

# Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching

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## TABLE OF CONTENTS

I.	INTRODUCTION AND OVERVIEW .....	349
A.	<i>The Law School Vicarious Learning/Self-Teaching Model</i> .....	351
II.	WHY LAW SCHOOL TEACHING HAS STAGNATED .....	360
A.	<i>The Pressure to Conform to the Vicarious Learning/Self-Teaching Model</i> .....	360
B.	<i>Law Teachers' Disinclination to Tailor Instruction to Their Learners' Aptitudes, Skills, Self-Images, Cultural Backgrounds, and Experiences</i> .....	362
C.	<i>Law Teachers' Familiarity and Comfort with the Vicarious Learning/Self-Teaching Model and the Ease of Defending the Model</i> .....	364

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III.	BACKGROUND OF LEARNING THEORY .....	365
A.	Behaviorism.....	367
1.	Explanation of Behavioral Theory.....	367
2.	Implications of Behavioral Theory for the Development of Law School Instruction.....	368
B.	Cognitivism.....	371
1.	Explanation of Cognitivist Theory.....	371
2.	Implications of Cognitivist Theory for the Design of Law School Instruction.....	375
C.	Constructivism.....	379
1.	Basic Tenants of Constructivism .....	379
2.	Implications of Constructivist Theory for the Design of Law School Instruction.....	380
D.	Final Comments Regarding the Learning Theory Discussion .....	383
IV.	INSTRUCTIONAL DESIGN THEORY AND PRACTICE.....	383
A.	Overview of the Instructional Design Process.....	383
B.	The Analysis Phase.....	384
1.	Assessment of the Learning Context .....	384
2.	Assessment of the Learners.....	386
a.	Law Instruction Practices with Respect to Learner Characteristics .....	389
b.	Analysis of Western State Law Students .....	390
c.	Design Implications .....	391
3.	Assessment of the Learning Task.....	392
a.	Identifying Learning Goals.....	394
b.	Determining the Types of Learning Involved in a Learning Goal (or Subgoal).....	394
c.	Conducting an Information-Processing Analysis .....	398
i.	A Partial Illusory Promise Information- Processing Analysis .....	399
d.	Performing a Prerequisite Analysis for Each Step Identified in the Information-Processing Analysis .....	401
i.	A Prerequisite Analysis for Performing Step Four of the Illusory Promise Analysis.....	402
e.	Writing Learning Objectives.....	403
4.	Assessing Learning from Instruction .....	404
C.	The Design Phase: Selecting Instructional Strategies .....	409
1.	The Events of Instruction.....	409
a.	The Instructional Introduction.....	410
b.	The Body of the Lesson.....	410
c.	The Conclusion of the Lesson .....	418
d.	Assessment.....	420
2.	Making Choices Along the Supplative- Generative Continuum.....	420
a.	Supplative-Generative Analysis .....	423
3.	Selecting Delivery Systems .....	424
a.	Selecting the Media of Instruction.....	424
b.	Selecting Grouping Strategies .....	426
V.	AN ILLUSTRATIVE LESSON PLAN .....	427

A.	Introduction .....	427
B.	An Illusory Promise Lesson Plan .....	428
1.	Introduction .....	428
a.	Deploy Attention and Arouse Interest and Motivation .....	428
b.	Establish Instructional Purpose and Preview Lesson .....	429
2.	Body .....	430
a.	Recall Prior Knowledge .....	430
b.	Process Information and Examples, Focus Attention (Part One), and Practice (Part One) .....	431
c.	Practice (Part Two) .....	432
d.	Employ Learning Strategies .....	433
e.	Process Information and Examples, Focus Attention (Part Two), and Evaluative Feedback (Part One) .....	433
f.	Practice (Part Three) and Evaluative Feedback (Parts Two and Three) .....	434
g.	Practice (Part Four), Evaluative Feedback (Part Four), and Transfer (Part One) .....	435
3.	Conclusion .....	435
a.	Summarize and Review, Transfer (Part Two), and Remotivate and Close .....	435
4.	Assessment .....	436
a.	Assessment, Evaluative Feedback, and Remediation .....	436
C.	Final Comments Regarding the Sample Plan .....	436
VI.	FORMATIVE AND SUMMATIVE EVALUATION .....	437
VII.	CONCLUSION .....	438
	APPENDIX .....	440

## I. INTRODUCTION AND OVERVIEW

Although law teachers generally have salutary educational goals and some individual law teachers have intuited and developed insightful experimental instruction, law school instruction as a whole, remains locked in an instructional methodology of dubious merit.<sup>1</sup> That method,

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1. The author agrees with Professor Duncan Kennedy's assertion that law schools teach lawyering skills in a way that "almost completely mystifies them for almost all law students." Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 596 (1982); see also Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971); Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 135-36 (1968).

characterized here as the Vicarious Learning/Self-Teaching Model, has persisted since Christopher Columbus Langdell's tenure at Harvard Law School in the 1870s.<sup>2</sup> It has persisted even in the face of the explosive evolution of learning theory throughout the twentieth century and the rise, in the second half of the century, of the field of instructional design, a field devoted to the systematic and reflective creation of instruction.<sup>1</sup>

As nearly all law professors know, nine years ago, the MacCrate Report<sup>4</sup> spawned a national discussion of the skills and values law school graduates should possess.<sup>5</sup> Although this discussion of what law students should learn is necessary, it addresses, at most, one-half of the equation. Good learning goals mean nothing if the instruction does not succeed in producing learners who have achieved those goals. In other words, what is missing is an educationally sound body of law school andragogy<sup>6</sup> scholarship, a body of scholarship that applies twentieth century developments in the fields of learning theory and instructional design to the design of law school instruction.

This Article examines the law school Vicarious Learning/Self-Teaching Model in light of learning theory and instructional design. Further, it identifies both the good intuitions<sup>7</sup> and the many deficiencies

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This Article does not address clinical legal education, externship experiences, legal writing, and other professional skills courses. Such experiences and courses have not and cannot adopt the Vicarious Learning/Self-Teaching Model and, therefore, are beyond the scope of this Article. The author perceives that such courses may be educationally superior but has neither considered nor evaluated the courses in connection with this Article.

2. See also Watson, *supra* note 1, at 116; ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

3. See *infra* Parts III-IV.

4. AMERICAN BAR ASSOCIATION, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS & PROFESSION: NARROWING THE GAP* (1992) [hereinafter MACCRATE REPORT].

5. See, e.g., Cynthia G. Hawkins-León, *The Socratic Method-Problem Method Dichotomy: The Debate over Teaching Method Continues*, *BYU EDUC. & L.J.*, Spring 1998, at 1; Alan M. Lerner, *Law & Lawyering in the Workplace: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solvers*, 32 *AKRON L. REV.* 107 (1999); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 *BAYLOR L. REV.* 201 (1996).

6. The proper term for instruction directed at adults is andragogy, which refers to teaching adults, and not pedagogy, which refers to teaching children. The "ped-" prefix refers to children, whereas the "andra-" prefix refers to adults. Linda Morton et al., *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Legal Externs*, 5 *CLINICAL L. REV.* 469 (1999).

7. The author agrees with Jan Heck, a professional instructional designer affiliated with Coastline Community College, that good teachers intuit many effective instructional techniques. The problem with such intuitions is that they are neither reflective, in the sense that the professors do not understand why what they are doing works, nor comprehensive, in the sense that they seldom span entire courses, much less the entire curriculum.



in how law professors develop and present instruction. More importantly, this Article offers a dramatically different approach to law school instruction, an approach more likely than current law teaching methodologies to produce effective, efficient, and appealing<sup>8</sup> law school instruction.

#### *A. The Law School Vicarious Learning/Self-Teaching Model*

While other characterizations of law teaching are possible, two aspects of law teaching epitomize how law professors teach law. First, law teaching requires students to learn vicariously. Second, law teaching requires law students to teach themselves. This Article classifies the approach as vicarious because law professors structure classroom interactions as one-on-one, professor-on-student dialogues. Professors expect that the other students in the classes will learn by watching these interactions. Regardless of whether a law professor classifies herself as a “case-method”<sup>9</sup> instructor or as a “problem-method”<sup>10</sup> instructor, most, if not all, classroom instruction involves such one-on-one dialogues. Vicarious instruction assumes some sort of rebound learning effect; somehow the professor’s comments, questions, and corrections of the selected student not only will help the selected student, but will rub off on all the students in the class. This method also presupposes that the nonselected students know to play along, answering the queries in their heads and learning to think like lawyers by experiencing vicariously what the speaking student actually experiences.<sup>11</sup>

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8. See PATRICIA L. SMITH & TILLMAN J. RAGAN, *INSTRUCTIONAL DESIGN* 8 (2d ed. 1999) (asserting that effectiveness, efficiency, and appeal “are considered indicators for success” in instructional settings).

9. This Article uses the term “case-method” to refer to an instructional approach in which the students read and brief cases. Most classroom instruction focuses on understanding the cases, deriving the precedential effect of the cases, and identifying and discussing underlying policies and counterpolicies. See Jay M. Feinman, *The Future History of Legal Education*, 29 RUTGERS L.J. 475, 476 (1998); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 581–83 (1987).

10. This Article uses the term “problem-method” to refer to an instructional approach in which students prepare answers to problems. Furthermore, the students must derive the meaning of assigned cases and the precedential effect of those cases. See Hawkins-León, *supra* note 5.

11. The author has serious doubts as to whether law students, particularly new law students, actually play along. He suspects many focus either on their relief at not being called on or their fear of being called on next. He bases his suspicion on the fact that, when he switches from selected students to one of the watching students at a time the

This Article classifies law school instruction as self-teaching because, for the most part, law professors expect students to figure out on their own what the students need to know and what they need to be able to do to succeed in the class. During classroom instruction, law professors hope the combination of their classroom comments and their critiques of students' comments will enhance students' legal reasoning, case analysis, issue spotting, drafting, and policy analysis skills, will open the students' minds to legal theory, will allow the students to understand the doctrine under study, and will encourage students to develop desired values. Law teachers, however, usually fail to identify for their students (and, sometimes, even for themselves) which goals they are teaching at any given moment. This approach requires the students not only to sort the insightful student comments from the comments lacking insight, but also to figure out, from the professor's comments and questions, both the professor's instructional goals and the relationships between those goals and the instruction presented.

Moreover, while most professors critique the selected students' classroom attempts to perform legal analysis, law professors fail to state explicitly what students need to know, or to explain how to spot legal issues or to perform legal analysis.<sup>12</sup> In fact, law professors devote considerable classroom time to critiquing students' case reading and case evaluation skills even though, ironically (or, perhaps, perversely), law professors seldom test case reading skills explicitly. Of course, many law professors do require or encourage students to apply and distinguish cases in their examination answers, but requiring and encouraging the use of cases already studied and discussed in class does not test whether students have developed the skills of reading and analyzing new court opinions. The classroom discussions certainly cannot be considered adequate tests of these skills. Such discussions are not really tests at all and, even if they were, they would be unsound from a testing perspective<sup>13</sup> for a couple of reasons. First, some students use canned briefs to prepare for class. Second, some students, particularly students who are shy or whose cultural backgrounds cause them to eschew conflict with an authority figure, may be unable to demonstrate their skills in an oral interaction with their instructor in front of sixty to eighty of their peers.

Law professors do not expect students to figure out everything on their own; professors encourage students to form study groups to enhance the

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watching students do not expect him to do so, the response he most frequently hears is, "What was the question?"

12. See Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 425 n.16 (1986).

13. See *infra* notes 264–79 and accompanying text.

students' self-teaching.<sup>14</sup> Likewise, law professors acknowledge that resources such as hornbooks, commercial outlines, nutshells, and guides to legal reasoning techniques exist to help students learn what they need to learn. Many professors, however, portray those resources either as too detailed and too long to be useful (hornbooks), or as too misleading or too oversimplified to be useful (commercial outlines, nutshells, and guides to legal reasoning). In any event, law professors never assign reading from these resources and never discuss specifics about the content of these resources in class. Ultimately, students must teach each other and themselves.

Law teaching methodologies, of course, are not uniform. Individual instructors have tinkered with the traditional methodology by creating experimental courses and by experimenting with different teaching methods in their classrooms. These professors report improved learning outcomes.<sup>15</sup> In addition, law faculties have engaged in curricular reforms, increasing law schools' emphasis on the skills and knowledge needed by practicing lawyers.<sup>16</sup> Moreover, legal writing and other professional skills courses, clinical experiences, and externship programs likely avoid many of the problems associated with the Vicarious Learning/Self-Teaching Model.

Nevertheless, as Jay Feinman and Marc Feldman asserted in 1985, on the whole, law teachers are "anti-intellectual" about their teaching,<sup>17</sup> and law school teaching methodologies have remained mired in a Langdellian tar since the 1870s.<sup>18</sup> While these deficiencies run across the entire

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14. Law professors, however, do not teach students how to operate effective study groups, how to learn from study groups, or even what they should do in their study groups. Because new law students are novices in lawyering skills, the best study groups tend to focus solely on what their prior educational experiences taught them they needed to focus on: acquiring knowledge. Each student is left to develop on his or her own the skills necessary to succeed in law school.

15. See, e.g., Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 875, 900-25 (1985) (describing their "Contorts" class and use of mastery learning principles); Edith R. Warkentine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112 (2000).

16. See, e.g., John B. Mitchell et al., *And Then Suddenly Seattle University Was on Its Way to a Parallel, Integrative Curriculum*, 2 CLINICAL L. REV. 1 (1995); Gregory S. Munro, *Integrating Theory and Practice in a Competency-Based Curriculum: Academic Planning at the University of Montana School of Law*, 52 MONT. L. REV. 345 (1991).

17. Feinman & Feldman, *supra* note 15, at 875.

18. See Feinman & Feldman, *supra* note 15; Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970); Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948) [hereinafter Llewellyn, *Current Crisis*]; K. N. Llewellyn, *On What is Wrong with So-Called Legal*

spectrum of American law schools and law students, the deficiencies are particularly problematic for all but the very best law students.<sup>19</sup> In other words, for better students, their legal education is irrelevant. These students possess the skills and have developed the learning strategies<sup>20</sup> with which to develop the legal reasoning skills they need as lawyers no matter how they are taught in law school.<sup>21</sup> On the other hand, students who enter law school with lesser skills and less developed learning strategies depend on their instruction to succeed in law school, on the bar exam, and in practice. What they get is the Vicarious Learning/Self-Teaching Model of instruction.

To understand the problem with this method, try to imagine using the Vicarious Learning/Self-Teaching Model to teach a skill entirely unrelated to law school, like swimming.<sup>22</sup> Assume the learner has above average but not extraordinary athletic skills but never has seen anyone swim.<sup>23</sup> Make sure the teacher for the class possesses both extraordinary natural athletic ability and learning strategies so that learning gross motor skills comes easily.<sup>24</sup> Do not teach the teacher anything about teaching or designing a class.<sup>25</sup> Put the learner in a class with sixty other prospective swimmers, all of whom enter the class with varying but generally similar athletic skill and experience. Adopt the following teaching approach:

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*Education*, 35 COLUM. L. REV. 651 (1935) [hereinafter Llewellyn, *On What is Wrong*]; Stone, *supra* note 1; Wangerin, *supra* note 12; Watson, *supra* note 1; see also GRANT GILMORE, *THE DEATH OF CONTRACT* 13–15 (Ronald K.L. Collins ed., 2d ed. 1995) (describing Langdell's first Contracts casebook as having "nothing whatever to do with getting students to think for themselves" and asserting that the method was "indoctrination through brainwashing").

19. Law professors frequently complain about their students' bluebook performances. See, e.g., Feinman & Feldman, *supra* note 15, at 881–82 (reporting the authors' disappointment when they read students' examination answers and asserting that many students in law school simply do not learn). At the time Professors Feinman and Feldman authored *Pedagogy and Politics*, they were teaching at Rutgers Camden, a school commonly classified as a middle tier American law school.

20. A learning strategy is a technique for maximizing learning from instruction. See Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALBANY L. REV. 471, 472–73 (identifying teacher study, time management, efficient reading, note taking, review, and problem solving as studying and learning strategies); see also, ADAM ROBINSON, *WHAT SMART STUDENTS KNOW: MAXIMUM GRADES, OPTIMUM LEARNING, MINIMUM TIME* (1993).

21. See generally Kennedy, *supra* note 1.

22. Professor Wangerin notes that law professors sometimes see themselves as "coaches." Wangerin, *supra* note 12, at 477–82.

23. Many beginning law students at nonelite schools could be similarly classified as having above average intellectual capacity. Many of these students do not have relatives who are lawyers and, in fact, some have no relatives who even graduated from college, much less graduated from law school.

24. Law professors, even at lower tier schools, tend to have attended more elite law schools and to be among the highest achievers.

25. Law professors receive little or no instruction in teaching, and no instruction at all in designing instruction for others.

have the learners watch swimmers swim, some of whom are excellent swimmers and some of whom are not particularly good swimmers,<sup>26</sup> and then have fifty-nine of the students watch as one of their number is forced to demonstrate the swimming skills she developed by watching. Over the course of a fourteen-week semester, give each learner, at best, two opportunities to practice what she has learned, but only in front of her peers. Administer, at most, one graded midterm<sup>27</sup> and one final, at which time the students must demonstrate their swimming skills or risk never being allowed to swim on their own.<sup>28</sup>

Assume, that to evaluate this hypothetical swim school, we were to adopt the standard that instruction should be effective, efficient, and appealing.<sup>29</sup> Assume further that we chose to measure effectiveness by Benjamin Bloom's well-known mastery learning standard,<sup>30</sup> which asserts that teaching is effective only if eighty percent of the learners learn eighty percent of the material.<sup>31</sup> The swim school's teaching methods appear to fail on all three counts. First, some of the learners will learn to swim because they possess the ability to self-teach or to learn from varied instructional approaches so they are able to learn in this environment. Most of the learners, however, will learn much less than eighty percent. Second, for those who do not learn, the instruction will have been a waste of their time. Moreover, given that swim schools generally manage to teach virtually all of their students to swim in much less than fourteen weeks, the approach must be deemed inefficient for all of the learners. Finally, it seems that few students will find the method appealing because they spend most of the time uninvolved in their own learning; one would predict such students to experience great frustration

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26. The reference to having some of the swimming demonstrators be "not particularly good swimmers" refers to the fact that some of the opinions included in casebooks are not particularly well reasoned. See, e.g., JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* 261-64 (7th ed. 1998) (including cases in which the reasoning is very superficial, such as *East Providence Credit Union v. Geremia*, 239 A.2d 725 (R.I. 1968)). In *Geremia*, the court analyzed the three elements of promissory estoppel with the following one line: "After a study of the facts in this case, our reply to each of the above inquiries [each element of promissory estoppel stated as a question] is a definite 'yes.'" 239 A.2d at 728.

27. Many law instructors do not administer a midterm.

28. This methodology description intentionally parallels the above discussion of the vicarious and self-teaching characteristics of law teaching. See *supra* notes 9-14 and accompanying text.

29. See generally *supra* note 8 and accompanying text.

30. Feinman & Feldman, *supra* note 15, at 896 & n.48.

31. *Id.*



and dissatisfaction.

In fact, although many people have learned to survive in the water by watching and imitating others, most people who have developed formal swimming skills learned to swim through one-on-one or small group instruction. Swim instructors emphasize key skills, such as small, fast kicks and breathing to both sides. They teach learning strategies, such as remembering and repeating “one, two, three, bubble out, breath” while swimming so that students can recall the proper sequence of the freestyle stroke. They also provide repeated practice opportunities and give feedback to help develop skills, reinforce appropriate body movements, and correct erroneous body movements. Some swimmers, even those who later became strong swimmers, also needed explanations as to why the suggested methods work. Additionally, most students needed to practice the head, leg, and arm movements in isolation before they could combine the skills.

This second approach is not only a matter of common sense; it is what a professional instructional designer would prescribe. Instructional design, which has existed as a field of endeavor since the 1960s,<sup>32</sup> “refers to the systematic and reflective process of translating principles of learning and instruction into plans for instructional materials, activities, information resources, and evaluation.”<sup>33</sup> Instructional designers presuppose that there are core methodologies for teaching all subjects well.<sup>34</sup> Those methodologies, the product of thousands of educational studies performed across all instructional levels,<sup>35</sup> allow the instructional designer to tailor instruction to the learning characteristics of the learners, the needs of the instructional system, and the nature of the learning task.

This Article applies learning theory and the theories and principles of instructional design to the law school Vicarious Learning/Self-Teaching Model. It further considers the extent to which law professors

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32. See WALTER DICK & LOU CAREY, *THE SYSTEMATIC DESIGN OF INSTRUCTION* 5 (4th ed. 1996) (noting that their approach is “an outgrowth of more than twenty-five years of research into the learning process”).

33. SMITH & RAGAN, *supra* note 8, at 2.

34. See *id.* at v.

35. See generally *id.* In the appendixes to each of the twenty chapters in their text, Smith and Ragan cite an average of slightly more than fifty articles and books. See also DICK & CAREY, *supra* note 32, at 5. Other major works in the fields of learning theory and instructional design include: ROBERT M. GAGNÉ, *THE CONDITIONS OF LEARNING AND THEORY OF INSTRUCTION* 3 (1985); ROBERT F. MAGER, *PREPARING INSTRUCTIONAL OBJECTIVES* (2d ed. 1975); I.P. PAVLOV, *CONDITIONED REFLEXES: AN INVESTIGATION OF THE PHYSIOLOGICAL ACTIVITY OF THE CEREBRAL CORTEX* (G.V. Anrep ed. & trans., Dover Publications 1960) (1927); B.F. SKINNER, *THE BEHAVIOR OF ORGANISMS: AN EXPERIMENTAL ANALYSIS* (1938); *CONSTRUCTIVISM AND THE TECHNOLOGY OF INSTRUCTION: A CONVERSATION* (Thomas M. Duffy & David H. Jonassen eds., 1992); Bloom, *supra* note 30. In addition to the foregoing authors, other influential writers in the fields include: Jean Piaget, Lev Semionovich Vygotsky, and Jerome Bruner.



systematically and reflectively design their instruction. This Article assumes that the Vicarious Learning/Self-Teaching Model is sufficient to teach most law students the basic legal-analytical reasoning skills and that many law school professors intuit on their own some effective and efficient teaching methodologies. Nevertheless, law school instruction, on the whole, is not particularly effective, efficient, or appealing.

Persuasive evidence of the deficiencies in current law school instructional approaches already exists. In recent years, literature criticizing law school teaching methodologies have become the norm.<sup>36</sup> Moreover, the author is not aware of any law teachers who believe that eighty percent of their students learn eighty percent of the material. Most regard bluebook reading as a painful experience, which teachers enter with a mixture of fear and hope and leave feeling either that they are inadequate as teachers or that their students are inadequate as students.<sup>37</sup> Finally, while some schools' bar pass rates justify a conclusion that the students are at least receiving instruction minimally sufficient to meet the students' goal of becoming lawyers, bar pass rates among all takers have plunged below fifty percent in recent years.<sup>38</sup> Thus, law school teaching is not particularly effective.

Moreover, law teachers frequently complain that they have coverage problems, either objecting to being forced to cover some aspect of the substantive law or being given inadequate time to cover the material the

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36. See, e.g., K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1930); Feinman & Feldman, *supra* note 15; Kennedy, *supra* note 18; Llewellyn, *Current Crisis*, *supra* note 18; Llewellyn, *On What is Wrong*, *supra* note 18; Stone, *supra* note 1; Wangerin, *supra* note 12; Watson, *supra* note 1.

37. For a similar point, see Feinman & Feldman, *supra* note 15, at 881-82.

38. See Don J. DeBenedictis, *Success Rate Slips to 40 Percent*, L.A. DAILY J., May 31, 2000, at 1 (noting that the overall pass rate for all takers of the most recent California Bar Examination was forty percent). Having recently studied California's Bar exam in great depth as part of his law school's intensive bar pass program, the author is convinced that the bar tests students on the most superficial of analytical skills and tests knowledge more than anything else. The issues never require a discussion of policy and seldom require more than quite rudimentary analysis.

For example, students' scores on a February, 1997, remedies law question (question three of the essay section of the exam) turned in large part on students' simple recall of a relatively obscure point of contempt law, the Collateral Bar Rule. If the students recalled the rule, they passed one-fourth of the exam. Likewise, a July, 1998, evidence bar exam question (question six of the essay portion of the exam) required students to discuss, in one hour, over fifteen potential evidentiary objections, some of which had several subissues. Obviously, only knowledge of the rules and the most superficial form of analysis is being tested on the bar exam. Of course, the fact that bar exam questions require such superficial skills makes a low bar pass rate particularly damning.

professors want to cover. Likewise, students frequently complain about professors who choose to complete their course coverage through an end-of-semester rush through material. Thus, either law teachers try to teach too much or they do not teach the material in a way that minimizes wasted effort and maximizes students' educational resources. Thus, law teaching is not efficient.

Finally, commentators have criticized law school instruction for being frustrating, for fostering student feelings of inadequacy and for lacking clarity and coherence;<sup>39</sup> this commentary indicates that law school instruction is not appealing.

Given that law teaching is neither effective, efficient, nor appealing, it can greatly benefit from change. The goal of this Article is to offer a different, more systematic, and more reflective approach to creating law school instruction, and to suggest ways by which law school instruction can be made to work. In doing so, this Article offers a harsh critique of law school instruction from two well-established and relevant perspectives, the perspectives offered by learning theory and by instructional design theory and practice. This Article, therefore, aims broadly, seeking to serve as a resource to professors and schools interested in improving law school instruction.

Part II of this Article identifies and explores three factors that have caused law school teaching to remain stagnant: (1) the multiple pressures on law teachers to conform to the Vicarious Learning/Self-Teaching Model and the lack of incentives to change; (2) the legal academy's discomfort with the idea that not all law students should be taught in the same way; and (3) the large extent to which law professors are familiar and comfortable with the Vicarious Learning/Self-Teaching Model and can easily defend and readily use it.

Part III of this Article explores learning theory, focusing on the three major schools of learning theory—behaviorism, cognitivism, and constructivism—and on the aspects of these theories most relevant to designing law school instruction. This Part demonstrates why instructors at all levels should be familiar with all three schools and suggests the implications of each for law school instructional design.

In Part IV of this Article, the author compares current law school approaches to designing and implementing instruction with the "instructional design" approach. This Part first explains each of the

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39. See, e.g., Kennedy, *supra* note 18; Eugene F. Mooney, *The Media is the Message*, 21 U. MIAMI L. REV. 507 (1967); Robert S. Redmount, *Law Learning, Teacher-Student Relations, and the Legal Profession*, 59 WASH. U. L.Q. 853 (1981); Thomas L. Shaffer & Robert S. Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME LAW. 190, 190 (1976); Watson, *supra* note 1, at 121–22, 135–36; Lawrence Silver, Comment, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201.

phases in the instructional design process and then, for each phase, compares what law professors do with what instructional designers do. Instructional designers engage in a systematic, reflective process in which they consider learner, contextual and learning goal factors, tailoring their choices of methodologies to the interplay of these factors. In contrast, law professors tailor their instruction to the textbooks they have selected, to their theories of law (realist, law and economics, critical race theory, etc.) or to their own personal theories of what makes instruction effective.

To make the discussions concrete, this Article considers the implications of both learning theory and instructional design for a first-year Contracts course, focusing principally on a single topic, illusory promise.<sup>40</sup> The discussion focuses on illusory promise because this subject is one with which first-year law students struggle greatly.<sup>41</sup>

Part V of this Article is a detailed lesson plan integrating the principles discussed in the Article. The author has annotated the lesson plan to make it clear how each instructional choice reflects a careful adaptation of learning theory and instructional design theory and principles. This model lesson plan demonstrates concretely how law professors can improve their instruction by applying the principles discussed in this Article.

Finally, Part VI of this Article explains the processes involved in evaluating instruction, a crucial, integral design step that the law teaching community has seldom considered.

This Article demonstrates that learning theory and the field of instructional design offer significant promise for making law school

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40. For those who do not teach Contracts and are far removed from their law school study of the subject, a refresher on illusory promise may be helpful. "An [I]llusory [P]romise is an expression cloaked in promissory terms, but which, on closer examination, reveals that the promisor is not committed to any act or forbearance." JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 203 (4th ed. 1998). A frequently cited example of an illusory promise comes from a nineteenth century case, in which the promisor convinced a wife to guarantee the note of her husband by saying, "I will hold it [the husband's note] until such time as I want my money . . . ." *Strong v. Sheffield*, 39 N.E. 330, 331 (1895). The *Strong* court deemed the promise illusory because the use of the word "want" left the promisor free to demand repayment immediately and, therefore, it was illusory. *Id.*

41. There is, of course, some risk that the choice to emphasize illusory promise may cause readers of this Article to assume the principles discussed in this Article are only effective for teaching doctrine or legal reasoning skills. Such a perception would be wrong. The techniques and theory discussed in this Article are relevant to the creation of all instruction, including instruction addressing legal theory and values.

instruction effective, efficient, and appealing. Because law school instruction mostly occurs according to the Vicarious Learning/Self-Teaching Model, this Article proposes a radical overhaul of law school textbooks and instruction, a project currently in an early stage of development at the author's law school.

