

Introduction to Student Assessment
Michael Hunter Schwartz, John Burwell Garvey, David Thomson
Legal Education at the Crossroads, v. 3
Conference on Assessment
Saturday, September 12, 2009
Remarks of David Thomson

I would like to start my remarks today with a story:

A colleague of mine offered me well wishes for this conference a few days ago. I thanked her, and said that I wished she were able to join us. She replied: “You know, it’s embarrassing to say, and I shouldn’t admit it, but – I really don’t care about assessment.” Of course, she probably thought she was saying she doesn’t care too much about the process of creating and grading a final exam. But, of course, assessment is really about teaching better. This misunderstanding is pervasive in legal education. But it is also based, I think, on the unmistakable message that what we get rewarded for is scholarship, and a deep commitment to teaching well is perceived to run counter to that, primarily because it takes time away from scholarly pursuits.

The problem, in short, is that we all know we need to do better in legal education, but we can’t seem to afford the time it costs from other imperatives. This is what I call the Change/Cost Conundrum. I would like to explore that conundrum with you this morning.

Problem

We all know that summative assessment can be done better. The old-style final exam has its charms, but we know that some of our students do well in them, and others do not, and we worry that it is a fairly blunt instrument. In the six show and tell sessions that follow this presentation, we are going to hear about some wonderful work that teachers are doing to improve our summative assessments. We will learn about developing and using an effective assessment rubric, a midterm oral examination, the use of peer feedback and electronic portfolios, and even an innovative use of video in a summative examination.

Some characteristics of the old-style final exam are that they take time to create and they take time to grade. Most professors use some rough rubric when they grade, although they don’t often share the rubric with their students in advance, and usually only with those who did poorly, and bother to come speak with the professor about it. All of this effort comes at a cost – of the professor’s time. But the time cost of the old-style final exam is built into the economics of law school, and it is what is accepted, and what has been done

for years. And it is pretty cost effective, because it allows the professor to teach many students, and to do so without a significant imposition on the scholarship imperative.

Some characteristics of better summative assessments are - at their essence - that they are more intentional, that they are thoughtfully created and graded. This effort takes more time typically. We can do these better, and later this morning we will learn about how some innovative educators are doing so, in a variety of settings. It is time for our summative assessments to get better and more intentional, and I hope this conference will contribute to that progress.

Later in the day – starting at 11:25 – we will have a set of show and tell sessions about formative assessment. Formative assessment is about “forming” the student’s learning while it is taking place. As a result, formative assessment is the much tougher nut to crack. For starters, we in the legal academy are fairly new to it, though I have to say – those of us who teach lawyering skills (LRW), and in the clinic, are not at all new to it – indeed, it is an essential component of what we do. But as a broad general statement: what we think we know about good and effective formative assessments is that they typically require more feedback from the teacher, which is by definition more customized to the particular student, and which takes more time than creating and grading the one final examination.

We know we need to do this, but my concern – particularly about formative assessments - is about the time cost, and this is particularly acute in a challenging economy. If what we have to do is hire more lawyering skills teachers, and more clinicians, I worry about the cost. Let me put it even more plainly, if I may:

If to do legal education right we have to blow up the cost to \$100,000 per year it won't happen.

If to do legal education right we have to have extraordinarily dedicated teachers like Michael Schwartz and Gerry Hess, and Greg Munro, and Sophie Sparrow, and all the people in this room – if we have to have that kind of dedication to teaching throughout the academy, I am sorry (very sorry) but I worry that it won't happen.

I have another story for you – this one from last night: I was visiting with a colleague from another school during the reception, and he said: “That homework you sent us – I read it on the plane on the way out. It’s great, but what planet does that guy live on?”

I worry that this group of dedicated legal educators that we have assembled

here will talk to each other and amaze each other at conferences, but basically, no one will be listening. OK, so that's an overstatement. Some will listen, many will care, but in terms of substantive change throughout legal education - it won't happen.

My bottom line is this: It has to be dumb easy so the incremental "time cost" is nil. To date, we have not found a way, and I think that is why – 100 years later – legal education looks fundamentally like it always has. Perhaps this is a reason why we have not had fundamental change over those 100 years: we can't afford it. Something new has to happen – something significant has to change.

Fortunately, we have something new, and something significant, already with us. It is the ever expanding use of technology – in our lives, and throughout education, and in the lives of our media-saturated students. Mike just demonstrated how this can help us with his clicker based classroom-instruction demonstration.

I think the answer will – over the next decade or so – be found in the development and broad application of educational technology to law schools. What needs to be done is to change the equation from "I can't do what Mike or John do" to "OMG - I can do that! In fact, much of it is done for me (or automated in some way that makes it workable on a large scale)."

Put another way, I believe that if true effective formative assessment is not scalable, at a minimum we lose an opportunity to make significant change in legal education. At worst, we are all talking to each other for our own benefit, and those of our own students, but the real, deep change - reaching the majority of students - will still be out of reach.

I have been to a lot of these conferences. We hear about these great ideas of how to conduct proper formative assessments. And then someone raises their hand and says: "How many students do you have in this wonderful pilot program?" And the answer is 15. We need to spend more time thinking about how to make these great programs work across the academy, in large classes, and among teachers who are mostly focused on scholarship and "don't care about assessment."

