

John Marshall Law School

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Why Students Aren't Learning?: Using Assessments to Measure

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Why Students Aren't Learning?: Using Assessments to Measure and Improve Law School Learning and Performance

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I. INTRODUCTION	1
II. WHAT ARE STUDENT ASSESSMENTS	3
A. <u>Assessment Forms</u>	3
1. <i>Norm-Referenced Assessments</i>	3
2. <i>Criterion-Referenced Assessments</i>	3
B. <u>Types of Assessment</u>	4
1. <i>Summative Assessments</i>	4
2. <i>Formative Assessments</i>	4
C. <u>Another Type of Assessment</u>	5
1. <i>Summative/Formative Assessments</i>	5
III. PURPOSES OF STUDENT ASSESSMENTS	5
IV. CURRENT ASSESSMENT PRACTICES	6
A. <u>Current Practice: The Do-Or-Die Final Exam with No Feedback</u>	6
B. <u>How We Got Here</u>	7
C. <u>The Shortcomings of Current Assessment Practices</u>	11
V. BEST PRACTICES FOR USING ASSESSMENTS TO IMPROVE STUDENT PERFORMANCE	13
A. <u>Use Assessments That Are Valid, Reliable and Fair</u>	14
1. <i>Valid Assessments Measure Whether Students Learn What We Teach.</i>	14
2. <i>Reliable Assessments are Criterion-Referenced.</i>	16
B. <u>Articulate and Communicate the Purpose of Each Type of Assessment.</u>	18
1. <i>Cognitive assessments</i>	19
2. <i>Performance assessments</i>	19
C. <u>Formative Assessments Should Be the Primary Form of Assessment.</u>	20
1. <i>Use Descriptive Criteria When Providing Feedback Using Formative Assessments.</i>	23
D. <u>Use Multiple Methods of Assessing Student Learning</u>	25
1. <i>Ensure That Summative Assessments Are Also Formative.</i>	27
E. <u>Use Assessments to Help Students Become Expert Self-Learners</u>	28
F. <u>Take Steps to Ensure that Providing Multiple Assessments Does Not Interfere with Earning Tenure.</u>	31

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1. Teaching Assistants	32
2. Self-Evaluated and Computerized Assessments.....	33
3. Easy to Score Criterion-Referenced Summative/Formative Assessments.....	34
4. In-Class Formative Assessments.	36

VI. EXAMPLES OF FORMATIVE AND SUMMATIVE/FORMATIVE ASSESSMENTS

A. <u>Examples of Formative Assessments</u>	38
1. <i>Hypotheticals with Sample Answers</i>	38
2. <i>Self-scoring Computer Quizzes</i>	39
3. <i>Scored But Not Graded Practice Exams</i>	41
4. <i>Informal Classroom Assessments</i>	41
5. <i>Other Types of Informal Assessments</i>	46
a. <i>Electronic Mail Feedback</i>	46
b. <i>Group Instructional Feedback</i>	46
c. <i>Electronic Classroom Assessment Systems</i>	46
B. <u>Examples of Summative/Formative Assessments</u>	47
1. <i>Graded Quizzes and Midterms</i>	48

CONCLUSION	48
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I. INTRODUCTION

The primary purpose of law schools is to make sure students are learning the skills they need to think, perform, and conduct themselves as competent lawyers.² The mission of teachers is to facilitate learning.³ Learning is a loop in which the teacher facilitates learning, students perform what they have learned, the teacher assess students' performance, the teacher provides students feedback on the students' performance and students use the feedback to improve their performance on the next learning task.⁴

The critical step on this learning loop is the teacher feedback. Prompt feedback allows students to take control over their own learning by obtaining necessary remediation for identified deficiencies in their understanding and to adjust their approaches to future learning tasks. Knowing what they know and do not know focuses students' learning. For the learning loop to work optimally, students need several chances during the semester to reflect on what they have learned, what they still need to know, and how to improve their learning.⁵

² William M. Sullivan, et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 22 (2007) (AKA the Carnegie Report) [hereinafter EDUCATING LAWYERS]; S. Gregory Munro, OUTCOME ASSESSMENT FOR LAW SCHOOLS 68-69 (2000) [hereinafter OUTCOME ASSESSMENT] (student learning is the primary purpose of law schools); Herbert L. Packer & Thomas Ehrlich, NEW DIRECTIONS IN LEGAL EDUCATION 22-22 (1972)[hereinafter Packer & Ehrlich] (the primary mission of law schools is the education of students for entry into the legal profession).

All law schools assert that one of their most important goals is preparing students for law practice. See e.g. John O. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 35 J. Legal Educ. 189, 191 (1986) [hereinafter Mudd]. Some commentators even suggest that preparing students to become good lawyers is the primary role of legal education. See e.g. Paul Brest, *Plus Ça Change*, 91 Mich. L. Rev. 1945 (1993) (“[T]he primary aim of law school is to train skillful and responsible lawyers, policymakers and judges.”). See also Robert B. Stevens, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 720 (1983);

³ See generally Rick McCown et al., EDUCATIONAL PSYCHOLOGY: A LEARNING-CENTERED APPROACH TO CLASSROOM PRACTICE 3 (2d ed. 1996).

⁴ OUTCOME ASSESSMENT, *supra* note 2, at 72.

⁵ See e.g. THE SEVEN PRINCIPLES IN ACTION: IMPROVING UNDERGRADUATE EDUCATION 50 (Susan Rickey Hatfield ed., 1995).

Teachers should engage in a variety of activities that are necessary to facilitate learning, including studying and mastering the subject matter, designing course content, structuring and implementing lesson plans, facilitating learning inside and outside of the classroom, listening to and learning from students and using reliable assessment tools.⁶ A valid, reliable and fair assessment system is one that assesses student learning and improves learning skills.⁷

Assessment methods and requirements have a greater influence on how and what students learn than any other single factor.⁸ As the recent Carnegie Report noted, however, there is currently no coordinated effort in American legal education to determine the best use of assessments to improve law student learning.⁹ Without a suitable program to provide students timely feedback on their performance, the learning loop is broken. The Carnegie Report urges law schools to incorporate a coordinated approach to assessments as a way to “strengthen law schools’ capacity to develop competent and responsible lawyers.”¹⁰ In addition to encouraging law teachers and law schools to use assessments to improve student learning, this article provides a set of best practices for using assessments and furnishes detailed examples of various forms of assessments.

⁶ Joseph D. Novak, *LEARNING, CREATING, AND USING KNOWLEDGE: CONCEPT MAPS AS FACILITATIVE TOOLS IN SCHOOLS AND CORPORATIONS* 112 (1998).

⁷ See e.g. *EDUCATING LAWYERS*, supra note 2, at 171 (“[A]ssessment should be understood as a coordinated set of formative practices that, by providing important information about the students’ progress in learning to both students and faculty, can strengthen law schools’ capacity to develop competent and responsible lawyers.”)

⁸ Roy Stuckey, et al., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* 243 (2007) [hereinafter *BEST PRACTICES FOR LEGAL EDUCATION*] (quoting Alison Bone, National Centre for Legal Education, *ENSURING SUCCESSFUL ASSESSMENT 2* (Roger Burrige & Tracey Varnava eds., 1999), available at <http://www.ukcle.ac.uk/resources/assessment/bone.pdf> (last visited July 27, 2008) [hereinafter *Bone*]).

⁹ *EDUCATING LAWYERS*, supra note 2, at 162.

¹⁰ *Id.* at 171.