## II. WHY LAW SCHOOL TEACHING HAS STAGNATED

Three factors explain why law school teaching has changed little in the past 130 years. First, in effect, the legal academy encourages law schools and law professors to conform to the Vicarious Learning/Self-Teaching Model and discourages attempts at instructional innovation. Second, law professors and law schools prefer a unitary model of law school instruction and are uncomfortable with the notion that law school instruction should be tailored to the needs and characteristics of the learners. Third, law professors are familiar and comfortable with the model, can easily justify it, and readily use it.

### A. *The Pressure to Conform to the Vicarious Learning/Self-Teaching Model*

The legal academy's policies regarding law school hiring, promotion, and tenure practices, law school textbooks, law school accreditation practices, and law school economics have created an environment in which change is very unlikely to occur.

The criteria by which law schools hire new law teachers and measure law teachers' performances for tenure purposes discourage innovation. Most law schools hire law teachers based on their record or potential for creating scholarship.<sup>42</sup> Publication is heavily weighted in tenure decisions.<sup>43</sup> This emphasis on scholarship derives from law schools' aspirations for upward mobility within the law school hierarchy. Law schools enhance their prestige based, in significant part, on faculty publications; teaching skill or effectiveness is not considered in the rankings.<sup>44</sup> Thus, law professors, like most academics, have an incentive

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42. See Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 389-99 (1990). Of course, a new hire's potential to be effective in the classroom and to be a good colleague also greatly influences hiring decisions, but, all other things being equal, a candidate with a strong publication record will generate significantly more interest from law schools than a candidate without such a record.

43. The author is aware of no law school in which either innovation in teaching or a professor's success in having their students successfully achieve learning objectives are criteria for promotion or tenure.

44. See *How U.S. News Ranks Graduate Programs*, U.S. NEWS & WORLD REP., Apr. 10, 2000, at 59. Law professors will, of course, base their assessments of reputation

to be minimally competent teachers and excellent scholars.

Moreover, textbook selection limits the spectrum of what is possible in instruction. Substantive law textbooks differ only in quite superficial ways. A set of textbooks in a given area of law may differ in terms of the selection of cases, theoretical orientation, organization, inclusion of introductory and explanatory material, subject matter emphasis, and ratio of questions and problems to cases. However, nearly all law textbooks consist mostly of past court decisions organized by subject matter, age, or theory. The cases, not any included explanatory materials, provide "the law" students will need to know and use on their examinations. Moreover, even though student performance on the LSAT varies greatly and law schools apply vastly different admissions criteria, no law textbook asserts its special application to any category of learners. Thus, law teachers must either conform their teaching to the texts they have chosen or develop their own teaching materials, which, as noted above, they have little incentive to do.

In any event, law school economics make innovation difficult to implement.<sup>45</sup> Law schools traditionally do well economically<sup>46</sup> in large part because, unlike most graduate school classes, law school classes—particularly first-year substantive law subjects and Bar-tested classes—range in size from 50 to 120 students.<sup>47</sup> Large class sizes allow law schools to admit large numbers of students while retaining the ability to cover all their course offerings. As a result, most students receive classroom feedback once or twice per semester and only very infrequent grading, usually through midterms and finals. Of course, students who have failed to learn the material, as reflected in their final grade, have the

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on the information to which they have access. As law professors have no access to information about the teaching at other schools, it is very unlikely they consider teaching skill at all. It seems likely, in contrast, that professors do consider the publications and other scholarly activities, such as conference presentations; this assumption is buttressed by the fact that law schools regularly send out mailings touting the scholarly achievements of their faculty, and never send out anything about the teaching accomplishments of their faculty.

45. The author wishes to credit Professor Susan Keller for this idea.

46. Randall T. Shepard, *From Students to Lawyers: Joint Ventures in Legal Learning for the Academy, Bench, and Bar*, 31 IND. L. REV. 445, 448–49 (1998) (discussing two specific universities and how profitable their law schools were).

47. See, e.g., Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679, 682 (1998) (noting that, at the University of Washington School of Law, most first-year classes have sections as large as 75 to 100 students and two "small" sections of 25 to 30 students).



opportunity to review their professors' comments on their bluebooks. This voluntary opportunity, however, usually occurs, if at all, months after the examination and often requires the student to suffer an intimidating meeting with the instructor. Office hours are only barely more availing. Even faculty members inclined to meet with their students regularly during office hours secretly must pray that most of their students never come to office hours, because, if all 120 students came for help even only on a once-per-week basis and only stayed for 15 minutes apiece, the faculty member would need to hold 30 office hours per week.<sup>48</sup>

The process by which law schools obtain and retain ABA approval reinforces all the foregoing factors. The ABA inspection process encourages law teachers to conform their teaching methodologies to the expectations of the ABA inspection team members. New law schools are most likely to receive approval if their professors' teaching approaches are similar to what the inspectors have seen in other ABA law school classrooms. Because ABA approval determines the success or failure of new law schools, the incentive to conform is likely to overwhelm innovation.

While the influence and prevalence of each of these factors can be debated, together they communicate a meta-message favoring the status quo and discouraging innovation. Law professors not only have no incentive to change their teaching methods, but they also have no incentive to change period.

*B. Law Teachers' Disinclination to Tailor Instruction to Their  
Learners' Aptitudes, Skills, Self-Images, Cultural  
Backgrounds, and Experiences*

Looking at law school andragogy scholarship and at law school textbooks, it appears law professors are wed to the notion that all law students should be taught in the same way.<sup>49</sup> For this reason, the assertion in this Article that law teachers should tailor instruction to their students' needs and backgrounds may seem radical. Instructional designers, however, have long regarded consideration of the characteristics of the learners in designing instruction.<sup>50</sup> In fact, a fundamental precept of instructional design is the idea that the selection

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48. It is the author's perception that most law professors hold between three and six office hours per week.

49. Aside from academic support scholarship, the author was not able to locate a single law review article or text that claims its special relevance to any particular class of learners.

50. See *infra* notes 183–95 and accompanying text.



of instructional strategies depends, in significant part, on the entering skills of the learners.<sup>51</sup>

Law school learners vary greatly in their ability, entering skills, motivation, background, self-image, and experience. Yet law review articles, textbooks, and teachers' manuals uniformly eschew considering the possibility that instruction should be tailored to the characteristics of the learners.<sup>52</sup> However intuitive the idea may be, the idea seems troubling to law professors.

While it is impossible to be certain why law professors have been unwilling to consider this idea in print, it is worthwhile to raise and explore a few of the possible explanations. First, because the notion that one class of students is inferior to another class of students is a false one in some respects, law professors simply may be hesitant to endorse the view at all. Not all students attending nonelite schools possess lessor analytical skills upon entry. Some students may have selected nonelite schools for economic reasons, for geographic reasons, or for other convenience-based reasons. Moreover, the LSAT is an imperfect test; students' personal or cultural issues may have caused their undergraduate grades and LSAT scores inaccurately to predict their aptitude for law study. Indeed, even the binary system referenced in the previous sentences, elite and nonelite schools, is an oversimplification of the wide spectrum of law schools and law students.

Second, law professors may accurately perceive that acknowledging student differences leads to preferences of a narrow set of lawyering skills. While LSAT scores and undergraduate grades may predict students' ability to perform the lawyering skill at which law professors excel (that is, legal analysis), neither the LSAT nor students' undergraduate grades have been shown to correlate with other crucial lawyering skills, such as sensitivity to human differences, ethics, listening and empathy skills, or even speaking skills. Thus, acknowledging differences among learners' capacities for developing legal analysis skills risks overemphasizing a small subset of the skills needed by practicing lawyers. Further, it undervalues the overall skill sets of students attending nonelite law schools.

Third, the hierarchical nature of the American law school system makes disclosure of differences detrimental both to the speaker's

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51. See *infra* notes 183–95 and accompanying text.

52. The author was unable to locate a single law review article, text, or teacher's manual considering this possibility.

personal upward movement within the law school hierarchy and to the law school's upward movement within the hierarchy.<sup>53</sup> Law professors and law school administrators may fear acknowledging that their law schools admit students who possess lower LSAT scores and undergraduate grade point averages. They may worry that the acknowledgment may cause the listener to associate the speaker or the law school with weaker students. This would lead to a self-perpetuating cycle of applications only from students who have lower LSAT scores and lower undergraduate grade point averages, admissions of only such students, and lower bar pass statistics.

Fourth, the pressures on law professors to conform their instructional techniques to the Vicarious Learning/Self-Teaching Model<sup>54</sup> constrain exploration of the obvious differences among learners. Any suggestion of difference may necessitate the development of teaching models that conflict with law school economics or with the established faculty hiring and tenure procedures. Indeed, though most new ABA schools have entered the field at the lowest tier, a law school that openly acknowledges that it has adopted a unique approach to instruction because of its students' lower LSAT scores and undergraduate grades, may decrease its chances of obtaining full ABA approval.

Fifth, it is possible that law professors teaching at nonelite law schools may themselves have doubts as to the appropriateness of admitting students with lower LSAT scores and undergraduate grades. Therefore, they may be uncomfortable acknowledging their students' weaknesses to their colleagues teaching at elite law schools.

Sixth, traditional liberal political views held by many law faculty and administrators may cause them to feel uncomfortable acknowledging differences among students, particularly if any of the women or the minority admittees happen to possess lower LSAT scores and undergraduate grade point averages.

*C. Law Teachers' Familiarity and Comfort with the Vicarious Learning/Self-Teaching Model and the Ease of Defending the Model*

Finally and perhaps most significantly, law professors are familiar with the Vicarious Learning/Self-Teaching Model. They learned law quite well from it, and the model is intellectually defensible and easy to use.

Because, as noted earlier, law professors receive very little instruction

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53. See Kennedy, *supra* note 1, at 603.

54. See *supra* notes 42–49 and accompanying text.

in designing instruction or in teaching,<sup>55</sup> law professors are likely to use the methodologies by which they learned law. Most law professors know little, if any, learning theory and nothing about instructional design. All they know is that they did well in law school and enjoyed it, and that they learned through the Vicarious Learning/Self-Teaching Model.

Moreover, they can justify the use of the model. The model does encourage learners to be self-teachers, a critical skill for practicing lawyers. It encourages critical thinking skills, by giving learners incentives to think critically and logically about court opinions and the students' own views and thereby avoid embarrassment in class. The model allows many learners to be taught at the same time. The law professor, as well as thousands of other law students, managed to learn by this model; thus, the professor can rationalize that students who fail to learn by the model and therefore are academically dismissed by their law schools would not have made good lawyers anyway.<sup>56</sup> The model requires little teacher training and relatively little class preparation time and it is enjoyable to use.

### III. BACKGROUND OF LEARNING THEORY

This section describes the three major learning theories: behaviorism, cognitivism, and constructivism. It also explores the implications of these theories for designing law school instruction. For the most part, instructional designers tend to be eclectic in their views of learning theory; to the extent that a theory is explanatory with respect to a particular aspect of learning or offers a particularly effective approach to an instructional problem, they use that theory in creating instruction.<sup>57</sup> Instructional designers strive to engage in "cherry-picking," not selecting which theory is "right," but, rather, selecting the best approach under the particular design circumstances.<sup>58</sup>

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55. See *supra* note 25 and accompanying text.

56. While the author does not agree with these views, they reflect common views held by law professors and law students. It seems unlikely that the narrow skill set preferred by law school exams defines what makes for effective lawyers. Thus, although law school exams do not test cooperative skills, listening skills, speaking skills, and sensitivity to others' needs, such skills are crucial to many lawyers' practices. Many of these skills are just as likely to be possessed by dismissed students as by the students who do very well in law school. Professor Dennis Honabach suggested this latter point.

57. See PATRICIA L. SMITH & TILLMAN J. RAGAN, *INSTRUCTIONAL DESIGN* viii (1st ed. 1993).

58. Peggy A. Ertmer & Timothy J. Newby, *Behaviorism, Cognitivism,*

Three concepts are at the crux of learning theory and, therefore, require elucidation at the outset. The three concepts are learning, instruction, and transfer. First, "Learning is a change in human disposition or capability, which persists over a period of time, and which is not simply ascribable to processes of growth."<sup>59</sup> For learning to have occurred, therefore, "(1) the duration of the change is long-term rather than short-term; (2) the locus of the change is the content and structure of knowledge in memory or the behavior of the learner; [and] (3) the cause of the change is the learner's experience in the environment."<sup>60</sup> Thus, a Contracts student has learned the concept of illusory promise when she has developed an ability to identify both those promises that are illusory and those that are not.

Second, instruction is "the deliberate arrangement of learning conditions to promote the attainment of some intended goal."<sup>61</sup> What is missing from this definition is particularly significant; instruction does not necessarily equate with classroom teaching. In fact, "one of the primary tenets of instructional design is that a live teacher is not essential to all instruction."<sup>62</sup> Rather, instruction includes textbook reading, computerized tests, on-line directed discussions, and any other form of mediated delivery of learning conditions. Thus, a law professor who requires her contracts students to take a CALI<sup>63</sup> illusory promise exercise is providing instruction.

Third, a core goal of all instruction is transfer, which learning theorists define as "the application of learned knowledge in new ways or situations."<sup>64</sup> In other words, transfer occurs if the learner can apply what was learned outside the context in which it was learned. To a contracts law professor teaching illusory promise law, transfer has occurred if the students can apply learned principles of illusory promise law to a previously unseen examination hypothetical or when they can identify a potentially illusory promise in a draft contract and can revise the promise to make it nonillusory (while honoring, of course, the client's objectives

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*Constructivism: Comparing Critical Features from an Instructional Design Perspective*, 6 PERFORMANCE IMPROVEMENT Q., 1993, at 50, 70; see also SMITH & RAGAN, *supra* note 57, at viii.

59. GAGNÉ, *supra* note 35, at 3.

60. 2 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH 1040 (Harold E. Mitzel et al. eds., 5th ed. 1982).

61. MARCY PERKINS DRISCOLL, PSYCHOLOGY OF LEARNING FOR INSTRUCTION 332 (1994); see also SMITH & RAGAN, *supra* note 8, at 2.

62. SMITH & RAGAN, *supra* note 8, at 3.

63. The term CALI refers to Computer-Assisted Legal Instruction, a set of computerized exercises created by the Center for Computer-Assisted Legal Instruction, available at <http://www.cali.org> (last visited Mar. 24, 2001).

64. Ertmer & Newby, *supra* note 58, at 55-56.

for the contract).<sup>65</sup>

### A. Behaviorism

#### 1. Explanation of Behavioral Theory

Although behaviorism has its roots in Aristotle's empiricist views,<sup>66</sup> it had its greatest prominence in the first half of the twentieth century with the well-known works of Pavlov regarding classical conditioning.<sup>67</sup> B.F. Skinner applied Pavlov's reinforcement ideas to teach humans to respond voluntarily to stimuli in his mid-twentieth century work on operant conditioning.<sup>68</sup> The core behaviorist belief is that learning occurs when the learner exhibits the proper response to a specific environmental stimulus.<sup>69</sup> In addition, behaviorists believe that the goal of instruction is to develop and strengthen the connection between the stimulus and response<sup>70</sup> by providing reinforcement for proper responses to the stimulus and punishment<sup>71</sup> for improper responses to the stimulus.<sup>72</sup> For example, a behaviorist would say that a learner has learned to choose healthy foods if, when given a choice between healthy and unhealthy foods, the learner selects a healthy food. Instruction should focus on

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65. Similarly, this Article demonstrates transfer of the idea of transfer because the author applies the concept in the sentences that precede this footnote to a situation, legal education, he did not encounter in an instructional design class or article.

66. See Ertmer & Newby, *supra* note 58, at 54.

67. PAVLOV, *supra* note 35. Pavlov, of course, is best known for his salivating dog experiments, in which a dog who hears a bell every time before eating, learns to salivate every time the bell rings. *Id.*

68. SKINNER, *supra* note 35; see also ANITA E. WOOLFOLK, EDUCATIONAL PSYCHOLOGY 202–10 (6th ed. 1995) (arguing that Skinner's ideas changed the way we think about learning and explaining that Skinner's theory was based on the idea that the learning process involves how people learn, through conditioning, to operate in their environment to produce certain consequences).

69. See SMITH & RAGAN, *supra* note 8, at 19; Ertmer & Newby, *supra* note 58, at 55.

70. See Ertmer & Newby, *supra* note 58, at 57.

71. Reinforcement can be either positive (giving the learner something, such as a compliment, because she responded properly to the stimulus) or negative (taking away an aversive from the learner, such as allowing the student to skip having to do homework, because she responded properly to the stimulus). Punishment also can be either positive or negative, depending upon whether the consequence for the improper response to the stimulus involves introducing an aversive (e.g., extra homework) or removing a benefit (e.g., taking away a scholarship). See DRISCOLL, *supra* note 61, at 32–38. Thus, it is clear that what most people call “negative reinforcement”—providing an aversive—should actually be classified as positive punishment.

72. See *id.*

strengthening the connection between the stimulus—the choice of foods—and the response—the selection of healthy foods.

While behaviorist views seem out of date, behaviorist ideas and approaches continue to greatly influence educators and instructional designers. Even today, instructional designers and educators would say that a law student has learned to perform legal analysis when, in response to a fact pattern (the stimulus), the student identifies legal issues, articulates and evaluates the likely arguments attorneys for the parties would make, and predicts how a court would resolve those issues. Moreover, across all levels of education, teachers assess learning according to the behavioral model by requiring the learners to produce an observable response (an answer) to a stimulus (the exam question).<sup>73</sup>

## *2. Implications of Behavioral Theory for the Development of Law School Instruction*

Behaviorists developed many of the approaches to instruction still in prominent use today. These approaches also have relevance for the design of law school instruction. First, behaviorists developed the idea of assessing learners to determine the point at which instruction should begin.<sup>74</sup> The idea of mastery learning and the attendant 80-80 test of effectiveness discussed above<sup>75</sup> came from a behaviorist, Dr. Benjamin Bloom.<sup>76</sup>

Second, behaviorists developed the idea that instruction should be sequenced so that students can master early steps and easier problems early in instruction. Only later should students progress to more difficult and complex steps and problems.<sup>77</sup> Law professors have ignored this idea entirely; casebooks for first-year law students often start with incredibly difficult cases. Thus, many Torts books<sup>78</sup> start with the difficult opinion in the *Vosburg v. Putney*<sup>79</sup> case. Likewise, many Contracts texts start with the ideas of expectation, reliance, and restitution;<sup>80</sup> many Civil

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73. See Ertmer & Newby, *supra* note 58, at 56; see also DRISCOLL, *supra* note 61, at 63.

74. Ertmer & Newby, *supra* note 58, at 56.

75. See *supra* note 30–31 and accompanying text.

76. See also Bloom, *supra* note 30.

77. Ertmer & Newby, *supra* note 58, at 56.

78. See, e.g., RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 4 (6th ed. 1995); JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 14 (5th ed. 1999); see also JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 30 (9th ed. 1994) (discussing *Vosburg* in notes after short introduction to battery).

79. 50 N.W. 403 (Wis. 1891).

80. See, e.g., RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 72 (1995) (discussing expectation, reliance, and restitution interests after a brief introduction to contract law); DAWSON ET AL., *supra* note 26, at 1; E. ALLAN FARNSWORTH, CONTRACTS



Procedure texts<sup>81</sup> begin personal jurisdiction with *Pennoyer v. Neff*;<sup>82</sup> and many Criminal Law texts begin with cases addressing complex constitutional law issues.<sup>83</sup> Moreover, the difficulty of law school examinations remains constant throughout students' law school careers. Student confidence and development of skills, however, would be enhanced by sequencing classroom discussion of hypothetical questions and topics both within substantive law classes and throughout the curriculum. In fact, law professors could even choose to sequence students' study of specific subtopics, such as illusory promises.

Third, behaviorists also developed the idea that learning can be enhanced by developing nonhuman, nonclassroom instruction.<sup>84</sup> Currently, nearly all law school instruction occurs in the classroom. In fact, the ABA specifically mandates that students receive large amounts of classroom instruction.<sup>85</sup> Increased use of nonhuman mediated instruction nevertheless has particularly exciting ramifications for law teaching. If more law school instruction occurred outside the classroom, in-class instruction time could focus on those subjects that require instructor mediation, such as instruction addressing legal analysis skills and providing instructional feedback regarding students' practice efforts.<sup>86</sup> In fact, resources already exist that allow law instructors to

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41 (2d ed. 1990) (discussing expectation, reliance, and restitution interests after a brief introduction to contract law); ROBERT W. HAMILTON ET AL., CASES AND MATERIALS ON CONTRACTS 1 (2d ed. 1992).

81. See, e.g., RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 27 (2d ed. 1997); STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE 62 (3d ed. 1992).

82. 95 U.S. (5 Otto) 714 (1877).

83. See, e.g., JOSEPH G. COOK & PAUL MARCUS, CRIMINAL LAW 14-26 (4th ed. 1999) (including, as the third and fourth cases in the text, two very difficult and complex Supreme Court opinions addressing Constitutional law issues, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Bowers v. Hardwick*, 478 U.S. 186 (1986)); JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 96 (3d ed. 1996) (including as the first case in the text a difficult Supreme Court opinion addressing the Eighth Amendment and proportionality requirements).

84. See SMITH & RAGAN, *supra* note 8, at 19.

85. AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS 43 (1999) (stating in Standard 304 that graduation may only be granted when the 56,000 minutes of instructional classroom time have been fulfilled).

86. This point does not change even if one of the professor's instructional objectives is teaching case reading skills. Teaching basic doctrine outside the classroom does not prevent the instructor from teaching case reading skills in the classroom. This approach allows greater focus and isolation of the case reading skills. At the same time, it is worth noting that, while many law professors devote considerable classroom time to reviewing cases, few identify for students the skills involved in case reading or teach

move instruction outside the classroom. Law professors already have access to CALI exercises in most bar-tested subjects. Most law schools also possess computer labs, and many law professors have found that they can use listservs and course web pages to enhance students' educational experiences.<sup>87</sup>

Fourth, behaviorists were the first to emphasize the importance of requiring student practice and of responding to such practice by providing structured feedback, cues and fading of cues,<sup>88</sup> and shaping.<sup>89</sup> Behaviorists see such practice and feedback as necessary to ensure that learners provide the desired response to the environmental stimulus.<sup>90</sup> As discussed above, law school instruction only provides law students with vicarious practice and feedback.<sup>91</sup>

Indeed, given the size of most substantive law classes, the burden on faculty of providing student practice and feedback poses difficult hurdles. But those hurdles are not insurmountable. CALI exercises offer some opportunities for practice and feedback, and computer programs allow faculty to administer short answer and multiple-choice assessments to their students on-line, ensuring that students receive immediate feedback. In addition, faculty could develop model answers or checklists and use teaching assistants to review student work and provide feedback. Finally, faculty could provide model answers or checklists to students and use self-, peer-, and small group-grading to provide students with the

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those skills or assess students' case reading skills on examinations, such as by requiring students to brief or explain a previously unseen opinion on an examination.

87. See Michael A. Geist, *Where Can You Go Today?: The Computerization of Legal Education from Workbooks to the Web*, 11 HARV. J.L. & TECH. 141 (1997).

88. Cues are prompts or hints from the instructor or instructional materials directing the learner's practice efforts. See DRISCOLL, *supra* note 61, at 44. Fading refers to the gradual withdrawal of cues. *Id.* Thus, a law professor working with a student who is analyzing an illusory promise problem might prompt the student to consider the possibility of implying a duty of "good faith" or a duty of "reasonable efforts" to determine if what appears to be a promise that does not restrict the promisor's future action can be made to restrict the promisor's future action. See generally CALAMARI & PERILLO, *supra* note 40, § 4.12, at 203-04. See also *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214-15 (N.Y. 1917) (finding that the implied duty of reasonable efforts makes plaintiff's promise nonillusory); U.C.C. § 2-306 (1989) (stating that requirements contracts and output contracts are not illusory because of the implied duty of good faith requirements or outputs).

89. "Shaping refers to the reinforcement of successive approximations to a goal behavior." DRISCOLL, *supra* note 61, at 40. In other words, the instructor provides encouragement to students regarding the correct aspects of their performances to gradually assist them in altering their performance to the desired form. A law professor teaching illusory promise would shape a student's responses to hypothetical questions by providing feedback to the student. Additionally, the professor can shape a student's understanding of the area by having the student continue to rewrite incorrect portions of the practice efforts until the student produces an appropriate analysis.

90. See Ertmer & Newby, *supra* note 58, at 56.

91. See *supra* notes 9-13 and accompanying text.

necessary opportunities for practice and feedback.”<sup>92</sup>

Finally, behaviorists have emphasized the importance of evaluating and revising instructional materials by empirically testing the effects of the materials on student performance and student satisfaction.<sup>93</sup> Law professors do alter their approaches as they become more experienced teachers, but this revision is neither systematic nor empirically based. Law school instruction could and should be evaluated empirically. Most law schools already require students to evaluate their instructors. These crude measures could be expanded to require students to evaluate the appeal of the various forms of instruction used. Instructional effectiveness could also be measured by determining whether the students have achieved mastery learning—whether eighty percent of the students have learned at least eighty percent of the material.<sup>94</sup>

As the foregoing discussion reveals, while behaviorist views offer great insight into learning and instruction, behaviorism has its limitations. “[I]t is generally agreed that behavioral principles cannot adequately explain the acquisition of higher level skills or those that require a greater depth of processing (e.g., language development, problem solving, inference generating, critical thinking).”<sup>95</sup> Thus, while behaviorism is important to law school instruction because law students must acquire knowledge of the relevant doctrine and policy, the most important law school skills—legal reasoning, factual analysis, and client problem-solving—require consideration of cognitivist and constructivist learning theories.

## B. Cognitivism

### 1. Explanation of Cognitivist Theory

In the late 1950s, learning theory began to move away from the use of behavioral models to the now dominant models rooted in cognitivist thinking.<sup>96</sup> The cognitivist models use a set of theories, called “information processing theories,” which explain how the brain processes

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92. Self-, peer- or group-grading should be “spot-checked” to ensure that students are devoting the requisite effort to the practice and the evaluation.

93. See SMITH & RAGAN, *supra* note 8, at 19.

94. See *supra* note 30 and accompanying text.

95. Ertmer & Newby, *supra* note 58, at 56.

96. *Id.* at 57–58; SMITH & RAGAN, *supra* note 8, at 20 (“Cognitive learning theories are the dominant theoretical influence on instructional design practice.”).

and retains learning.<sup>97</sup> Cognitivists equate learning with the learner's active storage of that learning in an organized, meaningful, and useable manner in long-term memory.<sup>98</sup>

In a sense, cognitivism addresses a different aspect of learning than behaviorism; cognitivism describes and focuses on what occurs in the brain between the stimulus and response.<sup>99</sup> Cognitivism also focuses on deeper forms of learning than behaviorism. Cognitivist theories emphasize the learning of intellectual skills, such as how to apply principles and use learned procedures, how to reason, and how to combine learned principles and procedures in new ways to solve complex problems.<sup>100</sup> Like behaviorism, cognitivism has ancient theoretical roots; cognitivism seems to have derived, in part, from Plato's rationalist views that knowledge arises through the mind.<sup>101</sup>

According to cognitivists, learning involves a mental process posited to occur in the very rough and sometimes iterative sequence described below. The implicit metaphor for cognitive processing theories is the computer.<sup>102</sup> Hundreds of pieces of information<sup>103</sup> reach the senses every moment. The information registers in the brain (the "sensory register") for a brief moment.<sup>104</sup> One attends, however, to only a few of these sensory inputs ("selective attention").<sup>105</sup> The information to which one attends passes into short-term memory, also known as "working memory."<sup>106</sup> Only small amounts of information can be retained in working memory and only for a limited time. Introductory psychology textbooks note the fact that telephone numbers consist of seven digits

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97. See SMITH & RAGAN, *supra* note 8, at 20; see also DALE H. SCHUNK, *LEARNING THEORIES: AN EDUCATIONAL PERSPECTIVE* 144 (2d ed. 1996) ("Information processing theories focus on how people attend to environmental events, encode information to be learned and relate it to knowledge in memory, store new knowledge in memory, and retrieve it as needed.").

98. See SMITH & RAGAN, *supra* note 8, at 20; Ertmer & Newby, *supra* note 58, at 59.

99. See Ertmer & Newby, *supra* note 58, at 59.

100. See *id.*

101. See *id.* at 62.

102. See DRISCOLL, *supra* note 61, at 68.

103. The term "information" can be misleading. It does not simply refer to what might be called rote knowledge, such as being able to state rules of law. Rather, as noted above, the term also refers to learning at all intellectual levels.

104. See DRISCOLL, *supra* note 61, at 72-73; SMITH & RAGAN, *supra* note 8, at 20.

105. DRISCOLL, *supra* note 61, at 73. For example, as the author writes this Article, his brain receives sensory inputs from the *sounds* of passing cars, backing trucks, and barking dogs, from the *feel* of the computer keys against his fingers and of the hard chair on which he is sitting, from what he *sees* as he reads his notes and the articles and books he is considering in writing this section of the Article, and from the *taste* of the coffee he is sipping as he works. No person possibly could attend to all of these inputs and write anything. Instead, the author selectively attended to each input as he wrote about it.

106. DRISCOLL, *supra* note 61, at 81.

precisely because studies of short-term memory show that seven bits of information (plus or minus two bits) is the maximum capacity of short-term memory.<sup>107</sup> Most of us have noted that we usually can remember a new phone number for only ten to twenty seconds.