What John Garvey is doing is important in so many ways. But to me the fact that John is working with Paul Maharg on applying his online simulation work – the SIMPLE system John just described - to their program is very encouraging. THAT could scale, or at least help.

I think our best hope for more change in legal education is in the disruptive and effective bending of educational technology to this effort. At this point, I have

to share something kind of personal with you: I am tired of being labeled the “geek” guy. It is about the teaching for me, not about the technology. I don't care about the technology, and I am sick to death of software demos. (You notice I don't have some razzle-dazzle for you today.) The technology still needs to mature – a lot – and in my view it needs to mature to the point where it disappears. At that point, it can come back to being about teaching effectiveness, not the latest technology whiz-bang. Alan Kay – the inventor of the graphical user interface and the mouse once said: “Technology is everything that was invented after you were born.” But the history of technology tells us that every new technology goes through predictable phases, from barely working, to starting to work, to finally working to the point when it – essentially - disappears. Do you remember the first cell phones? Horrible, clunky things that required a thick manual to operate? Has anyone even seen – much less read – a cell phone manual in years? We need to make formative assessment dumb easy. To make it so that we can say: "You don't have to be a great teacher, it does not have to be the center of your life, but there is a way to make it work even for you" - we need to be able to say that to the thousands of law professors who never come to our conferences, and don't care to.

I would love to give a talk one day about my Discovery Practicum course. I have taught this course a dozen times over the last 16 years at DU. It is a practice-focused course on the law of discovery. Students write 14 documents through the course of the semester, and I have to grade those - and give them formative feedback, so they do better on the next one. We still have lectures - we have to cover the rules, and the cases, and discuss practical strategies. It is, in many respects, a Carnegie course. Doctrine (and ethics) set in a practice context.

But grading those papers nearly kills me every time I teach the course. And I have to cap it at 20 students. It sells out in 15 minutes - students are clamoring for these courses. If I gave a presentation to you today about that course, you would be right to say back to me: "Great. 20 students. And you're a nut for doing all that work. I'm not going to do that - no how, no way." I have to figure out how to get you to say instead: "Oh, yeah - I could do that. The self-assessment piece works well, and I only have to grade 5 of those papers, and here's a rubric already done for how to formatively evaluate them."

Technologies

When I give one of my presentations on the use of emerging educational technologies in legal education I get basically one of two reactions:

The first reaction is: “Hey, that’s cool – how did you do that?”

The second reaction is: “Oh, geez. I could never do that.”

While I appreciate the openness behind the first reaction, I know it is the second reaction I need to be more concerned about.

Many techie people respond to the enthusiasts – the bleeding edgers - and hang out with them. Indeed, there’s a conference every year for those folks – the CALI conference. And – broadly speaking - they make fun of the folks who have the “I can’t do that” reaction.

But I want to validate it – I want to validate the ones who think they could never do that techie thing – whatever it is.

I think before we can expect broad adoption, we have to make it simple, straightforward, and easy to use. In other words, dumb easy and reliable. The good news is: we are getting there. We’ve had over a decade of lousy powerpoints, have we not? But there are finally a number of technologies that are maturing to the point where they might offer some help, and there are more on the way.

Online learning is gaining momentum. We still have the accreditation impediment to broad adoption of online learning technologies in law school, but as it gets more reliable, effective, and dumb easy, these barriers are likely to break down. At a minimum, now, we can (and do) put much of our work and materials online at TWEN or Blackboard sites. This is good. But mostly they have been a repository. We need to use them more interactively with our students, and get them involved in their learning. To use online technologies, in short, not only to provide instruction, but also to provide effective formative and summative assessment.

Clicker technology is coming along – we are figuring out that clickers can be used for much more than just a quiz, but rather for distributing the “power” dynamic in a classroom, and for increasing student engagement. And we can create smarter quizzes, ones that are about teaching as much as about assessment – because that’s what good assessment – particularly formative assessment – is all about.

Use of wiki technology – online software that works like Wikipedia – can allow students to co-create their learning – with the teacher, and with each other.

New, developing technology: Calibrated peer review (Explain it).

Also, John explained how standardized clients work in his program, and this is a helpful trend, and we can look to video to help scale such an approach.

Future of casebooks – Kindle – the Apple iPad, with interactive apps.

Did anyone notice how many of the presentations in this conference use technology to deliver their assessment mechanism? That did not happen because I was on the conference committee – it just happened. (And we had a session by a group from Australia about the use of Second Life – an online virtual world – but they could not find the funds to travel, unfortunately).

My message is this: Technology can facilitate and lubricate the change we need, and we are starting to see – and about to see at this conference – some early examples of this.

Electronic portfolios, video in an evidence exam, virtual reality testing, online problem sets, weekly quizzes, online technology to provide opportunities for feedback (peer, self, and teaching assistants) – we will hear about all of these approaches over the next day and a half. Soon, they will disappear, and everyone will know how to use them – just like your most technophobe colleague now uses his new iPhone with glee.

In Conclusion...

What is happening, I think, is this:

A new form of teaching and assessment is growing and expanding right at the time that technologies are becoming available to support it, and students are receptive to it. I would encourage you, over the next few years, to look to emerging technologies to provide ways to break through the cost/change conundrum. To deliver legal education in ways that are more effective and so easy that they bring in even our most skeptical colleagues. THAT is when, I believe, we will have broad change in legal education.