II. WHAT ARE STUDENT ASSESSMENTS

Assessments are tools to obtain and document information about student achievement, skills, and ability.¹¹

A. Assessment Forms

Assessment tools fall into two groups: norm-referenced assessments and criterion-referenced assessments.¹²

1. *Norm-Referenced Assessments*

Norm-referenced assessments evaluate student performance in relation to the performance of all the students in the class.¹³ They are designed to rank each student in relation to how she or he performs compared with other students in the same class, usually based on a curve.¹⁴

2. *Criterion-Referenced Assessments*

Criterion-referenced assessments (also called objective-referenced or domain-referenced assessments) evaluate student performance in relation to a specific standard or criterion.¹⁵ They are designed to help evaluate whether students have met a specific level of performance. Each student's score is based on the individual student's performance in relation to absolute

¹¹ Cf Children's Health Encyclopedia, available at <http://www.answers.com/topic/assessment> (last visited August 7, 2008). See also OUTCOME ASSESSMENT, *supra* note 2, at 9-11.

¹² BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 243.

¹³ Educational Assessments, in the CHILDREN'S HEALTH ENCYCLOPEDIA, available at <http://www.answers.com/topic/assessment> (last visited August 7, 2008).

¹⁴ *Id.*

¹⁵ *Id.* See also Greg Sergienko, *New Modes of Assessment*, 38 San Diego L. Rev. 463, 465 (2001) [hereinafter Sergienko].

expectations about the level of knowledge or skill the class should achieve.¹⁶ If the goal of legal education is not merely to sort but to produce “as many individuals proficient in legal reasoning and competent practice as possible,” most assessments should be criterion-referenced.¹⁷

B. Types of Assessment

There are generally two types of assessments: summative and formative. Summative and formative assessments are often referred to as "assessments of learning" and "assessments for learning" respectively.¹⁸

1. *Summative Assessments*

Summative assessments assign grades or otherwise indicate the extent to which students have achieved the course goals.¹⁹ Summative assessments usually take place once, at the end of the semester.²⁰

2. *Formative Assessments*

Formative assessments provide feedback to students and faculty.²¹ They are not directly used to assign grades or rank students. Their purpose is to aid learning. Formative assessments can be given in or outside the classroom. For example, teachers can assign self-graded practice

¹⁶ *Id.* For more on criterion-referenced assessments, see infra, notes 76-89 and accompanying text.

¹⁷ EDUCATING LAWYERS, supra note 2, at 168.

¹⁸ *Id.* at 164.

¹⁹ See e.g. Catherine Garrison & Michael Ehringhaus, FORMATIVE AND SUMMATIVE ASSESSMENTS IN THE CLASSROOM (2006), published by the National Middle School Association, available at <http://www.nmsa.org/Publications/WebExclusive/Assessment/tabid/1120/Default.aspx> (last visited August 8, 2008); The value of Formative Assessment, published by Fairtest.org and available at <http://www.fairtest.org/value-formative-assessment-pdf> (last visited August 8, 2008). See also Sergienko, supra note 14, at 465.

²⁰ *Id.*

²¹ *Id.*

problems and quizzes to students after the class discussion on a given concept is completed.²²

Formative assessments can also take place in class, by evaluating students' oral or written class performance.²³ Formative assessments provide feedback on student learning and can be used by teachers, teaching assistants, and students. Formative assessments help teachers determine whether students are learning and help students develop learning skills.

C. Another Type of Assessment

1. *Summative/Formative Assessments*

Summative assessments can also be formative. In other words, teachers can use summative (graded) assessments to provide feedback to students regarding their progress and to help them improve their performance. I call these summative/formative assessments.

Summative/formative assessments are graded assessments administered prior to the end of the semester so that they provide information to teachers regarding students' progress toward achieving course learning goals. In addition to a grade, however, these assessments provide students significant feedback to help them develop their learning skills and improve their performance. Summative/formative assessments should take place two or more times during the semester, prior to the final exam and should consist of graded quizzes and midterms with detailed sample answers designed to enhance learning.²⁴

III. PURPOSES OF STUDENT ASSESSMENTS

The main purpose of assessments in educational institutions is to determine whether

²² For a detailed description of various types of formative assessments, see "Examples of Formative Assessments," Section VI (A) below, *infra* notes 175-189 and accompanying text.

²³ EDUCATING LAWYERS, *supra* note 2, at 164.

²⁴ For a detailed description of summative/formative assessments, see *infra* notes 162-165 and accompanying text.

students are learning what we believe they should be learning.²⁵ Assessments are also used to grade and rank students; to motivate students; to help employers more easily select employees; to provide feedback to students about their progress and teachers about their effectiveness; to provide institutional information to professional bodies such as the ABA and AALS; and, to some extent, predict success in future legal employment.²⁶

Another purpose of assessment, often overlooked in law schools, is to enhance the learning experience and improve student performance.²⁷ As Gregory Munro states,

The focus of student assessment in law school should be on enhancing student performance, providing multiple evaluations of student performance, and giving appropriate feedback to students. Hence, assessment is more than just tests and testing. Rather, it is an approach to legal education that fosters more active teaching and learning.²⁸

The ideal assessment program should help teachers discover whether students have achieved the learning outcomes of the course and provide guidance and feedback to students to help them improve their learning skills. Too often, current assessment practices fail to do this.

IV. CURRENT ASSESSMENT PRACTICES

A. Current Practice: The Do-Or-Die Final Exam with No Feedback

²⁵ Bone, *supra* note 7, at 3.

²⁶ *Id.*

²⁷ Aside from protecting the public by denying graduation to students who are not expected to become competent lawyers, assessments should be used to foster learning, inspire confidence in the learner, enhance the learner's ability to self-monitor, and drive institutional self-assessment and curricular change. Ronald M. Epstein, MD, & Edward M. Hundert, MD, *Defining and Assessing Professional Competence*, JAMA, Jan. 9, 2002, at 226.

²⁸ OUTCOME ASSESSMENT, *supra* note 2, at 11.

In most law school courses, particularly in the critical first year, the only assessment most students experience is a three or four hour end-of-the-semester final.²⁹ These do-or-die final exams typically consists of essay questions that require “students to apply memorized legal principles to hypothetical fact patterns.”³⁰ Students are given no feedback whether and to what extent they are learning the course materials prior to the final exam and most law school final exams contain no feedback to students other than a score or a grade.³¹ Moreover, when students seek to review their final exam performance with their teacher they find that most law teachers provide little additional meaningful feedback on their individual final exam performance.³² In short, the after-the-fact nature of these summative assessments “forecloses the possibility of giving meaningful feedback to the student about progress in learning.”³³

B. How We Got Here

Use of the end-of-the-course final exam as the sole student assessment is a relatively recent development in the evolution of legal education, initiated in the late 19th century by Dean

²⁹ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 236; Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. Rev. 657 (1997) [hereinafter Sheppard].

³⁰ *Id.* While some teachers are beginning to include multiple choice and short-answer questions, the primary type of final exam remains the essay. See e.g. Robert C. Downs & Nancy Levit, *If It Can't Be Lake Woebegone ... A Nationwide Survey of Law School Grading and Grade Normalization Practices*, 65 UMKC L. Rev. 819, 822 (1997).

³¹ See e.g. Steven H. Nickles, *Examining and Grading in American Law Schools*, 30 Ark. L. Rev. 411, 438 (1977). In his 1977 study, professor Nickles found that law teachers generally provide no final exam feedback to students. See also Sheppard, *supra* note 28 at 681.

³² See e.g. OUTCOME ASSESSMENT, *supra* note 2, at 35. Students at all law schools I have taught describe final exam reviews that remind me of the final exam reviews I encountered as a student. Basically, the professor provides a copy of either a sample answer or the best student answer and suggests that the student compare his or her answer to the best answer in order to figure out what they did correctly and incorrectly.