By encoding<sup>108</sup> information in a meaningful way, the information becomes stored in long-term memory. The more deeply information is processed, the more likely one will remember it.<sup>109</sup> In fact, if one “overlearns” and, therefore, develops “automaticity”<sup>110</sup> with respect to what is learned, one can recall learning with minimal attention and, therefore, focus greater attention on using the recalled material to perform higher-level intellectual skills.<sup>111</sup>

Cognitivists believe prior learning plays a crucial role in allowing the storage of information.<sup>112</sup> Cognitivists also believe the brain does not merely store information; the brain organizes it in data structures called “schemata.”<sup>113</sup> These structures contain slots, theoretically organized like a card catalog, for each of a countless number of specific situations.<sup>114</sup>

Thus, the author of this Article, like most Contracts professors, can recall information regarding illusory promise by considering illusory promises as a part of consideration law, as a part of a large set of Contracts problems dealing with the interpretation of language used by contracting parties (a set that includes mutual assent issues, contract

107. See, e.g., WOOLFOLK, *supra* note 68, at 246–48.

108. Encoding refers to how we store the information in long-term memory. SMITH & RAGAN, *supra* note 8, at 21. As a law professor, when the author cannot recall the name of a student in his class, he often finds himself able to recall the length of the student’s name, the degree to which the student’s name is a common one, or the first letter of the student’s name. This recall suggests how the author stores his student’s names in long-term memory, by the length, commonness, or first letter of the name.

109. *Id.*

110. “Overlearning” refers to learning activities in which the goal is to learn material so well that its recall requires little mental energy. DRISCOLL, *supra* note 61, at 75. If our recall of material is so easy that it does, in fact, require little mental energy, we have reached the level of “automaticity.” *Id.* For example, most adults have overlearned how to read so that they are able to read and process the meaning of sentences and paragraphs without focusing on “sounding out” the words used or the meaning of unfamiliar words. Most adults, therefore, can be said to have developed automaticity with respect to reading. *Id.*

111. DRISCOLL, *supra* note 61, at 76. Thus, law professors, who recommend that their students not memorize doctrine or cases, encourage their students to do the exact opposite of what they should be doing.

112. Ertmer & Newby, *supra* note 58, at 60–61; SMITH & RAGAN, *supra* note 8, at 20.

113. SMITH & RAGAN, *supra* note 8, at 21.

114. *Id.*



interpretation issues, express conditions issues, and parol evidence rule issues), as a part of the body of situations in which courts imply promises (because courts imply promises of duties of “good faith” and “fair dealing” when handling illusory promise issues), or as part of conditions law (because many illusory promise issues involve conditions over which the promisor has control, such as promises to perform conditioned on the promisor’s satisfaction with the other party’s performance). The foregoing discussion suggests Contracts professors have encoded illusory promise in at least four meaningful ways and, therefore, are extremely likely to be able to recall illusory promise principles when they need to do so. Theorists believe such deep processing either strengthens the memory trace to allow easier recall or creates more paths of recall to allow easier recall.<sup>115</sup>

Schemata do not only store information. Schemata are more like computer programs because the organized material includes structures that reflect procedures and subprocedures, and schemata are like theories because they allow one to make predictions and to draw inferences.<sup>116</sup> Thus, a professor’s understanding of how to perform legal reasoning, how to develop case holdings from court opinions, how to draw inferences from facts, and how to apply and distinguish cases all are stored in schemata.

To use prior learning to analyze a problem, the learning must be recalled from long-term memory into short-term memory.<sup>117</sup> In this sense, short-term memory and long-term memory are seen as engaging in a continuous exchange program in which learning passes back and forth between them.<sup>118</sup> Finally, the retrieved information passes through a response generator which sends an appropriate message to the parts of the body that need to act or communicate.<sup>119</sup>

Because it is the learner who must ultimately store and retrieve the learning, the crucial factor in learning is the “active” involvement of the learner. Each learner brings a unique set of schemata to the learning experience; for this reason, cognitivist instruction models emphasize making the learning meaningful to the learner to enhance encoding.<sup>120</sup> This idea has led cognitivists to assert that “[t]he real focus of the cognitive approach is on changing the learner by encouraging him/her to use appropriate learning strategies.”<sup>121</sup> Thus, the idea of “active learning”

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115. *Id.*

116. DRISCOLL, *supra* note 61, at 144–46.

117. *Id.* at 94.

118. SMITH & RAGAN, *supra* note 8, at 21.

119. *Id.* at 22.

120. Ertmer & Newby, *supra* note 58, at 60.

121. *Id.* at 59 (emphasis omitted).



is of cognitivist origin.<sup>122</sup>

## *2. Implications of Cognitivist Theory for the Design of Law School Instruction*

Cognitivists subscribe to many of the instructional principles developed under behaviorism, but only because those principles allow the instructor to facilitate the learners' appropriate encoding of the learning.<sup>123</sup> Cognitivists also share behaviorists' belief in the importance of instructional objectives, of assessing learners, of providing students demonstrations, practice and corrective feedback, and of assessing the effectiveness of learning.<sup>124</sup>

Cognitivists' emphasis on the central role of learners and of cognitive information processing, however, has produced five additional principles relevant to the design of law school instruction. First, cognitivists recommend creating learning experiences that allow and encourage students to make connections between previously learned material and new material.<sup>125</sup> For example, a textbook introducing the concept of illusory promise might begin by reviewing previously studied materials dealing with the basic concept of consideration, the implied duty of good faith, and the recurring specialized consideration issues, such as the pre-existing duty rule, and past and moral consideration. This review would allow the students to access the schemata the students developed when they learned these materials so that they can connect what they are learning about illusory promise to what they already know.

Second, cognitivists emphasize "structuring, organizing, and sequencing information to facilitate optimal processing."<sup>126</sup> Thus, legal instructional materials could provide structure and organization by including and frequently referring to course outlines or charts showing the hierarchies in the materials being studied. Moreover, legal texts can sequence the instruction so that students learn prerequisite knowledge first, such as learning the good faith concept before learning illusory promise, or learning the underlying skills and knowledge necessary to perform legal analysis of complex problems before the students begin learning how to analyze such problems.

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122. *Id.*; SMITH & RAGAN, *supra* note 8, at 22.

123. Ertmer & Newby, *supra* note 58, at 60.

124. *Id.*

125. *Id.* at 61.

126. *Id.* at 60.

Third, cognitivists insist that instructors should integrate into their teaching materials instruction that allows students to learn to become active participants in their own learning.<sup>127</sup> Cognitivists believe learners should be taught, as a regular part of course instruction, to be expert at metacognition.<sup>128</sup> The term metacognition refers to the set of learning and study skills which encourage learners to be introspective, conscious, and vigilant about their own learning.<sup>129</sup> General metacognition skills include the following: “knowing when or what one knows or does not know; predicting the correctness or outcome of one’s performance; planning ahead and efficiently apportioning one’s cognitive resources and one’s time; and checking and monitoring the outcomes of one’s solution or attempt to learn.”<sup>130</sup> In short, metacognition involves thinking about one’s own thinking.

Thus, as a regular part of the students’ course work, substantive law texts and law professors should teach law students how to be active learners.<sup>131</sup> Students should not only be taught that they need to monitor their learning of legal concepts and legal reasoning techniques but also how to do the monitoring.<sup>132</sup> Students should be taught how to derive meaning from cases by briefing them,<sup>133</sup> not simply criticized for not doing so. Students should even be taught how to manage their time and effort<sup>134</sup> and how to create effective cooperative learning groups so the students can increase their opportunities for practice and feedback.<sup>135</sup> Students should be taught explicitly how to spot issues, and this instruction should include teaching students to brainstorm the recurring factual patterns that might give rise to each of the legal issues studied.<sup>136</sup>

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127. *Id.*; DRISCOLL, *supra* note 61, at 103.

128. Ertmer & Newby, *supra* note 58, at 60.

129. DRISCOLL, *supra* note 61, at 103; Wangerin, *supra* note 20, at 474–77.

130. Robert M. Gagné & Robert Glaser, *Foundations in Learning Research*, in INSTRUCTIONAL TECHNOLOGY: FOUNDATIONS 49, 75 (Robert M. Gagné ed., 1987).

131. Dr. Marcy Driscoll asserts the importance of integrating instruction in domain-specific learning strategies (such as case briefing and issue spotting) into the courses in which students must use the strategies; she argues that, otherwise, such instruction is virtually useless. DRISCOLL, *supra* note 61, at 103. Driscoll’s analysis suggests that many law school academic support summer preparatory programs may be of little value to students, a point far beyond the scope of this Article.

132. Wangerin, *supra* note 20, at 476–77.

133. *Id.* at 522–24.

134. *Id.* at 478.

135. *Id.* at 487–89.

136. In other words, after students studying illusory promise have seen a sufficient number of cases and hypotheticals raising illusory promise issues, the professor can require the students to brainstorm the types of regularly recurring facts that give rise to illusory promise issues. See *infra* note 238. Students, however, must understand the tentative nature of such a list, because human interactions can always produce new categories of problems beyond the scope of any such list. The act of developing such a list can be a helpful learning and studying tool.

Students should also be taught what skillful legal analysis looks like and how to self-check their own work to make sure they are performing it.<sup>137</sup> Finally, students should be taught both the importance of encoding their learning and the many techniques available to facilitate their encoding efforts, such as preparing deeply structured course outlines that show the hierarchical relations among the legal concepts being studied,<sup>138</sup> developing concept maps that visually express the relationships among the ideas under study,<sup>139</sup> creating flow charts that depict logical flows in the analytical process,<sup>140</sup> and using the four different types of mnemonic devices.<sup>141</sup>

For example, a unit on illusory promise might include instruction in developing mnemonic devices, outlines, and flow charts. The instruction then would require students to demonstrate their understanding of all three techniques by developing a mnemonic device to remember the rules of law relating to illusory promise, by outlining illusory promise doctrine (or, better yet, outlining all of consideration law) to help encode the details of the doctrine and the cases, and by creating a flow chart to depict the flow of illusory promise analysis.<sup>142</sup> The professor, of course,

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137. This point directly derives from the suggestion to the same effect in the quoted excerpt from Gagné and Glaser. See *supra* note 130 and accompanying text. For example, students who have applied a rule to a set of facts could learn to check their analysis by making sure that, after they identified the issue and the holding, they have stated a relevant fact and then explained how the fact tends to prove or disprove, or supply or not supply what the rule requires.

138. Wangerin, *supra* note 20, at 502.

139. *Id.* at 502–09.

140. This suggestion comes from the author of this Article.

141. SMITH & RAGAN, *supra* note 8, at 168–69. The first technique is the familiar “single-use coding” method, in which the learner uses the first letter in a set of words to remember a list. *Id.* at 168. Second is the “pegword” method, in which the learner arbitrarily associates with rhyme each item in a list with a sequence of numbers. For example, students can remember the elements of promissory estoppel by remembering: one is for run, because the promisor must expect the promisee to run out and do something; two is for do, because the promisee must actually do something; and three is for be, because enforcement of the promise must be necessary to avoid injustice. *Id.* at 169. The third technique is the “method of loci,” in which the learner imagines a familiar room and while scanning the room mentally noting the decorations, the learner creates an association between the decoration and each item on the list. *Id.* The final method is the “keyword technique,” in which the learner, trying to learn a series of matched items, associates keywords from each matched set with bizarre images. For example, students can remember “waiver” as an excuse of condition and its definition, “an intentional relinquishment of a known right,” by associating waiver with an ocean wave and relinquishment with roller blading and then imagining roller blading on an ocean wave). *Id.*

142. Such a flow might be organized in five steps:

would provide evaluative feedback as to the accuracy of what the students produce. Later instruction could require or allow students to select one from among the encoding techniques learned and apply that technique to new material, thus allowing the students to begin to develop a feel for which techniques work best for them.<sup>143</sup>

Fourth, the cognitivist view suggests the importance of performing a task analysis, a process in which the instructional designer identifies not only the observable behaviors that interest behaviorists, but also the internal, mental processing necessary to perform the observable tasks.<sup>144</sup> For example, a Contracts professor, intending to teach the internal mental process involved in analyzing contract law issues, might point out that a Contracts examination cannot raise one of the many contract law issues requiring interpretation of language (including mutual assent, the parol

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(1) Identify the existence of language of promise. If there is no language of promise, there can be no illusory promise issue.

(2) Analyze whether the promise is such that it appears that the promisor has the freedom to perform or withdraw with unrestricted discretion. In other words, consider whether the promisor can both perform and not perform without breaching the promise. If there is some restriction on the promisor's discretion, even in the form of a fortuitous event, the promise is not illusory, so stop the analysis here. If the promisor has not restricted her future action, the promise may be illusory and, therefore, continue the analysis.

(3) Analyze whether implying a duty of good faith places a restriction on the promisor's discretion. In other words, analyze whether the promisor still can choose to perform or not to perform in good faith without breaking the promise either way. If implying a duty of good faith would restrict the promisor's future action, the promise is not illusory so stop the analysis here. If implying a duty of good faith still does not restrict the promisor's discretion, the promise may be illusory and, therefore, continue the analysis.

(4) Analyze whether implying a duty of reasonable efforts places a restriction on the promisor's discretion. In other words, analyze whether the promisor can choose to perform or not to perform without breaking the promise if the court requires her to make reasonable efforts. If implying a duty of reasonable efforts would restrict the promisor's future action, the promise is not illusory so stop the analysis here. If implying a duty of reasonable efforts still does not restrict the promisor's discretion, the promise would be illusory in most states. Nevertheless, continue the analysis.

(5) Noting that not all courts would go so far, analyze whether implying a duty of "notice" of termination of the contract and a duty of reasonable notice of termination places a restriction on the promisor's discretion. In other words, analyze whether the promisor can still choose to perform or not to perform without breaking the promise if the court requires her to give reasonable notice of termination. If the answer is still yes, the promise is illusory in all states. If the answer is no, the promise is not illusory in some states but is illusory in most states.

143. The downside of allowing the students to choose is that different techniques work better depending on the nature of the learning. For example, flow charts are great at depicting sequence, but they often must sacrifice detail. On the other hand, outlines can provide complete detail and even sequencing information, but do not always allow the learner to see an entire sequence on one page.

144. SMITH & RAGAN, *supra* note 8, at 22.

evidence rule, contract interpretation, express conditions, and third party beneficiaries) without either giving the students the operative documents, such as the parties' contracts or the documents the parties exchanged during the course of negotiations, or placing the language to be interpreted in quotation marks.<sup>145</sup> Likewise, the suggestion discussed above that law professors teach students to brainstorm the recurring fact patterns in which illusory promise issues arise<sup>146</sup> stems from a belief that the observable activity of stating issues on a law school examination involves an internal mental process of scanning a fact pattern for recognizable or familiar patterns of fact.

Fifth, "instruction should present or encourage multiple representations of material to be learned."<sup>147</sup> Thus, as many law professors already know, students learn new material better when it is presented graphically, by way of hierarchy and flow charts.<sup>148</sup> Moreover, to help students learn abstract concepts, instructors should generate multiple examples so that students learn to identify and emphasize key features and thereby avoid confusion.<sup>149</sup>

### *C. Constructivism*

#### *1. Basic Tenants of Constructivism*

The rise of constructivism parallels the rise of postmodern thought throughout Western philosophy. Behaviorism and cognitivism have at their cores strong underlying determinist views about the world; according to both views, the world is real, external to the learner, and full of discoverable truths.<sup>150</sup> Constructivists, like other postmodernists, view learning and knowledge as being constructed by each individual from her

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145. Quotation marks used in a Contracts examination question should signal to the students a possibility that they may have to interpret language and, therefore, follow what is a fairly uniform pattern of analysis. The analysis might include identifying the key word(s) within the quoted language, brainstorming alternative and conflicting interpretations of that language, and then using principles and standards specific to the area to predict how a court would resolve the conflict. Teaching students both this pattern of reasoning and the fact that quotation marks trigger its possible use allows students to perform the mental tasks necessary to analyze language interpretation issues.

146. See *supra* note 136 and accompanying text.

147. DRISCOLL, *supra* note 61, at 99.

148. *Id.* at 100.

149. *Id.* at 100, 103.

150. Ertmer & Newby, *supra* note 58, at 62.



experience.<sup>151</sup> They view what appear to behaviorists and cognitivists to be “absolute truths,” such as the idea that the sun is a star, as “truths for now,” negotiated and agreed upon by experts in the field.<sup>152</sup> Constructivism, like behaviorism and cognitivism, has old roots; its roots are in the rationalist philosophy of early twentieth century philosophers like Jean Piaget.<sup>153</sup> Constructivists also share the cognitivists’ belief that learning is a mental activity and the behaviorists’ belief in direct experiences with the environment.<sup>154</sup>

Constructivism differs from both prior views, however, because it focuses on the relationship between the mind and the environment. Constructivists do not believe instructors transmit knowledge of “the real world”; rather, they believe each learner continually constructs and reconstructs her own images of what the world is “like” from her experiences and her interpretations of those experiences.<sup>155</sup> Constructivists also believe meaning is socially negotiated from multiple perspectives working in collaboration.<sup>156</sup> Most significantly, constructivists emphasize the need for learners to be situated in real world settings in which they encounter the complex, multilayered, ill-structured, and ill-defined problems that arise in real life.<sup>157</sup> Thus, for constructivists, three factors are crucial to learning: practice in real settings (experience), the opportunity to develop personal interpretations of experiences (construction of meaning by the learner), and the opportunity to negotiate meaning (collaboration).

## 2. *Implications of Constructivist Theory for the Design of Law School Instruction*

Constructivist thinking has several very important implications for the design of law school instruction. Constructivism obligates instructors to place learners in real world settings.<sup>158</sup> In a law school setting, this principle suggests the importance of clinical and externship experiences. In fact, scholars in the clinical legal studies movement already have made this point.<sup>159</sup> More particularly, the constructivist view suggests the need

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151. SMITH & RAGAN, *supra* note 8, at 14–15; Ertmer & Newby, *supra* note 58, at 62.

152. SMITH & RAGAN, *supra* note 8, at 15–16.

153. *Id.* at 14–15.

154. SMITH & RAGAN, *supra* note 8, at 15; Ertmer & Newby, *supra* note 58, at 62.

155. Ertmer & Newby, *supra* note 58, at 62.

156. SMITH & RAGAN, *supra* note 8, at 15.

157. Ertmer & Newby, *supra* note 58, at 64–65.

158. *Id.* at 64.

159. Christopher T. Cunneiffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85 (1997); Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-

for clinical experiences in which the learners do not simply perform basic, rote legal tasks, but handle (with coaching from an expert) difficult, real world matters. This view additionally suggests a need to overhaul basic required skills classes so that the courses involve real world experiences.

As for substantive law classes, constructivists would advocate not only that Contracts students should work with real contracts,<sup>160</sup> but also that they also should work on real problems raised by real clients with respect to real contracts.<sup>161</sup> This approach, of course, does not exist in legal education and, aside from less far-reaching proposals to include simulations in substantive law courses, such as Professor Warkentine's recommendation that contracts be used to teach contracts,<sup>162</sup> this aspect of the constructivist approach seems unlikely ever to be adopted in substantive law courses.

Constructivist principles also suggest that instructors should allow and encourage learners "to construct their own understandings and then to validate, through social negotiation (with other learners), these new perspectives."<sup>163</sup> Such collaboration "enables insights and solutions to arise synergistically that otherwise would not come about."<sup>164</sup> It also challenges learners to think beyond themselves, and share cultural knowledge.<sup>165</sup> It further allows learners both to refine their own ideas and to measure the quality of those ideas.<sup>166</sup>

These ideas seem much easier and, therefore, are more likely to influence the teaching of substantive law courses. For example, law

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KENT L. REV. 243 (1992); Trail & Underwood, *supra* note 5, at 234.

160. See Warkentine, *supra* note 15, at 118–20. Professor Warkentine asserts that her students enjoy the study of contracts more and learn better when their learning is anchored in real contracts. *Id.* at 119.

161. See generally DRISCOLL, *supra* note 61, at 366–68. The rarity with which real clients experience many commonly studied and commonly bar-tested contract law issues, including illusory promise, as well as the likelihood that, in any given semester, law students will only encounter a few issues, suggests a need for abandoning coverage goals in contracts instruction. Nevertheless, the author does not believe such an approach is desirable. Moreover, this suggestion directly conflicts with a stated goal of this Article, to ensure that learners develop the skills and knowledge they need to achieve their personal objectives, passing the Bar and becoming licensed to practice law. These practical considerations, however, have much less relevance to Professor Warkentine's proposal to use contracts to teach contracts.

162. Warkentine, *supra* note 15, at 118–20.

163. Ertmer & Newby, *supra* note 58, at 65.

164. DRISCOLL, *supra* note 61, at 368 (citation omitted).

165. *Id.* at 368–69.

166. *Id.* at 369.

professors intending to teach case synthesis skills should encourage students to construct their own reconciliations of lines of cases and then to meet with fellow students to negotiate as to the possible reconciliations. Likewise, law professors teaching case reading and case analysis skills should require students to do, with guided supervision, what most law professors currently merely encourage students to do: develop their own interpretations and discuss and compare their personal interpretations with their fellow students. These approaches seem particularly well-suited to teaching students the skills of manipulating case holdings and recognizing the possibility for conflicting interpretations of case authority. In fact, given the novice lawyers' extreme difficulty in seeing, much less developing, legal arguments contrary to their initial interpretations, requiring students to socially negotiate their analysis of even hypothetical disputes seems likely to enhance student skills.<sup>167</sup>

Finally, to avoid oversimplification and to represent the complexity of the real world, constructivists recommend multiple representations of reality.<sup>168</sup> Constructivists recommend "revisiting content at different times, in rearranged contexts, for different purposes, and from different conceptual perspectives."<sup>169</sup> This idea also has important implications for design of law school instruction. In a Contracts course, for example, this idea suggests that the course syllabus should be structured so that, after the students study all doctrinal categories in which the interpretation of language plays a role (for example, formation, contract interpretation, third party beneficiaries, and conditions), the instructor can require students to reconsider those topics as a unified subject dealing with the interpretation of language. Likewise, after students have studied all contract doctrine wherein boilerplate clauses have been developed (for example, merger clauses, no oral modification clauses, liquidated damages clauses, and warranty disclaimers), the instructor could require students to reconsider those topics as a unit. In fact, many law professors already strive to develop multiple arguments with respect to legal issues and have found that the process seems to enhance students' understanding of the materials.

Thus, although complete adoption of constructivist methodologies in substantive law classes may be unlikely given law schools' continued interest in teaching students the substantive doctrine and theory, constructivism offers intriguing possibilities for enhancing that instruction.

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167. Social negotiation of meaning is a particularly important strategy for new law students because new law students often struggle to develop counter-arguments to their initial assessments.

168. DRISCOLL, *supra* note 61, at 369.

169. Ertmer & Newby, *supra* note 58, at 65.

*D. Final Comments Regarding the Theory Discussion*

Having traced learning theory from its origins to current theories, it is important to reconsider the ideas with which this section started. The objective of any learning theory is to explain how we learn so that instruction can be refined accordingly. All three learning theories discussed—behaviorism, cognitivism, and constructivism—are relevant to law school instruction, yet, for the most part, the legal academy has ignored these theories. Together, the theories suggest that instruction should cause students both to build their skills from base levels to the highest levels, and to move from simple knowledge of information to the creative problem-solving contemplated by the constructivist model. In the next two sections, these ideas take the form of concrete recommendations as to how law professors can create effective, efficient and appealing instruction.

## IV. INSTRUCTIONAL DESIGN THEORY AND PRACTICE

This section describes the processes involved in instructional design, comparing how law professors design instruction with how professional instructional designers practice in their field. The recommendations in this section are the outgrowth of literally thousands of studies, articles, and books.<sup>170</sup> By necessity, therefore, this section attempts to confine an enormous field to those principles, approaches, and ideas most relevant to law instruction.

*A. Overview of the Instructional Design Process*

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.<sup>171</sup> In other words, the designer develops information regarding the parameters of the project (known as the “analysis phase”), creates instruction tailored to the particular

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170. DICK & CAREY, *supra* note 32 (citing hundreds of books, articles, and other sources); SMITH & RAGAN, *supra* note 8 (citing an estimated one thousand books, articles, and other sources).

171. DICK & CAREY, *supra* note 32, at 5–7; SMITH & RAGAN, *supra* note 8, at 7.

characteristics of the project (the “strategy phase”), and then assesses the instruction to determine whether it is succeeding (the “evaluation stage”). Throughout the process, the designer strives for congruence among the instructional goals, the test items, and the selected instructional strategies.

Notwithstanding the foregoing, the process is as much iterative as it is sequential. Designers revisit each phase of the process based on their evaluations. In other words, while the approach contemplates the three initial phases described above, instructional designers recognize that design decisions are, at best, only intelligent predictions about what approaches seem most likely to produce learning. Because designers make their predictions based on a reflective, systematic, and comprehensive process, as well as on thousands of educational studies, many of those predictions prove accurate. Others, for any number of reasons, prove inaccurate. In such cases, the designer must revise the instruction, re-evaluate it, and revise it again if necessary. The focus, therefore, is student centered. Instructional designers discard instruction that fails to produce learning and retain instruction that produces learning.

### *B. The Analysis Phase*

The analysis phase consists of four crucial activities: an analysis of the learning context, an analysis of the learners, an analysis of the learning tasks, and the development of assessment items.

#### *1. Assessment of the Learning Context*

Assessment of the context actually involves two steps: (1) demonstration of a need for instruction and for the revision of instruction, and (2) identification of the salient factors of the learning environment.<sup>172</sup> The first step involves conducting a needs assessment. The designer identifies the goals of the instructional system; determines the extent to which the goals are being met as efficiently, effectively, and appealingly as possible; prioritizes any gaps between what should be happening and what actually is happening; and determines the extent to which the identified, high priority gaps reflect instructional issues or issues stemming from problems with the learners’ lack of ability or motivation,<sup>173</sup> problems with the instructional facility, or problems with

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172. SMITH & RAGAN, *supra* note 8, at 31; *see also* DICK & CAREY, *supra* note 32, at 13–16; Andrew J. Pirie, *Objectives in Legal Education: The Case for Systematic Instructional Design*, 37 J. LEGAL EDUC. 576, 590–91 (1987).

173. Smith and Ragan assert that motivation can be taught and assign an entire



peer interactions.

Thus, in the law school setting, an instructional designer would consider the goals of the law school with respect to a particular class, the extent to which those goals are being met, and the cause(s) of any failures to achieve the stated goals. The goals of any law school include producing graduates who will become licensed to practice law and who will practice law competently, creatively, thoughtfully, sensitively, and ethically.<sup>174</sup> As this Article explains in the introduction, law schools are failing to achieve these goals as effectively, efficiently, and appealingly as possible.<sup>175</sup> Of course, it is possible to blame such failures on the students, concluding that the students who do not perform well are so lacking in ability that they either deserved the poor results they obtained or should not have been admitted to law school at all. As discussed in Part II, this conclusion is unwarranted.<sup>176</sup> Moreover, the absence of significant changes to the law school Vicarious Learning/Self-Teaching Model over the past one hundred years or more make any suggestion that whole categories of law students are unworthy to attend law school unwarranted, at least at this time. The problems with legal education, therefore, appear to be instructional in nature.<sup>177</sup>

Instructional designers identify the salient factors in the learning environment so that they can be sure the instruction they design will be technologically and procedurally possible in the particular learning system.<sup>178</sup> Important environmental factors include the following: the characteristics of the instructors—their comfort and experience with media-based instruction, their experience level, philosophical orientations, and role perceptions—and the educational philosophies behind the larger curriculum into which the instruction must fit, as well as the mission of the institution involved, and the relationship of the instruction to that mission. Other important factors are the availability of various media of instruction, the characteristics of the facilities available, the number of students who will be taking the class, and the learning

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chapter to designing instruction for attitude change, motivation, and interest. SMITH & RAGAN, *supra* note 8, ch. 14, at 249.

174. See MACCRATE REPORT, *supra* note 4, 233–36.

175. See *supra* Part I.

176. See *supra* Part II.

177. See Feinman & Feldman, *supra* note 15, at 875, 897 (criticizing law professors as being “anti-intellectual” about their teaching and as failing to provide students with “an educational environment that provides students with the resources and the situations with which they can best learn”).

178. SMITH & RAGAN, *supra* note 8, at 36–38.

climate, including the learners' experience and comfort with mediated instruction, active learning approaches, and group experiences.<sup>179</sup>

It is relatively easy to apply these considerations to legal education at most American law schools. Most, but certainly not all, law school instructors have little experience or comfort with media-based instruction, and they perceive instruction as a classroom-only exercise. Consequently, it may require both persuasion and training to make law professors effective users of nonclassroom instructional methodologies. Most law schools emphasize developing students' skills, theory, and knowledge so they will be able to practice law competently and ethically. Although many law schools emphasize particular areas of law, such as environmental law or entertainment law, these programs are unlikely to come in conflict with an approach to education that seeks to enhance students' knowledge and skills. Most law schools provide faculty with access to computers, student computer workstations, and e-mail capacity, educational and testing software, CALI software, Web pages for courses, and overhead projectors, so the availability of such materials, at least at the outset, is not an issue.<sup>180</sup> Law school facilities generally include classrooms that allow instruction to occur in both large and small subgroups. Law school class sizes, however, are a significant consideration. First-year substantive law courses as well as upper division bar-tested subjects have 100 or more students in many law schools.<sup>181</sup> Student comfort with mediated and group-based instruction varies greatly among law students; while continuing law students as a whole are quite accustomed to the rigor and expectations of active learning,<sup>182</sup> not all new law students have had active learning or mediated learning experiences.

