>2</sup> Most law professors aspire to producing practice-ready law school graduates who uphold both legal ethics and values and who are true to their own personal values. And surely none among us tries to cause his/her students to become depressed or anxious or to become substance abusers.

Yet, by and large, we are failing on all these fronts.

Too many students don't learn what their professors want them to learn. In fact, some American law schools have first-year academic attrition rates as high as 35%.<sup>3</sup> Twenty-four law schools in all have rates in excess of 20%, another twenty have rates of 15% or higher, and a large group of schools (33 in all) have rates in excess of 10%.<sup>4</sup> These numbers are astounding given the college performances of the students these law schools admit; what's particularly telling is that the

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<sup>1</sup> Formative assessment involves providing students with opportunities for practice and feedback. Its primary purpose is to improve student learning and attainment. Earl Martin & Gerald Hess, *Developing a Skills and Professionalism Curriculum—Process and Product*, 41 U. TOL. L. REV. 327, 332 (2010).

<sup>2</sup> Summative assessment evaluates and measures student learning for purposes of grading. Summative assessments provide the raw data for grading or for evaluating the effectiveness of instruction. *Id.*

<sup>3</sup> See Law School Numbers Rankings: 1L Attrition, <http://schools.lawschoolnumbers.com/rankings/attrition> (last visited DATE, "3 1, 4").

<sup>4</sup> *Id.*

above list of nearly 80 schools includes more than 15 law schools ranked among US News' latest list of top-100 law schools.<sup>5</sup>

On an individual level, many law professors are no more successful. Law professors perceive the experience of grading their students as so miserable that Professors Feinmanberg and Feldman described the experience as "the dark night of the soul,"<sup>6</sup> and Professor Ruthann Robson explains that law professors experience exam grading as "tedious and boring, leading to a 'corrosive negativity' regarding the intellectual abilities of our students as well as a destructive influence upon our own character."<sup>7</sup>

Few law professors provide their students with even one opportunity for practice and feedback.<sup>8</sup> Likewise, few professors base their students' course grades on more than a single, final exam or paper.<sup>9</sup> It is doubtful that law professors are unaware they would maximize their students' learning and reach more accurate conclusions about their students' learning if their courses included multiple formative and summative assessments. However, the competing demands of scholarship and institutional and community service combined with large class sizes, particularly in the first year, overwhelm professors' aspirations to do what they know to be right.

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<sup>5</sup> *Id.*; *Best Law Schools: Rankings*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/rankings> (last visited October 22, 2010).

<sup>6</sup> Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 878 (1985).

<sup>7</sup> Ruthann Robson, *The Zen of Grading*, 36 AKRON L. REV. 303, 303 (2003).

<sup>8</sup> See Andrea A. Curcio, Gregory Todd Jones & Tanya M. Washington, *Does Practice Make Perfect? An Empirical Examination of the Impact of the Practice Essays on Essay Exam Performance*, 35 FLA. ST. U.L. REV. 271, 278 (2008); Jess M. Krannich, James R. Holbrook & Julie J. McAdams, *Beyond "Thinking Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 DENV. U.L. REV. 381, 393 (2009) (noting that formative assessments are seldom used in legal education).

<sup>9</sup> Andrea A. Curcio, *Moving in the Direction of Best Practices and the Carnegie Report: Reflections on Using Multiple Assessments in a Large-Section Doctrinal Course*, 19 WIDENER L.J. 159, 159 (2009); Steven Friedland, *A Critical Inquiry Into the Traditional Uses of Law School Evaluation*, 23 PAGE L. REV. 147, 150 (2002).

According to two recent studies of legal education<sup>10</sup> and a slew of recent law review articles,<sup>11</sup> there is reason to believe that law schools do not produce practice-ready lawyers who are true to professional ethics and values or who even act consistently with their own, personal values. By and large, law schools simply do not teach professional values. In fact, as Elizabeth Mertz explains in her fine-grained study of law teachers' language choices, *The Language of Law School*,<sup>12</sup> "morality and social context are pushed to the margins of discourse [in the law school classroom] . . . ."<sup>13</sup>

*Best Practices for Legal Education*<sup>14</sup> prescribes what law professors should do (and typically fail to do) to increase the likelihood law students learn what they need to learn to become effective, ethical and moral practitioners. It recommends, among other things, that law professors establish and disseminate course learning goals,<sup>15</sup> set high

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<sup>10</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 1, 29 (2007) [hereinafter STUCKEY ET AL.] (asserting that "most new lawyers are not as prepared as they could be to discharge the responsibilities of law practice" and that professionalism instruction should be but isn't "a central part of law school instruction"); WILLIAM SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 188 (2007) [hereinafter SULLIVAN ET AL.] (decrying the failure of law schools to adequately develop students' law practice skills and their moral development and sense of professionalism).

<sup>11</sup> A recent Westlaw search by the author turned up 277 law review articles responsive to the search "'educating lawyers' & Carnegie." Many of these articles offer harsh critiques of legal education. See, e.g., Kirstin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1, 41-52 (2008) (highlighting how law schools do a poor job training students to interact with and have compassion for clients by discussing medical schools' approach to patient interaction); Krannich, et al., *supra* note 8, at 388 ("many students spend the third (and even second) year of law school figuratively treading water, having been taught the skill of legal reasoning but not provided a structured way to place this skill in the context of legal practice"); Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 662 (2009) ("law schools need to consider how they can fulfill this need to provide more and better instruction about professionalism"); Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 516 (2007) (criticizing legal education for developing "too little of the institutional, interpersonal, and investigative capacities that good lawyering requires"); Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 599 (2010) ("No longer can schools continue to subsidize academic research at the expense of teaching practical skills to their graduates.").

<sup>12</sup> ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* (2007).

<sup>13</sup> *Id.* at 212.

<sup>14</sup> STUCKEY ET AL., *supra* note 10.

<sup>15</sup> *Id.* at 55, 130.

expectations,<sup>16</sup> “engage the students in active learning,”<sup>17</sup> “give regular and prompt feedback,”<sup>18</sup> “help students improve their self-directed learning skills,”<sup>19</sup> “choose teaching methods that most effectively and efficiently achieve desired outcomes,”<sup>20</sup> “employ multiple methods of instruction,”<sup>21</sup> and “use context-based instruction.”<sup>22</sup>

Finally, there is increasing evidence that law schools make law students miserable. For years, legal scholars asserted the harmful effects of legal education.<sup>23</sup> Recently, a team of an educational researcher, Dr. Kennon M. Sheldon of the University of Missouri, Columbia, and Larry Krieger, a law professor at Florida State, succeeded in documenting the hypothesized harmful effects. Sheldon and Krieger showed that, while law students come to law school with levels of depression, anxiety, and substance abuse similar to other graduate students, by the end of their first year of legal education, law students’ levels of depression, anxiety and substance abuse are significantly greater.<sup>24</sup>

So, what can we do about all these failures of modern legal education? The solution may require us to modify the famous Shakespeare line about lawyers and say, “The first thing we do, let’s kill all the casebooks.”<sup>25</sup> The casebook choices out there certainly make it incredibly hard to change; by and large, law school casebooks are more similar than different, and casebook authors fail to providegive users of their texts what they would need to radically change their teaching practices.

Most people are, at the very least, uncomfortable with change, and law professors certainly are no different. Consequently, unless we make change easy to implement, most law professors will not change.

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<sup>16</sup> *Id.* at 116.

<sup>17</sup> *Id.* at 123.

<sup>18</sup> *Id.* at 125.

<sup>19</sup> *Id.* at 127.

<sup>20</sup> *Id.* at 130.

<sup>21</sup> *Id.* at 132.

<sup>22</sup> *Id.* at 141-157.

<sup>23</sup> Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 225 (1986); Barbara A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 627 (1991).

<sup>24</sup> Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 261-62 (2004).

<sup>25</sup> See William Shakespeare, Henry VI, Part 2, Act 4, scene 2.

Moreover, even if we were to make a particular change easy to implement, professors would be unlikely to adopt it if they did not see an immediate improvement in their students' learning. What is needed, therefore, are casebooks that make change as easy as possible and allow professors to assess whether the implemented changes have succeeded in improving their students' learning effort has succeeded.

Looking collectively at the dozen or so law review articles addressing casebook design, there appears to be some consensus that casebooks have a lot of room to improve; it's hard to find any casebook that meets anyone's ideal. However, these critiques, both positive and critical, do reveal a number of design principles relevant to this discussion. Casebooks, according to scholars, should: engage students in active learning;<sup>26</sup> provide more and better problems, including law practice-focused problems;<sup>27</sup> include doctrinal overviews and guidance as to doctrinal structure;<sup>28</sup> link what students are learning to the real world of lawyering;<sup>29</sup> address ethics, values, and professionalism issues;<sup>30</sup> have as few pages as possible;<sup>31</sup> be sequenced to progressively develop students' skills;<sup>32</sup> include instruction in the application of cognitive strategies to law school learning;<sup>33</sup> "expose [ ] students to the type of analysis expected of them on the exam and in practice;,"<sup>34</sup> and pro-

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<sup>26</sup> Craig Anthony Arnold, *How Do Law Students Really Learn? Problem-Solving, Modern Pragmatism, and Property Law*, 22 SEATTLE U. L. REV. 891, 895 (1999); Lynn Daggett, *Teaching Torts by Integrating Ethical, Skills, Policy and Real-World Issues and Using Varied Pedagogical Techniques: Reflections on Using the Henderson, Pearson and Siliciano Casebook*, 25 SEATTLE U. L. REV. 63, 70 (2001).

<sup>27</sup> Eric L. Muller, *A New Law Teacher's Guide to Choosing a Casebook*, 45 J. LEGAL EDUC. 557, 561 (1995); Constance Frisby Fain, *A Methodology for Teaching Constitutional Law*, 21 SEATTLE U. L. REV. 807, 827 (1999); Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143, 168 (1991); Arnold, *supra* note 26, at 899 (arguing students are more likely to learn when their professors adopt "a casebook that engages students in the activities and thinking of lawyers with the trust and expectation that they can do so").

<sup>28</sup> Muller, *supra* note 27, at 560 (1995); Daggett, *supra* note 26, at 68 (describing this principle as a "top-down" approach); Taslitz, *supra* note 27, at 164-67; Douglass Laycock, *A Case Study in Pedagogical Neglect*, 92 YALE L. J. 188, 189 (1982).

<sup>29</sup> Daggett, *supra* note 26, at 73; Taslitz, *supra* note 27, at 151-52.

<sup>30</sup> Daggett, *supra* note 26, at 65-66, 69 (students should be introduced to ethical and moral issues and should gain a sense of their responsibilities as custodians of the law); Taslitz, *supra* note 27, at 172.