³³ EDUCATING LAWYERS, *supra* note 2, at 164.

Christopher Langdell at Harvard Law School.³⁴ From the 14th to 17th centuries, legal education in England took place at the Inns of Court where student assessments were conducted throughout the school term by senior barristers and consisted primarily of oral arguments of moot cases lasting several hours.³⁵ Law students attended lectures and were mooted on set topics. The school year consisted of four terms and each student performed at least one moot case argument per term.”³⁶ By the early 17th century, in addition to moot court arguments, students wishing to graduate from an English law school had to stand for oral examinations, conducted by several examiners.³⁷ Eventually, written exams were also required of barristers studying at the Inns of Court and clerks wishing to become solicitors.³⁸

Early American law schools borrowed from their English counterparts, requiring weekly oral or written examinations and end-of-a-topic written exams that focused on analytical skills rather than the ability to memorize black letter rules.³⁹ During Harvard’s early years, for example, the law school used weekly oral exams augmented by written exams, and a summative assessment at the end of each topic. The questions in the written exams often involved problem solving, requiring students not only to recall applicable doctrine, but to apply it to determine

³⁴ See e.g. Ron M. Aizen, *Four Ways to Better 1L Assessments*, 54 Duke L.J. 765, 768-769 (2004) [hereinafter Aizen].

³⁵ Sheppard, *supra* note 28, at 658-9. The short history of the final exam in this paper comes from professor Sheppard’s article.

³⁶ *Id.* at 660.

³⁷ *Id.*

³⁸ *Id.* at 662-63.

³⁹ *Id.* at 664-66.

which hypothetical party would succeed.⁴⁰ In the early 19th century, well known legal educators like Judge Joseph Story and Professor Simon Greenleaf gave students the option to take quizzes and examinations in class, often several times a week.⁴¹ Other law schools gave daily quizzes administered by third-year student tutors.⁴²

By the middle of the 19th century, although many schools continued to hold daily or weekly exams, the end-of-term final examination was becoming the sole assessment at some American law schools.⁴³ In 1860, for example, the University of Michigan started to use a combination of daily oral and written examinations conducted by recent graduates and end-of-the-term examinations.⁴⁴ The University of Iowa law school required quizzes, end-of-the-term final exams, and a graduation exam while Cornell law school held daily examinations, end-of-the-term and graduation exams.⁴⁵

Although it had earlier abandoned examinations, Harvard reintroduced end-of-the-term final exams around 1870 to compliment Dean Christopher Columbus Langdell's new case method of instruction.⁴⁶ These new exams, the precursors to the current end-of-the-term final exam, were essay questions whose complexity increased over time—with an emphasis on

⁴⁰ *Id.* at 665.

⁴¹ *Id.* at 666.

⁴² *Id.*

⁴³ *Id.* at 670.

⁴⁴ *Id.*

⁴⁵ *Id.* at 671.

⁴⁶ *Id.*

application of legal doctrine to varying factual scenarios.⁴⁷ As this new assessment form developed, Harvard gave final exams over a period of six days at the end of the year – most courses were year-long courses – and students who scored below 70% were dropped from law school.⁴⁸ Columbia law school soon followed Harvard’s end-of-the-term final exam model but, for several years, law schools outside of the northeast continued to use weekly or monthly assessments and a graduation exam.⁴⁹

By the early 20th century, the end-of-the-term examination model had taken hold nationwide because of the influence of the nascent American Association of Law Schools,⁵⁰ inertia, and law teachers’ lack of pedagogical training.⁵¹ Beginning with the AALS’s first meeting in 1901, influential professors advocated for the use of end-of-the-term examinations, urging that they be no longer than three or four hours and “receive neither a perfunctory nor a long-delayed review.”⁵²

Law school teachers have never received much instruction on teaching or assessment.⁵³ We still teach in much the same way we were taught. The same is true for assessment. We test

⁴⁷ *Id.*

⁴⁸ *Id.* at 672.

⁴⁹ *Id.* at 673-75.

⁵⁰ *Id.* at 676.

⁵¹ See e.g. Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 Santa Clara L. Rev. 1, 13 (2002) [hereinafter Lasso].

⁵² Sheppard, *supra* note 28, at 676.

⁵³ Lasso, *supra* note 50, at 13. I started teaching law after eight years of working as a scientist and engineer, three years of law school and six years of law practice. My pedagogical training was limited to attending the AALS “Workshop for New Law Teachers,” where my instructors were other pedagogically challenged law professors. See also Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347, 365 (2001); BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 108 (pointing out that law teachers receive no training in assessment theory or practice).

in much the same way we were tested. Although the format of the final exam has undergone a few changes over the decades with some teachers abandoning the essay as the sole basis of the final exam and adding short-answer questions and some objective questions,⁵⁴ the end-of-the-term, do-or-die final exam remains the primary form of assessment in law school today.

An irony gleaned from this brief history of the American law school exam is that when law professors began drafting their own exams, many hoped this would lead to increased and personalized feedback and evaluation of final exam answers.⁵⁵ Unfortunately, this has not been the case. In fact, students consistently complain about the rarity of usable feedback on final exams.⁵⁶ Despite long-standing criticisms from academics, practitioners, and students, the single, end-of-the-term exam tradition remains with us today.

C. The Shortcomings of Current Assessment Practices

In theory, we administer assessments to determine whether our students are learning what we want them to learn.⁵⁷ Current assessment practices at American law schools, however, “function less as a means for measuring student learning than as a means for sorting and ranking students and for ‘weeding out’ students who are not developing the requisite knowledge, skills, and values to pass a bar examination.”⁵⁸ While one end-of-the-semester summative assessment may serve to assist employers and perhaps to protect the public by ensuring basic levels of competence, it does little to enhance the learning experience and improve student performance in

⁵⁴ Sheppard, *supra* note 28, at 683-85.

⁵⁵ *Id.* at 681.

⁵⁶ *Id.* See also EDUCATING LAWYERS, *supra* note 2, at 165-66.

⁵⁷ See e.g. BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 236. See also the “Purposes of Student Assessment” section, *supra* notes 24-27 and accompanying text.

⁵⁸ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 236. (Citing Judith Wegner, THINKING

law school.⁵⁹

There is much to critique about the form and content of the end-of-the-semester final exam.⁶⁰ The worst feature of current assessment practice, however, is that “students are not provided a chance to practice what will actually be tested, . . . [and]. . . do not get feedback during the course of the semester to gauge how they might do when the day of reckoning arrives.”⁶¹ The current assessment practice of end-of-the-semester final exams not only does little to help students learn, it is a source of needless stress and frustration to students.

According to the Carnegie Report:

[Students] complained that the quality and quantity of their studying was unrelated to their performance on the final examination. They claim to have had little feedback during the semester and no basis on which to gauge whether they were mastering the material or making adequate progress toward the desired proficiencies.⁶²

My own students have expressed similar frustration for many years.⁶³ They consistently complain about the quantity and quality of law school assessments and the seeming arbitrariness of the grading process. They complain about the stress caused by the fact that in most courses,

LIKE A LAWYER ABOUT LAW SCHOOL ASSESSMENT 19-22 and 34 (Draft 2003) [hereinafter Wegner, ASSESSMENT]).

⁵⁹ See e.g. OUTCOME ASSESSMENT, *supra* note 2, at 33; BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 236-237; EDUCATING LAWYERS, *supra* note 2, at 163-4. For a collection of scholarship documenting the dissatisfaction with the single exam practice and supporting an increase in the number, variety, and quality of law school assessments, see Aizen, *supra* note 33, at 769 nn.19 & 20.