## 2. *Assessment of the Learners*

Careful consideration of the characteristics of the learners allows instructional designers to create instruction that is both effective for and appealing to the learners.<sup>183</sup> One of the easiest errors to make as an instructor or designer is egocentrism, which, in the instructional design context, involves assuming that the learners are like the instructor.

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179. *Id.* Smith and Ragan also recommend considering the philosophy and taboos of the local community. *Id.* at 38.

180. Were a law school to overhaul its instruction in accordance with the recommendations of this Article, the demand for such media may tax the school's resources and necessitate additional acquisitions.

181. *See supra* note 47 and accompanying text.

182. *See supra* notes 9–21 and accompanying text.

183. DICK & CAREY, *supra* note 32, at 89–90; SMITH & RAGAN, *supra* note 8, at 46. Feinman and Feldman do not appear to have performed any analysis of the learners they were teaching. *See generally* Feinman & Feldman, *supra* note 15.

Ethnocentrism often results in explanations closely tailored to how the instructor likes things explained, in examples with which the instructor is familiar and comfortable, and in instructional techniques that work well for the instructor.<sup>184</sup> This risk is particularly high for law professors because law professors tend to teach at schools where the students likely are either equal to or inferior to the professor in aptitude for legal analysis, entering legal analysis skills, and self-concept. Moreover, law professors, in order to get tenure, quickly develop a very high level of expertise in their fields, thereby distancing themselves from the novices they teach.

Smith and Ragan provide assistance for this process by breaking down learner characteristics into four discrete categories: cognitive characteristics, physiological characteristics, affective characteristics, and social characteristics. Together, these characteristics, as explained below, influence the designer's selection of instructional strategies.

The most significant cognitive characteristics for law instructors are the students' aptitudes, level of visual literacy (that is, the students' ability to gain information from graphical materials), possession of learning strategy,<sup>185</sup> and general and specific knowledge.<sup>186</sup> These cognitive characteristics influence the designer's decisions with respect to the following issues: the speed of presentation; the amount of structure and organization needed; the media of instruction; the level of concreteness or abstraction; the size of instructional chunks; the response mode (oral or written); the number, sequencing and difficulty of

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184. SMITH & RAGAN, *supra* note 8, at 46.

185. See *supra* notes 127-43 and accompanying text (explaining the idea of metacognition and identifying some of the cognitive and learning strategies relevant to law study).

186. SMITH & RAGAN, *supra* note 8, at 46-55; see also DICK & CAREY, *supra* note 32, at 91 (describing specific knowledge as "entry behaviors"). Other learner cognitive factors not relevant to legal instruction but considered by designers in connection with K through twelve design projects include: developmental levels, language development levels, and reading levels. One factor Smith and Ragan explicitly have excluded is learning style. SMITH & RAGAN, *supra* note 8, at 50. According to Smith and Ragan, while learning style information (information as to whether students learn best visually or auditorially, for example) is very important information to learners in regulating their own learning, "typically this information is not sufficiently prescriptive to aid instructional designers in making design decisions." *Id.*

While learning style information is not prescriptive, the knowledge that a group of students' learning styles are likely to vary greatly should suggest to the designer that a multimodal approach to presenting any particular subject area would be most effective. In other words, instructors should strive to present information in varying forms: outlines, graphic organizers, verbally, in text form, and with real world examples.

examples; the level of learner control; and the amount and type of guidance, cues, and prompts necessary.<sup>187</sup>

The only “physiological” characteristic that may be of significance to the design of law school instruction is student age.<sup>188</sup> At law schools that have significant part-time programs structured to allow students to continue working while they are in law school, student age tends to vary more and be higher.<sup>189</sup> Age factors influence design decisions about techniques for gaining and focusing attention, media selection, grouping of students, level of learner control, context of examples and practice items, and the amount of time allotted for instruction.<sup>190</sup>

Affective learner characteristics also influence design decisions. Affective characteristics relevant to law school instruction include learners’ motivation levels, attitudes toward the subject matter, attitudes toward learning, perceptions of and experiences with various forms of mediated instruction, academic self-concepts,<sup>191</sup> anxiety levels, beliefs, and attributions of success or failure (also known as the loci of control).<sup>192</sup> These characteristics influence instructional designers’ decisions with respect to the number of successful experiences learners should have in practice, the types of statements to convince the learners of the relevancy of the instruction, the amount of structure and organization, the media of

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187. See *id.* at 56. Smith and Ragan do not purport to suggest the specific links between the learner characteristics and the authors’ list of implications of learner characteristics. The suggested links between the learner characteristics and a list of implications provided by Smith and Ragan were developed by the author of this Article as part of his participation in an instructional design class.

188. *Id.* at 55. Smith and Ragan also identify sensory perception and general health as factors for general design projects. *Id.* Those factors do not vary between law schools enough to justify their analysis here.

189. See *At a Glance: Fact Page*, W. STATE UNIV. COLL. OF LAW, at <http://www.wsulaw.edu/glance/facts.htm> (last visited Nov. 14, 2000) (stating that the median age is thirty-four); see also *JD Admissions: Admissions Details*, AM. UNIV. WASH. COLL. OF LAW, at <http://www.wcl.american.edu/pub/admiss/profile.html> (last visited Nov. 14, 2000) (stating that the median age is twenty-four for full time students and twenty-seven for part-time students entering in Fall 1998); *Law School Profile*, MERCER UNIV. SCH. OF LAW, at <http://www.law.mercer.edu/prospectivestudents/AIcProfile.cfm> (last visited Nov. 14, 2000) (stating that the median age of students is twenty-six years old); *Admission Information*, UNIV. OF VA. SCH. OF LAW, at <http://www.virginia.edu/~regist/97gradrec/chapter10/gchap10-2.1.html> (last visited Nov. 14, 2000) (finding that the average age of the entering class for 1996 was twenty-five).

190. SMITH & RAGAN, *supra* note 8, at 56.

191. Academic self-concept refers to the extent to which learners regard themselves as capable of learning. *Id.* at 51.

192. See *id.* at 46–55. A student’s attribution of success or failure, also known as the locus of control, refers to how the student perceives the causes of success or failure in life. *Id.* at 50. A person has an internal locus of control if the person attributes success or failure to factors within (her perseverance, efforts, actions). A person has an external locus of control if she attributes successes and failures to external factors (luck, the professors or employers, other students). *Id.*

instruction, the number and difficulty of examples and practice, the type of feedback given after practice items, the amount and types of reinforcement, and the amount and types of learning guidance, cues, and prompts provided.<sup>193</sup>

Social learner characteristics relevant to law school instructional design include the learners' relationship with peers, tendencies toward cooperation or competition, and socio-economic, ethnic and racial backgrounds and affiliation.<sup>194</sup> These social characteristics influence instructional designers' decisions with respect to the following issues: the selection of techniques for gaining and focusing attention, the contexts for examples and practice items, and the grouping of students.<sup>195</sup>

#### *a. Law Instruction Practices with Respect to Learner Characteristics*

Given the potential for variance among law students with respect to all of these factors, it is striking that law school textbooks never purport to be designed for particular groups or classes of students.<sup>196</sup> Moreover, with the exception of academic support scholarship,<sup>197</sup> law review andragogy scholarship does not ever purport to consider learner

193. *See id.* at 56.

194. *Id.* at 55. Smith and Ragan identify three additional considerations relevant to other instructional design projects: role models, moral development, and feelings toward authority; all of which would seem to have more relevance to design projects at lower educational levels. *Id.*

195. *See id.* at 56.

196. *See, e.g.,* STEVEN J. BURTON, *TEACHER'S MANUAL TO ACCOMPANY PRINCIPLES OF CONTRACT LAW* (1995); JOHN D. CALAMARI ET AL., *TEACHER'S MANUAL TO ACCOMPANY CASES AND PROBLEMS ON CONTRACTS* (2d ed. 1989); JOHN P. DAWSON ET AL., *TEACHER'S MANUAL, CONTRACTS: CASES AND COMMENTS 8-9* (7th ed. 1998); EDWARD J. MURPHY, *STUDIES IN CONTRACTS LAW TEACHING NOTES* (5th ed. 1997).

197. *See generally* Robin Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213 (1998) (discussing how a learner may fail under one particular teaching methodology and succeed under an alternative methodology); Pamela Edwards, *The Culture of Success: Improving the Academic Success Opportunities for Multicultural Students in Law School*, 31 NEW ENG. L. REV. 739 (1997) (discussing multicultural learners and how they learn); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994) (discussing gender based differences in learning and law school interaction); Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839 (1997) (discussing how learning and cognitive theory form the basis of academic support and the success of different learners); Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449 (1996) (suggesting improvement of the Langdellian method and using academic support programs for those who do not easily adapt to the Langdellian methodology).



characteristics.<sup>198</sup> Rather, in deciding which text to select, law professors make their selections based on factors such as the professor's past experiences with the text, the reputation of the text among their colleagues, the theoretical orientation of the text, and other factors that fail to account for their students' particular characteristics. They place little, if any, emphasis on the degree of difficulty of the text. While it is undoubtedly true that professors consider their students' strengths and weaknesses in planning their lectures, the consideration is neither systematic nor complete. Finally, the factors that confine most law school instruction to the Vicarious Learning/Self-Teaching Model<sup>199</sup> make adjustments to account for learner differences unlikely and difficult.

This Article demonstrates below the benefits of conducting a learner analysis and evaluating the design implications of that analysis.

#### *b. Analysis of Western State Law Students*

The author has not conducted a formal learning assessment of the students in his Contracts class. According to Smith and Ragan, however, where the designer is also the instructor, a more formal investigation is unnecessary.<sup>200</sup> This section describes the application of the foregoing learner assessment principles and their resultant design implications.

Students participating in the class are second semester law students whose LSAT scores and undergraduate grade point averages generally place them in the twenty-fifth to fiftieth percentile among those taking the LSAT. They range significantly in their writing and reasoning skills, their level of visual literacy, and their possession of general learning strategies, but most, as would be expected based on their LSAT scores and undergraduate grade point averages, possess less than the average levels of these skills as compared to all new law students. As a whole, most possess some, but not all of the general world knowledge they need, but they vary greatly in their possession of specific knowledge based on

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198. See, e.g., Feinman & Feldman, *supra* note 15, at 875 (noting that legal educators disregard learning theory and ignore learner characteristics); Christopher T. Matthews, *Sketches for a New Law School*, 40 HASTINGS L.J. 1095, 1097 (1989) (noting that law school breaks students of original thought and operates as if there were only one way to learn, thus ignoring learner characteristics); Stropus, *supra* note 197, 450-51 (asserting that the Langdellian methodology should be used in the twenty-first century); Wangerin, *supra* note 12 (providing no mention of learner differences); Wangerin, *supra* note 20, at 472-74 (noting the absence of learning theory in legal education but purporting to identify key learning strategies for all law students); Warkentine, *supra* note 15 (failing to address the implications of applying Warkentine's ideas to different types of law students).

199. See *supra* Part II.

200. SMITH & RAGAN, *supra* note 8, at 46, 56.

their life experiences, reading interests, and undergraduate majors. Most are still relatively early in their development of law school learning strategies. The median student age is thirty-four, and students range in age from twenty-one to fifty-five.

The author believes most of the students have high motivation for becoming lawyers, although many have significantly greater interest in becoming lawyers than studying law or learning generally. Students vary in their interest in contracts law depending on their life and business experiences and career aspirations. Some are comfortable and have experience with nonhuman mediated instruction. Because nearly all have received more critical feedback and lower grades in law school than they have at any other time in their educational lives, the students tend to have lower academic self-concepts. The students also tend to have an external locus of control and experience extremely high anxiety, particularly because the students know that, of those students who are academically dismissed from law school, most are dismissed after their second semester.

Because students have only been in law school together for one semester, most peer relationships are cautious. Moreover, law students in general are known to be competitive and not cooperative, particularly at law schools where a significant percentage of students are academically dismissed after their first year of law school. The law school has a very large percentage of nonwhite students in comparison with other law schools. In fact, the law school's fall 1999 entering class was fifty percent nonwhite, making Western State one of the ten most diverse law schools in the country.<sup>201</sup> The students also are very diverse in terms of socio-economic background, and, for a significant number of students, English is not their first language.

### *c. Design Implications*

Given the learners' low academic self-esteem, external loci of control, and high anxiety, the learners would benefit greatly from a large number of practice experiences, in which examples and practice are sequenced so that the students experience significant early success. For the same reasons, the students also would benefit from significant learning guidance, cues, and prompts, from substantial structure and organization,

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201. See generally AM. BAR ASS'N, OFFICIAL ABA GUIDE TO APPROVED LAW SCHOOLS (Rick L. Morgan & Kurt Snyder eds., 2000).

and from substantial, detailed, and balanced feedback and reinforcement. Selection of context for examples and practice items will be crucial given the diversity of the learners' socio-economic and ethnic backgrounds. Response modes should be mixed to allow students who are more comfortable with either oral or written response modes to get practice and enjoy success. While group experiences are not impossible, they will need to be carefully structured to teach students cooperative skills. Most of the students will have significant motivation to study the course material because of their fear of academic dismissal and their interest in legal studies; therefore, great effort to convince them of the relevancy of most of the instruction will be largely unnecessary. The instructor, however, will have to explain fully the rationales behind instruction directed at developing the students' learning strategies so that students understand why the instructor is allocating their limited time to learning strategy. Nearly all students have had some experience with mediated instruction, at least in the form of participation in listservs in prior classes and in using computer word processing software; while they may lack familiarity with on-line testing software, the ease of using such software should offset any student discomfort.

As the foregoing discussion reveals, a learner analysis reveals information crucial to the planning and implementation of law school instruction.

### *3. Assessment of the Learning Task*

Having determined the characteristics of the learners, the next step requires an assessment of the learning task. "[Instructional] Designers expend a great deal of effort in obtaining as clear a description and as thorough an analysis as possible of the learning task[s]."<sup>202</sup> According to Smith and Ragan, this step involves five sub-steps: (1) writing all the learning goals; (2) determining for each learning goal the types of learning involved in that goal; (3) conducting an analysis of the mental steps involved in achieving that goal (performing an "information-processing analysis"); (4) determining the prerequisite skills and knowledge underlying each step identified in the information-processing analysis (performing a "prerequisite analysis") and identifying, for each identified prerequisite, the type of learning involved; and (5) writing learning objectives for the learning goal for each step and for each of the prerequisites.<sup>203</sup>

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202. SMITH & RAGAN, *supra* note 8, at 63; *see also*, DICK & CAREY, *supra* note 32, at 33; Pirie, *supra* note 172, at 591.

203. DICK & CAREY, *supra* note 32, at 116-34; SMITH & RAGAN, *supra* note 8, at 63. This process is another area in which Feinman and Feldman's admirable contorts

A principle danger of failing to conduct this analysis is that the instructor may include “deadwood” in the instruction.<sup>204</sup> Deadwood is “information that is not essential or especially supportive in attaining a learning goal.”<sup>205</sup> While it may be true that one instructor’s deadwood is another instructor’s educational moment, it nevertheless appears that many law school texts include deadwood. For example, many Contracts texts include, under the guise of background information, information about what happened to the poor plaintiff in the “hairy hand” case<sup>206</sup> after he won the appeal that is the subject of study<sup>207</sup> or how his family discovered that his case has been included in most Contracts casebooks.<sup>208</sup> The authors of the casebooks include the case in their texts to offer students a first glimpse into the nature of expectancy damages.<sup>209</sup> The fact that the plaintiff later went to the Mayo clinic for help with his problem or that his family was intrigued by the idea that the plaintiff had achieved the odd fame of frequent inclusion in casebooks is neither essential to understanding expectancy damages nor even supportive of the implicit learning goals that led the authors of these casebooks to include the case.<sup>210</sup>

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experiment fell short of the ideal. While it is clear the authors developed learning objectives, it is evident they conducted neither an information-processing analysis nor a prerequisite analysis. *See* Feinman & Feldman, *supra* note 15, at 898 (indicating that the authors attempted to break down the learning into smaller teaching units but nowhere suggesting that the authors conducted either an information-processing analysis or a prerequisite analysis).

204. SMITH & RAGAN, *supra* note 8, at 63. Another danger is the risk of failing to identify crucial prerequisite knowledge and information. *Id.* For example, law students need to understand the appellate process, court structures, standards for appellate review of trial court decisions, the ideas of precedent and stare decisis, and legal terminology, to be able to learn from cases.

205. *Id.*

206. Hawkins v. McGee, 146 A. 641 (N.H. 1929).

207. DAWSON ET AL., *supra* note 26, at 6–7.

208. LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 214–15 (6th ed. 1996).

209. DAWSON ET AL., *supra* note 196, at 8–9.

210. The inclusion of the facts about what happened to the plaintiff’s hand or how his palm grew hair could be justified. Memory experts agree that events that trigger emotional responses are more likely to be remembered. DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 20–21 (1995). Student’s discomfort at imagining the physical condition of Mr. Hawkins may increase the likelihood they will remember what they learned about expectancy theory. On the other hand, the students may remember the hand and forget the theory.

### *a. Identifying Learning Goals*

A learning goal is an unambiguous statement of the purpose of the lesson, unit, or course; in other words, a learning goal states what the learner should be able to do after she has completed the instruction.<sup>211</sup> All instructors, at every level of education, base their instruction on expressed or unexpressed learning goals.<sup>212</sup> Without at least implicit goals, an instructor cannot make a decision as to what will occur in the classroom. For example, a professor teaching mutual assent law is likely to require her students to read and discuss cases raising mutual assent issues, to discuss the policy implications of how the courts have treated the issues, and to respond to mutual assent hypothetical questions. She does so because, at the end of the instruction, she wants her students to be able to identify mutual assent issues and analyze them. In the context of illusory promise, an instructional designer probably would identify at least the following six learning goals:

- (1) Given a set of facts, the learner should be able to identify a promise that appears, on its face, to be illusory.
- (2) Given a set of facts that the learner has identified as involving a promise that appears illusory, the learner should be able to explain, in writing, why that promise appears illusory.
- (3) Given a set of facts that the learner has identified as involving a promise that appears illusory, the learner should be able to articulate the arguments that reasonable lawyers representing each of the parties would be likely to make with respect to whether the promises are illusory.
- (4) Given a set of facts that the learner has identified as involving a promise that appears illusory and the learner's articulation of the parties' arguments, the learner can evaluate the arguments.
- (5) Given a set of facts that the learner has identified as involving a promise that appears illusory and the learner's articulation and evaluation of the parties' arguments, the learner can predict what a court would decide as to whether the promise is illusory or not.
- (6) Given a set of facts that the learner has identified as involving a promise that appears illusory and the learner's articulation and evaluation of the parties' arguments, and the learner's prediction as to what a court would decide, the learner can explain why a court would reach the conclusion it has reached.

### *b. Determining the Types of Learning Involved in a Learning Goal (or Subgoal)*

This step is particularly crucial because instructional designers have developed different types of instructional strategies and assessment

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211. DICK & CAREY, *supra* note 32, at 17; SMITH & RAGAN, *supra* note 8, at 64.

212. SMITH & RAGAN, *supra* note 8, at 64.



mechanisms for the different types of learning.<sup>213</sup> Although other systems for classifying learning goals exist,<sup>214</sup> instructional designers most commonly use Professor Robert Gagné's system.<sup>215</sup> The learning outcomes are divided into five main "domains."<sup>216</sup> The discussion below considers the three domains most relevant to legal instruction.

The first domain is verbal information, which is also known as declarative knowledge; this domain involves being able to recall or understand something.<sup>217</sup> It seems likely that one of many goals (which these materials will later identify as a "learning objective")<sup>218</sup> underlying the six illusory promise goals listed above would be that the students will know that an illusory promise is a statement, in promissory form, that gives the promisor the freedom to choose, according to her whim, whether to perform or not without incurring liability for breach of contract either way.<sup>219</sup> This objective is a prerequisite for most of the above goals; it allows the students to identify potentially illusory promises, to develop and evaluate illusory promise arguments, and to predict what a court would decide.

In the intellectual skill domain, the second of Gagné's domains, there are four learning outcomes that are relevant to legal instruction: defined concepts, principles, procedures, and problem solving.<sup>220</sup> Learning

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213. See DICK & CAREY, *supra* note 32, at 34–35; SMITH & RAGAN, *supra* note 8, at 65.

214. See, e.g., INSTRUCTIONAL DESIGN THEORIES AND MODELS: AN OVERVIEW OF THEIR CURRENT STATUS 283 (Charles M. Reigeluth ed., 1983); TAXONOMY OF EDUCATIONAL OBJECTIVES: HANDBOOK 1, COGNITIVE DOMAIN (Benjamin S. Bloom et al. eds., 1956).

215. See generally ROBERT M. GAGNÉ, THE CONDITIONS OF LEARNING AND THEORY OF INSTRUCTION (4th ed. 1985).

216. The five domains are verbal information, intellectual skills, cognitive strategies, attitudes, and psychomotor skills. SMITH & RAGAN, *supra* note 8, at 65. The two domains not addressed in this Article are psychomotor goals and attitude goals. The former is not a subject of law school instruction. As to the latter, attitude objectives are crucial in ethics classes. In fact, attitudes often are important objectives in substantive law courses. For example, one evident goal of instruction in Kastley, Post, and Hom's Contracts text is the development of a sensitivity to the explicit and subtle ways in which law and legal rhetoric are different for women and minorities. See, e.g., AMY HILSMAN KASTLEY ET AL., CONTRACTING LAW 158–60 (1996) (including an excerpt from Patricia Williams's 1987 article describing her experiences as a black woman seeking to rent an apartment in New York). Nevertheless, the author of this Article has chosen, solely based on space considerations, to eschew any discussion of attitude goals.

217. DICK & CAREY, *supra* note 32, at 36; SMITH & RAGAN, *supra* note 8, at 66.

218. See *infra* notes 246–55 and accompanying text.

219. CALAMARI & PERILLO, *supra* note 40, at 228.

220. See SMITH & RAGAN, *supra* note 8, at 66–67. Two other intellectual skills

defined concepts requires the learner to classify items as examples or nonexamples based on whether the item matches a definition or list of characteristics. Thus, the first illusory promise learning goal above, which requires the learner to be able to “spot” illusory promise issues, would properly be categorized as a defined concept goal because the learner must be able to match a given set of facts to the illusory promise definition above.

The second intellectual skill is principle learning. A principle describes a set of circumstances that predict or produce an outcome; principles are often expressed as if-then statements.<sup>221</sup> Learners have acquired a principle if they can go beyond stating it (declarative knowledge) and use the principle to predict an outcome based on that principle or use that principle to control the outcome.<sup>222</sup> The rule that, if a court deems a promise illusory, the promise cannot serve as consideration for the other party’s promise is a principle. The principle is acquired if the learner can apply it to a previously unseen hypothetical and identify the promise as being illusory and use it to decide to redraft the illusory promise to make it nonillusory and, therefore, enforceable. The skills of applying and distinguishing cases would seem to be principle skills.

The third intellectual skill is procedural learning. Procedures tell the learner the steps the learner should follow in a particular circumstance.<sup>223</sup> For example, in very broad terms, one crucial part<sup>224</sup> of the procedure by which a practicing lawyer would evaluate a client’s common law (non-UCC) contract dispute would involve the following: (1) determining whether there are any issues with respect to whether the parties formed a contract; (2) determining whether either party has a possible defense to the enforcement of the contract (such as mistake, undue influence, or fraud); (3) determining what express and implied terms are likely to be deemed a part of the parties’ agreement (parol evidence rule, implied

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either do not apply to legal education or operate at too simplified a level to be relevant to legal education: learning concrete concepts and discrimination. Learning concrete concepts involves learning concepts defined in terms of their physical characteristics, and learning discriminations involves simply being able to identify two things as different. *Id.* Dick and Carey also use Gagné’s classification system but do not distinguish principles from procedures, instead classifying the two together as “rules.” DICK & CAREY, *supra* note 32, at 35.

221. SMITH & RAGAN, *supra* note 8, at 67.

222. *Id.*

223. *Id.*

224. Law professors, including the author tend to forget that lawyers almost never consider only the legal issues brought to them by clients. By way of example, in a contract dispute, a practicing lawyer also would consider a client’s need for cash, ability and inclination to litigate, the client’s relationship with the opposing party and any need to preserve that relationship, and any factors outside the parties’ relationship, such as an impending public offering of stock. Once again, the author must thank his colleague, Dennis Honabach, for suggesting this point.

contract duties); (4) determining what a court is likely to conclude the contract means (contract interpretation); (5) determining the likely order of performance and the standards by which each performance likely will be measured (express and constructive conditions); (6) determining who a court is likely to conclude breached the contract (one party, neither party, or both parties) and the likely significance of any breach (for example, substantial performance and excuse of condition); and (7) determining what possible form(s) of relief and the extent of any such relief the court likely will give to one or both parties (for example, damages, specific performance, or restitution to a breaching party). Of course, because expert lawyers have developed automaticity<sup>225</sup> in their knowledge of contract law, some of the review may be mental, particularly as to nonissues. Learners have acquired a procedure when they can apply it to a previously unencountered situation.<sup>226</sup> Thus, if a learner can apply the above procedure to a new client's contract dispute, that procedure has been acquired.

The last relevant intellectual skill is problem solving. Problem solving is defined as "the ability to combine previously learned principles, procedures, declarative knowledge, and cognitive strategies in a unique way within a domain of content to solve previously unencountered problems."<sup>227</sup> In other words, the skill of problem solving has been acquired when the learner can perform as an expert in the field would perform in response to a new problem.<sup>228</sup> At first glance, it might appear difficult to see how law school examinations involve problem solving. The confusion lies in the fact that a crucial part of problem solving in the legal field involves identifying and evaluating the analytical arguments reasonable lawyers would make with respect to the particular set of legal issues presented by a fact pattern and then predicting how a court would assess those arguments and resolve each issue. In other words, the problem the learner must "solve" is a problem requiring the learner to identify, explain, and analyze a process of argumentation and reasoning, not a problem for which "the correct solution" is the specified goal.<sup>229</sup>

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225. See *supra* note 110 and accompanying text.

226. SMITH & RAGAN, *supra* note 8, at 214.

227. *Id.* at 132.

228. See *id.*

229. See RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE xv (1999) (noting that students often get caught up in trying to write the correct answer when professors are looking for the student to discuss the ambiguities and the issues as they relate to both sides of the argument).

Thus, law school exams test problem-solving skills.

The last domain relevant to law school instruction is cognitive strategies.<sup>230</sup> As noted above, students use cognitive strategies to manage their own learning, and experts use cognitive strategies to manage and check their problem-solving efforts.<sup>231</sup>

### *c. Conducting an Information-Processing Analysis*

Instructional designers perform an information-processing analysis of a goal to “decompose” the goal into the mental steps a person must go through to perform it.<sup>232</sup> In other words, an information-processing analysis seeks to identify and sequence all the mental steps involved in achieving the learning goal. Although it is possible and it is considered proper for an expert to conduct the analysis simply by mentally reviewing the steps involved,<sup>233</sup> the risk of this approach is missing steps. Experts, such as law professors, perform many mental steps in their field of expertise automatically, and different experts properly can approach the same problem in different ways.<sup>234</sup> Thus, ideally, a designer should create a problem that tests a stated goal and administer the problem to several experts in the field, asking them to explain, in painstaking detail, each of their cognitive steps and the thinking underlying their selection and application of the steps. The experts should identify the least complex path for completing the task—noting what factors allow for this simple path, what factors require a more complex path, and the decision steps that lead to the more complex path. Finally, the designer should list the steps and decision points and recheck the list with the experts with whom the designer worked.<sup>235</sup>

No such analysis exists anywhere in legal andragogy scholarship.<sup>236</sup> Indeed, it is doubtful that most law professors ever consider the possibility of breaking their instructional goals into cognitive steps.<sup>237</sup> Below is an excerpt from an information-processing analysis for evaluating illusory promise problems. The author has chosen to limit this

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230. See SMITH & RAGAN, *supra* note 8, at 67–68.

231. See *supra* notes 127–143 and accompanying text.

232. DICK & CAREY, *supra* note 32, at 39–41; SMITH & RAGAN, *supra* note 8, at 69.

233. SMITH & RAGAN, *supra* note 8, at 69.

234. See *id.* at 69–70.

235. See *id.* at 70–71; see also DICK & CAREY, *supra* note 32, at 46–47.

236. Three works represent partial attempts: H. Russell Cort & Jack L. Sammons, *The Search for “Good Lawyering”: A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397 (1980); H.F.M. Crombag et al., *On Solving Legal Problems*, 27 J. LEGAL EDUC. 168 (1975); Feinman & Feldman, *supra* note 15. None of the three works represents even an attempt to identify all of the mental steps and processes involved in analyzing legal problems within a single doctrinal area.