<sup>31</sup> Muller, *supra* note 27, at 560-61

<sup>32</sup> Susan M. Gilles, *A Review of Torts and Compensation: Personal Accountability and Social Responsibility for Injury*, 25 SEATTLE U. L. REV. 115, 122 (2001).

<sup>33</sup> Daggett, *supra* note 26, at 74 (describing cognitive strategies as "academic skills").

<sup>34</sup> Arnold, *supra* note 26, at 900.

vide teacher's manuals that offer the authors' practical teaching guidance.<sup>35</sup>

Previously, this author has argued that legal texts should communicate structure and hierarchy in the form of graphic organizers and barebones outlines, should be sequenced developmentally, should include instruction in metacognition and learning strategies, and should include authentic, real-world problems.<sup>36</sup> In addition, an ideal casebook would, among other things, include "both large scale problems that require students to combine concepts and smaller scale hypotheticals that allow students to practice applying the concepts as they learn them;" would "introduce topics with overviews and a problem the students can solve once they have learned the topic;" would "[s]equence concepts so that students don't start with the most difficult concepts;" "[i]nclude thinking questions at all thinking levels (from problem-solving to application to issue spotting to understanding);" "[i]nclude activities that engage students in adopting and reflecting on their adoption of cognitive strategies;" "engage a wide variety of [different types of] learners;" "provide a teacher's manual that facilitates multiple means of assessment, including assessment of the course, assessment for the benefit of student learning, and assessment for evaluation purposes;" and "provide a teacher's manual that suggests varied methods of instruction."<sup>37</sup>

Articles on textbook design authored by educational researchers identify some additional deficiencies of law school casebooks. According to Dr. Cheryl Cisero Durwin and Dr. William M. Sherman, associate professors of psychology at Southern Connecticut State University, "appropriate imagery and concreteness of details enhance comprehension . . ." and a textbook's use of "advance organizers can influence a reader's recall of detail from the text."<sup>38</sup>

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<sup>35</sup> Muller, *supra* note 27, at 565-66.

<sup>36</sup> 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, 375, 380-81 (2001) [hereinafter Schwartz, *Learning Theory and Instructional Design*].

<sup>37</sup> MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM*, 46-47 (2009) [hereinafter SCHWARTZ, SPARROW & HESS].

<sup>38</sup> Cheryl Cisero Durwin and William M. Sherman, *Does Choice of College Textbook Make a Difference in Students' Comprehension?*, 56 C. TEACHING 28, 29 (2008). An advanced organizer is a hierarchy chart or mind map that depicts the relationships among a set of concepts the students are learning. *Id.*

Given these concerns, there appears room for a different approach to casebooks design. There are plenty of impressive casebooks written by leading scholars in the various doctrinal fields. Candidly, even though this author has strong opinions about the need for new and better casebooks, the intellectual attainment reflected in existing casebooks is daunting.

But legal education has enough scholar-driven casebooks. What legal education needs right now are learning-centered casebooks written by experts in law teaching. We need casebooks that engage students in all three Carnegie apprenticeships, casebooks that make it easy for law professors to adopt best practices, such as frequent practice and feedback, casebooks that offer law teachers a different model than the ubiquitous soul-killing model Mertz captures in her study and that Krieger and Sheldon's research suggests causes so much harm to our students. We need casebooks that translate well-documented principles of instructional design to the creation of law school casebooks.

This article uses the core, guiding principles of the *Context and Practice Casebook Series* as a mechanism for arguing for a new model of law school casebook design. Drawing on examples from the first book published in the series, a Contracts text authored by this author,<sup>39</sup> and the second completed book in the series, a state Civil Procedure text authored by Professor Benjamin Madison of Regent University School of Law.<sup>40</sup> The article identifies fourteen features of casebooks in the *Context and Practice Series* that distinguish the books from some, most, and, in some instances, all other casebooks currently available in the legal education marketplace.

The distinctive features fall into five categories, which define the organization of the rest of this article. Part A of the article describes innovations aimed at increasing the likelihood that we produce practice-ready lawyers. Part B articulates what casebooks can take from the field of instructional design. Part C addresses what was, perhaps, the most challenging aspect of the design, creating learning experiences that assist students in synthesizing their existing value systems with the value systems implicitly and explicitly taught in law school. Part D de-

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<sup>39</sup> MICHAEL HUNTER SCHWARTZ & DENISE RIEBE, *CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK* (2009) [hereinafter SCHWARTZ & RIEBE].

<sup>40</sup> BENJAMIN MADISON, *CIVIL PROCEDURE FOR ALL STATES: A CONTEXT AND PRACTICE CASEBOOK* (2010) [hereinafter MADISON]. *CIVIL PROCEDURE FOR ALL STATES* is currently in the final proof stage of production; consequently and with apologies, some page citations to *CIVIL PROCEDURE FOR ALL STATES* may be off by one or two pages.

scribes the ways in which series books assist law teachers in being more effective as day-to-day classroom teachers, and Part E explains what the books in the series do to assist law professors in providing students meaningful opportunities for practice and feedback (without killing the law professors) and to make it easier for law teachers to conduct multiple and varied summative assessments. Part F concludes this article with some thoughts about the future of legal education and some beginning explorations of how future casebooks might take things even further.

A. *Casebook Design Principles Focused on Producing Practice-Ready Graduates*

In an effort to develop students' practice readiness in accordance with the recommendations of *Educating Lawyers* and *Best Practices for Legal Education*, *Context and Practice* casebooks include the following four features, each of which are things law school casebooks can and should do better: (1) each chapter begins with a chapter problem, nearly all of which have a law practice focus; (2) the books intersperse explicit instruction in how to practice law; (3) the books include authentic materials a lawyer might encounter in practice; and (4) the entire final chapter of most of the books is devoted to problem-solving in the field.

Improvement 1: Chapter Problems

Each chapter begins the way legal matters begin in the real world, with a chapter problem. Most of the Chapter Problems in *Contracts: A Context and Practice Casebook* have a law practice focus and place students in the role of practitioners doing a wide variety of lawyering projects. Some of the problems are similar to what students might encounter on a law school exam but are reformatted as assignments from a supervisor for which the student must provide an objective analysis,<sup>41</sup> and a few are deliberately formatted as exam questions to allow stu-

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<sup>41</sup> See SCHWARTZ & RIEBE, *supra* note 39, at 15-17 (Chapter 2) (objective analysis problem regarding the binding effect of a letter of intent), 175 (Chapter 5) (objective analysis and identification of information needed to fully evaluate a contract defense), 459-62 (Chapter 11) (students asked to think of themselves as in-house counsel to an insurance company and conduct an objective analysis of a contract interpretation dispute and advice company president), 635-39 (Chapter 13) (draft an objective analysis and identification of information needed to fully evaluate a client's claim as a third party beneficiary).

dents to prepare themselves for their exams.<sup>42</sup> A number have, more or less, a litigation focus, such as asking students to interview and advise a client about a proposed claim,<sup>43</sup> to draft a pleading,<sup>44</sup> to draft an argument,<sup>45</sup> or to prepare for an oral argument on a motion.<sup>46</sup> Others have a transactional focus, asking students to draft contract provisions<sup>47</sup> or to read and evaluate contracts clients are considering signing.<sup>48</sup>

*Civil Procedure for All States* also contextualizes the doctrine in law practice, but, because of its procedural focus, the text uses a master problem that runs throughout the text to contextualize the concepts within the litigation process; the goal is to place students inside the process of handling a particular case.<sup>49</sup> Each chapter begins with a brief description of where students are in the litigation process and how a lawyer would proceed.<sup>50</sup>

### Improvement 2: Explicit Skills Instruction

In four places, *Ccontracts* provides explicit instruction in how practitioners practice law. Chapter 8 summarizes and includes excerpts from a practitioner article on drafting liquidated damages clauses.<sup>51</sup> Chapter 12 excerpts Tina Stark's groundbreaking *Thinking Like a Deal Lawyer*.<sup>52</sup> The article does a wonderful job of introducing students to the five business issues central to most agreements, risk, money, control, standards, and what she calls "endgame," and giving readers a sense of what lawyers can bring to the table in connection with those

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<sup>42</sup> See *id.* at 149-51 (Chapter 4) (three practice exam hypos), 373-74 (Chapter 9) (practice exam hypo).

<sup>43</sup> See *id.* at 175-77 (Chapter 5) (interview client about possible mistake defense in breach of contract suit), 255 (Chapter 6) (interview client about her damages in connection with a planned lawsuit).

<sup>44</sup> See *id.* at 95-98 (Chapter 3) (drafting of an answer to a complaint alleging contract formation where challenge would be based on an alleged lack of consideration), 681-84 (Chapter 14) (drafting a trial memorandum).

<sup>45</sup> See *id.* at 339-41 (Chapter 7) (draft opposition to motion for summary judgment).

<sup>46</sup> See *id.* at 419 (oral argument regarding admission of parol evidence).

<sup>47</sup> See *id.* at 359, 369-71 (draft valid liquidated damages clause), 684 (Chapter 14) (draft a prohibition of an assignment of a contract).

<sup>48</sup> See *id.* at 411-18 (Introduction to Part V of text) (read and evaluate six-page contract), 491-92 (Chapter 12) (read and evaluate contract).

<sup>49</sup> See MADISON, *supra* note 40, at 4-5.

<sup>50</sup> *Id.* at chs. Three, Four.

<sup>51</sup> Henry F. Luepke III, *How to Draft and Enforce a Liquidated Damages Clause*, 61 J. MO. B 324. (Nov.-Dec. 2005).

<sup>52</sup> Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223 (2004).

issues.<sup>53</sup> Chapter 15 includes a discussion of what it means to practice law with professionalism<sup>54</sup> and an abbreviated discussion of basic principles of contract drafting, including a checklist of questions worth considering when students use form contracts.<sup>55</sup>

*Civil Procedure for All States* provides similar instruction with respect to the skill of statutory interpretation, providing a detailed discussion of the thought process a lawyer would go through as she is reading a statute.<sup>56</sup> The text provides similar instruction for handling statute of limitations problems,<sup>57</sup> for estimating damages by finding verdicts in similar cases,<sup>58</sup> and for drafting a pleading.<sup>59</sup>

### Improvement 3: Authentic Exercises and Materials

The books in the series place a heavy emphasis on authenticity and real world implications in a wide variety of ways. For example, in many instances, *contractsContracts* asks students, as part of their class preparation, to find and report on the law of the state where they intend to practice law with respect to particular legal issues they are learning.<sup>60</sup> *Civil Procedure for All States* includes similar class preparation requirements.<sup>61</sup>

The books and teacher's manuals draw on real-world examples to illustrate concepts and issues. *contractsContracts*, for example, includes assignments that ask students to bring to class examples of advertisements so the class can evaluate their enforceability,<sup>62</sup> and the teacher's manual identifies places where professors can make connections between contract doctrine and real-life phenomena students may have encountered.<sup>63</sup> Two of the problems in the book are authentic in their

<sup>53</sup> *Id.*

<sup>54</sup> SCHWARTZ AND RIEBE, *supra* note 39, at 730-32.