⁶⁰ See e.g. Philip C. Kissam, *Law School Examinations*, 42 Vand. L. Rev. 433, 438-456 (1989).

⁶¹ EDUCATING LAWYERS, *supra* note 2, at 166.

⁶² *Id.* at 165.

⁶³ For the past ten years, I have conducted informal surveys of students’ perceptions about their first year experience. These surveys include written requests to current students for feedback about how my class and their other classes are progressing as well as conversations with them about these topics. Additionally, at the end of the semester I ask students to e-mail me their perceptions about the semester, about my class, other classes, and about law school in general. Finally, I ask my teaching assistants, all of whom were my students the previous year, to talk to their classmates and give me detailed feedback about their first year of law school.

they have no idea what is expected of them on the final exam and what is necessary to perform well in any given course. As former ABA president Sandy D'Alemberte put it, "Is there any educational theorist who would endorse a program that has students take a class for a full semester or a full year and get a single examination at the end? People who conduct that kind of educational program are not trying to educate."⁶⁴

The end-of-the-semester do-or-die final exam is an inadequate tool for assessing student achievement and does little to help students learn and improve their performance. Except perhaps in legal writing and research courses, which usually involve significant feedback on student progress, current assessment practices in American law schools are not valid, reliable, or fair.⁶⁵

V. BEST PRACTICES FOR USING ASSESSMENTS TO IMPROVE STUDENT PERFORMANCE.

Legal educators in the U.S. "need to clarify the purposes of grading systems, reconsider practices that perpetuate advantages and disadvantages associated with high-stakes testing early in students' law school careers, find ways to stimulate rather than skew student learning and reallocate faculty time spent on semester-end grading to better use."⁶⁶ A good assessment system (a) stimulates student reflection on strengths, weaknesses, and learning approaches, (b) guides students toward relevant learning opportunities; (c) provides incentives that lead students to take more active responsibility for their own learning as they undertake increasingly sophisticated work throughout law school; and (d) documents information that reflects our graduates'

⁶⁴ Talbot D'Alemberte, *Talbot D'Alemberte on Legal Education*, 76 ABA J. 52 (Sep. 1990).

⁶⁵ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at at 238

⁶⁶ *Id.* Quoting Wegner, ASSESSMENT, *supra* note 57, at 30.

professional capabilities and assists employers in making better hiring decisions.⁶⁷

For the past two decades, a number of individuals and organizations have been working to create a set of best practices for legal education.⁶⁸ The culmination of their effort is the BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP, published in March of 2007,⁶⁹ the basis for many of the best practices described in this section.

A. Use Assessments That Are Valid, Reliable and Fair

Effective assessments exhibit the qualities of validity, reliability, and fairness.⁷⁰ Single end-of-the-semester final exams given under time pressure are not valid, reliable or fair.⁷¹

1. *Valid Assessments Measure Whether Students Learn What We Teach.*

Validity means that an assessment tool accomplishes the purpose for which it was intended. “Validity measures the extent to which assessments and their results demonstrate the students’ achievement of outcomes.”⁷² A valid assessment, then, is one that measures what it is

⁶⁷ *Id.* Citing Wegner, ASSESSMENT, supra note 57, at 63.

⁶⁸ These individuals include Robert McCrate, Gerald Hess, Roy Stuckey, Judith Wenger, Michael Schwartz and many others. The organizations include the American Bar Association (ABA), the Carnegie Foundation for the Advancement of Teaching, and the Clinical Legal Education Association (CLEA).

⁶⁹ See BEST PRACTICES FOR LEGAL EDUCATION, supra note 7. The Best Practices described in this section are to a great extent based on the “Best Practices for Assessing Student Learning” section in the BEST PRACTICES FOR LEGAL EDUCATION text.

⁷⁰ Michael Josephson, LEARNING AND EVALUATION IN LAW SCHOOL 7 (1984).

⁷¹ Gregory S. Munro, *How Do We Know If We Are Achieving Our Goals?: Strategies for Assessing the Outcome of Curricular Innovation*, [hereinafter Munro, *Strategies for Assessing*] in ERASING LINES: INTEGRATING THE LAW SCHOOL CURRICULUM 229, 237 (Pamela Lysaght et al. eds., 2002); BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 238.

⁷² Bone, supra note 7, at 6.

supposed to measure.⁷³

An assessment tool is valid if it allows the teacher to draw inferences about the matters that the test purports to assess.⁷⁴ Congruence is a necessary aspect of validity, which means the goals of the test match the goals of the instruction.⁷⁵ For example, a professor seeking to test students' ability to apply and distinguish cases might ask an essay question that tests the outer limits of a set of precedents. If the exam is open book and the students are given enough time to review relevant authorities, it is a valid exam. If, however, the exam is a closed-book test or students are not given enough time to review relevant authorities during the exam, students who have developed the ability to apply and distinguish cases, but are slow readers or possess poor memorization skills, would likely perform poorly.⁷⁶ This exam is not valid because it does not test whether all students learned to apply and distinguish cases.

Early in the semester, I give my torts students an assessment to determine whether they have learned to identify and differentiate between several intentional torts and defenses. Leading up to the assessment, the class analyzes several cases to extract black-letter rules for battery, assault, self-defense, and consent, and to identify facts that show whether the claims and defenses exist. The assessment presents a short set of facts describing a scenario in which an inebriated young woman attacks her young male friend with a broken wine glass and the friend reacts by shooting the young woman. Students can consult their outline and class notes and they are given

⁷³ Arthur Hughes, *TESTING FOR LANGUAGE TEACHERS* 33 (2d ed. 2003).

⁷⁴ Gerald F. Hess & Steven Friedland, *TECHNIQUES FOR TEACHING LAW* 289 (1999) [hereinafter Hess & Friedland]. See also Patricia L. Smith & Tillman J. Ragan, *INSTRUCTIONAL DESIGN* 118, 95 (2d ed. 1999) [hereinafter Smith & Ragan].

⁷⁵ Smith & Ragan, *supra* note 73, at 95.

⁷⁶ *BEST PRACTICES FOR LEGAL EDUCATION*, *supra* note 7, at 241.

thirty minutes to enumerate the potential claims and defenses the young woman and her friend might raise. This assessment is valid because it seeks to measure only what the students have learned, does not require memorizing rules, and provides sufficient time for even the slowest readers.

I ask students to resolve questions that require the use sophisticated analysis only after they have completed related readings and class discussions that develop the skills of using facts and law to argue for and against the existence of the elements necessary to establish claims and defenses. To assess students' development of analytical skills in my torts class, I often use the same fact scenario as in the previously described assessment but ask students to determine whether the friend has a viable defense for shooting the young woman and whether the young woman has a valid claim for being shot. Students may consult their outline, class notes and previously discussed hypotheticals dealing with claims and defenses. They are given one and one-half hours to complete the assessment. This assessment properly test the students' ability not only to identify claims and defenses, but to engage in analysis regarding whether the claims and defenses can be established. Like the earlier assessment, this one is valid because it seeks to measure only what the students have learned, soon after they have learned it, and in a setting where only their analytical skills are being tested.