237. Feinman & Feldman, *supra* note 15, at 898.

analysis to one page to allow the reader to more readily consider the information-processing analysis as a whole. Thus, the analysis begins after the learner has identified, by analysis of the call of the question and the pattern of the facts, that the question includes a formation issue. In addition, the analysis omits most of the mental steps involved in analyzing the arguments with respect to whether implying duties of good faith and fair dealing would make an alleged illusory promise nonillusory and in predicting how a court would decide the issue.

*i. A Partial Illusory Promise Information-Processing Analysis*

- (1) Recall the common fact patterns that give rise to illusory promise issues.<sup>238</sup>
- (2) Does the fact pattern involve an alleged promise that falls within any of the foregoing categories?

If no, go to Step 3.

If yes and the fact pattern is analogous to *Wood v. Lucy, Lady Duff-Gordon*,<sup>239</sup> the promise may be illusory. In writing, state the facts that arguably reveal an absence of a promise and the similarities between those facts and the facts in *Wood v. Lucy*; state the general rule that an illusory promise is a promise that gives the promisor full discretion to decide to perform or not to perform and, regardless of the decision, avoid liability for breach of contract; and then explain how it is that the particular facts arguably do not appear to state a promise by one of the parties and, if possible, arguably do appear to state a promise by one of the parties. Go to Step 5.

If yes, and the fact pattern involves a promise conditioned on a fortuitous event, absent other facts giving rise to an illusory promise issue, the promise is not illusory. In writing, state the general rule that an illusory promise is a promise that gives the promisor full discretion to decide to perform or not to perform and, regardless of the decision, avoid liability for breach of contract; and then explain how the particular facts involve a promise conditioned on a fortuitous event; how the promisor lacks control over the event, that, for this reason, the condition does restrict the promisor's discretion; and that, therefore, the promise is not illusory and suffices as consideration for the other party's return promise and the contract is enforceable. Stop.

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238. The common fact patterns in which illusory promise problems arise are: promises that reference the promisor's desire or choice, "satisfaction conditions," conditions based on the occurrence of fortuitous events, loan contingencies, requirements agreements, output agreements, termination clauses, and facts like those in *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917) (finding that the writing does not indicate a party has promised to do anything at all). All of the illusory promise cases referenced in the Second Restatement of Contracts and Calamari and Perillo's well-respected contracts hornbook fall within one of these categories. RESTATEMENT (SECOND) OF CONTRACTS § 77 (1979) (Illusory and Alternative Promises); CALAMARI & PERILLO, *supra* note 40, § 4-12, at 228-35.

239. 118 N.E. 214.



If yes, and the fact pattern involves facts arguably fitting in one of the categories other than the *Wood v. Lucy* fact pattern or the promise conditioned on a fortuitous event fact pattern, the promise may be illusory. In writing, state the facts that give rise to an illusory promise issue; identify and explain the relevant analogy and, where possible, distinguish the relevant analogy; state the general rule that an illusory promise is a promise that gives the promisor full discretion to decide to perform or not to perform and, regardless of the decision, avoid liability for breach of contract; and then explain how it is that the particular promise appears to confer such discretion on the promisor and, if possible, how it is that the particular promise does not confer such discretion on the promisor. *Go to Step 7.*<sup>240</sup>

- (3) Recall the basic test for what makes a promise illusory (see above and below).
- (4) Does either party's promise appear to give one party full discretion to decide whether to perform or not and, regardless of the party's choice, avoid liability for breach of contract?

If no, the promise is not illusory. *Consider other possible legal issues.*

If yes, the promise may be illusory. In writing, state the facts that give rise to an illusory promise issue; state the general rule that an illusory promise is a promise that gives the promisor full discretion to decide to perform or not to perform and, regardless of the decision, avoid liability for breach of contract; and then explain how it is that the particular promise appears to confer such discretion on the promisor and, if possible, how it is that the particular promise does not confer such discretion on the promisor. *Go to Step 7.*

- (5) Recall the key ideas from *Wood v. Lucy*.
- (6) Does the parties' agreement, on the whole, imply the existence of obligations on both parties?

If no, the contract contains an illusory promise. In writing, explain that courts are inclined to preserve contracts that appear to omit one of the parties' promises if the agreement implies the existence of obligations on both parties; explain why this contract does not do so; and then explain that, therefore, the promise is illusory, the promise does not serve as consideration for the other party's return promise, and that the other party's return promise is not enforceable. *Stop.*

If yes, explain why this contract does imply obligations on both parties, that the courts will therefore imply a duty of reasonable efforts to achieve any unstated but implicit obligation; what the effect of implying a duty of reasonable efforts would have; and then explain that, therefore, the promise is not illusory, the promise does serve as consideration for that the other party's return promise and that the other party's return promise is enforceable. *Stop.*

- (7) Recall that courts attempt to preserve contracts by implying promises of good faith or reasonable efforts.

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240. It seems likely that, in teaching illusory promise, most law professors would skip steps one through two because they engage in the process of analogizing fact patterns to known key cases automatically.

- (8) Recall the definitions of good faith and reasonable efforts.

A few points are worth noting about the above information-processing analysis. The author's intent is not to suggest an exclusive approach to analyzing illusory promise problems; rather, this analysis describes the physical actions (writing) and mental steps (thinking) the author would take in analyzing an illusory promise problem. The analysis reveals a few things about how at least one expert analyzes illusory promise problems. First, despite the assertions made by many law professors, knowing the rules and the cases from memory is critical. Second, most law teaching omits instruction directed at many of these steps (that is, instruction directed at helping the learners encode the rules of law and cases and fails to assist learners in encoding the common fact patterns that give rise to illusory promise problems). Third, the writing of legal analysis is the end product of all the thinking that precedes it; if students learn to think properly, they are more likely to write properly.

*d. Performing a Prerequisite Analysis for Each Step Identified  
in the Information-Processing Analysis*

A prerequisite analysis takes the process of decomposing the learning goal one necessary step further; it seeks to identify what the learner needs to know and to be able to do to perform each step identified in the information-processing analysis.<sup>241</sup> Smith and Ragan describe the process as "top-down" because designers start with the higher level task and work their way down to and then through each prerequisite, seeking to find the lowest level prerequisite tasks and knowledge involved.<sup>242</sup> This analysis allows the designer to make sure that the overall instruction includes specific instruction in everything the learner needs to be able to do to perform each course goal.

Because law professors have not conducted information-processing analyses of their goals, it is certain that no prerequisite analyses exist either. Below is a prerequisite analysis for Step Four of the above

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241. DICK & CAREY, *supra* note 32, at 52–85 (referring to the analysis as a "subordinate skills analysis"); SMITH & RAGAN, *supra* note 8, at 78; *see also* Pirie, *supra* note 172, at 591–92.

242. SMITH & RAGAN, *supra* note 8, at 78. Dick and Carey recommend using a "hierarchical approach." DICK & CAREY, *supra* note 32, at 54–59. They suggest that designers ask themselves questions about common student errors and underlying skills and knowledge. *Id.* They should then work both backwards from the lowest level skill to the highest and forward from the highest level skill to the lowest. *Id.*

information-processing analysis; the analysis is confined to Step Four for the sake of brevity.

*i. A Prerequisite Analysis for Performing Step Four of the Illusory Promise Analysis*

- Understand the concept “promise.”
  - Define promise.
- Understand the concept “discretion.”
  - Define discretion.
- Understand the concept “perform a contractual obligation.”
  - Define “perform.”
  - Define “contract.”
  - Define “contractual obligation.”
- Understand the concept “breach of contract.”
  - Define “breach.”
- Understand the concept “impose liability.”
  - Define “liability.”
  - Define “impose.”
    - Understand the concept “damages.”
    - Define “damages.”
  - Understand the concept “specific performance.”
  - Define “specific performance.”
- Understand the principle that, even though a promise appears illusory, a court may, through additional analysis, conclude the promise is not illusory.
- Understand the concept “facts.”
  - Define “facts.”
- Know and be able to state the rule as to what makes a promise appear illusory.
- Understand and be able to apply the principle as to what makes a promise appear illusory.
  - Understand and be able to perform legal analysis of language-based legal issues.
  - Understand the concept “legal analysis.”
    - Define “legal analysis.”
  - Understand and be able to apply the procedure for identifying a word or a set of words in a promise that make the promise appear illusory.
    - Understand and be able to identify credible definitions of relevant language.
    - Understand and be able to explain how a definition of a word in a promise tends to show or not to show that the promisor has been given absolute discretion.
- Be able to evaluate and select between conflicting interpretations of contract language.

Again, a few points are worth noting. At the most obvious level, the analysis reveals how a single prerequisite can necessitate instruction of many prerequisites. Also, one set of prerequisites requires the learners to interpret contract language. As discussed earlier in this Article, there are many issues in Contracts law, like illusory promise, that require the learner to interpret language.<sup>243</sup> The frequent recurrence of a need to

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243. See *supra* note 145 and accompanying text.

perform this particularized form of legal analysis means the instructor can teach the pattern of analysis for such issues when teaching the first issue and refer the students back to that prior learning and rehearse it on each occasion later in the semester that the issue arises.<sup>244</sup> Thus, the prerequisite analysis reveals patterns that can facilitate greater depth of learning and understanding. In addition, the prerequisite analysis reveals a need to at least familiarize students with how courts enforce promises before or at the time students study illusory promise.<sup>245</sup> Finally, as noted above, a designer would identify the type of learning each prerequisite represents. A quick glance at the above list of prerequisites reveals many defined concept and declarative knowledge prerequisites, a few principle prerequisites, and one procedural prerequisite.

#### *e. Writing Learning Objectives*

The purpose of the next sub-step in the process, writing learning objectives, is to communicate “where we are going.”<sup>246</sup> Learning objectives describe the observable behaviors that learners must demonstrate to show they possess the desired cognitive capability.<sup>247</sup> Objectives allow the designer to focus the instruction and the evaluation of the students and the instruction.<sup>248</sup> Finally, if communicated to the learners, objectives can arouse interest in the instruction and enable the learners to engage in metacognitive self-assessment; students can ask themselves whether they have learned to do what they were supposed to

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244. When he thinks back to his own experience when he was a contracts student, the author realizes that his contracts professor, Professor Warren Shattuck of Hastings College of the Law, recognized this prerequisite skill and made an effort to teach it to his students. He had all of his students recall and repeat the following phrase numerous times throughout our year of studying contracts: “The language is ambiguous and needs to be interpreted.”

245. Indeed, without even conducting a prerequisite analysis, many contracts text authors appear to have sensed that remedies notions are important prerequisites for most contracts issues and, therefore, have placed remedies materials early in their textbooks. *See, e.g.*, BARNETT, *supra* note 80 (remedies material found in the second chapter after a short introductory chapter); CALAMARI & PERILLO, *supra* note 40 (remedies material in the first chapter of text); DAWSON ET AL., *supra* note 26 (remedies material in the first chapter of text); FARNSWORTH, *supra* note 80 (introductory materials include several remedies cases); HAMILTON ET AL., *supra* note 80 (remedies material in the first chapter of text).

246. SMITH & RAGAN, *supra* note 8, at 84; *see also* Pirie, *supra* note 172, at 593–94.

247. *See* SMITH & RAGAN, *supra* note 8, at 84.

248. *Id.*

learn to do.<sup>249</sup>

Although at least one other model for objectives exists,<sup>250</sup> instructional designers recommend<sup>251</sup> Robert F. Mager's three-component approach to creating objectives.<sup>252</sup> The three components are: (1) the terminal behavior, or what the learner must be able to do by the end of the instruction; (2) the conditions of demonstration, or the circumstances under which the learner must be able to perform the terminal behavior; and (3) the standards or criteria, or how well the learner must be able to perform the objective for the instructor to conclude that the learner has met it.<sup>253</sup> Many designers delay writing the criteria until they write their assessment items in the next phase of the design process.<sup>254</sup> The learning goals set forth above are examples of objectives for which the criteria have been omitted. They easily could be converted into three-component goals by adding a reference to the standard by which the designer is to measure achievement of the objective. Of course, setting a mastery standard is not easy, particularly for problem-solving goals such as legal analysis, because the students' responses are not uniform. The criteria-setting step for intellectual skills, therefore, requires creation of checklists of required features in an acceptable response.<sup>255</sup> The consideration of criteria for achievement of objectives leads to the next step, assessing learning from instruction.

#### 4. *Assessing Learning from Instruction*

Although law teachers usually evaluate students only to assess student learning and to rank order students, assessment really offers two insights: one into the students, and one into the instruction. In other words, instructional designers assess learners for two reasons: "to assess individual students' performances and to provide information about what kinds of revisions are needed in the instructional materials."<sup>256</sup> In fact, because a goal of assessment is to evaluate instruction, Smith and Ragan emphasize the importance of not only testing the highest level objectives,

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249. See *id.* at 116.

250. See, e.g., Lisa Schuman, *Understanding Objectives*, at <http://edweb.sdsu.edu/courses/edtec540/objectives/components.html> (last visited Nov. 20, 2000).

251. See DICK & CAREY, *supra* note 32, at 117–19; SMITH & RAGAN, *supra* note 8, at 84.

252. MAGER, *supra* note 35, at 1–3.

253. *Id.* at 21; SMITH & RAGAN, *supra* note 8, at 84–85.

254. DICK & CAREY, *supra* note 32, at 123–24; SMITH & RAGAN, *supra* note 8, at 85.

255. DICK & CAREY, *supra* note 32, at 124.

256. DICK & CAREY, *supra* note 32, at 142–43; SMITH & RAGAN, *supra* note 8, at 92. In an excellent, recently-published monograph addressing assessment, Professor Gregory S. Munro details numerous suggestions for enhancing law school assessment. GREGORY S. MUNRO, *OUTCOMES ASSESSMENT FOR LAW SCHOOLS* (2000).



but also testing the prerequisite objectives. In other words, a Contracts instructor should test the students' ability to state the declarative knowledge with respect to the rules and the common fact patterns giving rise to illusory promise issues, the students' skill in spotting illusory promise issues, and the students' skill in applying the principle. Testing both higher level and prerequisite objectives allows the designer to develop information as to why the students failed to achieve the higher level objective.<sup>257</sup> Very few law schools have used examination results to evaluate instruction and almost never isolate and test prerequisites; rather, most exams test only the students' development of problem-solving skills.<sup>258</sup>

Instructional designers also attend to the institutional goals of the assessment. If the goal is to obtain a spread of scores among all test takers, designers create "norm-referenced tests." Designers create such tests by administering trial versions of the test, assessing test-taker performance on each test item, eliminating items that are either too easy or too hard, and developing a test that produces a bell curve.<sup>259</sup>

If the goal is to assess learner competency, designers create "criterion-referenced assessment instruments."<sup>260</sup> Designers create these instruments by matching learning objectives with assessment items, creating items that span the range of difficulty possible, and retaining items on which most of the learners do well, so long as the item does test what it was designed to test and is a sound question.<sup>261</sup> If the learners produce a wide range of scores, designers become concerned; such a result indicates that the instruction is probably not effective.<sup>262</sup>

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257. See SMITH & RAGAN, *supra* note 8, at 95.

258. Some readers might have concern that designing instruments to test prerequisites would create a risk that the prerequisite questions, particularly those directed at assessing declarative knowledge, will overwhelm the higher-order objectives. An instructor can avoid this problem simply by carefully constructing and weighting the examination questions, assigning much greater weight to the questions testing the higher-order objectives.

259. SMITH & RAGAN, *supra* note 8, at 93-94.

260. *Id.* at 93.

261. *Id.* at 94.

262. See *id.* Criterion-referenced measures do not make the assignment of grades impossible. Instructors who successfully develop effective, efficient, and appealing instruction, and appropriate assessment mechanisms can assign competency at any grade value they choose. For example, if the instructor equates competency with a B minus grade, she can assign grades below B minus to those students who fail to demonstrate competency, assigning specific grades based on how far each such student fell below competency level. The instructor can assign grades above B minus to those students who exceeded the specified competency level of performance, assigning specific grades based

Law school examinations cannot be easily classified as either norm-referenced or criterion-referenced. Law professors follow neither approach in creating their exams. Most law school exams produce a bell curve, yet they purport to test and should be testing competency. In other words, because the goal of most legal education is to produce graduates who are competent new lawyers, the goal of legal instruction also should be competence. In fact, the bell curve result indicates that the instructor probably has fallen far from this goal.<sup>263</sup>

Law school exams also fail to meet at least two of the three criteria for “good” assessment instruments: validity and reliability.<sup>264</sup> Most law school examinations, however, do meet the third criterion, practicality; therefore, the practicality criterion is not further addressed in this Article.<sup>265</sup>

A measure is valid if it actually assesses what it purports to assess.<sup>266</sup> First, individual items in a test should be “consistent with the goals or objectives they claim to assess (*congruence*).”<sup>267</sup> This simply requires instruction to test for the skills the instruction was designed to foster. Second, the test “items for each objective [should be] representative of the range of items that are possible to develop for that objective . . . and [the] objectives upon which the instrument is based [should be] adequately sampled (*completeness*).”<sup>268</sup> This requires examinations to test students along the range of expected difficulty and to assess for competency as to all objectives.

Law school examinations are deficient as to both validity criteria. First, given the instructional time devoted to the skills involved in reading court opinions and to legal theory, it is evident that law professors have at least implicit instructional objectives relating to these subjects. However, law professors almost never test case reading skills and only sometimes test theory. Second, given the fact that most substantive law professors only test their students using one midterm and a final examination, it is impossible for law professors to test students as to each learning objective even once, much less develop test items along

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on how far each student exceeded the competency level.

263. A bell curve means that the learners roughly are equally distributed around the mean. In other words, the same number of students have demonstrated competence as have demonstrated a lack of competence. In a criterion-referenced, competency-focused model, one would expect most students (eighty percent) to demonstrate competence. See Bloom, *supra* note 30, at 10.

264. See SMITH & RAGAN, *supra* note 8, at 95.

265. See *id.* at 98. Practicality means examination should not place excessive time and work demands on the instructor. *Id.* While law professors often complain about grading, most are able to grade their final exams in only one or two weeks.

266. *Id.* at 95.

267. *Id.*

268. *Id.* at 95 (emphasis added).

the range of difficulty possible for each objective.<sup>269</sup>

A measure is reliable if “we have a high degree of *confidence* in the scores that it produces.”<sup>270</sup> In other words, to conclude an instrument is reliable, a designer must be reasonably sure that those who scored high on the test did so because they possess the tested skills and knowledge and that they would score high again if retested.

This goal pulls designers in somewhat conflicting directions. An instrument that the instructor cannot objectively grade, such as an essay test, can produce unreliable grades because of problems in inter-rater reliability (if the designer uses multiple graders) or of changes in the grader’s grading time or mood during the grading process.<sup>271</sup> Instructors can reduce this risk, however, by the use of checklists, rating guides, model responses, and other explicitly developed and stated criteria.<sup>272</sup> In addition, Smith and Ragan recommend that instructors grade all the answers to one question before grading students’ answers to additional questions.<sup>273</sup>

Objective tests, such as multiple-choice tests, on the other hand, often do not provide realistic assessment of objectives and are vulnerable to errors caused by student guessing.<sup>274</sup> Instructors can minimize these risks by using a mix of objective and constructed answer (essay) assessment tools and by using best practices<sup>275</sup> in constructing multiple-choice questions.

Regardless of testing mode, one great threat to reliability that is of particular significance for law professors is a failure to create several items and several testing instances for each learning objective.<sup>276</sup> Fewer

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269. Because law school grades tend to correlate so highly with LSAT scores and with bar examination performance, it is tempting to believe there is nothing wrong with either law school instruction or testing practices. Feinman and Feldman, however, explain that this type of thinking is “evil and false” and an “outgrowth of Darwinian evolutionary theory.” Feinman & Feldman, *supra* note 15, at 896–97. Indeed, the strong correlation between LSAT scores and first-year grades arguably indicates how little students learn in law school.

270. SMITH & RAGAN, *supra* note 8, at 97.

271. *See id.* at 97.

272. *Id.*

273. *Id.* at 98.

274. *Id.* at 97.

275. Best practices in constructing multiple-choice questions include having multiple distracters (logical but wrong answers), constructing all possible answers using the same grammatical structure, writing clear, unambiguous questions, and including “none of the above” as a choice infrequently. *Id.* at 92–111.

276. *Id.* at 97.

items and testing instances increase the likelihood that the learner's knowledge and skills will not be reflected in their performance.<sup>277</sup> The student may have understood every aspect of the knowledge or skill tested, except the specific aspect tested on the exam. The student also may have been confused by the form of the question or may have been ill or have encountered a severe personal problem on the day of the exam. For these reasons and others, instructional designers regard test-retest reliability as the best measure of reliability for criterion-referenced examinations.<sup>278</sup>

Law school examinations, by and large, are not reliable. The infrequency of testing, only midterms and finals, makes it extremely likely that some students deemed competent are not and some students deemed incompetent actually are competent. Moreover, law professors almost never test as to all objectives, much less test each objective multiple times. Many law professors regard checklists and other rating guides as superficial and reductionistic and therefore instead, apply a "gestalt" approach to grading examinations, in which they decide upon a grade based on their overall sense of how the student performed. Finally, law professors never even attempt to assess test-retest reliability.

In many cases, the sacrifice of validity and reliability does not occur unconsciously. Many law professors have a sense that their testing instruments are less than ideal. However, law professors choose not to address the deficiencies in their exam construction because they have elevated the practicality criterion above all other considerations. Law professors believe they cannot construct assessment devices that are practical, valid, and reliable, all at the same time. This belief is not well-founded. For each area of study in a Contracts course, for example, a Contracts professor could construct a twenty or twenty-five question, multiple-choice quiz and require the students to take the quiz on-line. On-line testing technology allows a students' work to be immediately assessed. The technology scores the students' performance and sends the test-taker an immediate e-mail reporting the score, which questions the student got wrong, and the correct answer for each erroneous answer.<sup>279</sup> Moreover, law schools could employ graders or teaching assistants to address a higher grading load. In addition, for practice purposes,

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277. *Id.*

278. *Id.* at 98. Test-retest reliability refers to whether the measure produces consistent results over two test administrations. *Id.*

279. In fact, students who failed to score in the competency range could be required to restudy and then either take a second version of the test or send an e-mail to the professor explaining why the correct answers were correct and why the students' answers were wrong. This latter approach would allow for quick and directed remediation of deficiencies, a crucial instructional strategy for all types of learning outcomes. *See infra* notes 354–55 and accompanying text.

professors could develop mechanisms, such as spot-checking, grading checklists, and model answers, to allow peer grading of students. Finally, law schools could and should reduce class sizes to allow for more frequent grading and student practice, as discussed below. They should also reduce faculty course loads and begin to give greater weight to instructional achievements and less weight to scholarship in making hiring and tenure decisions. Such institutional changes would reduce faculty burden in order to accommodate the heavier grading loads.

### *C. The Design Phase: Selecting Instructional Strategies*

This subsection discusses the selection of instructional strategies for individual lessons.<sup>280</sup> The discussion above, with respect to the implications for instruction of each of the learning theories,<sup>281</sup> foreshadows some of the ideas and recommendations addressed below. Learning theory has greatly influenced the development of instructional strategies.<sup>282</sup> This subsection addresses three key subjects of great relevance to law school instruction and their implications for law school instructional design. First, this subsection describes each of the events of instruction, discusses the extent to which legal instruction addresses each event, and offers suggestions for integrating those events into law school instruction. Second, this subsection discusses a crucial instructional planning issue, the selection of instructional strategies along what designers refer to as the “supplative–generative continuum,” a continuum that addresses the level of learning guidance instructors should be providing, and provides a demonstrative supplative–generative analysis. Third, this subsection addresses two additional, crucial strategy issues: the selection of instructional media and the grouping of students for instruction. This subsection is followed by a model lesson plan that integrates not only the principles discussed in this section but also the principles suggested by learning theory.

#### *1. The Events of Instruction*

According to Smith and Ragan, there are some general principles to

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280. Except where necessary, this discussion does not address course-level or curriculum-level design issues because a discussion of these issues is beyond the scope of this Article.

281. See *supra* Part III.

282. Ertmer & Newby, *supra* note 58, at 51.



designing instruction applicable to all learning objectives, instructors, and learners. One such principle is that a lesson should be organized to include the following: an introduction, a body, a conclusion, and assessment.<sup>283</sup> Smith and Ragan offer an expanded version of these basic events, although they also explain that the expanded events may be, and often are, combined in various ways.<sup>284</sup> A second universal principle is that instruction with respect to all events of instruction should be “learner-centered, active, and meaningful.”<sup>285</sup>

While there are universal principles, instructional strategy selection is not an exact science in which the designer identifies and then selects the “right” technique for the particular design problem. Rather, designers make educated, thoughtful predictions of which strategies, from among the range of possibly appropriate strategies, will work, basing their decisions on the many learner, learning context, and task factors discussed throughout the previous subsection of this Article.<sup>286</sup>

#### *a. The Instructional Introduction*

According to Smith and Ragan, the introduction should accomplish four goals: get students to attend to the class, establish the instructional purpose, arouse the students’ interest and attention, and preview the lesson.<sup>287</sup> These expanded events cause learners to attend to the class, as opposed to other stimuli in her environment, and to know what they are supposed to learn and how they are going to learn it.<sup>288</sup> Many law professors have intuited the need for these events and provide them; however, most do not include an introduction at all, or they assume the introduction provided by the text they use suffices.

#### *b. The Body of the Lesson*

There are five expanded events in the body of a lesson. The events are: recalling relevant prior knowledge, processing information and examples, focusing attention, employing learning strategies, practicing, and giving or getting feedback. Recalling relevant prior knowledge involves the

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283. SMITH & RAGAN, *supra* note 8, at 114.

284. *Id.* at 123.

285. SMITH & RAGAN, *supra* note 8, at 115.

286. *See id.* at 113–26.

287. *Id.* at 115. Smith and Ragan emphasize that each of these “events”—activate attention, establish purpose, arouse interest and motivation, and previewing the lesson—could be generated by the learner or supplied by the instruction. *Id.* at 114–15. For a discussion of how designers make choices along this continuum and a demonstration of one set of choices made for a law school lesson addressing illusory promise, see *supra* notes 256–66 and accompanying text.

288. *See* SMITH & RAGAN, *supra* note 8, at 116–17.

learner in a process of retrieving, from long-term memory, the knowledge and skills necessary and helpful in learning the new objective.<sup>289</sup> Smith and Ragan also recommend having students restructure their prior knowledge into new structures and helping students identify and distinguish similar classes of problems.<sup>290</sup> For example, after studying general contract interpretation, the parol evidence rule, express and constructive conditions, all third-party beneficiary law, assignment law, and delegation law, the contract interpretation aspects of these areas of contract law can be studied together.<sup>291</sup> In addition, contract interpretation issues can be analogized to mutual assent issues because both involve the interpretation of language, and distinguished from mutual assent issues because of the specialized rule sets that apply.

The review of prior knowledge contemplated by this step is different from a common practice of law professors in which the professor calls on a student to review the class discussion from a prior class. Rather, this event is much more structured; it focuses on having students search their memories for learning experiences weeks or even years before. The instruction must cause the student to review all the prerequisite information that is already possessed, not just what was learned the prior week.

For example, an instructor teaching promissory estoppel should cause students to review the general principles they have learned about contract formation, and more particularly, about consideration. In addition, the instructor should cause the students to review what they have learned about the following principles: the influence of the *Restatement of Contracts*; equitable estoppel; interpreting language (so the learner will be able to assess whether, in a particular fact pattern, the party really made the requisite "promise"<sup>292</sup>); negligence (from Torts class);<sup>293</sup> the foreseeability standard in connection with negligence and contract damages claims,<sup>294</sup> and the patterns of arguments common to both of

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289. *Id.* at 117.

290. *Id.* at 137.

291. This approach is also suggested by the cognitivist learning theory. *See supra* note 145 and accompanying text.

292. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (requiring a promise as a prerequisite for relief under that section).

293. Many commentators have drawn the link between tort negligence law and promissory estoppel. *See, e.g.,* GILMORE, *supra* note 18, at 88-89; Neil G. Williams, *What To Do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1044 (1995).

294. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (requiring the promisor to

these areas;<sup>295</sup> the theory for and practice of awarding damages based on the nonbreaching party's reliance interest;<sup>296</sup> and how to perform the skill of legal analysis.

The "processing information and examples" event begins the instruction of new material.<sup>297</sup> The instructor may choose to present the information in a discovery sequence or in an expository sequence.<sup>298</sup> In a discovery sequence, if the learning outcome is a concept or principle, the instructor provides examples and nonexamples of the concept or principle to be learned and requires the learners to derive the concept or principle at play.<sup>299</sup> If the objective is a procedure outcome or a problem-solving outcome, such as legal analysis, the instructor has the learners immediately begin to work multiple problems, with the instructor guiding their efforts.<sup>300</sup> In an expository sequence, the instructor presents the principle statements, concept definitions, or the steps of the procedure, and then presents the examples or nonexamples, and demonstrates the use and application of the procedure.<sup>301</sup> If the objective is a problem-solving outcome, the instructor models an approach to problem solving by performing a "think aloud" analysis, a process in which the instructor states aloud each mental activity involved in mentally processing an analysis.<sup>302</sup>

Because most law texts involve collected cases from which the students must derive what they need to learn, law texts probably can be

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have reasonably anticipated (foreseen) that the promise would induce action or forbearance as a prerequisite for relief under that section).