<sup>55</sup> *Id.* at 739-42.

<sup>56</sup> MADISON, *supra* note 40, at 25.

<sup>57</sup> *Id.* at 36.

<sup>58</sup> *Id.* at 249-50.

<sup>59</sup> *Id.* at 150.

<sup>60</sup> *See, e.g., id.* at 43 (state law re advertisements as offers).

<sup>61</sup> *See, e.g., id.* at 35, 96.

<sup>62</sup> SCHWARTZ AND RIEBE, *supra* note 39, at 43.

<sup>63</sup> MICHAEL HUNTER SCHWARTZ, *CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK, TEACHER'S MANUAL* 31-32 (2010) [hereinafter *SCHWARTZ TEACHER'S MANUAL*] (suggesting professor: (1) ask students to reconcile the pre-existing duty rule and the common practice of professional sports teams renegotiating their contracts with their best players; (2) hand out and discuss with their students the Letter of Intent signed by the University of Kentucky and its former basketball coach, Billy Gillespie; and (3) hand out

multi-disciplinarity approach; both combine contract law issues with issues students would have encountered in their other first-year courses.<sup>64</sup> Finally, the book includes materials lawyers would be likely to encounter in practice, including two complaints and an answer,<sup>65</sup> a stipulation of facts,<sup>66</sup> nine contracts,<sup>67</sup> a letter of intent,<sup>68</sup> letters authored by clients, opposing parties, expert witnesses, and attorneys,<sup>69</sup> supervisor memoranda,<sup>70</sup> and even a police report and an autopsy report.<sup>71</sup>

*Civil Procedure for All States* includes a slew of authentic materials, including an accident report,<sup>72</sup> a complaint,<sup>73</sup> a counterclaim,<sup>74</sup> a summons,<sup>75</sup> a pretrial scheduling order,<sup>76</sup> a subpoena,<sup>77</sup> a set of interrogatories,<sup>78</sup> a set of requests for admissions,<sup>79</sup> and a trial plan and discovery plan.<sup>80</sup>

#### Improvement 4: Problem-Solving Chapter

The final chapter of most *Context and Practice* casebooks explicitly focuses on problem solving.<sup>81</sup> Ultimately, of course, lawyers are problem solvers, and both *Educating Lawyers* and *Best Practices* advocate that law schools explicitly teach this skill.<sup>82</sup> The final chapter in *contract-sContracts* includes both the types of problems students will encounter on law school exams and the types of unstructured problems contract-

and discuss with their students the carefully-written form contract between the producers of the movie *BORAT* (20th Century Fox 2006) and the unwitting dupes in the film).

<sup>64</sup> SCHWARTZ AND RIEBE, *supra* note 39, at 747-50 (hybrid contracts-torts and civil procedure problem); *id.* at 751-52 (hybrid alternative dispute resolution, tribal sovereign immunity, contract drafting problem).

<sup>65</sup> *Id.* at 96 (complaint), 246-47 (answer), 748-49 (complaint).

<sup>66</sup> *Id.* at 340-41.

<sup>67</sup> *Id.* at 97-98, 413-18, 460, 493, 637-38, 638-39, 743-44, 745-46, 750.

<sup>68</sup> *Id.* at 17.

<sup>69</sup> *Id.* at 462, 734, 735-36, 737, 738-39.

<sup>70</sup> *Id.* at 176, 635-36, 681-84, 733, 747, 751-52.

<sup>71</sup> *Id.* at 461.

<sup>72</sup> MADISON, *supra* note 40, at 18-20.

<sup>73</sup> *Id.* at 83.

<sup>74</sup> *Id.* at 89.

<sup>75</sup> *Id.* at 103.

<sup>76</sup> *Id.* at 177-78.

<sup>77</sup> *Id.* at 185, 239.

<sup>78</sup> *Id.* at 188-90.

<sup>79</sup> *Id.* at 192-94.

<sup>80</sup> *Id.* at 168.

<sup>81</sup> See, e.g., SCHWARTZ & RIEBE, *supra* note 39, at ch. 15.

<sup>82</sup> SULLIVAN ET AL., *supra* note 10, at 87; STUCKEY ET AL., *supra* note 10, at 39.

scontract lawyers encounter in practice. The law practice problems include the types of multi-disciplinary problems lawyers are more likely to encounter in practice. For example, Problem 15-11 is a hybrid contracts and legal research problem;<sup>83</sup> Problems 15-12 and 15-13 require students to draft a client engagement letter and, then, in accordance with that agreement, evaluate a contract the client is considering signing;<sup>84</sup> and Problem 15-14 is a hybrid civil procedure, torts, and contracts problem that engages students in challenging whether a complaint states a proper claim.<sup>85</sup> Finally, Problem 15-15 engages students in two very different tasks: drafting a contract term or terms to accomplish a client's goal and researching a tribal sovereign immunity issue.<sup>86</sup> The drafting task requires students to understand the client tribe's cultural interests and weigh those considerations against the client's economic objectives.<sup>87</sup> Both aspects of Problem 15-15 were developed in consultation with Professor Angelique Eaglewoman, a clinician who practices tribal law at the University of Idaho College of Law.

#### B. *Casebook Design Principles from the Instructional Design Field*

Books in the *Context and Practice* series have a core objective of producing learning. The model for the series, in fact, is grounded in core principles developed in the fields of learning theory and instructional design. A learning theory "attempt(s) to describe, explain and predict learning."<sup>88</sup> Learning theories therefore provide a foundation upon which "[teachers] infer instructional treatments . . ." <sup>89</sup> Choosing to include the authentic law practice materials described above, for example, draws from adult learning theory, which holds that adults learn best when they see what they are learning as authentic and important to their personal and professional goals.<sup>90</sup>

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<sup>83</sup> SCHWARTZ & RIEBE, *supra* note 39, at 733-39.

<sup>84</sup> *Id.* at 739-46.

<sup>85</sup> *Id.* at 747-50.

<sup>86</sup> *Id.* at 751-52.

<sup>87</sup> *Id.*

<sup>88</sup> PATRICIA L. SMITH & TILLMAN J. RAGAN, *INSTRUCTIONAL DESIGN* 25 (3d ed. 2005) [hereinafter SMITH & RAGAN]. For a more detailed discussion of the application of Instructional Design principles to law teaching, see Schwartz, *Learning Theory and Instructional Design*, *supra* note 36.

<sup>89</sup> SMITH & RAGAN, *supra* note 88, at 29.

<sup>90</sup> SCHWARTZ, SPARROW & HESS, *supra* note 37, at 8.

### Instructional design is

a reflective, systematic, and comprehensive approach to creating instruction. The design expert analyzes the learning context, the learners, and the learning task, writes test items, determines instructional strategies, writes instruction, and then evaluates the instruction and uses what the designer learned from the evaluation to revise the instruction. In other words, the designer develops information regarding the parameters of the project, creates instruction tailored to the particular characteristics of the project, and then assesses the instruction to determine whether it is succeeding. Throughout the process, the designer strives for congruence among the instructional goals, the test items, and the selected instructional strategies.<sup>91</sup>

Instructional designers believe there are core methodologies central to the design of all instruction and draw on the thousands of educational studies available to them.<sup>92</sup> Thus, the choice to include a final, problem-solving chapter in most *Context and Practice* casebooks implements a core instructional design principal: students need instruction in both the forest and the trees. It is not enough to teach students the principles, concepts, and procedures, and assume the students can combine those principles, concepts, and procedures to solve complex problems; novices need explicit problem-solving instruction.<sup>93</sup> Likewise, while the above-described choice to begin each chapter with a problem the students will be able to solve by the end of the chapter is not an explicit recommendation in any instructional design text, the choice is consistent with a series of studies of law students. Those studies have found that the most successful law students read cases with particular legal problems or concerns in mind.<sup>94</sup>

Learning theory and instructional design, together, justify six additional things casebooks can do better along with the following aspects of the casebooks in the *Context and Practice* series: the developmental approach to skills development; the use of scaffolds to build students' cognitive learning strategies; the inclusion of both verbal and visual doctrinal overviews; the inclusion of additional visual aids to learning; the provision of course and topic-by-topic learning objectives; and the inclusion of discovery sequence exercises. The dis-

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<sup>91</sup> Schwartz *Learning Theory and Instructional Design*, *supra* note 36, at 384-85 (parenthetical comments omitted).

<sup>92</sup> *Id.* at 356.

<sup>93</sup> SMITH & RAGAN, *supra* note 88, at 223.

<sup>94</sup> Leah Christensen, *Legal Reading And Success In Law School: An Empirical Study*, 30 SEATTLE U. L. REV. 603, 604, 609, 633 (2007).

discussion below provides the instructional design background and explains how those principles take form in the design of the texts.

#### Improvement 5: Developmental Approach to Skills Development

When students new learners are first learning challenging and complicated skills, such as the skills we teach in law school, they benefit from a progressive approach that helps them move towards competency. Instructional designers recommend providing substantial opportunities for practice and feedback,<sup>95</sup> and the initial instruction can assist students' development of the skill by providing hints and cues when students first try to perform the skill.<sup>96</sup> Instructional designers call this and other forms of student support "scaffolding" and assert that, for complex ideas, scaffolding is necessary.<sup>97</sup> In many instances, beginning with easier problems and progressing to more challenging applications assists students in developing crucial self-efficacy for performing the skills<sup>98</sup> and help students move towards mastery.<sup>99</sup>

Generally, books in the series adopt this developmental approach. *contractsContracts* and the teacher's manual follow these principles with respect to the skills of performing legal reasoning, deconstructing rules/statutes, identifying contractual ambiguities, and understanding cases.

*contractsContracts* first explains the process of applying and distinguishing cases when students are first asked to use the skill to respond to a hypothetical.<sup>100</sup> A few pages later, the book includes seven pages of direct instruction explaining the processing of applying rules to facts followed by a series of five problems tied to a scaffold that guides students through their initial efforts at performing the skill.<sup>101</sup> A later portion of the text suggests active reading and visual strategies students can use in reading exam hypotheticals.<sup>102</sup> The *contract* teacher's manual includes, as a suggested handout, a complete answer to an exam-length hypothetical so that teachers can provide their students with a

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<sup>95</sup> SMITH & RAGAN, *supra* note 88, at 130.