2. *Reliable Assessments are Criterion-Referenced.*

Reliability means the assessment yields the same results on repeated trials. A reliable assessment reduces the impact of subjective influences of the test giver and grader on the assessment processes.⁷⁷ A reliable assessment tool is one that accurately rates “those who have

⁷⁷ Bone, supra note 7, at 6.

learned as having learned and those who have not learned as having not learned.”⁷⁸ If an assessment is reliable, it does not matter whether a student is assessed first or last or even whether one teacher or another is conducting the assessment.⁷⁹

“Assessments can be norm-referenced or criterion-referenced.”⁸⁰ A norm-referenced assessment, or normative assessment, is done primarily to ensure that a certain grading curve is achieved and is based on how students perform in relation to each other rather than how well the student achieves the educational objectives of the course.⁸¹ By contrast, a criterion-referenced assessment is based on how students perform in relation to explicit criteria identifying the skills all students should be able to demonstrate by the time the assessment is given.⁸²

Criterion-referenced assessments enable teachers to determine whether students have met certain learning criteria.⁸³ Some students develop learning skills faster or easier than others, but if the teaching is effective, most students will learn what they should by the time discussion and analysis of a given set of materials are completed or soon thereafter.⁸⁴ Criterion-referenced assessments permit students and teachers to determine how fast students are learning, so the teacher can make adjustments that ensure that most students eventually acquire the skills sought

⁷⁸ BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 243 (citing Smith & Ragan, supra note 73, at 97).

⁷⁹ *Id.* at 243.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 244 (citing Sophie Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics – Explicit Grading Criteria*, 2004 Mich. St. L. Rev. 1, 6-15 [hereinafter Sparrow]).

⁸³ BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 244 (citing Bone, supra note 7, at 4).

⁸⁴ *Id.*

to be taught. The purpose of criterion-referenced assessments is to make sure most, if not all students master the skills they will need to be competent lawyers. “[T]he implicit pedagogical philosophy underlying criterion-referenced assessment is that the fundamental purpose of professional education is not sorting, but producing as many individuals proficient in legal reasoning and competent practice as possible.”⁸⁵

Law teachers should develop and use explicit evaluation criteria to minimize the risk of unreliability in assigning grades.⁸⁶ Unlike norm-referenced assessments, “[c]riteria-referenced assessments rely on detailed, explicit criteria that identify the abilities students should be demonstrating (for example, applying and distinguishing cases) and the bases on which the instructor will distinguish among excellent, good, competent, or incompetent performances.”⁸⁷ Student answers to hypotheticals, quizzes, and exams that are evaluated using detailed evaluation sheets explaining exactly what the teacher is looking for and how points are allocated result in more reliable assessments.

The use of explicit criteria minimizes the risk of unreliability when evaluating many papers, resulting in a more reliable and fair grading process.⁸⁸ Criterion-referenced assessments are more reliable because they are tethered to explicit criteria rather than the instructor’s abstract sense of the correct answer or performance.⁸⁹ Providing students with clear criteria regarding

⁸⁵ *Id.* at 210-11.

⁸⁶ See N. R. Madhava Menon, *Designing a Simulation-Based Clinical Course: Trial Advocacy*, in A HANDBOOK ON CLINICAL LEGAL EDUCATION 177, 181 (N. R. Madhava Menon ed., 1998) [hereinafter Menon] (“Students and evaluators need a clear understanding of the criteria on which performances will be graded.”).

⁸⁷ BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 244 (citing Sparrow, supra note 81, at 6-15).

⁸⁸ Menon, supra note 85, at 181.

⁸⁹ *Id.* at 244 (citing Sparrow, supra note 81, at 28-29).

what is expected of them in a given assessment tool enhances their learning, helps them understand their progress and, eventually, the grades they receive.⁹⁰

B. Articulate and Communicate the Purpose of Each Type of Assessment.

In designing student assessment tools, teachers should know what students should be learning and what is important to assess.⁹¹ Teachers should know what they are trying to evaluate and students should know what each assessment seeks to measure. Students learn better when they understand what they are expected to learn, the standards they must meet, and they have a way to determine what they have learned.⁹² The goals of a particular assessment may be to evaluate a student's acquired knowledge, ability to perform a task, or a combination of these.

1. *Cognitive assessments*

In the context of legal education, cognitive assessments test the acquisition of applicable knowledge of the substantive law.⁹³ In the first week of my torts class, I advise students that by the end of the first four weeks of the course, they should be able to (a) articulate the elements of all the intentional torts and defenses, and (b) organize these materials in an outline format. To help students learn the elements of the intentional torts and defenses and to determine whether they have learned these, I provide a variety of cognitive assessments, including informal classroom assessments (like fill-in outlines), CALI exercises, hypotheticals (with detailed sample answers), and multiple choice quizzes on the course web page. To assist students develop the skills of outlining the legal concepts we have studied, I provide case synthesis problems (with

⁹⁰ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 245.

⁹¹ *Id.* at 243.

⁹² See e.g. OUTCOME ASSESSMENT, *supra* note 2, at 112-117.

⁹³ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 240.

detailed sample answers), and a primer on using the outline format to organize acquired information about legal concepts.

2. *Performance assessments*

Performance assessments measure students' ability to perform a task.⁹⁴ They measure whether students are able to use previously learned concepts to resolve new legal problems. I advise my torts students the first week of class that by the end of six weeks, they should be able to (a) identify relevant facts to determine whether a given claim or defense can be asserted, (b) resolve new legal problems using learned legal concepts, and (c) articulate solutions to new legal problems orally and in writing. The performance assessments I use include hypotheticals to help students hone the skill of identifying relevant facts that can be used to determine the presence of claims or defenses. I also give more complicated hypothetical problems with detailed sample answers to help them refine their problem-solving skills and improve their analysis regarding the existence of specific claims and defenses. Finally, I administer a practice quiz, a practice mid-term, a graded quiz and a graded midterm, all within the first six weeks of class.

C. Formative Assessments Should Be the Primary Form of Assessment

Formative assessment are intended to be given throughout the course to provide feedback to students and teachers about student learning.⁹⁵ Formative assessments range from informal classroom assessments and hypotheticals with sample answers to self-scored computerized quizzes and practice exams.⁹⁶ The use of formative assessment is perhaps the most effective way to improve student learning and performance in a course, in law school, and, on the bar exam.

⁹⁴ *Id.*

⁹⁵ *Id.* at 255; Sergienko, *supra* note 14, at 465

⁹⁶ For detailed examples of formative assessments, see the section on “examples of formative assessments” below, *infra* notes 175-189 and accompanying text.

As such, regular formative assessments should be the primary form of assessment in law school.⁹⁷

Contemporary learning theory suggests that efficient application of educational effort is significantly enhanced by the use of formative assessment. For educational purposes, summative devices have their place primarily as devices to protect the public by ensuring basic levels of competence. Formative practices directed toward improved learning ought to be the primary forms of assessment.⁹⁸

Formative assessments are especially important during the first year of law school,⁹⁹ when students need time to adjust to a different –and more demanding– environment, and a dramatically different approach to learning. While undergraduate success depends primarily on the acquisition of knowledge, law school success demands also the ability to apply acquired knowledge.¹⁰⁰ It is during the first year that students most need the type of feedback that lets them know how they are progressing and how to improve their skills.¹⁰¹

Formative assessments also provide teachers valuable information about their teaching effectiveness.¹⁰² Educational experts suggest that using formative assessments throughout a course helps teacher determine how to improve instruction.¹⁰³ Formative assessments help

⁹⁷ BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 256. See also EDUCATING LAWYERS, supra note 2, at 189.

⁹⁸ BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 256, quoting one of the earlier drafts of the EDUCATING LAWYERS book.

⁹⁹ *Id.*

¹⁰⁰ See e.g. OUTCOME ASSESSMENT, supra note 2, at 12; Lasso, supra note 51, at 27.

¹⁰¹ BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 256 (Quoting Wegner, ASSESSMENT, supra note 57, at 31).