295. For example, arguments on behalf of defendants in both areas tend to emphasize the length of the chain of events and the cost to defendants and society of anticipating every possible consequence. Arguments on behalf of plaintiffs tend to focus on the ease with which one could have guessed the plaintiff would suffer the loss and the choice between placing the cost of the defendant's loss on the wrongdoer or on the victim. It is also worth having the students note the differences between contract and tort foreseeability. Contract foreseeability tends to focus on the defendant's ability to anticipate the quantum of the loss; whereas tort foreseeability focuses on the defendant's ability to anticipate the fact of loss. R.W. Byrom, *Do Damages Depend on the Same Principles Throughout the Law of Tort and Contract?*, 6 U. QUEENSLAND L.J. 118, 122-28 (1968).

296. See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a.

297. SMITH & RAGAN, *supra* note 8, at 117.

298. *Id.* at 117-18.

299. See *id.* at 117-18, 183, 200-01.

300. See *id.* at 137, 217-19.

301. See *id.* at 117-18, 183, 200-01, 217-19.

302. *Id.* at 137; see also *infra* note 320 and accompanying text. The selection between discovery sequences and expository sequences is an important one because discovery sequences are theorized to produce a deeper level of processing but tend to require greater instructional time and carry with them a greater risk of student frustration and disengagement. SMITH & RAGAN, *supra* note 8, at 117-18. This selection is a crucial part of the decision as to where along the supplantive-generative continuum the instruction should fall, as explained in Part C.2.

classified as having adopted a discovery sequence. This approach greatly limits the number of examples and nonexamples which the instructor can present to the students, in part because it causes law professors to devote considerable class time to helping students understand the cases and the doctrine the cases create.<sup>303</sup> If law professors tested students' ability to read and understand cases, this approach might be sound, but, as explained above, most law school exams do not test case reading skills at all. Law professors, instead, purport to test legal analysis skills. For this reason, there appears to be a disjunction between the use of the discovery approach and a law professors' instructional goals.

The third event in the body, focusing attention, involves getting students to attend to the critical features of the concept or principle, to what triggers the application of the procedure or of the critical steps of the procedure, or to the principles, concepts, or procedures necessary to perform the problem solving, or pattern recognition in order to identify the issues within the problem.<sup>304</sup> Because legal principles are elementized, getting students to focus their attention on the critical details of the principles or concepts is not difficult and already occurs in legal instruction. Pattern recognition instruction, however, seldom occurs in legal instruction. Law professors almost never explicitly identify for students or require students to identify common factual patterns relevant to spotting issues<sup>305</sup> or to common patterns of legal argumentation.<sup>306</sup> This omission is striking because instruction designed to help students develop knowledge of common fact patterns and the skill of deploying common legal arguments almost certainly would enhance student performance.

The fourth event, employing learning strategies, may involve any or all of the following:

- (1) Supplying, or instructing the students in generating and then having students generate, alternative ways of

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303. See SMITH & RAGAN, *supra* note 8, at 117–18.

304. See *id.* at 118, 138, 183, 201, 219.

305. See, e.g., *supra* note 238.

306. See Feinman & Feldman, *supra* note 15, at 887–88 (identifying common legal argument patterns); Susan Etta Keller, *The Rhetoric of Marriage, Achievement, and Power: An Analysis of Judicial Opinions Considering the Treatment of Professional Degrees as Marital Property*, 21 VT. L. REV. 409, 455 (1996) (identifying common rhetorical patterns in arguments concerning the issue of treating professional degrees as marital property); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 534 (1986) (noting that policy arguments often come in “matched contrary pairs, like certainty vs. flexibility, security vs. freedom of action”).

representing the information, concept, principle, or problem, such as by creating an outline, a mnemonic,<sup>307</sup> an analogy, a graphic organizer,<sup>308</sup> or a graphic problem representation;<sup>309</sup>

- (2) Supplying students with additional examples, exam or problem approaches, and additional problems, or requiring students to “elaborate” on their learning by developing their own examples, exam or problem approaches, and problems;
- (3) Rehearsing students’ recall and application of the learning, or requiring students to rehearse; and
- (4) Monitoring, or teaching students to self-monitor, and having students self-monitor their efforts by checking their analysis of concepts, principles, procedures, or their problem-solving efforts.<sup>310</sup>

A few law professors already use graphic organizers, mnemonics, and outlines in their instruction,<sup>311</sup> and law professors have told students for years that they should develop their own course outlines. Most law professors, however, never provide their students with instruction in developing graphic organizers, mnemonics, and outlines; never require their students to develop their own graphic organizers, mnemonics, and outlines; and never monitor the accuracy of their students’ graphic organizers, mnemonics, and outlines.<sup>312</sup> Moreover, law professors do not

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307. For a description of the different types of mnemonic devices, see *supra* note 141 and accompanying text.

308. A graphic organizer can take the form of a comparison chart, a concept map, a hierarchy map, or a flow chart. See generally SMITH & RAGAN, *supra* note 8, at 166–68; Jennifer Blakely Dalrymple, *Teaching and Learning Law with Graphic Organizers*, at <http://www.loyno.edu/~dciolino/Courses/GraphicOrganizers.htm>. (last visited Nov. 26, 2000).

309. See SMITH & RAGAN, *supra* note 8, at 138. For example, a student analyzing a contract interpretation or a conditions problem could depict the contract graphically, showing the parties and their duties above an arrow pointing from the performing party to the party receiving the performance. The author suspects most Contracts professors already use such graphics in their teaching but seldom, if ever, require their students to create them, much less give their students feedback on efforts to create such graphics.

310. See *id.* at 118, 138, 169, 185–86, 202, 219.

311. Dalrymple, *supra* note 308.

312. The author’s review of student outlines in the past year has revealed that his students do not all know how to create a good outline. One of the best reasons to create an outline is to force one’s mind to create a schema for the learning—to see the hierarchical relationships among the concepts and principles being studied. Students, having never received intensive instruction in creating outlines, tend to create outlines that just list rules and cases under large headings, such as acceptance, instead of seeing the hierarchies, and subhierarchies within acceptance doctrine, such as: (1) how offers can be accepted, (a) manner issues, (b) manifestation issues; (2) termination of the power to accept; and (3) mailbox rules.



provide any instruction in self-monitoring learning strategies, do not demonstrate self-monitoring learning strategies in class, and do not require their students to demonstrate self-monitoring strategies. Finally, while some law professors suggest that their students develop their own examples and problems, few require students to do so or check students' examples and problems for accuracy.

Practice and feedback, the last two events of the body of instruction, are particularly crucial.<sup>313</sup> They are linked together, and represent the greatest deficiency of the Vicarious Learning/Self-Teaching Model. In fact, for problem-solving objectives, such as legal analysis, experts believe thousands of hours of practice and feedback are necessary to make a novice into an expert.<sup>314</sup> The purpose of practice and feedback is not to evaluate the students for grading purposes, but rather, to allow the learners to develop their skills under supervision.<sup>315</sup>

Practice should be sequenced from easy to hard to allow learners to develop their skills, and structured to allow students to use not only the skills being taught, but also the skills and knowledge underlying the skills being taught.<sup>316</sup> The underlying skills and knowledge are particularly important for problem-solving objectives; studies have shown that crucial characteristics of experts include an ability to readily recognize patterns and to recall better organized and more automatically retrievable knowledge.<sup>317</sup> Smith and Ragan suggest that expert problem-solvers are able to apply principles of application skills "fairly automatically";<sup>318</sup> this point suggests instructors may want to teach students the underlying principles before the students move into problem solving.<sup>319</sup>

For problem-solving objectives, one common way to move the instruction from processing information and examples to practice is to use what designers refer to as the "think aloud" technique.<sup>320</sup> A professor demonstrates problem solving during the processing information and

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313. See DICK & CAREY, *supra* note 32, at 187.

314. William G. Chase & Michelene T.H. Chi, *Cognitive Skill: Implications for Spatial Skill in Large-Scale Environments*, in COGNITION, SOCIAL BEHAVIOR, AND THE ENVIRONMENT 111-36 (John H. Harvey ed., 1981).

315. SMITH & RAGAN, *supra* note 8, at 118-19.

316. *Id.* at 118, 139, 184, 202, 219.

317. *Id.* at 136.

318. See *supra* note 110 and accompanying text (explaining the concept of automaticity).

319. SMITH & RAGAN, *supra* note 8, at 136.

320. *Id.* at 137.

examples stage by stating out loud every thought with respect to the problem being solved, seeking to provide students with a rough information-processing demonstration.<sup>321</sup> To begin students' attempt at practice, the professor can provide students with a partial think aloud and requires the students to finish it.<sup>322</sup> This process could be supplemented with guiding questions, in which the students work the problem in chunks, moving from clarifying and articulating the problem to identifying the principles involved, and only then to analyzing the problem fully.<sup>323</sup> Only after the students have tried a few partial problem-solving exercises will they begin to practice on their own.<sup>324</sup> In fact, students may need to cycle through the "think aloud" process with an easy set of problems first and slowly move through additional cycles with increasingly difficult problems.<sup>325</sup> Problem-solving practice also should include opportunities for students to check their work.<sup>326</sup>

Feedback is equally important. Feedback should be informational in nature; that is, students should be told if their analysis is reasonable or unreasonable and why, told about any patterns in their errors, and given information about errors in their approach to the practice items. Feedback should be coupled with additional practice if the learner did not enjoy sufficient success.<sup>327</sup> Particularly for problem-solving objectives, Smith and Ragan recommend providing students a model answer.<sup>328</sup> Feedback should include information about the efficiency of the student's approach, whether the learner correctly identified the problem, correctly applied all relevant principles and procedures, and correctly checked the work.<sup>329</sup> Finally, hints and guidance, which are a form of feedback, should be included early on during practice, but should decrease as learners develop their skills.<sup>330</sup>

Law schools fall far short of the goal of providing adequate practice and feedback. Practice opportunities implicitly exist every time a professor calls on any student; the other students can attempt to answer the professor's questions in their minds. Professors do not require students to do so. Moreover, only the selected student actually receives

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321. *Id.*

322. *Id.*

323. *See id.* at 138.

324. *Id.* at 137–38.

325. *See id.*

326. *See id.* at 138, 202, 220. One way to accomplish this crucial goal is to provide students with model answers or checklists and require them to check their own work or a peer's work. *See supra* note 137 and accompanying text (discussing self-correction as a metacognitive skill).

327. SMITH & RAGAN, *supra* note 8, at 118–20, 139, 184, 202, 219–21.

328. *Id.* at 139.

329. *Id.* at 139, 202, 220–21.

330. *Id.* at 139.

feedback, and the feedback often indicates only that the student has erred without helping the student discern the nature of the error or how to correct it. Students, as noted at the outset of this Article, are expected to learn from that feedback vicariously.<sup>331</sup> Of course, even assuming the watching students are playing along, they may have committed different errors than the selected students.<sup>332</sup> Thus, the only genuine feedback students receive are their grades and their professors' handwritten comments on midterm and final examination exam books, if the students motivate themselves to see the exam books. For this reason, Smith and Ragan assert that, of all the existing macrostrategies for teaching problem solving, "Socratic Dialogue" is "the least applicable to ill-structured problem solving."<sup>333</sup>

One likely reason for this critical shortcoming in legal instruction is time (because faculty spend so much time case crunching). The problem also stems from a false belief that providing feedback to large classes of students is not feasible. Smith and Ragan suggest that computer programs can provide much of the necessary feedback.<sup>334</sup> They also recommend programs that provide guiding questions to students to allow the students to self-check their essay examination answers.<sup>335</sup> Instructors also can provide guiding questions and model answers to the students in class to allow for self-, peer-, or group evaluation of the students' practice.<sup>336</sup> Finally, one benefit of increasing the efficiency and effectiveness of the instruction with respect to lower level intellectual skills (declarative knowledge, concepts, principles, and procedures) and moving much of that instruction outside the classroom is to provide more

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331. See *supra* notes 9–31 and accompanying text.

332. SMITH & RAGAN, *supra* note 8, at 141 (noting this flaw with what they call the Socratic approach).

333. *Id.* at 141. Ill-structured problems can be understood in contrast to well-defined problems. Well-defined problems are problems for which there is one right answer or a definable range of solutions. *Id.* at 133. Ill-structured (or "ill-defined") problems have multiple correct solutions "with the appropriateness of the solution dependent upon the rationale for solution." *Id.* Given the intersecting factors of client economics, client relationships, and doctrinal issues, the problems lawyers handle tend to fall in the ill-structured category. Law school examinations, however, tend to fall into the category of well-defined problems because, on most law school examinations, and certainly on bar examinations, while there is no single "right" answer, there usually is a range of appropriate analyses.

334. *Id.* at 288.

335. *Id.* at 185.

336. A law teacher with concerns about student loafing could ensure enthusiastic student effort by including in their designs weekly rotating spot-checks of students' efforts at practice, self-assessment, and peer-assessment.

classroom instruction time, particularly at the end of each semester when the students possess all the knowledge and skills they will need for legal problem-solving instruction and practice.<sup>337</sup>

Two other ideas from Smith and Ragan seem particularly promising. First, the “think aloud” technique holds particular promise for teaching analysis skills to new law students, particularly because the initial “think aloud” and the first few practice experiences involving partial “think aloud” exercises need not occur in the classroom. Rather, with computer prompts or a model provided in class, the students could self- or peer-evaluate their completion of the partial “think aloud” exercises.<sup>338</sup> Second, law professors should abandon a particularly misleading and disturbingly common habit, the habit of suggesting to students that knowledge of the law and memorization are irrelevant on law school exams. In fact, as the many studies of experts have shown, a critical characteristic of an expert is the possession and ability to use huge stores of well-organized, readily-accessible domain knowledge.<sup>339</sup>

### *c. The Conclusion of the Lesson*

The overarching goal of the conclusion section is to allow students to consolidate their new learning.<sup>340</sup> It consists of three events—summarize and review, transfer learning, and remotivate and close.<sup>341</sup>

Because new learning takes time to be fully grasped by the learners, review of the new learning is essential. Smith and Ragan recommend providing the learners with a partially completed graphic organizer and requiring them to complete it and having the learners or the instructor paraphrase learned principles and concepts.<sup>342</sup> They also recommend periodic cumulative review to ensure recall.<sup>343</sup> For problem-solving objectives, the summary and review should include efforts to classify, if possible, the problems studied and to identify which approaches proved effective in analyzing the class of problems.<sup>344</sup> Some law professors probably do provide some sort of review as they complete each topic. Many also encourage students to develop paraphrased understanding of rules and concepts on their own time; few, if any, however, check

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337. The author’s plans for developing Contracts instruction in accord with learning theory and instructional design include an allocation of the last three weeks of the semester to instruction and practice of legal analysis skills.

338. *See infra* Part V.

339. SMITH & RAGAN, *supra* note 8, at 136.

340. *Id.* at 120.

341. *Id.* at 120–21.

342. *Id.* at 121, 186, 203.

343. *Id.* at 121.

344. *See id.* at 139.

students' paraphrased rule statements for accuracy or use the partially completed graphic organizer approach.

Transferring learning involves the application of learning to new contexts.<sup>345</sup> Near transfer refers to the application of learning to new contexts relatively similar to the contexts in which the learner learned the information. Far transfer involves application of the learning in very different situations and in very different ways than those in which the learning was acquired.<sup>346</sup> Near transfer requires the learner to recognize critical similarities between the new context and the old one, a skill developed only after substantial practice.<sup>347</sup> Far transfer, on the other hand, can be facilitated by having learners develop their own examples and problems, develop analogies between prior learning and the new learning, and by requiring learners to paraphrase their learning.<sup>348</sup>

Transfer is a critical event for law instruction. Near transfer, which, in the law context, involves simple application of rules and case holdings to facts, is considered a basic level skill.<sup>349</sup> Far transfer is a mark of excellence for practicing lawyers. Trial and appellate lawyers who are able to persuade courts to shift the application of principles beyond their initially apparent application to a previously unencountered problem are considered experts. Transactional lawyers demonstrate their expertise by transferring principles of law from cases and statutes into their drafting implications.

Because law professors frequently require students to apply rules and case holdings to new fact patterns, near transfer regularly occurs in legal education. To facilitate greater near transfer, instructors teaching contracts principles could encourage students to connect those principles to the common contexts in which they arise.<sup>350</sup> Far transfer occurs much less frequently in legal education. To facilitate far transfer, instructors can encourage students to brainstorm broader applications of new contracts learning or to consider the contract drafting implications of that learning.

Finally, the remotivate and close event is necessary so that students appreciate the importance of the learning, an appreciation that educators

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345. *Id.* at 121.

346. *Id.*

347. *See id.*

348. *Id.* at 121, 139.

349. *See* MACCRATE REPORT, *supra* note 4, at 151–55.

350. *See, e.g., supra* note 238 (discussing the common contexts in which illusory promise issues arise).



have determined “greatly influence[s] how well the learning will be acquired initially and how well that learning will be retained.”<sup>351</sup> This event is commonly combined with the transfer event by encouraging the learner to explore how information can be use in the future.<sup>352</sup> Law professors, having not sought to motivate students in an introduction, are even less likely to strive for motivation in their conclusions. Because students will need to be able to use the principles they are learning in connection with other studied principles on their exams and in practice, having students brainstorm the links to other issues and to the drafting implications of the doctrine should suffice for either event.

#### *d. Assessment*

This Article already has addressed assessment, in large part.<sup>353</sup> Thus, here it is only necessary to add a few points. First, Smith and Ragan suggest including, in this instructional event, remediation instruction for those students who failed to demonstrate competency on the assessment instrument.<sup>354</sup> Indeed, Feinman and Feldman included both remediation and reassessment in their instructional design.<sup>355</sup> This approach is both exciting and somewhat daunting. One way to implement this goal is to require those students who did not pass an assessment examination to restudy the subject matter (providing their own events of instruction) and then either require the students to send the professor an e-mail explaining each of their errors or to take a new form of the test. Another possibility, at the law school level, is to implement remediation into the students’ bluebook review period; those students who performed poorly in a subject could be required to determine, on their own, what skills and knowledge they failed to demonstrate on their final examinations.

### *2. Making Choices Along the Supplantive–Generative Continuum*

A crucial consideration in designing instruction that addresses each of the events of instruction is whether to have the students supply the events of the instruction or to have the events provided by the instructor. Designers use the term “generative” to describe instruction in which the students create the events of instruction, and use the term “supplantive” to describe instruction in which the instructor supplies the events of instruction.<sup>356</sup> This choice is evocative of the distinction between

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351. SMITH & RAGAN, *supra* note 8, at 121.

352. *Id.*

353. See *supra* notes 256–79 and accompanying text.

354. SMITH & RAGAN, *supra* note 8, at 122.

355. Feinman & Feldman, *supra* note 15, at 911–12.

356. SMITH & RAGAN, *supra* note 8, at 124.

constructivism and cognitivism in the sense that constructivists generally believe learners should be encouraged to construct their own meanings; most constructivists, however, also believe learners should be placed in real world, cognitive apprenticeships.<sup>357</sup>

The choice is not so much a toggle, where instruction must either be supplantive or generative, but, rather, supplantive and generative are a continuum along which most instruction falls.<sup>358</sup> The choice is not between instruction requiring active learning and passive learning; active learning is a fundamental principle of all instructional design.<sup>359</sup> The question really revolves around whether the learners prompt their own engagement in active learning activities or whether the instruction "scaffolds" the students' involvement in active learning activities.<sup>360</sup> For example, under either approach, an instructor would want students to use cognitive strategies, such as mnemonics or graphic organizers, to encode their learning. The question addressed here is whether the instruction should prompt or require students to select and demonstrate their use of cognitive strategies or whether the students should be required to determine the need for using and selecting among the possible cognitive strategies on their own.

A few points warrant emphasis. First, under either approach, assuming it were successful, the students could select and use the strategies. Second, generative approaches produce deeper processing than supplantive approaches and, therefore, generative approaches tend to produce better learning.<sup>361</sup> Third, generative approaches require much more time because nonexperts make a significant number of errors in making instructional choices. Fourth, under a generative approach, students who lacked well-developed and relevant, general or domain-specific cognitive strategies would founder, become frustrated, and would not learn much.

In deciding where along the supplantive-generative continuum to locate any particular event of instruction, the information gleaned by the designer from the learner, context, and task analyses is crucial. Smith and Ragan maintain that instruction both should tilt as much as possible toward the generative pole and, generally, should progress toward the

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357. See *supra* note 155 and accompanying text.

358. SMITH & RAGAN, *supra* note 8, at 123-26.

359. *Id.* at 125.

360. *Id.* at 124.

361. *Id.*

generative pole during the course of instruction.<sup>362</sup> Smith and Ragan also emphasize, however, that a number of learner, context, and task factors may suggest otherwise. The relevant learner considerations are the learners' possession of relevant prior knowledge, their possession of "a large and sophisticated repertoire of cognitive strategies," their aptitude, their motivation, their level of anxiety, and their locus of control.<sup>363</sup> Context factors include the amount of instructional time available, whether "learning to learn" or domain-specific goals are the objectives of the instruction, and whether the goal is to have all of the learners develop a minimum level of competency.<sup>364</sup> Learning task factors include the intellectual level of the objective and the complexity of the problems.<sup>365</sup>

The Vicarious Learning/Self-Teaching Model can be seen as a generative instructional strategy. In the sense that students must teach themselves under the Vicarious Learning/Self-Teaching Model, the strategy is generative. The Model, however, is only superficially generative. Law texts and, therefore, law instructors determine the order in which the students study the material, the amount of classroom time devoted to the study of each subject, and what subjects will not be studied.<sup>366</sup> Instructors require students to devote considerable learning time to discussions of doctrine, case analysis, policy, and theory, leaving students little time to decide upon and then to engage in learning strategies, to practice, or to generate other instructional events. A truly generative strategy would involve giving students a set of problems to evaluate within a domain, such as contracts law, providing the students with no doctrine with which to evaluate the problem, and telling the students they must analyze the problems in small groups. This approach, therefore, would require the students to research and find the relevant doctrine. The approach certainly would include only those few aspects of theory the students found in the course of their research. Finally, students would need to develop their reasoning skills on their own and from their groups, or find resources to assist their development of reasoning skills.

In any event, the Vicarious Learning/Self-Teaching Model, to the extent that it reflects a generative approach, is not the outgrowth of a careful consideration of learner, context, and learning task factors; rather, it is a matter of inertia. Law professors continue to use it mostly because

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362. *Id.* at 126.

363. *Id.*

364. *Id.*

365. *Id.*

366. For example, Dawson and Harvey's well-regarded Contracts text relegates statutes of frauds instruction to an appendix. See DAWSON ET AL., *supra* note 26, at 925-47.

law professors have done so for generations. What is needed is a thoughtful consideration of where along the supplantive-generative continuum each course in every law school should fall. Accordingly, as a starting point, below is a supplantive-generative analysis with respect to first-year law students studying illusory promise as part of the author's Contracts class.

*a. Supplantive-Generative Analysis*

The illusory promise lesson plan below<sup>367</sup> is considerably more supplantive than generative. All of the learner characteristics weigh in favor of a more supplantive approach. The students, being first-year law students, possess only minimal relevant prior knowledge, and although many of the students had successful college experiences, most nevertheless lack a significant repertoire of cognitive strategies. Moreover, the students' aptitude for performing legal analysis is average to below average in comparison to all law students who take the LSAT. Finally, while the students are highly motivated to become lawyers, they are less motivated to study law, and the students have high anxiety (typical of all first-year law students), particularly because they are second semester students, the semester after which those students who will be dismissed academically are determined.

Three context factors influenced the choice. First, it is difficult to both teach skills and cover the entire body of Contracts doctrine in a one-semester, four unit class. Instructional time is quite limited, suggesting the need for a more supplantive approach. Second, the goal of the instruction is to have most of the students reach a minimum competence level; thus, a more supplantive strategy seems necessary. Third, learning to learn, while an important goal, was not as important a goal as having the students learn the domain-specific knowledge and skills. This factor also weighs in favor of a more supplantive approach.

The task factor that influenced the choice to be more supplantive was the difficulty of learning to perform legal analysis and the students' relative newness to that skill.

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367. See *infra* Part V (describing the lesson plan and the rationales for the instructional strategy choices made).

### 3. *Selecting Delivery Systems*

At the same time a designer is selecting strategies, decisions need to be made about the media of instruction and about grouping strategies.<sup>368</sup> A medium is “the physical means by which the instructional message is communicated.”<sup>369</sup> Instructional media include: computers, print, video, interactive multimedia, slides and filmstrips, distance education, people (teachers), real objects and models, visuals (photographs, drawings, charts, graphs), display boards (chalkboards, white boards, bulletin boards), overhead transparencies, audio (for example, audiocassettes, compact discs), and television (live broadcasts).<sup>370</sup> Grouping strategies revolve around how the learners will be gathered and organized for learning.<sup>371</sup> Types of grouping possible include: tutoring, individualized and adaptive instruction, interactive small groups, recitation groups,<sup>372</sup> and lecture groups.<sup>373</sup> As Smith and Ragan suggest, these selections do not need to be the same for all instructional events within a lesson.<sup>374</sup> For example, as demonstrated below in the model illusory promise lesson, the introduction and review may occur textually; the rest of the body events and the conclusion may occur in a classroom with various groupings during the course of the classroom instruction; and the assessment may be by computer.<sup>375</sup>

#### a. *Selecting the Media of Instruction*

Numerous media comparison studies reveal that, while certain media are more effective than others in certain contexts, with certain learners and for certain tasks, no single medium—not computers, texts, or live teachers—has ever been shown to be superior overall.<sup>376</sup> Thus, the

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368. See SMITH & RAGAN, *supra* note 8, at 286.

369. *Id.*

370. *Id.* at 288–91; see also DICK & CAREY, *supra* note 32, at 201–02, 228; TIMOTHY J. NEWBY ET AL., INSTRUCTIONAL TECHNOLOGY FOR TEACHING AND LEARNING: DESIGNING INSTRUCTION, INTEGRATING COMPUTERS, AND USING MEDIA 144 (1996).

371. See SMITH & RAGAN, *supra* note 8, at 292–94.

372. Recitation equates, more or less, with the Vicarious Learning/Self-Teaching Model because it involves having the instructor ask individual students questions, having the students prepare in advance for class to respond, and having the instructor correct the student’s responses. *Id.* at 293. Interestingly, Smith and Ragan, while noting the prevalence of the use of recitation, also note that the method is “of little current interest among scholars in either pedagogy or instructional design.” *Id.*

373. *Id.* at 293–94; see also ROBERT GAGNÉ ET AL., PRINCIPLES OF INSTRUCTIONAL DESIGN 267–87 (3d ed. 1988).

374. SMITH & RAGAN, *supra* note 8, at 286.

375. See *infra* Part V. The footnotes for the lesson indicate the bases for the media and grouping selections made.

376. See generally SMITH & RAGAN, *supra* note 8, at 286; HANDBOOK OF RESEARCH ON TEACHING (Merlin C. Wittrock ed., 3d ed. 1986).



selection of media requires consideration of the learning tasks, the learners, the learning context, including any practical matters, and the attributes of each type of media.<sup>377</sup>

The type of learning involved is the crucial task characteristic. While declarative knowledge and concepts can easily be learned through texts,<sup>378</sup> the intellectual skills other than concept learning that are so crucial to law school learning—principles, procedures and problem solving—require the students to encounter multiple examples, to respond to questions about the examples as practice, and to get feedback about their performances.<sup>379</sup> Only certain types of media—programmed texts, live teachers, computers, and interactive multimedia—can provide these conditions.<sup>380</sup>

Most of the learner characteristics relevant to media selection—reading levels, ability to decode symbols, and familiarity with the operation of media hardware (computers)—are not an issue for law school instruction; only learners' attitudes about various types of media, if ascertainable, seem relevant.<sup>381</sup> Contextual and practical considerations include the availability of sufficient media equipment, facilities, scheduling and funding.<sup>382</sup>

Each medium of instruction possesses a different set of critical attributes. The media and the attributes of those media that are most relevant to the design of law school instruction are detailed below. Computers and interactive multimedia possess the ability to retain large amounts of information, manipulate the information rapidly, provide access to other stores of information (by hyperlinks, for example), interactively respond to student work and adapt to the learner, and maintain and analyze student progress records.<sup>383</sup> Interactive multimedia, however, is expensive and difficult to produce.<sup>384</sup> Print is inexpensive, supports individualized student use, allows for random access by learners, can be annotated by learners to reflect their personal

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377. SMITH & RAGAN, *supra* note 8, at 287; *see also* DICK & CAREY, *supra* note 32, at 226–28. *See generally* ROBERT A. REISER & ROBERT M. GAGNÉ, *SELECTING MEDIA FOR INSTRUCTION* (1983).

378. *See* DICK & CAREY, *supra* note 32, at 201.

379. SMITH & RAGAN, *supra* note 8, at 287.

380. *Id.*; *see also* DICK & CAREY, *supra* note 32, at 201–02.

381. *See* SMITH & RAGAN, *supra* note 8, at 387.

382. *Id.* at 287–88; *see also* DICK & CAREY, *supra* note 32, at 201–02.