<sup>96</sup> *Id.* at 226.

<sup>97</sup> *Id.* at 130.

<sup>98</sup> MICHAEL HUNTER SCHWARTZ, *EXPERT LEARNING FOR LAW STUDENTS* 42-44 (2d ed. 2008).

<sup>99</sup> SMITH & RAGAN, *supra* note 88, at 224.

<sup>100</sup> SCHWARTZ & RIEBE, *supra* note 39, at 27.

<sup>101</sup> *Id.* at 29-38.

<sup>102</sup> *Id.* at 169-70.

model of a multi-issue analysis.<sup>103</sup> This model is accompanied by another instructional design-recommended teaching tool, a think-aloud. A think-aloud is an attempt to offer students insights into an expert's thinking process as the expert works through the process of analyzing a problem; the expert speaks aloud every idea, hypothesis, rejected hypothesis, concern, problem, or other thought she has beginning when she first encounters the problem and continuing all the way through her creation of a work product.<sup>104</sup> The think-aloud in this context expresses the author's thinking process beginning with the initial read of the problem and continuing through the process of outlining and then writing a complete response to the hypothetical.<sup>105</sup> The text includes a second think-aloud in connection with the problem-solving instruction in Chapter 15.<sup>106</sup> The remainder of the book appropriately operates from an assumption that students know how to apply rules and apply and distinguish cases, but, of course, nearly all students need many more opportunities to master these skills.

The materials on statutory interpretation, introduced when the book first requires the students to read and apply sections of Article 2 of the Uniform Commercial Code ("the U.C.C."), progress similarly. The book begins the topic by explaining the process of deconstructing rules, the role of conjunctions and other transition words in rules (e.g., "except," "unless," etc.), and demonstrating a rule deconstruction for section 1-103 of the U.C.C.<sup>107</sup> This simple deconstruction is followed by an elaborate rule outline for section 2-205, a more complex statute that requires practitioners to identify its multiple requirements and draw on definitions from other U.C.C. sections.<sup>108</sup> Students are then asked to try out the skill on their own in connection with the other U.C.C. sections addressing contract formation.<sup>109</sup> Later chapters in the book assign specific, relevant U.C.C. sections, assuming the students now know how to deconstruct the rules.<sup>110</sup> By the end of the book, the text does not even mention specific U.C.C. sections, instead requiring

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<sup>103</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 474-79.

<sup>104</sup> SMITH & RAGAN, *supra* note 88, at 224.

<sup>105</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 469-79.

<sup>106</sup> SCHWARTZ & RIEBE, *supra* note 39, at 720-24.

<sup>107</sup> *Id.* at 83-84.

<sup>108</sup> *Id.* at 84-85.

<sup>109</sup> *Id.* at 84-85.

<sup>110</sup> *See, e.g.*, SCHWARTZ & RIEBE, *supra* note 39, at 428.

students to identify the relevant sections, deconstruct those sections as they see fit, and apply the sections to assigned problems in the text.<sup>111</sup>

The teaching materials aimed at developing students' skill in identifying contract ambiguities also progress developmentally. The materials begin with an explanation of what makes contracts ambiguous and, because identifying ambiguities is so challenging, include a checklist students can use to regularize their approach to identifying ambiguities.<sup>112</sup> The discussion draws on but modifies slightly Allan Farnsworth's well-known classificatory system for contract ambiguities;<sup>113</sup> the three categories of ambiguity identified in *contractsContracts* are ambiguities caused by ambiguous word choices, ambiguities caused by grammatical errors or sloppiness, and ambiguities caused by conflicts between terms.<sup>114</sup> The casebook materials on how to identify ambiguity are followed by a series of ten hypotheticals; in each instance, the students' assigned class preparation tasks are to explain why each term is ambiguous by identifying at least two alternative plausible and relevant meanings of each term and to classify the type of ambiguity involved.<sup>115</sup> The book provides a demonstration of the expected performance for the first problem.<sup>116</sup> After the students have worked through the nine other problems, the students' class preparation work concludes with a required re-examination of their approach to identifying ambiguity.<sup>117</sup>

The *contractsContracts* teacher's manual recommends a particularized, developmental approach to teaching this skill in the class session that focuses on identifying ambiguity.<sup>118</sup> The teacher's manual suggests a type of cooperative learning exercise, group (or team)-pair-solo, designed to move the students progressively closer towards independence in performing this skill;<sup>119</sup> the manual suggests that students be placed in small groups and asked to compare and negotiate a single

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<sup>111</sup> *Id.* at 548-50.

<sup>112</sup> *Id.* at 465-66.

<sup>113</sup> See E. ALLAN FARNSWORTH, *CONTRACTS* § 7.8, at 441-43 (4th ed. 2004).

<sup>114</sup> SCHWARTZ & RIEBE, *supra* note 39, at 465-66.

<sup>115</sup> *Id.* at 467-69.

<sup>116</sup> *Id.* at 467.

<sup>117</sup> *Id.* at 469.

<sup>118</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 238-43.

<sup>119</sup> In group-pair-solo cooperative learning exercises, students start by working to solve problems in a team. They then work problems with a partner. When they have developed sufficient confidence and skill, they work a final set of problems on their own. See Class Activities that Use Cooperative Learning, Team-Pair-Solo, <http://edtech.kennesaw.edu/intech/cooperativelearning.htm#activities> (last visited July 1, 2010).

group answer to the first six problems, work in pairs on the next three problems, work in pairs on one new problem introduced in class, and then work on their own on three additional, new problems.<sup>120</sup> The recommended teaching process concludes with a second opportunity for the students to revise their ambiguity-spotting processes.<sup>121</sup>

The book does not include materials designed to address all aspects of case reading, mostly because the resources already available are more than sufficient. Ruth Ann McKinney's insightful *Reading Like a Lawyer* is a wonderful tool for developing students' case-reading skills.<sup>122</sup>

However, although the book does not purport to teach students everything they need to know to master case reading, the book does provide materials designed to develop students' case analysis skills and approaches that task progressively. Because students reading the book will be novices, nearly all the cases in the book are preceded by thinking questions that prompt students to read the cases with particular goals in mind.<sup>123</sup> In addition, the first several cases in the casebook include embedded commentary directing students to particular statements of the court to assist students in identifying rules, legal reasoning, and policy arguments,<sup>124</sup> and later embedded commentary focuses on explaining concepts that might distract a novice case reader.<sup>125</sup> By the middle of the book, those scaffolds have been withdrawn<sup>126</sup> based on an assumption that the prior materials, the students' classroom discussions of the cases, and the students' experiences in their other courses (which traditionally devote considerable time to case reading discussions) have allowed the students to develop these skills sufficiently. However, the materials in Chapter 12 provide an additional tool for making sense of court opinions. In the portion of the text addressing constructive conditions, the materials introduce, demon-

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<sup>120</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 238-43.

<sup>121</sup> *Id.* at 243.

<sup>122</sup> RUTH ANN MCKINNEY, *READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT* (2005). *See also* SCHWARTZ, *supra* note 98.

<sup>123</sup> *See, e.g.*, SCHWARTZ & RIEBE, *supra* note 39, at 274 (questions preceding *Groves & Sons v. John Wunder Co.*, 205 Minn. 163, 286 N.W. 235 (1939); *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (1962)).

<sup>124</sup> *See, e.g.*, SCHWARTZ & RIEBE, *supra* note 39, at 26.

<sup>125</sup> *See, e.g., id.* at 137 (explaining what a promissory note is), 168 (explaining an omitted portion of the court's opinion).

<sup>126</sup> *See, e.g., id.* at 313-16 (the text provides no embedded commentary for *Freund v. Washington Square Press, Inc.*, 314 N.E.2d 419 (1974)).

strate, and prompt students to practice a particularly useful strategy for understanding cases involving complex contracts; the materials prompt students to create a contract obligations chart,<sup>127</sup> such as the chart below depicting the duties created by the contract at issue in *Kingston v. Preston*.<sup>128</sup>

CONTRACT OBLIGATIONS CHART: *KINGSTON V. PRESTON*<sup>129</sup>

Π's DUTIES	Δ's DUTIES
Serve D as an apprentice (servant) for next 1 and 1/4 years	Pay P 200 pounds/year while P is an apprentice
Buy D's business with D's designee from D, paying fair value for D's stock	Sell P and D's designee (probably D's nephew) D's business and stock
Execute a 14-year partnership agreement with D's designee	Let P and D's designee use D's house to carry on the business
Pay D 250 pounds per month until the value of the stock is reduced to 4,000 pounds	
Give D good and sufficient security ("before the sealing and delivery of D's deeds)	

#### Improvement 6: Scaffolds for Students' Development of Cognitive Learning Strategies

Doctrinal law teachers often assert that one of their primary goals in teaching their courses is to teach their students how to learn in their fields. Law professors generally believe the doctrinal area they teach is so complex and consists of so much doctrine, no one could teach every doctrinal point, and no student could remember every doctrinal point. Consequently, doctrinal teachers want to produce students who understand the field well enough to learn what they don't know. However, this goal requires students to learn how to be expert learners of the law. For this reason, *Best Practices for Legal Education* asserts that teaching students to be independent, self-directed learners should be a core goal of legal education.<sup>130</sup> Interestingly, British legal educators list "autonomy and ability to learn" as among the seven core goals of British legal education.<sup>131</sup>

<sup>127</sup> See, e.g., SCHWARTZ & RIEBE, *supra* note 39, at 530, 533, 538, 539.

<sup>128</sup> *Kingston v. Preston*, (1773) 2 Dougl. 689, 689-90 (K.B.).

<sup>129</sup> SCHWARTZ & RIEBE, *supra* note 39, at 531.

<sup>130</sup> STUCKEY ET AL., *supra* note 10, at 66-67.

<sup>131</sup> "What's reflection got to do with it?", The Higher Education Academy: UK Centre for Legal Education, <http://www.ukcle.ac.uk/resources/reflection/reflection.html> (last visited June 22, 2010).