¹⁰² *Id.*

¹⁰³ *Id.*

teachers determine whether material needs to be presented again or in a different manner.¹⁰⁴

When a significant number of the students fail to understand a particular legal concept, corrections can be made before the summative assessment reveals deeper problems.¹⁰⁵

The authors of the Carnegie Report explain why formative assessments are critical in law school:

[T]he essential goal of professional schools must be to form practitioners who are aware of what it takes to become competent in their chosen domain and equips them with the reflective capacity and motivation to pursue genuine expertise. They must become “metacognitive” about their own learning, to use the psychologists’ term. This is why effective means of formative assessment are so critical for training professionals.¹⁰⁶

According to the 2006 report of the Law School Survey of Student Engagement (LSSSE), “[s]tudents who have more opportunities to assess their own progress and refocus their studying in light of feedback tend to gain more in higher level thinking skills.”¹⁰⁷ And, students whose teachers provide frequent formative assessments “reported greater gains in their ability to synthesize and apply concepts and ideas, spent more time preparing for class, and were more likely to say they worked harder than they thought they could to meet the expectations of faculty members.”¹⁰⁸ Formative assessments also help to humanize the law school experience. The 2005 LSSSE report, for example, concluded that students whose teachers provide frequent

104 *Id.*

105 *Id.*

106 EDUCATING LAWYERS, *supra* note 2, at 217.

107 LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, ENGAGING LEGAL EDUCATION: MOVING BEYOND THE STATUS QUO 13 (2006) [hereinafter 2006 LSSSE]

108 BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 126 (citing the 2006 LSSSE).

formative assessments are “more positive about their overall law school experience.”¹⁰⁹

Because formative assessments are about learning, not ranking, they may be scored but should not be graded.¹¹⁰ Moreover, feedback should be provided to students soon after the assessment takes place.¹¹¹ “To be most helpful, feedback normally should be prompt, indicate the direction of change desired, be specific to the particular circumstances and be given in a quantity that can be understood and acted upon by the learner.”¹¹² The feedback on formative assessments can be provided by the teacher, teaching assistants, and even the student.¹¹³

1. *Use Descriptive Criteria When Providing Feedback Using Formative Assessments.*

Law school assessments should help students determine their level of expertise.¹¹⁴ “The development of expertise takes time, and there are stages with discernable differences: novice, advanced beginner, competent, proficient, and expert.”¹¹⁵ Formative assessments are the ideal tool to help students develop skills at their own pace. And, since formative assessments are not used to calculate grades, their evaluation standards need not be numerical scores; they can be criteria reflecting levels of proficiency such as (a) limited proficiency, (b) basic competence, (c)

¹⁰⁹ LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, THE LAW SCHOOL YEARS: PROBING QUESTIONS, ACTIONABLE DATA 7, 18 (2005) [hereinafter 2005 LSSSE].

¹¹⁰ *Id.* at 255.

¹¹¹ *Id.* at 127.

¹¹² *Id.* Quoting THE SEVEN PRINCIPLES IN ACTION: IMPROVING UNDERGRADUATE EDUCATION 59 (Susan Hatfield, ed., 1995).

¹¹³ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 127.

¹¹⁴ *Id.* at 245.

¹¹⁵ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 245 (citing Wegner, ASSESSMENT, *supra* note 57, at 11).

intermediate competence, and (d) advanced proficiency. I use descriptive criteria to evaluate the first few formative assessments in the semester and numerical scores to evaluate formative assessments the rest of the semester.

To illustrate how descriptive evaluation criteria work, I will use the assessment problem described earlier in which an inebriated young woman attacks her young male friend with a broken wine glass and, in response, the friend shoots the young woman.¹¹⁶ The hypothetical describes the young woman lunging at her friend with a broken wine glass and the friend reacting by shooting the young woman. After completing related readings and class discussions designed to develop the skills of using facts and law to argue for and against the existence of the elements necessary to establish intentional claims and defenses, students should be able to identify a battery and assault claim on behalf of the young woman as well as an assault claim on behalf of the friend. The friend also has a viable affirmative defense of self-defense. In this early formative assessment, students are asked simply to enumerate all potential claims and defenses. The assessment's evaluation form provides students feedback on their answers using the following descriptive criteria:

a. Limited proficiency:

Answer recognizes some but not all key issues, rules, relevant facts, arguments and, if applicable, policy.¹¹⁷ Analysis is one sided, incomplete, overly simplistic, and/or focuses on irrelevant facts and issues. For the above described problem, an answer that misses one or more key claims – like battery (for the young woman) or assault (for her friend) – or key defenses – like self-defense (for the friend) – would be evaluated as demonstrating “limited proficiency,” as

¹¹⁶ See supra, note 75 and accompanying text.

¹¹⁷ *Id.*

would an answer that brings up irrelevant facts, like gender or size of the parties.

b. Basic competence:

Answer recognizes most key issues, rules, relevant facts, arguments and, if applicable, policy. Analysis is formalistic and/or one-sided but identifies many issues, distinguishes most relevant and irrelevant facts and utilizes most applicable rules.¹¹⁸ For the above described problem, an answer is evaluated as demonstrating “basic competence” if it recognizes most key claims (battery and assault) and defenses (self-defense) but misses the assault claim by the young woman and the friend’s assault claim against the young woman.

c. Intermediate competence:

Analysis is more integrated and addresses nearly all issues, focusing on and developing relevant rules, facts and policy in a meaningful way that reflects a reasonable understanding of the legal concepts rather than a formulaic approach. Answer spots but does not work extensively or effectively with issues involving significant uncertainty or novelty.¹¹⁹ For the above described problem, an answer that recognizes both of the young woman’s claims (assault & battery) and the friend’s self-defense but misses the friend’s assault claim against the young woman would be evaluated as showing “intermediate competency.”

d. Advanced proficiency:

Answer demonstrates characteristics of intermediate competence, but also recognizes all potential claims and defenses, considers implications of analysis more fully, brings to bear sound and creative approaches, works extensively and effectively with issues involving substantial

¹¹⁸ Id.

¹¹⁹ Id.

uncertainty or novelty.¹²⁰ For the above described basic problem, an answer is evaluated as showing “advanced proficiency” if it describes all potential claims and defenses by both the young woman and the friend without using irrelevant facts.

D. Use Multiple Methods of Assessing Student Learning

As previously discussed, the single end-of-the-term examination is an inadequate tool for determining which students have learned and which have not.¹²¹ A single assessment has significant potential for error because performance depends not only on students’ preparation but on the unpredictability of how the students feel on a given day.¹²² The validity, reliability, and fairness of a single exam is further affected by unduly high levels of stress associated with a do-or-die exam.¹²³ Finally, the subjective nature of grading in norm-referenced assessments, which is done by comparing exam answers, adds to the lack of validity, reliability, and fairness of the single exam.¹²⁴

For assessments to be valid, reliable and fair, they should be carried out several times during the semester using various modes of assessment: formative, summative/formative, and summative assessments.¹²⁵ “Multiple evaluations of student learning increase the accuracy of the

¹²⁰ *Id.*

¹²¹ See *supra*, notes 56-64 and accompanying text. See also BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 259.

¹²² BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 260 (pointing out that on any given day, students may be “ill or have other personal issues that can distort the accuracy of the evaluation”). See also Sergienko, *supra* note 14, at 470.

¹²³ *Id.* (“a single assessment produces higher levels of stress because of its significance to the student’s grade in the course and future”).

¹²⁴ *Id.* See also Sergienko, *supra* note 14, at 468-70.

¹²⁵ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 253.

conclusions about student performance, improve student performance on the final examination, and increase the range of skills, values, and knowledge that the instructor may evaluate.”¹²⁶

Moreover, law teachers should strive to provide students with formative feedback on their progress before administering summative evaluations. This requires teachers to provide several formative assessments (hypotheticals with sample answers and practice essay and multiple choice exams) and summative/formative assessments such as quizzes and midterms, prior to the end-of-the term summative exam.