383. SMITH & RAGAN, *supra* note 8, at 288–90.

384. *See id.* at 290.

elaborations, and can be made to be fairly interactive with the learner.<sup>385</sup> People are highly interactive, extremely expensive, highly adaptable and flexible, possess empathy, can possess and obtain access to large stores of information, and are able to rapidly process multiple sensory inputs.<sup>386</sup>

Law professors seldom consider any of these factors when designing their instruction. Not only do law professors, who have an economic incentive not to consider other forms of mediation, almost always select person-mediated instruction but also, law professors generally have neither the knowledge base nor the skills to develop instruction by other media.<sup>387</sup>

### *b. Selecting Grouping Strategies*

As noted above, grouping strategies include tutoring; individualized and adaptive instruction; small group learning; recitation group learning, which equates, more or less, to the large Socratic groups used in law school; and lecture. In selecting among grouping strategies, designers consider the following factors: (1) the demonstrated effectiveness of cooperative learning methodologies;<sup>388</sup> (2) the nature of the learning task, particularly whether the learners can reach the objective on their own, interacting with other learners, or only from the instructor;<sup>389</sup> (3) the relevant learner characteristics, particularly the learners' loci of control, the variation in their prior learning, and their experience and skill in participating in group exercises;<sup>390</sup> and the (4) media selection factors<sup>391</sup> and the instructional strategy selected.<sup>392</sup>

While cooperative learning groups have been very effectively explored and deployed by academic support faculty and by faculty teaching legal

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385. *Id.* at 289.

386. *Id.* at 291.

387. CALI exercises, of course, are an exception to this point. The 2000 CALI catalog lists over 150 exercises covering 27 legal topics. *See* Center for Computer-Assisted Legal Instruction, *CALI Lesson Catalog*, at <http://www.cali.org/catalog.html> (last visited Nov. 22, 2000). While this Article trumpets the idea of CALI exercises, it does not unreservedly endorse CALI exercises, which, in the opinion of the author, are of mixed quality.

388. *See* HANDBOOK OF RESEARCH FOR EDUCATIONAL COMMUNICATIONS AND TECHNOLOGY: A PROJECT OF THE ASSOCIATION FOR EDUCATIONAL COMMUNICATIONS AND TECHNOLOGY 1017-44 (David H. Jonassen ed., 1996). *See generally* DAVID W. JOHNSON & ROGER T. JOHNSON, *LEARNING TOGETHER AND ALONE: COOPERATIVE, COMPETITIVE, AND INDIVIDUALISTIC LEARNING* (4th ed. 1994).

389. *See generally* VERNON S. GERLACH & DONALD P. ELY, *TEACHING AND MEDIA: A SYSTEMATIC APPROACH* (2d ed. 1980).

390. SMITH & RAGAN, *supra* note 8, at 295. Interestingly, learners' dislike of particular grouping approaches "are often not highly predictive of a strategy's effectiveness." *Id.*

391. *Id.*

392. *Id.* at 295-96.

writing courses,<sup>393</sup> this learning has not reached substantive law classrooms. Moreover, other forms of grouping, particularly individualized and adaptive learning approaches, have hardly been explored by the law teaching community. The lesson plan below identifies the bases for the media and grouping strategies selected.<sup>394</sup>

## V. AN ILLUSTRATIVE LESSON PLAN

### A. Introduction

Below is a sample lesson plan for teaching illusory promise doctrine, issue spotting, and analysis. The events of instruction provide the organizational principle for the lesson; the lesson integrates learning theory, instructional design theory, and practice. The lesson is more supplantive than generative for the reasons stated in the supplantive-generative analysis above.<sup>395</sup> Explanations for the instructional strategies, media selections, and grouping approaches used appear in the footnotes to make the text of the lesson plan easier to follow. The author is currently in the process of developing a Contracts textbook<sup>396</sup> based on the principles discussed in this Article. To make the author's proposals more concrete for readers interested in adapting some or all of the suggestions contained in this Article to their own instructional efforts, the

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393. See Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 32-33 (1996); Marla L. Mitchell, *Beyond a Book Review: Using Clinical Scholarship in Our Teaching*, 2 CLINICAL L. REV. 251 (1995) (reviewing *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS* (Rodney J. Uphoff ed., 1995)); Clifford S. Zimmerman, "Thinking Beyond My Own Interpretation": *Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957 (1999).

394. In connection with the Gonzaga University Institute for Law School Teaching's 1995 conference entitled, "The Science and Art of Law Teaching," Professor Vernellia Randall of Dayton University College of Law presented conference materials in which she offered guidance to law teachers in implementing ideas from the Instructional Design field. See Vernellia R. Randall, *Helping Students Learn: A Model for Effective Legal Teaching*, in *THE SCIENCE AND ART OF LAW TEACHING* (1995) (on file with author). Randall's materials, which are presented as a manual for designing law school instruction rather than as a scholarly work, include several of the ideas explored in the preceding section. Randall, however, also omits many of the ideas in this section and proposes an implementation sequence inconsistent with the sequence recommended by Smith and Ragan and other experts in the instructional design field.

395. See *supra* notes 356-67 and accompanying text.

396. Although the text is not complete, the author has already begun using portions of the text in his teaching. The author anticipates completing the text by Fall 2002.

portion of the text addressing illusory promise, other than the edited court opinions, appear as an Appendix to this Article.<sup>397</sup>

It is worth noting that the author has designed the lesson to ensure that a large segment of the instruction occurs outside the classroom. This approach stems from the author's goals of reserving classroom time for those events of instruction for which an instructor is really necessary and to make the study of illusory promise as efficient as possible. Efficiency is an objective because of its intrinsic value<sup>398</sup> and because the designer's goal is to reserve the last two or three weeks of the course time for practice in analyzing the integrated, complex problems—the overarching instructional goal for the author's course.<sup>399</sup> Furthermore, given the expense and burden of human-mediated instruction, it should be reserved for learning objectives that require it.<sup>400</sup>

## *B. An Illusory Promise Lesson Plan*

### *1. Introduction*

#### *a. Deploy Attention and Arouse Interest and Motivation*

First, note that these two events of instruction are combined.<sup>401</sup> The entire introduction will be provided by the students' text.<sup>402</sup> The illusory promise textual materials begin by highlighting the subject area label, "illusory promise," and by presenting an illusory promise issue set in the context of familial relations. In the hypothetical, a parent promises to let an older child use the family car if the child washes the car and the parent

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397. See *infra* app. The edited court opinions have not been included in the Appendix.

398. See *supra* note 8 and accompanying text.

399. This approach derives from the wealth of research showing that experts possess well-organized, detailed knowledge and skills with which to attack problem analysis. See *supra* notes 317–19 and accompanying text. In other words, because the author seeks to develop students capable of analyzing unique contracts problems by combining contracts concepts, principles, and analytical procedures in unique ways, the author requires students to possess a great deal of well-organized, readily accessible domain-specific knowledge and skills. The author also requires instruction time to allow for instruction and practice of the skills involved in analyzing previously unseen problems. See SMITH & RAGAN, *supra* note 8, at 287. These factors suggest the importance of reserving significant classroom time for work on problem-solving exercises.

400. As Smith and Ragan suggest, human instructors are one of the few media effective for instruction in intellectual skills. SMITH & RAGAN, *supra* note 8, at 287. Because the learners have high anxiety and external loci of control, the unique human capacity for empathy is particularly relevant. See *id.* at 291.

401. See *supra* note 284 and accompanying text (noting that Smith and Ragan recommend and frequently choose to combine instructional events).

402. This choice is justified by the facts that the learners effectively can receive these events on their own and because of the low cost of delivering these events textually. See SMITH & RAGAN, *supra* note 8, at 289, 294.

decides not to use it herself. The text notes the likelihood that the promise will anger the child because the child must wash the car even though she has no assurance that the parent will decide to let her use the car.<sup>403</sup> The text identifies this promise as illusory and then transitions the students to the subject of the lesson, illusory promise issues set outside the familial context. The text then offers the students a matched set of examples: a simple but prototypical illusory promise and a promise that is not illusory but is similar in all nonrelevant respects.<sup>404</sup> The text explains that the courts would conclude the former is an illusory promise, and therefore does not constitute consideration for the return promise described in the example; consequently, the contract is not enforceable. The text then requires students to answer two questions. The first question asks students to write down why courts have chosen to intervene and refuse to enforce promises deemed illusory, and the second question asks students to write down why the promise in the first example is illusory and the promise in the second example is not.<sup>405</sup>

*b. Establish Instructional Purpose and Preview Lesson*

The text next describes the instructional objectives for the lesson (learning the doctrine, theory, and analysis of illusory promise problems) and explicitly details how the students will achieve the objectives. In other words, the text describes the instructional process set forth below, explaining what instruction the students will receive in the text, in the classroom, and by computer, and describing the students' obligations

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403. Smith and Ragan recommend both the highlighting of the label and the use of a stimulating example. SMITH & RAGAN, *supra* note 8, at 182. The age of the students justifies the selection of a parent-teenager interaction because they will either relate to the example because they are parents or because they were recently teenagers themselves.

404. Smith and Ragan suggest offering such a first matched set to pique interest. SMITH & RAGAN, *supra* note 8, at 182. The students are likely to be curious why the former promise is illusory and the latter is not illusory.

405. These questions further stimulate interest and also, consistent with cognitive learning theory, require students to actively engage with the text by dialoging with the material. See *supra* notes 128-30 and accompanying text (suggesting the value, according to cognitive learning theory, of integrating cognitive strategies into instruction). They are also somewhat consistent with constructive theory because the learners must develop their own theories. See *supra* note 163 and accompanying text (suggesting the value, according to constructivist learning theory, of encouraging students to develop their own hypotheses). To ensure students actually answer the many questions contained in the workbook and do the workbook exercises, the instructor will need either to regularly collect the students' assignments or, at least, spot-check the students' efforts.



with respect to each of these activities.<sup>406</sup>

## 2. *Body*

Large segments of the body of the instruction will be provided by the text, and a significant portion of the body will occur in the classroom.<sup>407</sup>

### a. *Recall Prior Knowledge*

Through the use of two previously-explained and used graphic organizers, the text first situates the subject of illusory promise within the context of the other recurring consideration issues. It next situates consideration within the larger body of contract formation law and situates contract formation law within the larger body of contracts law.<sup>408</sup> The text then guides students through a review of the relevant prior knowledge. This review includes a discussion of general consideration concepts, of promise, of good faith and reasonable efforts, and of the application of those concepts. It also includes an abbreviated review of the other, recurring doctrinal categories in which courts refuse to enforce contracts notwithstanding the fact that the parties have bargained for the alleged consideration. Those areas are past and moral consideration, pre-existing duties, and bad faith or unreasonable assertions of invalid claims. The review concludes by having students revisit ideas about breach of contract and remedies because, according to traditional illusory promise doctrine, an illusory promise allows the promisor to choose to perform or withdraw without risk of liability for breach of contract.<sup>409</sup>

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406. These represent a supplantive approach to these events, a choice dictated by the supplantive-generative analysis above.

407. The early events of the body are mediated by the text because students can fully benefit from these events in this medium. While some practice is also provided textually, most of the practice and feedback occur in the context of a medium well-suited to providing such practice and feedback, human mediation. See SMITH & RAGAN, *supra* note 8, at 287.

408. The repeated use of graphic organizers helps students develop and structure their schema to accommodate the new learning to follow. See *supra* notes 113–22 (explaining the role of schema in cognitive processing theory).

409. Having the students participate in their own review, even if the students must review prior sections of the text to do so, strengthens the students' mental connections to the previously learned material as well as their connections of the new learning to the prior learning. See SMITH & RAGAN, *supra* note 8, at 20–21 (explaining that cognitive processing theory involves helping learners make their own connections between the new learning and their prior knowledge).

*b. Process Information and Examples, Focus  
Attention (Part One), and Practice (Part One)*

This section<sup>410</sup> begins with straightforward statements of doctrine, both the general definition of illusory promise and the courts' inclination to attempt to transform promises that appear to be illusory into enforceable promises by implying duties of good faith and reasonable efforts.<sup>411</sup>

The text then redirects the students to the matched set of examples with which the instruction began. The text reprints the two fact patterns, but this time certain words in the fact patterns are in bold font.<sup>412</sup> The text then provides a "think aloud"<sup>413</sup> explanation of how the author determined that the first problem raised an illusory promise issue and why the author believes a court probably would conclude the promise is illusory. This demonstration illustrates all the thinking and writing skills the students will need to analyze illusory promise issues. The text also includes a similar "think aloud" for the matched nonillusory promise.

The text next invites the students to classify as illusory or nonillusory a series of matched sets<sup>414</sup> of illusory and nonillusory promises,<sup>415</sup> after which the text provides increasingly truncated "think aloud" analyses for each problem in each set and requires the students to complete partial "think aloud" exercises in their workbooks. The examples span the range of factual patterns that commonly raise illusory promise issues.<sup>416</sup> The text also sequences the examples so that the earlier problems are relatively easy and the subsequent problems become increasingly

410. Note, again, the combining of events of instruction.

411. The instructional goals for this lesson do not include a goal of developing students' ability to deduce the illusory promise doctrine from the cases. Accordingly, the lesson does not require students to figure out the doctrine from cases. Cases are important, of course, and are included in the lesson; they simply are not used as a vehicle for teaching the skill of deriving doctrine from cases.

412. The visual cue allows students to isolate the key attributes of the prototype example, a strategy recommended by Smith and Ragan. SMITH & RAGAN, *supra* note 8, at 183.

413. See *supra* notes 320–26 and accompanying text.

414. The sets are matched in the sense that they are similar in all nonrelevant aspects so that students can begin to isolate and understand the crucial attributes of the promises that the courts classify as illusory. See SMITH & RAGAN, *supra* note 8, at 118 (identifying attribute isolation as an important cognitive step in understanding concepts).

415. Because students only have considered two problems at this time, the text requires students to classify the examples, not so much for practice, but as a means of making sure the students are actively engaging with the text.

416. SMITH & RAGAN, *supra* note 8, at 183, 201 (recommending this approach).

difficult.<sup>417</sup>

The text then requires the students to read four heavily edited illusory promise court opinions. The text provides the cases to illustrate the application of the doctrine, not as a tool for teaching case reading skills. Thus, rather than requiring the students to brief the cases, the text requires the students to respond in writing to questions in their workbooks designed to help students identify what they need to gather from the opinions. Additionally, the text requires students to identify the parties' respective promises, to determine which promise allegedly is illusory, to state the court's conclusion as to whether the promise is illusory, to relate the court's explanation of its conclusion to the illusory promise principles they have learned, and to identify any hints given by the courts as to why courts are concerned about illusory promises.<sup>418</sup> Because the courts' reasoning in the selected cases is not altogether clear, the text focuses students' attention on particular points in the opinions by the use of bolding and guiding hints.

### c. Practice (Part Two)

After reading the cases, the text requires students to prepare written restatements, in the students' own words, of illusory promise doctrine. Next, they must identify in writing whether each question in a new set of problems raises an illusory promise issue and then prepare written

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417. See *supra* note 77 and accompanying text (discussing the behavioral preference for easy-to-hard sequencing); see also *supra* note 316 and accompanying text (discussing easy-to-hard sequencing as an instructional design principle).

418. The cases used are *Strong v. Sheffield*, 39 N.E. 330 (N.Y. 1895); *Omni Group, Inc. v. Seattle-First National Bank*, 645 P.2d 727 (Wash. Ct. App. 1982); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917); and *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642 (2d Cir. 1945). Although, arguably, cases are unnecessary, the cases span four major contexts in which illusory promises occur and serve to make the learning more concrete and realistic, and to provide insight, from courts, as to the courts' thinking with respect to illusory promise problems. See SMITH & RAGAN, *supra* note 8, at 201 (explaining the importance of providing students with "the *whys* of a principle").

The selection of these particular cases is a crucial matter. *Strong* provides a clear, easy-to-understand illustration of a promise that appears illusory and cannot be made non-illusory even had the court implied duties of good faith or reasonable efforts. *Omni Group* plays off *Strong* nicely because the apparently crucial distinction between the word "want" in *Strong* and the satisfaction clause in *Omni Group* allows insight into the very fine distinctions courts make in this area of law. *Wood's* lack of any promise from Mr. Wood shifts the discussion into a new arena, and *Sylvan Crest* allows the class to discuss the termination clause line of illusory promise cases. As a result, by the time the students have completed the ten initial problems and have read these four cases, they have been introduced to all of the ways in which illusory promise issues have arisen and, therefore, will be better able to spot illusory promise issues. Also, the cases are sequenced by degree of difficulty to allow the students to continue their progression in understanding illusory promise doctrine.

analyses of those problems that do raise illusory promise issues.<sup>419</sup> These problems also move from easier to more difficult and span a wide variety of contractual contexts.<sup>420</sup>

*d. Employ Learning Strategies*

The last preclassroom activity first encourages students to reread materials they previously studied about creating graphic organizers and mnemonics. Students are then required to select from among the possible choices and develop a mnemonic or a graphic organizer to assist them in recalling illusory promise doctrine.<sup>421</sup> Next, students are directed to self-evaluate their learning and to consider what questions they have regarding the material to prepare for class.<sup>422</sup> Finally, the text requires the students to identify in writing the eight recurring fact patterns that raise illusory promise problems as reflected in the examples, the problems, and the cases in the text.<sup>423</sup>

*e. Process Information and Examples, Focus Attention (Part Two), and Evaluative Feedback (Part One)*

The classroom component will begin with a discussion of students' efforts to paraphrase the doctrine and with several students explaining their mnemonic devices or graphic organizers to the entire class. Students will self-correct both their paraphrase of the doctrine and their mnemonic or graphic organizer in accordance with instructions supplied by the professor.<sup>424</sup> The professor then will lead a short discussion of the students' written answers to the questions regarding each of the four cases; this discussion may appear similar to the traditional Vicarious Learning/Self-Teaching Model in the sense that the instructor will be selecting a student to read her responses.

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419. Smith and Ragan suggest that practice with respect to principle learning includes practice at "stating the principle", practice at identifying situations to which the principle applies, and "practice applying the principle". SMITH & RAGAN, *supra* note 8, at 202.

420. *See id.* at 201.

421. *See id.* at 185–86, 202 (recommending this approach); *supra* notes 138–41 and accompanying text (describing the various types of mnemonic devices and graphic organizers).

422. *See* SMITH & RAGAN, *supra* note 8, at 118.

423. *See id.* at 138 (discussing the instructional design basis of this approach).

424. *See id.* at 202 (suggesting the instructions take the form of a model answer).

There are, however, three significant differences between this process and the Vicarious Learning/Self-Teaching Model. First, the students will have already responded to the questions in writing. Second, the goal of the discussion is to use the cases to process information and as examples, and not to provide students with feedback on their case reading skills.<sup>425</sup> Third, the students' reading efforts will be aided substantially by the text questions, decreasing the likelihood of substantial error. Finally, the professor will assist the selected student to develop a proper response. In doing so, the professor will ask the other students to indicate if they made errors similar to or different from the selected student's errors, and will lead a discussion as to the source of any confusion.

The instructor will then scaffold the students' learning of the most difficult aspect of illusory promise, the courts' efforts to salvage promises that appear illusory by implying duties of good faith and reasonable efforts. To do so, the instructor will show the students a graphic image depicting a person who is labeled "the allegedly illusory promise" floating in a body of water next to a ship. Someone on the ship, labeled "the court" will be seen throwing two floating rings to the person in the water; one of the rings will be labeled "good faith" and the other will be labeled "reasonable efforts."<sup>426</sup> The professor then will lead the discussion of why courts strive to salvage allegedly illusory promises.<sup>427</sup>

The instructor will conclude this section with a discussion of the students' efforts to identify common fact patterns.

*f. Practice (Part Three) and Evaluative Feedback  
(Parts Two and Three)*

Having solidified the students' understanding of the doctrine and its application, the instructor will give the students a few minutes to review, in small groups, their responses to the practice problems and reach a group consensus as to the problems.<sup>428</sup> The instructor then will lead a short discussion in which the groups compare their analyses and the class develops a consensus analysis.

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425. It is probably true that students may draw inferences about their case reading skills based on the discussion.

426. Smith and Ragan recommend the use of such imagery, where possible, as a way of reinforcing knowledge. *Id.* at 186.

427. *See id.* at 201 (emphasizing the importance of providing "whys" in the discussion of principles).

428. The use of small groups is, more or less, a constructivist approach in that students negotiate the meaning of what they have learned. *See id.* at 15. The use of cooperative learning groups, have also been shown to be particularly effective for learning. *See id.* at 293.



*g. Practice (Part Four), Evaluative Feedback (Part Four),  
and Transfer (Part One)*

The students next will spend fifteen to thirty minutes, again in groups, brainstorming and creating their own illusory promise problems and developing their own analyses of those problems.<sup>429</sup> The body event will conclude with groups reporting their problems to the class. The professor will lead a classroom discussion as to whether each problem raises an illusory promise issue and how the students should have analyzed those problems that do raise the issue.

*3. Conclusion*

*a. Summarize and Review, Transfer (Part Two), and  
Remotivate and Close*

The professor will again prompt students to develop paraphrased rule statements and to recall what they have learned about analyzing illusory promise problems. Then, the professor will ask students to assess whether the questions they had about illusory promise have been answered, and will review the prototype illusory promise problem by leading students through a discussion of why this problem epitomizes illusory promises.<sup>430</sup> Finally, the professor will ask the students how illusory promise problems might be paired with other issues studied so far and then ask students how contract drafters can avoid creating illusory promises.<sup>431</sup>

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429. Smith and Ragan recommend having students create their own problems both as practice and to promote transfer. *Id.* at 139, 184. Once again, the effectiveness of cooperative learning groups justifies the use of such groups. *Id.* at 293.

430. Again, this discussion will reinforce the importance of reflective learning or metacognition because the professor will require the students to self-assess their understanding and to be reflective about how the author of their text structured their learning materials. *See supra* notes 131–32 and accompanying text.

431. *See* SMITH & RAGAN, *supra* note 8, at 203 (suggesting paraphrasing as a way to summarize and review a principle, suggesting that transfer activities include student consideration of how the principle could be combined with other principles in a larger problem-solving activity, and suggesting that students consider the principle's real life relevance as a way of remotivating the students and closing).

#### 4. Assessment

##### a. Assessment, Evaluative Feedback, and Remediation

This instructional event will occur entirely on-line. Students will take a twenty-five to thirty problem multiple-choice and short answer quiz.<sup>432</sup> The quiz will include questions requiring the students to state the principles of illusory promise, to distinguish illusory promise problems from those problems that do not raise illusory promise issues, and to apply the illusory promise doctrine.<sup>433</sup> The on-line quiz software will send the students an immediate e-mail, informing the students about how well they performed on the quiz, which questions they answered correctly, which they answered incorrectly, and what the correct answers were to the questions they answered incorrectly.<sup>434</sup> For students who score below competency level on the examination, the e-mail directs the students to review their texts, class notes, and specific sections of supplemental materials (hornbooks). The goal of the review is to remediate the students' learning problems. After completing their self-remediation, students will e-mail their instructor, identifying the questions they answered incorrectly, their incorrect responses, and explaining why their responses were incorrect and the correct response was correct.<sup>435</sup>

##### C. Final Comments Regarding the Sample Plan

The foregoing lesson plan, while undoubtedly imperfect, represents a dramatic departure from the Vicarious Learning/Self-Teaching Model. Instead of emphasizing instruction on subjects the designer does not intend to assess (such as case reading skills), the design has "congruence"—the objectives, strategies, and assessment all match and make sense together.<sup>436</sup> The design effectively integrates ideas from

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432. The multiple-choice or short-answer format for the quizzes, while less than optimal, reflects a reasonable trade-off among the three goals of assessment (practicality, validity, and reliability). *See id.* at 99 (noting the trade-off among these goals). This approach is less troubling in light of the fact that the overall design for the course includes the administration of traditional law school essay examination questions during both a midterm and a final examination. Before the midterm, the design contemplates at least one week of instruction addressing problem-solving in the context of the materials assigned up to the date of the midterm. Before the final examination, the design contemplates two weeks of problem-solving instruction.

433. *See id.* at 95 (recommending testing students on all three levels so that the designer can later determine, if necessary, the cause of any performance problems).

434. This feedback should suffice to inform the student and designer whether the learner achieved the objective. *See id.* at 204.

435. *See id.*

436. *Id.* at 9.

learning theory and the best practices suggested by instructional design theory and practice. Finally, the instruction seems likely to be effective, efficient, appealing, and learner centered.<sup>437</sup> It is a model that offers great hope for producing mastery learning by a large percentage of students in the class (that is, having eighty percent of the students learn eighty percent of the material).<sup>438</sup>

## VI. FORMATIVE AND SUMMATIVE EVALUATION

Instructional designers regard assessment as involving three separate, but related processes. The first process, discussed above, involves assessing each individual student's learning to determine whether the student has developed the requisite level of competency.<sup>439</sup> The second and third processes are "formative evaluation" and "summative evaluation," respectively.<sup>440</sup> Both formative and summative evaluation are processes by which instructional materials are assessed.<sup>441</sup> The differences between the two lie in their goals and their methodologies.

The purpose of formative evaluation is to allow the designer to determine whether and how the instruction needs to be revised to make it more effective and efficient.<sup>442</sup> In fact, Smith and Ragan assert that instruction that has been tried out with even as few as one or two students and then revised based on that assessment is "substantially more effective than the original instruction."<sup>443</sup> Smith and Ragan recommend that instructional materials be evaluated in six ways: (1) during design as the designer completes each output of the process (context analysis, learner analysis, task analysis, strategy selection);<sup>444</sup> (2) by experts in both domain and instructional design before learners try the materials;<sup>445</sup> (3) by trying "out the instructional materials with two or three members . . . of the target audience";<sup>446</sup> (4) by testing the material on small groups;<sup>447</sup> (5)

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437. *See id.* at 8–9.

438. *See supra* note 30 and accompanying text.

439. *See supra* notes 256–79 and accompanying text.

440. SMITH & RAGAN, *supra* note 8, at 338.

441. *Id.*

442. *Id.*; *see also* DICK & CAREY, *supra* note 32, at 257.

443. SMITH & RAGAN, *supra* note 8, at 338.

444. *Id.* at 339.

445. *Id.* at 340; *see also* DICK & CAREY, *supra* note 32, at 257–58. Smith and Ragan note that most commercial publishers of texts and computer programs do arrange for expert review, although, typically, the review is only by experts in the domain and at a time when the materials are ready for publication. SMITH & RAGAN, *supra* note 8, at 338.

446. *Id.* at 340; *see also* DICK & CAREY, *supra* note 32, at 258–60.

by field trial with actual students;<sup>448</sup> and (6) ongoing evaluation even after the instruction has been adopted.<sup>449</sup>

Nothing even remotely comparable occurs in the assessment of law school instructional materials. Texts are reviewed by other law teachers, but none of the other phases of formative evaluation occur. It is of no surprise that most law school instructional materials are not particularly effective, efficient, or appealing.

Summative evaluation occurs after the institution has implemented the instruction. Its purpose is to collect data so that decision makers can develop their own assessments about the effectiveness, efficiency, and appeal of the instruction and determine whether to continue using it.<sup>450</sup> The designer of the instruction should not participate in summative evaluation so as to avoid the appearance of bias.<sup>451</sup> Smith and Ragan recommend that summative evaluation involve four steps: (1) determining the goals of the evaluation, (2) selecting the indicators of success, (3) selecting the orientation (subjective or objective) of the evaluation, and (4) selecting the design of the evaluation.<sup>452</sup> Law instruction is never subjected to such evaluation.<sup>453</sup>

## VII. CONCLUSION

Three significant barriers exist to adopting an instructional design approach to teaching law. First, designing the necessary texts, software, and assessment tools will require substantial resources, including human effort, time, and economic resources. This Article includes a sample lesson plan addressing illusory promise, only one of an extremely large number of topics in contracts law. Moreover, this Article contemplates

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447. SMITH & RAGAN, *supra* note 8, at 342; *see also* DICK & CAREY, *supra* note 32, at 263.

448. SMITH & RAGAN, *supra* note 8, at 348; *see also* DICK & CAREY, *supra* note 32, at 265–66. It is interesting to note how much review Smith and Ragan recommend before the materials are tried with actual classes. Looking at the level of assessment Smith and Ragan contemplate at each level of assessment, SMITH & RAGAN, *supra* note 8, at 338–48, it appears likely that instruction subjected to such careful assessment will not even be field tested until a year or two after it has been completed.

449. SMITH & RAGAN, *supra* note 8, at 351–52.

450. *Id.* at 352; *see also* DICK & CAREY, *supra* note 32, at 323–24.

451. SMITH & RAGAN, *supra* note 8, at 354–55.

452. *Id.* at 355–57.

453. Peer and accreditation review of classroom teaching falls far short of the mark. First, both types of review almost always include only review of classroom teaching. Second, reviewers seldom consider, much less assess, the instructor's instructional objectives, selection of media, or testing methodologies. Third, as argued above, the standard against which classroom instruction is measured—what ABA law schools have done over the past 100 years—is a very dubious standard. Finally, neither law school professors nor accreditation committees possess expertise in learning theory or instructional design.

the creation and implementation of integrated lessons, crossing over doctrinal categories to develop the student skills necessary to creatively analyze complex problems. The lesson plan and the textual material addressing illusory promise required many hours to create, and the assessment test is still under construction.<sup>454</sup> Second, law school accreditation teams as well as law schools and their faculty will have to rethink how they evaluate law schools and law instructors, and, perhaps, even shift at least some of the priorities from scholarship to instruction. Finally, law teachers will have to rethink what they do in their classrooms.