Smith and Ragan label these strategies as “cognitive strategies” and explain that cognitive strategies include, among other things, rehearsal strategies, elaboration strategies, metacognition, and strategies for maintaining attention, staying motivated and managing time.<sup>132</sup> Smith and Ragan regard these skills as so crucial that they list cognitive strategies instruction as one of the “Events of Instruction” necessary for effective learning in any context.<sup>133</sup> Smith and Ragan also include cognitive strategies in their taxonomy of learning outcomes,<sup>134</sup> devote a chapter of their instructional design text to “Strategies for Cognitive Strategy Instruction,”<sup>135</sup> and explain that, based on the studies conducted to date, “training in cognitive strategy use can be effective.”<sup>136</sup>

Consequently, the books in the *Context and Practice* series include materials directed at helping students develop various skills within this skill set. *Contracts*, for example, includes reflection questions aimed at developing students’ metacognitive skills. Professional Development Reflection Questions 2-4 in Chapter 1, for example, prompt students to write about why they should aspire to being expert, self-regulated learners, explain what self-regulated learning is, and ask students to identify, evaluate, and modify the study methods they used for the materials in Chapter 1.<sup>137</sup> For similar reasons, the Professional Development Reflection Questions in Chapter 3 expand upon the explanation of self-regulated learning and walk students through the process of setting mastery learning goals, deciding how they will learn the materials in Chapter 4, monitoring their learning process while they are learning the materials in Chapter 4, and then reflecting on the process when it is complete.<sup>138</sup>

Another goal of *contracts* *Contracts* is to teach students how, when, and why to use “organizational strategies,” which are techniques for organizing material into organized structures.<sup>139</sup> Of course, it is common for law professors to suggest their students create course outlines; the text differs from traditional texts by making outlining a required class preparation assignment, by explaining how to outline course

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<sup>132</sup> SMITH & RAGAN, *supra* note 88, at 81-82.

<sup>133</sup> *Id.* at 135.

<sup>134</sup> *Id.* at 81 (identifying cognitive strategies as an outcome within Robert Gagne’s taxonomy of learning outcomes).

<sup>135</sup> *Id.* at ch. 13.

<sup>136</sup> *Id.* at 244.

<sup>137</sup> *See, e.g.*, SCHWARTZ & RIEBE, *supra* note 39, at 11.

<sup>138</sup> *Id.* at 148.

<sup>139</sup> *Id.*

materials, and by providing an example outline for a previously-studied topic.<sup>140</sup> In addition, *Ccontracts* includes four partially-completed graphic organizers.<sup>141</sup> A graphic organizer is a type of organizing strategy such as a hierarchy chart, a flowchart, or a mindmap.<sup>142</sup> A graphic organizer is partially-completed if the students must supply missing information to complete it. The text also directs students to create their own graphic organizers.<sup>143</sup> For very different reasons, a different chapter of the text prompts students to create a comparison chart identifying all the similarities and differences between common law and U.C.C. contract formation rules.<sup>144</sup> This exercise is designed to help students succeed on exams by making sure they can distinguish the two bodies of contract doctrine.

*Civil Procedure for All States* places particular emphasis on providing students a wide variety of graphic organizers and other, similar tools for understanding, remembering, and practicing state civil procedure. The text engages students in using visual tools such as checklists,<sup>145</sup> flow charts,<sup>146</sup> and timelines.<sup>147</sup>

A second category of learning strategies, is called elaboration strategies. Elaboration strategies are particularly powerful learning and memorization tools for law students<sup>148</sup> and therefore are a focus of *contractsContracts*. Elaboration strategies allow students to expand upon what they have learned by developing their own, related ideas.<sup>149</sup> For example, a common elaboration strategy is for students to paraphrase a concept. If students can accurately restate a rule in their own words, they understand it. Consequently, the text repeatedly prompts students to paraphrase various rules.<sup>150</sup>

Another elaboration strategy involves developing examples and non-examples. An example of a concept includes all the required fea-

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<sup>140</sup> *Id.* at 282-83.

<sup>141</sup> *Id.* at 81, 82, 407, 717.

<sup>142</sup> SCHWARTZ, *supra* note 98, at ch. 12.

<sup>143</sup> *See, e.g.*, SCHWARTZ & RIEBE, *supra* note 39, at 223.

<sup>144</sup> *Id.* at 93.

<sup>145</sup> MADISON, *supra* note 40, at 98.

<sup>146</sup> *Id.* at 69, 119, 150.

<sup>147</sup> *Id.* at 282.

<sup>148</sup> SCHWARTZ, *supra* note 98, at 184.

<sup>149</sup> *Id.*

<sup>150</sup> *See, e.g.*, SCHWARTZ & RIEBE, *supra* note 39, at 22, 38, 86, 223, 274, 313, 325, 538, 568, 672.

tures of that concept,<sup>151</sup> such as a misrepresentation that meets all the required elements. A non-example possesses most of the features of a concept but lacks an essential feature,<sup>152</sup> such as a misrepresentation by a seller upon which the buyer does not rely. In several places, *Ccontracts* includes exercises that ask students to create their own examples and non-examples of concepts they are learning.<sup>153</sup> A more advanced version of this elaboration strategy engages students in developing their own, exam-like questions; if law students understand a legal concept well enough to develop their own hypothetical questions for which there are no obvious, right answers, they have mastered that concept.<sup>154</sup> *Ccontracts* includes two exercises that engage students in this form of elaboration.<sup>155</sup>

Mnemonic devices “are particularly potent associational techniques;”<sup>156</sup> however, instructional designers recommend that students learn them only if other memorization techniques are unavailing.<sup>157</sup> Consequently, *Ccontracts* includes only a few prompts aimed at getting students to develop their own mnemonics,<sup>158</sup> and, even though the text asks students to create their own mnemonics, the text suggests outside readings for students who need help in coming up with a suitable mnemonic.<sup>159</sup>

Because reflective, self-regulated learners make conscious choices from among the various cognitive strategies available to them,<sup>160</sup> *contracts* also prompts students to choose from among one of two or more alternative cognitive strategies. For example, in Chapter 5, the text suggests students develop a checklist of the various contract defenses and prompts students to decide whether to create a mnemonic, a set of flashcards, or a picture to help them remember the list.<sup>161</sup> Similarly, in Chapter 2, the text prompts students to convert U.C.C. 2-207 into either an outline or a flowchart.<sup>162</sup>

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<sup>151</sup> SCHWARTZ, *supra* note 98, at 185.

<sup>152</sup> *Id.* at 186.

<sup>153</sup> SCHWARTZ & RIEBE, *supra* note 39, at 218 (questions 1-2), 527 (question 3a).

<sup>154</sup> SCHWARTZ, *supra* note 98, at 238-40.

<sup>155</sup> SCHWARTZ & RIEBE, *supra* note 39, at 199, 527 (question 3b).

<sup>156</sup> SMITH & RAGAN, *supra* note 88, at 163.

<sup>157</sup> *Id.*

<sup>158</sup> See, e.g., SCHWARTZ & RIEBE, *supra* note 39, at 64, 249.

<sup>159</sup> *Id.* at 64.

<sup>160</sup> SCHWARTZ EXPERT LEARNING, *supra* note 98, at 50-51.

<sup>161</sup> See SCHWARTZ & RIEBE, *supra* note 39, at 249.

<sup>162</sup> *Id.* at 86.

As noted above, both legal scholars and instructional designers recommend that texts include written and visual overviews of subject matters the students need to learn.<sup>163</sup> By exposing students to this approach to structuring their learning, *Ccontracts* strives to expand students' repertoire of learning strategies beyond the traditional course outline; while some law professors sometimes seem to assume that the only way to organize and synthesize course materials is by creating a course outline, hierarchy charts and mind maps are also valuable organizational strategies.<sup>164</sup>

Because all learners mentally store what they are learning in organized structures called schemata,<sup>165</sup> *Ccontracts* also includes "note-taking guides," which are barebones outlines into which students can take notes in class. The outlines do not articulate the law, but they do provide a structure for organizing the course material.<sup>166</sup> The choice to include these guides in the teacher's manual stems primarily from the evidence that the guides facilitate learning,<sup>167</sup> as someone knowledgeable about schema theory would predict. It also stems from the fact that students overwhelmingly already use secondary sources, such as commercial outlines, hornbooks, and, most problematically, past students' course outlines.<sup>168</sup>

In a number of places, *Ccontracts* includes textual overviews of basic doctrinal points. For example, the book includes overviews of the rules governing manner of acceptance,<sup>169</sup> the rules that determine whether a settlement of an invalid claim can serve as consideration,<sup>170</sup> the elements of misrepresentation,<sup>171</sup> the measure of damages for breach of contract,<sup>172</sup> and the rules courts use to construct constructive conditions.<sup>173</sup>

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<sup>163</sup> See *supra* notes 28 and 38 and accompanying text.

<sup>164</sup> SCHWARTZ EXPERT LEARNING, *supra* note 98, at 164-70.

<sup>165</sup> SCHWARTZ, SPARROW & HESS, *supra* note 37, at 5-6.

<sup>166</sup> See, e.g., SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 428-32 (note-taking guide identifies the labels for and the structure of the key concepts relating to the measure of damages but provides no rules, case holdings, or explanations of policies).

<sup>167</sup> *Id.* at ii.

<sup>168</sup> *Id.* at ii.

<sup>169</sup> See SCHWARTZ & RIEBE, *supra* note 39, at 53.

<sup>170</sup> See *id.* at 115.

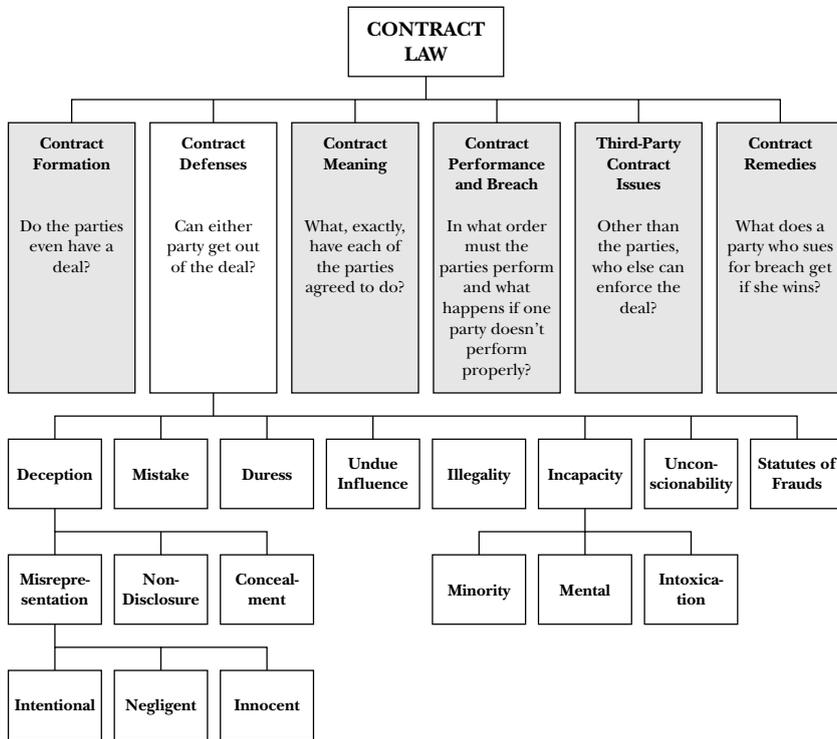
<sup>171</sup> See *id.* at 180.