There are many types of formative assessments available to teachers. These range from classroom assessments and short homework problems with sample answers to self-assessed exercises and practice exams.¹²⁷ Summative/formative assessments may take the form of graded issue-spotting and performance quizzes and/or multiple choice quizzes administered after the completion of a unit of instruction as well as a graded combination essay and multiple choice midterm exam.¹²⁸ For detailed examples of formative and summative/formative assessments, see section VI below.

1. *Ensure That Summative Assessments Are Also Formative.*

The current assessment approach in most law school courses consists of one summative exam at the end of the semester.¹²⁹ These final exams are generally not returned to students unless students request to see them, providing students little useful feedback on their

¹²⁶ *Id.*

¹²⁷ *Id.* at 255-260. For detailed examples of formative assessments, see “Examples of Formative Assessments,” in Section VI below, *infra* notes 172-189 and accompanying text.

¹²⁸ *Id.* at 260-61.

¹²⁹ See e.g. BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 236; Sheppard, *supra* note 28, at 657.

performance.¹³⁰ Students learn very little from this approach.¹³¹ Assigning a score or grade to end of the semester exams does little to help students understand what they need to do to improve.¹³²

To insure that students learn from exams, teachers should provide detailed feedback on students' work in a way that allows students to learn from their mistakes and develop the self-learning skills to improve their performance.¹³³ This feedback should include a criterion-referenced model answer with clear indication about what the teacher is looking for and how points are allocated. Teachers should also create a process that encourages students to engage in self-evaluation and provides opportunities for students to discuss their work with classmates, teaching assistants or the teacher.¹³⁴

Although first year students' analytical skills may not be fully developed until the end of the first (or perhaps even the second) semester, some aspects of first year learning may be summatively assessed during the first semester.¹³⁵ For example, determining whether students understand legal doctrine or are able to read and understand appellate cases can be assessed through multiple choice or short answer formative or summative/formative tests.

¹³⁰ *Id.* See also BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 261.

¹³¹ BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 261.

¹³² *Id.* at 260.

¹³³ American Bar Association, Section of Legal Education and Admissions to the Bar, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 8 (1979) [hereinafter CRAMTON REPORT] 4 (explaining why “[l]aw schools and law teachers should develop and use more comprehensive methods of measuring law student performance than the typical end-of-the-term examination. Students should be given detailed critiques of their performance”).

¹³⁴ BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 261. See also Richard Henry Seamon, *Lightening and Enlightening Exam Conferences*, 56 J. Legal Educ. 122 (2006) (describing how exam conferences can help students learn and write better exam answers).

¹³⁵ *Id.* at 260

E. Use Assessments to Help Students Become Expert Self-Learners

To maximize the learning potential of all forms of assessments, teachers should help law students become better self-learners. This self-learning skill set is also called self-directed learning, self-regulated learning, autonomous learning, or expert learning.¹³⁶ Educational psychologists note that expert self-learners have unique characteristics: (a) they actively engage with the materials they are learning; (b) they take responsibility for their own learning; and (c) they practice identifiable self-learning techniques.¹³⁷ Students who become expert self-learners “learn more, learn better and perform better than their peers.”¹³⁸

Studies show that self-learning skills can be taught in traditional doctrinal law school courses.¹³⁹ To become better self-learners, students must engage in a three-phase cyclical process of (a) planning, (b) implementation and monitoring, and (c) evaluation.¹⁴⁰ In the planning phase, students analyze and classify the learning task, set learning goals, and plan strategies to approach the learning task.¹⁴¹ In other words, they decide what they want to learn and how to learn it. In the implementation and monitoring phase, students implement the chosen strategies while self-monitoring the effectiveness and efficiency of the chosen plan.¹⁴² In the

¹³⁶ See e.g. Michael Hunter Schwartz, EXPERT LEARNING FOR LAW STUDENTS (2005) [hereinafter Schwartz].

¹³⁷ See e.g. *Id.* at 3. See also Barbara Hofer, et al, *Teaching College Students to Be Self-Regulated Learners*, in SELF-REGULATED LEARNING: FROM TEACHING TO SELF-REFLECTIVE PRACTICE 57 (D. H. Schunk, B. Zimmerman, eds 1998).

¹³⁸ Schwartz, supra note 135, at 3.

¹³⁹ *Id.* at 5; Sergienko, supra note 14, at 479.

¹⁴⁰ Schwartz, supra note 135, at 3.

¹⁴¹ *Id.*

¹⁴² *Id.*

evaluation phase, students determine if their strategies produced the best results, which, in turn, helps them adjust their strategies when they plan for the next learning task.¹⁴³

The first step to helping students become expert self-learners is for the teacher to explain early in the semester what students need to learn and how self-learning techniques will help them perform better in class and beyond.¹⁴⁴ Students must understand that developing analytical skills requires a large expenditure of time; that they will need to repeatedly practice their analytical skills and should regularly seek feedback from teachers, teaching assistants, and peers on their attempts at resolving new legal problems.¹⁴⁵ At least a week prior to the first day of class, I provide my incoming torts students a handout entitled “The Study of Law: the Bad, the Ugly, & the Good,” which explains why first year is grueling, what it takes to develop self-learning skills, and how these skills are critical to mastering law school.

The second step is to provide students with explicit instruction on using assessments to improve their self-learning skills. The idea is to make students self-conscious of the learning process so they develop self-regulated learning habits they can use throughout law school and in the practice of law. Michael Schwartz’s “EXPERT LEARNING FOR LAW STUDENTS” is one of the first attempts by an American law professor to explain how to teach self-learning skills to first year students. Prior to the first day of class, I provide my first year students a handout that explains the self-learning process based on Professor Schwartz’ approach. During the first week of school, I spend one class period describing how students can use the various assessments provided throughout the course to develop their self-learning skills. I encourage students to

¹⁴³ *Id.* For more details on the self-learning process, read professor Schwartz’ text, which thoroughly explains the self-regulated learning cycle in detail and demonstrates its application to law school learning.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 8-9.

discuss among themselves and with teaching assistants how to create strategies to resolve particular learning tasks and to self-monitor and evaluate the effectiveness of those strategies. I instruct my teaching assistants to emphasize to students throughout the semester how to use assessments to monitor how well they are learning legal concepts and develop their self-learning skills. I regularly consult my teaching assistants and students throughout the semester to determine whether the various assessment exercises are helping students to develop self-learning skills.

The hypotheticals I provide during the semester are designed to help students learn legal concepts and develop analytical and self-learning skills. Critical to helping students develop self-learning skills is the proper use of detailed sample answers, which accompany most hypotheticals and problems throughout my course. These sample answers explain how the points are allocated based on whether the answer clearly articulates (a) the issue(s) to be resolved, (b) the rule(s) used to resolve each issue, (c) the facts that would support arguments for or against liability, and (d) a conclusion.

In addition to providing specific feedback on students' performance, these sample answers help students develop self-learning skills. Students in my torts class must use the sample answers to write detailed critiques of their answers to several of the more complex problems. The critique must include (a) what each student believes the sample answer required, (b) how his or her answer compared to the sample answer, (c) how his or her answer fell short, (d) why the answer fell short, and (e) what the student will do differently to avoid falling short on future assessments.