There is a way to make law school instruction effective, efficient, and appealing; that way, however, does not involve continued adherence to the Vicarious Learning/Self-Teaching Model.

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454. Smith and Ragan estimate that each hour of instruction requires on average forty hours of instructional development time and may even take as much as three to four hundred hours of development time. *See id.* at 331.



## APPENDIX

### *Unit Two—Contract Formation, Topic Two—Consideration Part Six—Illusory Promise*

#### *Introduction*

We now turn to the last topic in our study of consideration, *illusory promise*. Imagine you are a parent. Your seventeen year-old-daughter comes to you on Thursday and asks to use your car Saturday night. You know the car needs washing, so you say, “If you wash the car today, I will let you use it if I determine not to use it.” Your seventeen-year-old does not say a word, leaves the room in a huff, and, after a moment or two, you hear the door to her room slam, making a sound somewhat similar to the sound made by a firing gun. Why is she so angry? Because she feels set up. She has to wash the car for the possibility of being allowed to drive the car, but you have reserved for later your decision as to whether you or she will use the car Saturday night. In other words, while she must wash the car, you have not committed yourself at all, and you have done so while making it sound like you are promising something (“I will let you use it . . .”). In our study of illusory promise, we will consider what happens when problems of apparent but not real promises move from parent-child conflicts to courtroom contract disputes.

Let’s look at an example of an illusory promise. Imagine the following interaction: Thu owed Juanita \$500 and, though the money was due, lacked sufficient funds at that moment to repay Juanita. Thu, therefore, begged Juanita for extra time. Juanita said, “If you agree to pay me an extra \$50, I will not demand that you pay me all the money you owe me until I, using my sole discretion, decide to demand it.” Thu replied, “Thanks, I promise to pay you an extra \$50.” Assume that Juanita waits one month before demanding repayment of her money. Thu pays Juanita \$500 but refuses to pay the extra \$50. In a suit brought by Juanita against Thu for the extra \$50, all courts would agree that Juanita’s promise is illusory and, therefore, there is no consideration for Thu’s promise to pay the extra \$50. Because there is no consideration for Thu’s promise to pay the extra \$50, Thu’s promise to pay the extra \$50 is not enforceable. Juanita would lose her lawsuit.

Now imagine the following, slightly different interaction: Once again, Thu owed Juanita \$500 and, though the money was due, lacked sufficient funds at that moment to repay Juanita. Thu, therefore, begged Juanita for

extra time. Juanita said, "If you agree to pay me an extra \$100, I will not demand that you pay me all the money you owe me until one month from today." Thu replied, "Thanks, I promise to pay you an extra \$100." Assume that Juanita waits the one month before demanding repayment of her money. Thu pays Juanita \$500 but refuses to pay the extra \$100. In a suit brought by Juanita against Thu for the extra \$100, all courts would agree that Juanita's promise is not illusory and, therefore, is good consideration for Thu's promise to pay \$100. Because there is consideration for Thu's promise to pay the extra \$100, Thu's promise to pay the extra \$100 is enforceable. Assuming Juanita's lawsuit did not raise any other issues, Juanita would win her lawsuit.

It is clear from the previous two paragraphs that courts will intervene and refuse to enforce promises that the courts conclude are illusory. Why are courts concerned about illusory promises? (*Not down your answer in the space provided below before reading on.*)

Why are courts concerned about illusory promises? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

To paraphrase Arthur Corbin, an illusory promise really is not a promise at all; in other words, the speaker has not bound herself to any obligation. Refusing to enforce a promise because a court deems it illusory, of course, is the end result of an analysis of whether the promise is illusory. Our real questions, then, are: (1) Why is Juanita's promise in the first interaction illusory? and (2) Why is Juanita's promise in the second interaction not illusory? (*Not down your answer before reading on.*)

Why is Juanita's promise in the first interaction illusory and why is Juanita's promise in the second interaction not illusory? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

### *Instructional Objectives*

In this lesson, you will learn how to use the rules of law for illusory promises to determine whether a court would conclude that each item on a list of promises is illusory or not, explaining for each item why that example is or is not an illusory promise. Of course, to do so, you will

need to be able to state, verbatim, the three rules of law used by the courts to determine whether promises are illusory.

### *Overview of Lesson*

To develop this skill and the underlying knowledge required to deploy the skill, we will begin by reviewing the ideas you already know that are relevant to your understanding of illusory promise. We will then return to the two Thu–Juanita hypotheticals to learn why Juanita’s promise in the first hypothetical is illusory and her promise in the second hypothetical is not illusory. In the course of the discussion of these two hypotheticals, you will be introduced to the rules used by the courts to determine whether promises are illusory and see how courts use these rules to analyze illusory promise questions. We will then look at four more matched sets of examples and nonexamples, using the rules to identify why promises stated in the hypotheticals are examples or nonexamples.

To prepare for the classroom portion of the lesson and to see how courts reason through illusory promise issues, you will read and respond in writing to specific questions regarding four short court opinions. You will then paraphrase the rules you have learned and develop either a flowchart or a mnemonic device (in accordance with our past discussions of these devices for encoding information) to help you encode the rules. Finally, you will analyze, in writing, whether a list of nine promises are illusory or nonillusory. To prepare for a class discussion of the hypotheticals, consider what questions you have regarding these materials and the doctrine, and then identify the narrow set of recurring fact patterns in which illusory promise cases arise.

In class, we will begin by reviewing the illusory promise rules, your paraphrases of those rules, and your flowcharts and mnemonics. We will then discuss the four cases, focusing on the courts’ reasoning. After we have finished discussing the cases, students will exchange their answers to the problem set, and the class will discuss the hypotheticals. You will then break into small groups for a few minutes to develop your own examples and nonexamples of illusory promises; each group then will report one example and one nonexample and explain its analysis as to each. The class will discuss the groups’ examples and nonexamples and review the critical attributes that make promises illusory. Finally, the class will consider how practicing lawyers could use what the class has learned about illusory promises, and we will attempt to rewrite some of the promises the class has deemed illusory to make the promise nonillusory.

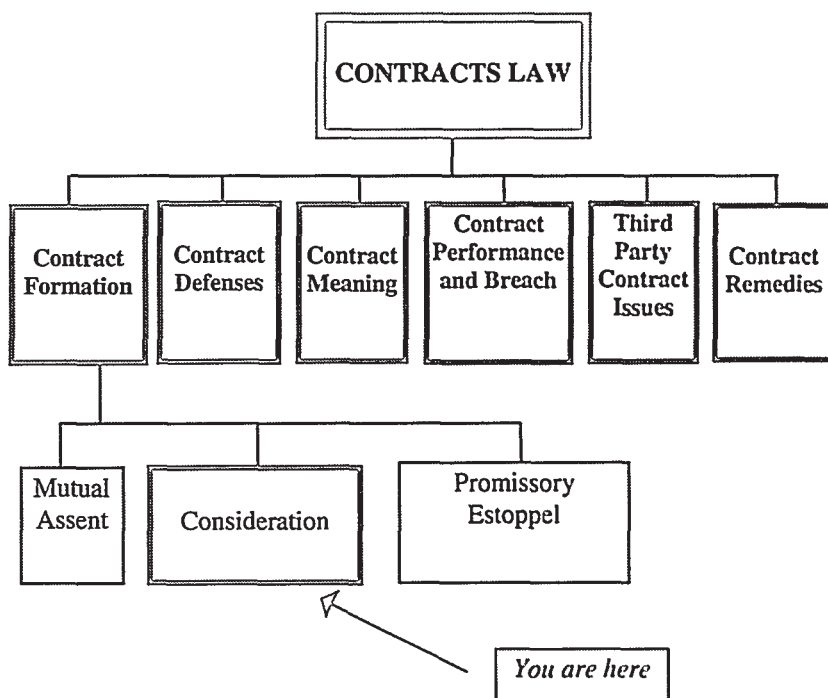
After class, on your own time, you will take a quiz. Those who do not score at least eighty percent will be expected to review these materials, read the suggested hornbook section and their lecture notes, and then explain why their incorrect answers were incorrect and why the correct answers are correct.

### *Review*

Once again, we begin by situating the subject of our study within the context of this entire course by looking at how consideration fits within contracts law and how illusory promise fits within consideration law.

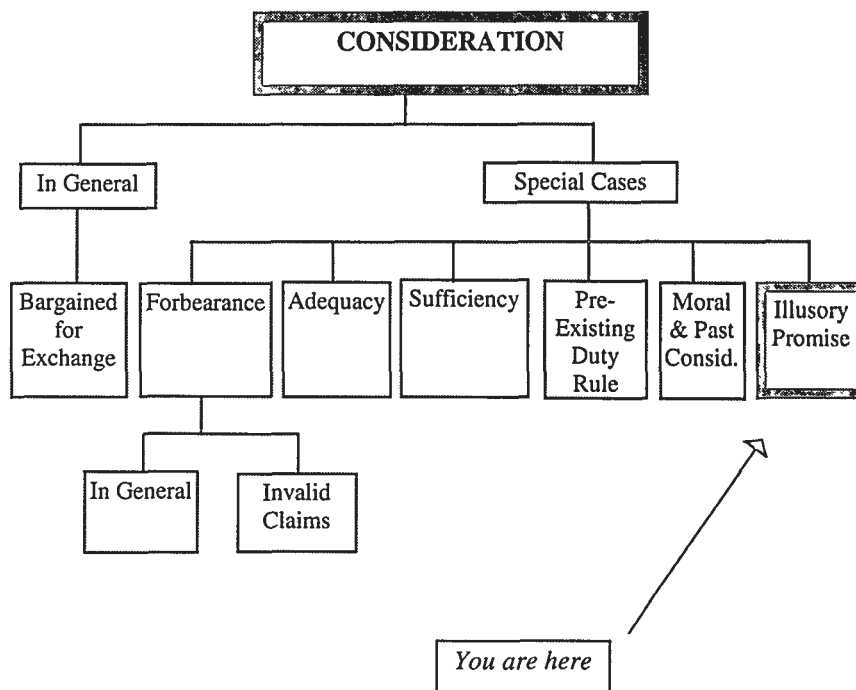
### *Contracts Course Graphic Organizer*

The *Contracts Course Graphic Organizer* below shows how the consideration unit fits within our larger study of all the topics in this course. Note that we are still working on issues relating to contract formation and, more specifically, the rules relating to consideration.



### *Consideration Concept Tree*

The *Consideration Concept Tree* shows how illusory promise fits within our study of consideration. Note that illusory promise, like forbearance, adequacy, sufficiency, the pre-existing duty rules, and past and moral consideration, is a special consideration issue. Finally, note that illusory promise is the last consideration issue we will be studying.





Recall from our prior study of consideration law that the *Restatement (Second) of Contracts* and the courts have defined consideration as a promise, act, or forbearance for which a party has “bargained.” Because our topic is “illusory promise,” we will focus on bargained for promises, that is, contracts that involve exchanges of promises. Courts have held that a party has “bargained for” a promise when that party sought the promise in exchange for her promise and the other party gave his promise in exchange for the first promisor’s promise. To see if you still understand the general idea of consideration, write an answer to the question posed below.

After several hours of negotiating, Peggy Sue says to Demetrius: “I will pay you \$50 per week if you clean my house once per week for the next year.” Demetrius replies: “I accept your offer.”

Question: Why would a court be likely to hold that there is consideration to both parties to this transaction?

Your Answer: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Correct Answer:* In this case, Peggy Sue asked for cleaning services from Demetrius, thereby seeking them and promised \$50 per week as an inducement, thereby proposing an exchange of her promise of money for his promise of services, and Demetrius gave his promise of cleaning services to bind her promise of the \$50. Consequently, there is consideration passing from Demetrius to Peggy Sue. Likewise, Demetrius promised his services to induce Peggy Sue’s promise of money, and Peggy Sue promised her money to get Demetrius’ promise of services. Thus, each bargained for each other’s promise and, therefore, a court would conclude both parties received consideration.

Recall that, notwithstanding the fact that a particular promise has been “bargained for,” a court may conclude the promise does not suffice as consideration. Thus, if Peggy Sue had offered and Demetrius had accepted an offer for Peggy Sue to pay Demetrius only 1¢ per week, the court would have deemed her consideration inadequate because it was nominal, even though courts do not generally inquire into the inadequacy of consideration. Similarly, if Peggy Sue had proposed and Demetrius

had accepted an offer to exchange Peggy Sue's \$50 per week for Demetrius' \$100 per week, the court would have deemed her consideration inadequate because the exchange would have involved a like-kind exchange of items known to be of different value and, therefore, really a gift. Two final examples serve to illustrate the courts' inclination to find an absence of consideration even if both parties bargained for the exchange: (1) courts will not enforce an exchange of a promise for actions or forbearances rendered in the past (past consideration) or a promise based solely on moral grounds (moral consideration); (2) courts will not enforce an exchange of a promise for a settlement or release (forbearance) of an invalid claim where either the payee did not honestly believe the payee's claim had a colorable basis or where the payee did not reasonably believe the payee's claim had a colorable basis.

We will see that illusory promises are another basis on which courts may choose not to enforce bargained-for exchanges.

The rules with respect to illusory promises are particularly similar, in some respects, to the above rules dealing with the question of when a forbearance to assert an invalid claim suffices as consideration. Two key underlying concepts in illusory promise are: (1) the idea of *good faith*, which, as we have seen, means *honesty-in-fact*, and (2) the idea of *reasonable efforts*, which, as we have seen in this course and you have seen in your other law school courses, requires a consideration of what a hypothetical *reasonable person* would do.

Finally, recall a few basic ideas about breach of contract. Any party to a contract can choose to breach the contract and suffer the consequences of doing so. A breach of contract occurs when a party refuses to perform the contract at all or where a party's promised performance is defective in some way. The consequences a breaching party faces, as we have seen, usually involve paying a sum of money as damages to the victim of the breach.

### *What Makes Promises Illusory*

Courts and legal commentators have offered a variety of definitions for what makes a promise illusory: (1) "an expression cloaked in promissory terms, but which, on closer examination, reveals that the promisor is not committed to an act or forbearance";<sup>455</sup> or (2) "[w]ords of promise which by their terms make performance entirely optional with the

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455. CALAMARI & PERILLO, *supra* note 40, at 203.

‘promisor’”;<sup>456</sup> or (3) “[a promise that] leaves a party free to perform or to withdraw from the agreement at his unrestricted pleasure.”<sup>457</sup>

Recall the hypothetical promise made by Juanita to Thu that the above discussion classifies as illusory:

If you agree to pay me an extra \$50, I *will not demand* that you pay me all the money you owe me *until I, using my sole discretion, decide* to demand it.

Note that the words “will not demand” are in italics. As we learned previously, the courts uniformly have concluded that the word “will,” if linked to an action or forbearance (here a forbearance from demanding), expresses the commitment requisite to be a promise. The word “until” also is in italics; the word “until” suggests that what is to follow is a time restriction on the speaker, that is, the period of time before the speaker can demand repayment. What follows in the sentence, however, are the words “I, using my sole discretion, decide.” As I explain below, these are the words that make the promise illusory.

A person can decide according to their “sole discretion” to demand the money immediately or at some later date. In other words, the speaker has not actually agreed to delay collection at all. She has the right to decide when to demand the money. Moreover, a court cannot make this promise nonillusory by implying either good faith or reasonable efforts. Implying a duty of reasonable efforts would make no sense because deciding according to one’s sole discretion does not involve taking any kind of action; it is an internal, mental process. Likewise, if we were to assume the speaker must “decide” in good faith, the promise would nevertheless be illusory. Because a person can honestly (the definition of good faith) decide to demand the money right away (because he is greedy or wants to buy a new toy), an implied duty of good faith would not eliminate the speaker’s absolute discretion. In other words, the speaker can either demand the money immediately or wait any period of time and not breach this promise. Accordingly, the promise is illusory. Note that, if a court deems a promise illusory, the contract will not be enforced because one of the two parties, Thu, received no consideration for her promise. Note also that Thu’s promise, to pay money (an extra \$50) is not even colorably illusory because Thu has no discretion whether to pay the extra \$50 or not.

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456. RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (1979).

457. *Mattei v. Hopper*, 330 P.2d 625, 626 (Cal. 1958).

Note the three critical attributes of illusory promise used in the above discussion to conclude the promise was illusory:

- (1) An illusory promise includes *language of promise*.
- (2) An illusory promise *does not restrict the promisor's discretion* to choose, in her sole discretion and without consequence, to act or to refrain from acting.
- (3) An illusory promise *cannot be made to restrict* the promisor's discretion by *implying* a duty of *good faith* or a duty of *reasonable efforts*.

Now recall the other example, which the materials above indicate does not contain an illusory promise. That promise stated:

If you agree to pay me an extra \$100, *I will not demand* that you pay me all the money you owe me *until one month from today*.

Note again that the words “I will” are in italics and are words of promise. Also note the use of the word “until,” which, as noted above, suggests the speaker is agreeing to postpone collection. The stated time for postponement, “one month from today,” is what distinguishes the nonexample from the example. The speaker has no discretion to demand the money before one month from today because the statement places no limit whatsoever on the term “one month from today.” If the speaker does demand the money sooner than one month from today, she will have breached her promise. The promise, therefore, is not illusory. Note again that Thu’s return promise, to pay money (an extra \$50), is not even colorably illusory because Thu has no discretion whether to pay the extra \$50 or not.

Consider the following additional examples. As we learned during the first week of class, you should strive to actively *dialogue* with the text. Therefore, try to classify each as illusory or as nonillusory by marking an “I” or an “NI” in the space provided before you read the answers below:

- (1) I will buy your car for \$5000 cash if I feel like it. \_\_\_\_
- (2) I will buy your car for \$5000 cash. \_\_\_\_
- (3) If I wake up in a good mood tomorrow, I will clean your house in exchange for \$100. \_\_\_\_
- (4) Unless I win the lottery tonight, I will clean your house in exchange for \$100. \_\_\_\_
- (5) (From a baseball league to a baseball manufacturer) We will buy at \$1 per ball all of the baseballs we require. \_\_\_\_
- (6) (From a baseball league to a baseball manufacturer) We will buy at \$1 per

ball as many baseballs as we choose to buy. \_\_\_\_

(7) I covenant to pay you \$4000 for this washing machine if I am satisfied with it. \_\_\_\_

(8) I covenant to pay you \$4000 for this washing machine if I desire to do so.  
\_\_\_\_\_

1. *I will buy your car for \$5000 cash if I feel like it.*

*Answer.* This statement does contain language of promise (will). The phrase, “feel like it,” does not *restrict the speaker’s discretion*, however. A person could choose to “feel like” buying the car or choose not to “feel like” buying the car and yet not breach this alleged promise. Implying a duty to “feel like it” in *good faith* would not make this promise non-illusory because a person can, with equal ease, *honestly* feel either like doing something or *honestly* feel not like doing something. Likewise, implying a duty to make a *reasonable effort* to “feel like it” would not make this promise nonillusory; because the standard is “feel like it,” the only relevant efforts would occur in the speaker’s head. The promise is illusory.

2. *I will buy your car for \$5000 cash.*

*Answer.* Once again, this statement contains language of promise (will). In this case, however, there is no contingency to the speaker’s willingness that even gives rise to a possibility the promise might be illusory. The speaker cannot choose not to pay \$5000 without breaching this contract. The promise is not illusory.

3. *If I wake up in a good mood tomorrow, I will clean your house in exchange for \$100.*

*Answer.* This statement does contain language of promise (will). The phrase, “if I wake up in a good mood tomorrow,” does not *restrict the speaker’s discretion*, however. A person could choose to be “in a good mood” or choose not to be “in a good mood” and yet not breach this alleged promise. On the one hand, implying a duty to evaluate one’s mood in *good faith*, may seem to restrict the speaker’s discretion because some people believe they have no control over their moods. More likely, on the other hand, implying a duty to “be in a good mood” in *good faith* would not make this promise nonillusory because a person can, with



equal ease, *honestly* be in a good mood or *honestly* not be in a good mood. Likewise, implying a duty to make a *reasonable effort* to be in a “good mood” may seem to make this promise nonillusory because it suggests the speaker must try to be happy. However, because the standard is “in a good mood,” the only relevant efforts would occur in the speaker’s head. The promise is illusory.

4. Unless I win the lottery tonight, I will clean your house in exchange for \$100.

*Answer:* This statement does contain language of promise (will). The fact that the promise is contingent on the speaker not winning the lottery raises a question as to whether the speaker’s discretion has been restricted. On the one hand, the speaker seems able to avoid liability simply by not buying a lottery ticket and has full control over whether that purchase occurs, and the speaker can avoid liability altogether if the speaker wins the lottery. The courts, however, would imply a duty on the speaker to make a *reasonable effort* to buy the ticket and, therefore, that event is virtually certain to occur and, in any event, the speaker has no discretion not to try to buy. Moreover, because the speaker has no control over whether he or she wins the lottery, the speaker has no discretion. The promise is not illusory.

5. (From a baseball league to a baseball manufacturer) We will buy at \$1 per ball all of the baseballs we require.

*Answer:* This statement does contain language of promise (will). On the one hand, the use of the word “require” suggests the speaker has complete control over whether the league orders the baseballs or not. On the other hand, courts imply a duty of good faith so that the baseball league must require or not require baseballs in good faith. Thus, if the league’s orders were much lower or much higher than in previous years, a court would analyze closely whether the league breached its duty to require baseballs in honesty. Because a court could assess objectively whether any such deviation from the league’s normal requirements was honest, the promise, therefore, is not illusory.

6. (From a baseball league to a baseball manufacturer) We will buy at \$1 per ball as many baseballs as we choose to buy.

*Answer:* This statement does contain language of promise (will). Here, however, because the use of the words “we choose to buy” have the same

connotation as the phrase “feel like it,” the analysis above with respect to No. 1 above applies. The promise is illusory.

7. I covenant to pay you \$4000 for this washing machine if I am satisfied with it.

*Answer:* This statement does contain language of promise (covenant). The use of the word “satisfied,” however, suggests the promisor may choose to perform or withdraw based simply on whether she feels satisfied with it, a feeling over which the speaker would seem to have complete control. Courts, however, imply a duty of *good faith satisfaction* if the matter is one of fancy, taste, or judgment, or of *reasonable satisfaction* if the matter is one of utility. Because the effectiveness of a washing machine is a matter of utility (whether the machine works properly), a court would imply a duty of reasonable satisfaction and, therefore, only allow the speaker to avoid liability if the speaker has a reasonable basis for claiming dissatisfaction. Accordingly, the promise is not illusory.

8. I covenant to pay you \$4000 for this washing machine if I desire to do so.

*Answer:* Because the word “desire” is a synonym for the phrase “feel like it,” the analysis above with respect to No. 1 applies here also. The promise is illusory.

#### *Preparation for Classroom Discussion*

Follow the instructions below. Read *Strong v. Sheffield*, 39 N.E. 330 (N.Y. 1895); *Omni Group, Inc. v. Seattle-First National Bank*, 645 P.2d 727 (Wash. Ct. App. 1982); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917); and *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642 (2d Cir. 1945). Answer the questions regarding the cases in the spaces provided below.

After you finish answering the questions for each of the four cases, read and analyze in writing each problem in the Illusory Promise Problem Set. Then, paraphrase the rules of law you have learned in this part, review the explanations in this text as to how to develop flow charts

and how to create your own mnemonic devices, and then develop a flow chart or write out a mnemonic in the space provided to help you remember the critical features of illusory promises. Keeping in mind our previous reading about the importance of being a reflective learner, review all the hypotheticals and explanations, the four cases and the materials in this part and write out, in the space provided, any questions you have about illusory promise. Finally, identify the eight recurring illusory promise fact patterns.

*Case Analysis Form*

*Strong v. Sheffield*, 39 N.E. 330 (N.Y. 1895)

Write answers to the following questions.

What did plaintiff promise? \_\_\_\_\_  
\_\_\_\_\_

What did defendant promise? \_\_\_\_\_  
\_\_\_\_\_

Whose promise was allegedly illusory? \_\_\_\_\_

What did the court conclude as to whether the promise was illusory or not (circle one)?

Illusory

Not Illusory

Why did the court conclude the promise was or was not illusory? (Identify each step of the court's stated reasoning. If you believe the court did not state any part of its reasoning, determine what the court must have reasoned.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Would the result have changed had the court implied a duty of good faith or a duty of reasonable efforts? Why or why not? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Case Analysis Form*

*Omni Group, Inc. v. Seattle-First National Bank,*  
645 P.2d 727 (Wash. Ct. App. 1982)

Write answers to the following questions.

What did the plaintiff/buyer promise? \_\_\_\_\_

\_\_\_\_\_

What did the defendant/seller promise? \_\_\_\_\_

\_\_\_\_\_

Whose promise was allegedly illusory? \_\_\_\_\_

Why was the promise allegedly illusory? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

What did the court conclude as to whether the promise was illusory or not (circle one)?

Illusory

Not Illusory

Why did the court conclude the promise was or was not illusory? (Identify each step of the court's stated reasoning. If you believe the court did not state any part of its reasoning, determine what the court must have reasoned.) \_\_\_\_\_

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*Case Analysis Form*

*Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917)

Write answers to the following questions.

What did the defendant/employer promise? \_\_\_\_\_  
\_\_\_\_\_

What did the plaintiff/employee promise? \_\_\_\_\_  
\_\_\_\_\_

Whose promise was allegedly illusory? \_\_\_\_\_

Why, allegedly, was there an illusory promise problem here? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

What did the court conclude as to whether the promise was illusory or not (circle one)?

Illusory      Not Illusory

Why did the court conclude the promise was or was not illusory? (Identify each step of the court's stated reasoning. If you believe the court did not state any part of its reasoning, determine what the court must have reasoned.) \_\_\_\_\_  
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\_\_\_\_\_



## Case Analysis Form

*Sylvan Crest Sand & Gravel Co. v. United States*,  
150 F.2d 642 (2d Cir. 1945)

Write answers to the following questions.

What did the defendant promise? \_\_\_\_\_

What did the plaintiff promise? \_\_\_\_\_

Whose promise was allegedly illusory? \_\_\_\_\_

What did the court conclude as to whether the promise was illusory or not (circle one)?

Illusory

## Not Illusory

Why did the court conclude the promise was or was not illusory? (Identify each step of the court's stated reasoning. If you believe the court did not state any part of its reasoning, determine what the court must have reasoned.) \_\_\_\_\_

*Illusory Promise Problem Set*

1. Pay me \$25 per month as premiums. If you keep current with your premium payments and become physically or mentally unable to work at your current employ, I will pay you each month one-half of your monthly salary as of the time you became disabled.

Is this promise illusory? \_\_\_\_\_ Why or why not? \_\_\_\_\_

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2. We will pay you \$5 per brick for all of the bricks we want.

Is this promise illusory? \_\_\_\_\_ Why or why not? \_\_\_\_\_

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3. (From a widget manufacturer to a widget retailer) We will sell you at \$.50 per widget all the widgets we produce.

Is this promise illusory? \_\_\_\_\_ Why or why not? \_\_\_\_\_

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4. If you give me \$1 and if I draw your name from this fishbowl from among all the names of the other persons from whom I have collected a dollar, I will give you all the money I have collected.

Is this promise illusory? \_\_\_\_\_ Why or why not? \_\_\_\_\_

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5. Unless I accept the job offer I received to be a law clerk with the Law Offices of Schwartz & Schwartz, I promise to tutor you in Contracts.

Is this promise illusory? \_\_\_\_\_ Why or why not? \_\_\_\_\_

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6. I covenant to pay you \$25 per hour to tutor me in Contracts, but I may terminate this contract at any time.

Is this promise illusory? \_\_\_\_\_ Why or why not? \_\_\_\_\_

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7. I will buy your home if I get a 30-year, \$200,000 loan from the Bank of Schwartz at an 8% interest rate.

Is this promise illusory? \_\_\_\_\_ Why or why not? \_\_\_\_\_

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8. We will pay you \$5 per brick for all of the bricks we need for our construction project. Cancellation of this contract may be effected by us at any time without notice.

Is this promise illusory? \_\_\_\_\_ Why or why not? \_\_\_\_\_

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9. We will pay you \$5 per brick for all of the bricks we need for our construction project. Cancellation of this contract may be effected by us at any time.

Is this promise illusory? \_\_\_\_\_ Why or why not? \_\_\_\_\_

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*Paraphrase of Doctrine and  
Creation of Flow Chart or Mnemonic Device*

Please paraphrase the rules of law you have learned regarding illusory promises in the space provided below.

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Please reread the materials regarding creating flow charts and mnemonic devices. Attach a flow chart for illusory promise to this page or describe a mnemonic device you have created to help you remember illusory promise doctrine.

In the space provided below, write down the questions you have about illusory promises.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.



*The Eight Recurring Illusory Promise Fact Patterns*

Reread all of the illusory promise hypotheticals and cases in this part. In the spaces provided below, list the recurring illusory promise fact patterns you have observed.

- (1) \_\_\_\_\_  
\_\_\_\_\_
- (2) \_\_\_\_\_  
\_\_\_\_\_
- (3) \_\_\_\_\_  
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- (4) \_\_\_\_\_  
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- (5) \_\_\_\_\_  
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- (6) \_\_\_\_\_  
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- (7) \_\_\_\_\_  
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- (8) \_\_\_\_\_  
\_\_\_\_\_