<sup>172</sup> See *id.* at 258-61.

<sup>173</sup> See *id.* at 529-30.

In addition, throughout the text, the book provides a progressive advanced organizer,<sup>174</sup> exemplified below, that helps students situate the subject they are learning within the larger body of contract doctrine. An advanced organizer is a visual learning tool that communicates the organization of a body of knowledge the students must learn; an advanced organizer can both preview a lesson and serve as a tool for stimulating student recall of relevant prior knowledge.<sup>175</sup> The advanced organizer in *Ccontracts* depicts contract law along a process-based timeline from formation to remedies for breach and fleshes out the particular aspect of contract law the students are learning.

DIAGRAM 5-1: CONTRACT LAW GRAPHIC ORGANIZER<sup>176</sup>



Materials in the text that accompany this advanced organizer explain what students should be taking from it.<sup>177</sup>

<sup>174</sup> See *id.* at 178.

<sup>175</sup> SMITH & RAGAN, *supra* note 88, at 158-59.

<sup>176</sup> SCHWARTZ & RIEBE, *supra* note 39, at 178.

<sup>177</sup> See *id.* at 178-79.

Advanced organizers support student learning, according to instructional designers, because they help students identify the structure of the field's discourse.<sup>178</sup> In other words, they assist students in developing a schema for the course material.<sup>179</sup>

Smith and Ragan recommend integrating other types of visual images in textual materials "to clarify, organize, summarize, or support recall of information" or to "influence attitudes or feelings about the content or about learning in general."<sup>180</sup> Accordingly, *Ccontracts* includes more than a dozen tables<sup>181</sup> and a half-dozen or so diagrams,<sup>182</sup> and the unit-by-unit PowerPoint slides available with the teacher's manual are replete with visual metaphors for concepts, with charts, and with other visual images.<sup>183</sup>

#### Improvement 7: Provision of Course-Level and Lesson-Level Learning Objectives

*Best Practices for Legal Education* asserts that law teachers should develop, articulate and disseminate learning goals to their students.<sup>184</sup> Learning goals state, "what learners should be able to do at the conclusion of instruction."<sup>185</sup> Instructional designers strive to identify learning goals for both each particular learning unit and for entire courses.<sup>186</sup> The preface to *contractsContracts* provides course goals at the levels of doctrine, cognitive strategies, contract reading, and contract drafting,<sup>187</sup> and the teacher's manual for the text provides learning goals on a unit-by-unit basis for all the doctrinal and skills topics addressed by the text.<sup>188</sup> The choice to put the unit-by-unit goals in the teacher's manual allows law professors to modify the goals to reflect their own teaching goals (the goals are provided electronically on the DVD provided with the teacher's manual) and to decide for themselves whether to disclose the goals to their students

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<sup>178</sup> SMITH & RAGAN, *supra* note 88, at 161.

<sup>179</sup> *Id.* at 162.

<sup>180</sup> *Id.* at Web Chapter 2, page 5, ([http://highereduc.wiley.com/legacy/college/smith/0471393533/web\\_chaps/wch02.pdf](http://highereduc.wiley.com/legacy/college/smith/0471393533/web_chaps/wch02.pdf)) (last visited June 21, 2010).

<sup>181</sup> See SCHWARTZ & RIEBE, *supra* note 39, at 32, 34, 35, 36, 40, 169, 194, 261, 361, 466, 557, 718, 719, 741.

<sup>182</sup> See, e.g., *id.* at 35, 421, 423, 457, 642 (two diagrams), 721.

<sup>183</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, DVD.

<sup>184</sup> STUCKEY ET AL., *supra* note 10, at 55, 130.

<sup>185</sup> SMITH AND RAGAN, *supra* note 88, at 77.

<sup>186</sup> *Id.*

<sup>187</sup> SCHWARTZ & RIEBE, *supra* note 39, at xxvii-xxviii.

<sup>188</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 393-99.

### Improvement 8: Use of the Discovery Approach

Instructional designers recommend a powerful technique for engaging students in their learning called the discovery approach.<sup>189</sup> Discovery sequence instruction, which is also known as the inquiry approach, involves presenting students with a set of examples and non-examples of a concept students need to learn and prompting students to identify or synthesize a concept that reconciles the examples and non-examples.<sup>190</sup> Because the students discover the concept on their own, they may be more likely to remember and understand it. *Ccontracts*, accordingly, includes two discovery sequence exercises. The first involves distinguishing when the common law or the U.C.C. applies to a contract,<sup>191</sup> and the second involves identifying the limited circumstances where a seller has a duty to disclose information to a buyer.<sup>192</sup>

#### C. Casebook Design Principles that Emphasize Professional and Personal Values

As explained above, the consensus of *Educating Lawyers* and *Best Practices for Legal Education* is that law schools do a poor job helping their students develop their identity as professionals.<sup>193</sup> Professional identity, which *Educating Lawyers* calls “the third apprenticeship,”<sup>194</sup> inculcates students in the goals, values, ethics, social roles, and responsibilities of lawyers.<sup>195</sup> Those values include both service to clients and service to the welfare of their communities.<sup>196</sup> They also include “the virtues of integrity, consideration, civility, and other aspects of professionalism.”<sup>197</sup> *Ccontracts* operates from the premise that it is not enough merely to teach students professional values. As Professor Lawrence S. Krieger of Florida State explains, students also have a basic need to synthesize these professional values with their pre-law school selves and to act with authenticity and autonomy;<sup>198</sup> moreover, acting with morality and integrity are central to professionalism.<sup>199</sup>

<sup>189</sup> SMITH & RAGAN, *supra* note 88, at 175.

<sup>190</sup> *Id.*

<sup>191</sup> SCHWARTZ & RIEBE, *supra* note 39, at 9-10.

<sup>192</sup> *Id.* at 195-97.

<sup>193</sup> SULLIVAN ET AL., *supra* note 10, at 29-31; STUCKEY ET AL., *supra* note 10, at 24, 27-29.

<sup>194</sup> SULLIVAN ET AL., *supra* note 10, at 28.

<sup>195</sup> *Id.* at 28.

<sup>196</sup> *Id.* at 126.

<sup>197</sup> *Id.* at 132.

<sup>198</sup> Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L.J. 247, 254 (2008).

<sup>199</sup> *Id.*

Law students are unlikely to develop these values on their own, and, in fact, Krieger reports that law students shift from intrinsic values (values deriving from the students' personal and individual identities) to extrinsic values (such as wealth, power, fame and prestige) during their first year of law school and suffer a generalized loss of all values in their third year.<sup>200</sup>

These concerns explain why *Ccontracts*, unlike other contract texts on the subject, includes "Professional Development Reflection Questions."<sup>201</sup> This feature of the *Context and Practice* series was designed specifically to respond to and to begin to address the concerns raised by *Educating Lawyers, Best Practices for Legal Education*, and Krieger's findings. Thus, in addition to the questions aimed at developing students' self-regulated learning skills described above, *contracts* includes questions that prompt students to consider professional ethics and their identity as professionals and to reflect on the intersection of legal ethics and values and their personal values and needs.

#### Improvement 9: Reflection Questions Focused on Professional Ethics and on the Development of a Professional Identity

*Ccontracts* includes a wide range of questions prompting students to reflect on issues of legal ethics and professional identity. The questions on legal ethics include prompts that ask students to consider, for example, issues relating to what the ABA's Model Rules of Professional Conduct refer to as "Meritorious Claims and Contentions,"<sup>202</sup> in the context of trying to admit parol evidence<sup>203</sup> and of challenging a liquidated damages clause.<sup>204</sup> The text also includes questions that relate to the attorney's authority to agree to offers to settle cases,<sup>205</sup> an issue that falls within the purview of the attorney's duty to communicate with her client.<sup>206</sup> Other legal ethics issues include a question regarding fees,<sup>207</sup> addressed in Rule 1.5 of the Model Rules,<sup>208</sup> a question about communicating with unrepresented opposing parties,<sup>209</sup> addressed in Rule 4.3

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<sup>200</sup> *Id.* at 263.

<sup>201</sup> See, e.g., SCHWARTZ & RIEBE, *supra* note 39, at 93-94, 147, 170-71.

<sup>202</sup> MODEL RULES OF PROF'L CONDUCT, R. 3.1 (2009).

<sup>203</sup> SCHWARTZ & RIEBE, *supra* note 39, at 458.

<sup>204</sup> *Id.* at 372.

<sup>205</sup> *Id.* at 358.

<sup>206</sup> MODEL RULES OF PROF'L CONDUCT, R. 1.4 (2009).

<sup>207</sup> SCHWARTZ & RIEBE, *supra* note 39, at 171.

<sup>208</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5 (2009).

<sup>209</sup> SCHWARTZ & RIEBE, *supra* note 39, at 252.

of the Model Rules,<sup>210</sup> and a question regarding self-dealing,<sup>211</sup> addressed in Rule 1.8 of the Model Rules.<sup>212</sup>

A number of the reflection questions addressing professional identity focus on conflicts between a lawyer's duty to diligently represent her client<sup>213</sup> and the student's evolving sense of professional identity. For example, *Ccontracts* includes questions that ask whether deliberately drafting an illusory promise is "good lawyering."<sup>214</sup> Another question asks whether it is proper to, at the request of a client, "deliberately leave a (contract) clause ambiguous."<sup>215</sup>

Other questions prompt students to more directly reflect on professional identity concerns and values. For example, one question explains that legal professionals enjoy the status of "professional privilege" and asks "[i]n what sense is it a privilege to be a member of our profession?"<sup>216</sup> A follow-up question asks, "[a]s a member of this privileged profession, what are your individual responsibilities to society?"<sup>217</sup> A question from a different chapter engages students in reflecting on self-assessment as a critical professional value; the question asks students to engage in self-assessment with respect to their current professional enterprise—succeeding in law school.<sup>218</sup> Finally, another question asks students to reflect on their identity and professional values in the context of interacting with the hypothetical client described in the chapter problems; the client gives the student-lawyer conflicting directions; a reflection question asks students to think through how they would respond to this conflict.<sup>219</sup>

*Civil Procedure for All States* includes similar questions, labeled "Professional Identity Questions."<sup>220</sup> These questions engage students in reflecting on challenging law practice concerns such as misleading clients,<sup>221</sup> rationalizing decisions based on considerations other than

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<sup>210</sup> MODEL RULES OF PROF'L CONDUCT R. 4.3 (2009).

<sup>211</sup> SCHWARTZ & RIEBE, *supra* note 39, at 679.

<sup>212</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8 (2009).

<sup>213</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3 (2009).

<sup>214</sup> SCHWARTZ & RIEBE, *supra* note 39, at 147.

<sup>215</sup> *Id.* at 632.

<sup>216</sup> *Id.* at 252.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 358.

<sup>219</sup> *Id.* at 371.

<sup>220</sup> *See, e.g.*, MADISON, *supra* note 40, at 32, 51.

<sup>221</sup> *Id.* at 32.

the client's best interests,<sup>222</sup> interacting with opposing counsel,<sup>223</sup> taking advantage of opposing counsel's weaknesses,<sup>224</sup> and accommodating questionable requests from clients.<sup>225</sup>

#### Improvement 10: Reflection Questions Focused on the Intersection of Legal Ethics and Values and Students' Personal Values and Needs

Many of the ethics-based questions also implicate students' personal values. In other words, even if particular conduct would survive scrutiny as a matter of legal ethics, students also need to reflect on whether such conduct is consistent with their personal values. Consequently, the above-referenced question about the legal ethics of a client request to "deliberately leave a (contract) clause ambiguous" also asks whether it is moral to do so.<sup>226</sup> The question asking students whether they will make a bogus argument against the validity of a valid liquidated damages clause asks, "[w]ill you, and should you, do so?"<sup>227</sup>

*Ccontracts* includes a number of questions that directly prompt students to reflect on the intersection of their personal values, career goals, and professional life. These questions include queries that engage students in reflecting on their reasons for attending law school,<sup>228</sup> their goals and dreams,<sup>229</sup> and the effect of their law school experiences on those goals.<sup>230</sup> The final reflection question in the text asks students to imagine they are about to retire from law practice and articulate what they hope their friends and colleagues will say about them.<sup>231</sup> The question suggests that students write their responses in a letter and give the letter to a friend to hold until they graduate from law school.<sup>232</sup>

Finally, a large number of questions aim at to helping students recognize their strengths, find happiness in the face of practicing a

<sup>222</sup> *Id.* at 51.

<sup>223</sup> *Id.* at 180.

<sup>224</sup> *Id.* at 237.

<sup>225</sup> *Id.* at 274.

<sup>226</sup> SCHWARTZ & RIEBE, *supra* note 39, at 632.

<sup>227</sup> *Id.* at 372.

<sup>228</sup> *Id.* at 93-94.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 94, 752.

<sup>231</sup> *Id.* at 752.

<sup>232</sup> *Id.*

stressful profession, and deal with stress in a productive way. These questions prompt students to focus on gratitude for the good things in their lives,<sup>233</sup> reframe their struggles in more positive, affirming ways,<sup>234</sup> stop perseverating on negative thoughts,<sup>235</sup> becoming more goal-oriented,<sup>236</sup> identify their strengths,<sup>237</sup> serve their larger communities in ways they find personally meaningful,<sup>238</sup> and plan, now, how they will manage stressful law practice situations.<sup>239</sup>

#### D. *Casebook Design Principles Focusing on Improved Classroom Teaching*

Three additional aspects of the series derive from more general principles of effective teaching: suggestions for creating a positive classroom environment, suggestions relating to specific teaching techniques, such as suggestions for effectively doing role plays, simulations, and cooperative learning groups, and a complete set of PowerPoint slides with embedded multiple choice questions for teachers inclined to teach using PowerPoint slides and/or teaching using one of the various classroom responder systems.

#### Improvement 11: Suggestions for Creating a Positive Classroom Environment

A critical prerequisite to teaching and producing deep and lasting student learning is creating a positive classroom learning environment.<sup>240</sup> In particular, the following attitudinal matters are critical to the learning process: expertise, respect, high expectations, support for student success, passion, preparation and organization, variety, active learning, collaboration, clarity, and formative feedback.<sup>241</sup>

The *Ccontracts Teacher's Manual* includes materials addressing many of these issues. For example, it encourages contractsContracts professors to communicate high expectations,<sup>242</sup> passion,<sup>243</sup> and enthusiasm.<sup>244</sup> The Manual also suggests a series of things law teachers can

<sup>233</sup> *Id.* at 488.

<sup>234</sup> *Id.* at 632.

<sup>235</sup> *Id.* at 678.

<sup>236</sup> *Id.* at 679.

<sup>237</sup> *Id.* at 711.

<sup>238</sup> *Id.* at 752.

<sup>239</sup> *See id.* at 488.

<sup>240</sup> SCHWARTZ, SPARROW & HESS, *supra* note 37, at 12.

<sup>241</sup> *Id.* at 12-21.

<sup>242</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 7, nn. viii-x.

<sup>243</sup> *Id.* at 7, n. viii.

<sup>244</sup> *Id.* at 7, n. x.

do that manifest respect for students, including, letting students know that the professor expects to also learn from the students,<sup>245</sup> memorizing students' names,<sup>246</sup> learning about students' reasons for attending law school, asking students to share something the professor doesn't know about them,<sup>247</sup> and explaining the professor's rationales for her grading practices.<sup>248</sup> The Teacher's Manual notes ways in which contracts professors can manifest sensitivity to students in other ways, such as being aware of the areas of law with which they struggle<sup>249</sup> and respecting their autonomy, particularly when they react emotionally to perceived doctrinal inadequacies.<sup>250</sup>

The text and Teacher's Manual devote particular attention to the need for variety. Variety, as Gerry Hess explains elsewhere in this issue,<sup>251</sup> is a crucial component of effective teaching. *Teaching Law by Design* explains "[v]ariety keeps the class interesting, engages students in different levels of thinking, and addresses different learning preferences."<sup>252</sup> Law professors "can inject variety into many aspects of [their] teaching—objectives, teaching and learning methods, materials, and evaluation."<sup>253</sup>

Consequently, the text and teacher's manual provide learning objectives across a wide spectrum of skills, knowledge and values. For example, the course objectives in the text include goals that address knowledge of contract law, the skills involved in performing legal analysis, expert learning skills, and contract reading and drafting skills,<sup>254</sup> and the sample Course Policies handout in the teacher's manual includes goals addressing professional values such as respect, cooperation, moral lawyering, reliability, and critical self-reflection.<sup>255</sup>

<sup>245</sup> See *id.* at 2, 7, n. xiii.

<sup>246</sup> *Id.* at 34.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 95, 201, 215 (noting that students struggle with illusory promise, specific performance, and the parol evidence rule).

<sup>250</sup> *Id.* at 70-71.

<sup>251</sup> Gerald F. Hess, *Value of Variety: An Organizing Principle to Enhance Teaching and Learning*, 3 ELON L. REV. 65 (2011).

<sup>252</sup> *Id.*; SCHWARTZ, SPARROW & HESS, *supra* note 37, at 116; See also Hess, *supra* note 251, at 13-18 (demonstrating different teaching and learning methods to achieve variety).

<sup>253</sup> SCHWARTZ, SPARROW & HESS, *supra* note 37, at 17.

<sup>254</sup> SCHWARTZ & RIEBE, *supra* note 39, at xxvii-xxviii.

<sup>255</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 2.

Similarly, the sample Course Policies lists the following teaching methods as among the methods the professor will use in the course: “Socratic[s]ocratic, lecture, clicker questions, cooperative learning experiences, law practice simulations, charts and other graphic organizers, contracts drafting exercises, and optional, online multiple-choice tests.”<sup>256</sup>

As explained above, the texts include a wide variety of materials, prompting students to study and analyze a wide variety of legal materials, including cases, statutes, restatement sections, complaints, answers, stipulations, professional memoranda, and contracts.<sup>257</sup>

Finally, as explained below, the text and teacher’s manual provide the materials, ideas and teaching suggestions necessary to allow contractsContracts professors to engage their students in multiple and varied forms of formative and summative assessment.<sup>258</sup>

### Improvement 12: Suggestions Relating to Specific Teaching Techniques

While the sample Course Policies document suggests contract-sContracts professors use a wide variety of teaching methods, the teaching notes detail how and when to use those techniques. The idea is to arm law teachers with a wide variety of choices from which they can draw and to assist them in successfully doing so.

Many of the specific teaching recommendations in the *contractsContracts* teacher’s manual encourage contractsContracts professors to integrate cooperative learning experiences in their teaching. Cooperative learning is perhaps the best documented and most effective teaching methods.<sup>259</sup>

“[C]ooperative learning fosters [among other things] . . . more student learning and better academic performance, development of problem solving, reasoning, and critical thinking skills, positive student attitudes towards the subject matter and course, . . . and students’ willingness to consider diverse perspectives.”<sup>260</sup>

Consequently, the *contractsContracts* teacher’s manual recommends and explains how to best use cooperative learning groups in a

<sup>256</sup> *Id.* at 3.

<sup>257</sup> *See, supra* notes 60-80 and accompanying text.

<sup>258</sup> *See, infra* notes 287-302 and accompanying text.

<sup>259</sup> SCHWARTZ, SPARROW & HESS, *supra* note 37, at 19.

<sup>260</sup> *Id.*

significant number of places throughout the course. For example, the teacher's manual addresses whether to allow students to create their own groups,<sup>261</sup> encourages professors to ask their students to sit together with their fellow group members<sup>262</sup> (so that classroom time is not devoted to the students getting together with their fellow group members), suggests exercises for which working in pairs would be a good idea,<sup>263</sup> and identifies complex problems and skills for which cooperative learning exercises would be particularly useful.<sup>264</sup> One such exercise includes more detailed information about best practices for managing groups and minimizing the free rider problem,<sup>265</sup> and another exercise walks the professor through the process of using a particular type of cooperative learning exercise: group-pair-solo.<sup>266</sup> The teacher's manual also provides an explanation of how to use a variety of cooperative learning techniques as a tool for preparing students for their final exams in Ccontracts.<sup>267</sup>

As detailed above, the *contractsContracts* text and teacher's manual includes many exercises designed to be simulations and role plays, including a client interview,<sup>268</sup> oral arguments,<sup>269</sup> a client counseling exercise in which the client requests legal advice via text message,<sup>270</sup> and a client meeting in which the students, in role as in-house counsel, have five minutes to explain (to the president of the company) their analysis of and recommendations regarding a challenging insurance coverage issue.<sup>271</sup> The teacher's manual also describes in depth a role play designed to help students understand in a personal way the idea of benefit of the bargain damages,<sup>272</sup> a concept with which some contractsContracts students struggle.

Another effective set of teaching techniques for which the teacher's manual provides materials and ideas are called Classroom Assessment Techniques. These techniques help teachers determine

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<sup>261</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 34.

<sup>262</sup> *Id.*

<sup>263</sup> *See, e.g., id.* at 36, 45, 188, 256.

<sup>264</sup> *Id.* at 52, 176, 216, 238.

<sup>265</sup> *Id.* at 216.

<sup>266</sup> *Id.* at 238.

<sup>267</sup> *Id.* at 372-73.

<sup>268</sup> SCHWARTZ & RIEBE, *supra* note 39, at 176.

<sup>269</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 74; SCHWARTZ & RIEBE, *supra* note 39, at 419.

<sup>270</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 141.

<sup>271</sup> SCHWARTZ & RIEBE, *supra* note 39, at 459, 488.

<sup>272</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 157-61.

whether their students have learned what they were supposed to learn in connection with a particular class or unit of instruction.<sup>273</sup> The techniques involve making direct inquiries to students regarding what they are learning, what is confusing them, what teaching techniques are working for them, and how we can help the students learn more effectively.<sup>274</sup> The students respond anonymously<sup>275</sup> responding in five minutes or less to prompts asking them to: explain a course concept, articulate a case holding, identify what is confusing them, define professional behavior in the classroom, plan how they will study the next topic, or evaluate a teaching technique.<sup>276</sup>

The *Ccontracts* text and teacher's manual weave in a number of built-in Classroom Assessment Activities, including a question asking the students to explain their planned process for determining whether a particular communication expresses the commitment required by the offer rule,<sup>277</sup> a question asking them to identify what is confusing them with respect to manner of acceptance,<sup>278</sup> a question prompting the students to identify which teaching techniques are working for them in the course,<sup>279</sup> and a question asking them to describe their process for identifying ambiguities in contract terms.<sup>280</sup> The text message activity described above<sup>281</sup> is also a Classroom Assessment activity.

### Improvement 13: Visuals, Including PowerPoint Slides with Embedded Multiple-Choice Questions

Visuals "can be highly effective" as a teaching tool, and PowerPoint, in particular, "can work really well."<sup>282</sup> However, PowerPoint is most effective if the slides are not stuffed with more information than the students can process, use white space effectively, use color and clipart judiciously, and do more than merely transmit information.<sup>283</sup> Consequently, on a DVD that accompanies the teacher's manual, the teaching materials include PowerPoint slides for every unit of instruction that the author created based on the princi-

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<sup>273</sup> SCHWARTZ, SPARROW & HESS, *supra* note 37, at 149.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 150.

<sup>276</sup> *Id.* at 151-52.

<sup>277</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 46.

<sup>278</sup> *Id.* at 61.

<sup>279</sup> *Id.* at 72-73.

<sup>280</sup> *Id.* at 243.

<sup>281</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 141.

<sup>282</sup> SCHWARTZ, SPARROW & HESS, *supra* note 37, at 128.

<sup>283</sup> *Id.* at 128-129.

ples described above.<sup>284</sup> The included slideshows include additional hypotheticals not included in the text, visual metaphors for concepts, and advanced organizers.<sup>285</sup>

The slideshows also include multiple-choice questions professors can use to assist students in self-assessing their learning.<sup>286</sup> One possible use of these questions would be to use what are commonly referred to as “the clickers,” which are devices with which students communicate their individual answers to multiple-choice questions and which generate, for each question, a visual report of how their peers answered the question.<sup>287</sup> If a contracts professor does not teach at a law school where clickers are available, she can have students hold up sheets of paper on which they have written their answers or respond by a show of hands. These multiple-choice questions are, as explained below in section E, one of the many tools the teacher’s manual provides law teachers so they can provide formative feedback to their students without killing themselves.

E. *Casebook Design Principles Focused on Formative  
and Summative Assessment*

Improvement 14: Resources for Providing Formative Assessment and  
Enhancing Summative Assessment

There is considerable agreement that formative assessment, also known as practice and feedback, is essential to learning.<sup>288</sup> Smith and Ragan identify practice and feedback as among the key learning activities necessary to produce learning<sup>289</sup> and as two of the “events of instruction” applicable to all types of learning ranging from acquiring knowledge to solving complex problems.<sup>290</sup>

Consequently, the books in the *Context and Practice* series provide the resources law teachers need to provide such practice and feedback without killing themselves. *contracts* includes more than a

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<sup>284</sup> SCHWARTZ TEACHER’S MANUAL, *supra* note 63, DVD.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. LEGAL EDUC. 551, 560-61 (2004).

<sup>288</sup> SCHWARTZ, SPARROW & HESS, *supra* note 37, at 137; NELSON MILLER, TEACHING LAW: A FRAMEWORK FOR INSTRUCTIONAL MASTERY 100-01 (2010). *See also*, STUCKEY ET AL., *supra* note 10, at 255- 59.

<sup>289</sup> SMITH & RAGAN, *supra* note 88, at 130.

<sup>290</sup> *Id.*

dozen essay questions in a form typical of law school exams,<sup>291</sup> and the teacher's manual provides answers for all of the questions.<sup>292</sup> In addition, another five problems in *contractsContracts*, while presented as law practice problems, require students to deploy the same skill sets and knowledge they would need to use on law school exams,<sup>293</sup> and, again, the teacher's manual provides answers.<sup>294</sup>

The teacher's manual for *Ccontracts* offers suggestions for using these problems in ways that will minimize the burden on the teacher. The suggestions include: practice tests with peer feedback using the model answer in the teacher's manual, practice tests with self-grading using the model answer in the teacher's manual, practice tests where the teacher reviews two or three typical answers,<sup>295</sup> and group projects/competitions.<sup>296</sup>

Optimal summative assessment requires more than just an end-of-term examination.<sup>297</sup> As Professor Greg Munro of the University of Montana explains, "[aA] valid, reliable and fair picture of the student's ability is much more likely to exist if the measures are done several times using different modes of evaluation."<sup>298</sup> In other words, by increasing the number of summative assessments they administer, law professors can test a wider range of skills and knowledge, and do so in multiple ways on multiple occasions.

Of course, one constraint on a law professor's ability to adopt multiple assessments is the quantity of work involved in reading and evaluating a large number of student essays.<sup>299</sup> Because many *contractsContracts* classes have as many as 80 students, and because law professors must also publish and provide institutional and commu-

<sup>291</sup> SCHWARTZ & RIEBE, *supra* note 39, at 51-52, 82-83, 149-51, 373-74, 724-30.

<sup>292</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 52, 469-79, 484-88, 213-14, 373-83.

<sup>293</sup> SCHWARTZ & RIEBE, *supra* note 39, at 15-17 (case evaluation), 175-77 (case evaluations/advice to client re merits of case), 459-62 (case evaluation in preparation for meeting with company president), 635-39 (case evaluation).

<sup>294</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 481-83, 151-53, 251-52, 340.

<sup>295</sup> *Id.* at 8, n. xxiv, 109, 201.

<sup>296</sup> *See, e.g., id.* at 52.

<sup>297</sup> STUCKEY ET AL., *supra* note 10, at 239, 253-55; SCHWARTZ, SPARROW & HESS, *supra* note 37, at 155-58.

<sup>298</sup> Gregory S. Munro, *How Do we We know if If We are Are Achieving Our Goals?: Strategies for Assessing the Outcome of Curricular Innovations*, 1 J. ASS'N LEGAL WRITING DIRECTORS 229, 237 (2002).

<sup>299</sup> STUCKEY ET AL., *supra* note 10, at 254.

nity service, this constraint usually causes law professors to choose to limit their assessment to a single final exam.<sup>300</sup>

Consequently, books in the series strive to provide mechanisms for helping law teachers expand their graded assignments to include more and more varied summative evaluations. Most significantly, the teacher's manual for *contractsContracts* includes a 300+ question bank of multiple choicemultiple-choice questions.<sup>301</sup> While the questions are printed in the teacher's manual, they are provided electronically to allow professors to modify the questions to their liking. The questions are correlated with the text so that *contractsContracts* professors can use the questions to provide practice and feedback, as part of topic-by-topic quizzes, or as part of midterm and final examinations.

In addition, most of the drafting assignments in the text require students to create short, one or two-paragraph contract terms that a law teacher can assess speedily.<sup>302</sup> The professional development reflection questions in *Contracts* coand the professional identity questions in *Civil Procedure for all States* also can be assessed as short, required assignments. Finally, the sample course policies for *contractsContracts* includes a graded "professional development obligation," which students can satisfy by a reflection essay and by either (1) keeping a journal based on the professional development reflection questions, (2) by taking a series of online, optional multiple-choice review tests, by (3) their postings to the class course webpage, or (4) by a combination of the foregoing options.<sup>303</sup>

#### F. Conclusion: Where Might We Head Next?

There is no doubt that law school texts have considerable room for improvement. In the past 50 years, both education theory and our practical understanding of what teaching methods and materials work best have grown exponentially. Likewise, it is clear that c. Contrary to the ideal, legal education is falling far short of producing practice-ready, thoughtful, reflective practitioners. Moreover, as a legal education has become more and more expensive, so have casebooks. Many of today's casebooks sell for more than \$150. Thus, law school

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<sup>300</sup> See *supra* note 9 and accompanying text.

<sup>301</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 501-607.

<sup>302</sup> See, e.g., SCHWARTZ & RIEBE, *supra* note 39, at 359 (liquidated damages clause), 522-23 (timely performance clause), 597 (demand for assurances), 684 (no assignments clause).

<sup>303</sup> SCHWARTZ TEACHER'S MANUAL, *supra* note 63, at 4-5.

casebooks, the core instructional materials in legal education, cost more yet deliver little more than they always have delivered.

The *Context and Practice Series* casebooks represent a first and ambitious effort to synthesize learning insights from modern learning theory and instructional design and the recommendations of the recent Carnegie and Best Practices studies of legal education. Books in the series will also be less expensive than other law school texts; *contractsContracts*, for example, sells for \$85. For these reasons, the *Context and Practice Series* is an exciting first step in the needed overhaul of legal education.

There are other exciting developments. Legal publishers are increasingly willing to allow law teachers to combine materials from multiple casebooks to create personalized versions of casebooks. This approach, while so far limited to the books offered by a single publisher, is promising. Publishers also are experimenting with electronic casebooks and enhanced visuals. All of these efforts are encouraging, but there nevertheless remains substantial a lot of room for improvement.

The future of law school instructional materials depends on two rapidly progressing fields: instructional technology and cognitive science. When it becomes reasonable and cost effective to create computer simulations that allow students to interact with imagined clients, make decisions, get individualized feedback, and reflect on the success of their decisions, those who design instructional materials will have a great opportunity to create increasingly authentic learning experiences that allow students to learn to practice law by doing so. At the same time, as our understanding of the brain and the learning process grows, we will inevitably develop even better techniques for helping students learn, remember, and be able to deploy legal doctrine and skills and adopt the values of the profession.

However, both now and in the future, the only measure of the success of instructional materials, including the books in *the Context and Practice Series*, is whether they help students learn more and learn better.