The teaching assistants review with students their critiques of the various formative assessments throughout the semester, providing students with further insights for improving their

performance. I review with students their critique of the summative/formative midterm, further helping students develop their self-learning skills. Both the assessments and self-learning techniques help students improve their performance in law school, on the bar exam and in practice.¹⁴⁶

F. Take Steps to Ensure that Providing Multiple Assessments Does Not Interfere with Earning Tenure

Tenure in most law schools is based primarily on scholarly output.¹⁴⁷ Teaching effectiveness is a minor factor, if it is considered at all.¹⁴⁸ Compensation in law school also depends more on scholarly output than on teaching effectiveness.¹⁴⁹ As a result, teachers, particularly those who are not tenured, resist conducting multiple assessments throughout the semester because they take time away from scholarly pursuits.¹⁵⁰ Obviously, law schools should emphasize and better compensate teaching at least as much as they do scholarship. Until they do, there are ways to manage the amount of time required to conduct meaningful assessments

¹⁴⁶ The July 2007 Illinois bar passage rate for all JMLS students was 90%. Students in my 2004 torts class, who had several formative assessments as well as a midterm during the semester, passed the July 2007 bar exam at a rate of 97%. The July 2008 Illinois bar passage rate at JMLS was 90% while the bar passage rate for my torts students was 94%. Although the results of bar passage rates for two years are not statistically significant, they do show that multiple assessments can improve student performance, not only in law school but also in the bar exam, and I believe, in the practice of law.

¹⁴⁷ See e.g. Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching*, 40 J. Legal Educ. 407, 415 (1990).

¹⁴⁸ *Id.* In every school I have been associated with, the most heavily weighed factor in the tenure decision is scholarly output. Teaching is considered, if at all, only if the candidate has consistently poor student and/or peer evaluations.

¹⁴⁹ In every school I have been associated with, yearly raises are directly affected by scholarly output and teaching effectiveness is usually not even a consideration. Moreover, summer grants are available for scholarship but I have never heard of a summer grant for working on teaching matters.

¹⁵⁰ See e.g. OUTCOME ASSESSMENT, *supra* note 2, at 68-9. The responses from tenured and non-tenured colleagues at some law schools is that conducting multiple assessments during the semester is time consuming and they believe their time is better spent on scholarship.

without reducing scholarly output. Following are a few examples.

1. Teaching Assistants

Upper level students can be used as teaching assistants to help teachers in several ways, including preparing, providing, and evaluating multiple formative assessments throughout the semester.¹⁵¹ I hire several second year students each year – former torts students – as teaching assistants to help me write, post, and score formative assessments and provide assessment feedback to current tort students. In addition to helping with assessments, teaching assistants provide me with valuable feedback regarding what is and is not working in the course because of the candid feedback they receive from my students.

2. Self-Evaluated and Computerized Assessments.

Self-evaluated assessments are an efficient way to assess students and help them develop critical self-learning skills.¹⁵² The Crampton Report points out that

A most important aspect of assessment is student self-assessment. Throughout an attorney’s professional life after law school, her success in practice will depend on the ability to self-assess professional performance, behavior, and attitudes. “An indispensable trait of the truly competent lawyer, at whatever stage of career development, is that of knowing the extent and limits of his competence: what he can do and what requires the assistance of others.”¹⁵³ Yet law students are trained in a tradition in which all assessment is external so that she never must assess herself. Early in law school, students need to be taught the essentials of assessment and need to be introduced to self-assessment. They need to assess their own work and then compare their assessment with that of their instructor. They need feedback on their ability to self-assess so that they can improve. Teachers can provide students with assessment instruments that reflect explicit criteria for the performance so that the students can judge their own performance. As Crampton said, we should view legal education “in long-run terms as preparation for a lifetime career involving continuous growth and self-

¹⁵¹ See e.g. BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 254.

¹⁵² See e.g. *Id.*

¹⁵³ CRAMPTON REPORT, *supra* note 133, at 8.

development over a forty-year period.”¹⁵⁴

Computerized, automatically scored quizzes provide students with multiple self-evaluated formative assessments during the semester.¹⁵⁵ They can be prepared by teaching assistants and loaded onto the class web page before the semester begins.¹⁵⁶ The Lexis’ Web Course and Westlaw’s Ten web course systems have features that allow faculty (or teaching assistants) to post automatically scored quizzes on the faculty member’s course materials web site.¹⁵⁷ There is also a web-based platform called ‘Cyber Workbooks’ that allows faculty to publish course materials that integrate learning outcomes such as critical thinking, applied reasoning, and creative problem-solving.¹⁵⁸ Cyberworkbooks has a self-assessment feature that times, scores, and records student responses which helps reduce faculty time devoted to assessing students.¹⁵⁹

There are several other types of self-evaluated, computerized assessments available to faculty. Practice essay problems test individual legal concepts and can be posted online with sample answers which allow students to self-evaluate their responses. Automatically-scored exercises, like those provided by CALI, also allow students to engage in self-evaluation without

¹⁵⁴ CRAMPTON REPORT, *supra* note 133, at 10.

¹⁵⁵ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 255.

¹⁵⁶ I use several practice multiple-choice quizzes that are prepared by my Teaching Assistants prior to the beginning of the course and loaded onto my Lexis Web Course page. Students are instructed to take these self-graded quizzes after we complete the class discussion of particular legal concepts.

¹⁵⁷ For more information about Lexis Web Courses, visit <http://www.lexisnexis.com/lawschool/webcourses/>. For more information about Twen, visit <http://lawschool.westlaw.com/twen/default.asp>.

¹⁵⁸ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 255. “The platform consists of an authoring tool for developing course modules with lessons, questions, and answers, a user website accessible by students with a user name and password, and an administrative site for generating reports and allowing faculty to evaluate course modules.” *Id.*

¹⁵⁹ *Id.* For more information about “Cyber Workbooks” visit <http://www.cyberworkbooks.com> (last visited Dec. 28, 2008).

input from the teacher.¹⁶⁰ Automatically-scored multiple-choice quizzes can also be given throughout the semester.¹⁶¹

3. Easy to Score Criterion-Referenced Summative/Formative Assessments

The problem-based essay exam is the primary assessment tool used by legal educators in the United States.¹⁶² The strength of problem-based essay exams is that they require students to apply recalled law to new factual situations, much like lawyers do in practice.¹⁶³ Essay questions test the ability to read, identify facts, and engage in analysis by applying legal rules to relevant facts.¹⁶⁴ As stated earlier, however, the end-of-the-semester do-or-die final exam does little to help students learn and improve their performance.

For essay exams to serve as learning tools, they should be administered throughout the semester – and they should be criterion-referenced. The value of frequent assessments is that they provide students feedback about their developing skills. The value of using criterion-referenced essay exams is that a detailed sample answer with corresponding point allocation allows students to determine how well their analytical skills are developing.¹⁶⁵

¹⁶⁰ The Center for Computer-Assisted Legal Instruction (CALI) provides students with Computer Assisted Instruction (CAI) exercises in just about every subject matter covered in the first year of law school. See <http://cali.orghttp://www2.cali.org/> (last visited Dec. 28 2008).

¹⁶¹ Sergienko, *supra* note 14, at 493-505.

¹⁶² See e.g. OUTCOME ASSESSMENT, *supra* note 2, at 34; BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 236; Sergienko, *supra* note 14, at 464.

¹⁶³ Sergienko, *supra* note 14, at 469.

¹⁶⁴ *Id.*

¹⁶⁵ For more detailed description of criterion-referenced assessments, see *infra* notes 76-89 and accompanying text.

Scoring criterion-referenced summative/formative essay exams is time consuming but offers significant benefits to students. Moreover, there are ways to reduce the time demands of giving essay exams throughout the semester. First, preparing the exams prior to the beginning of the term reduces the time demands on the teacher during the semester. Second, preparing a detailed sample answer while writing the exam rather than after the exam is given, results in a better organized and more focused exam which is likely to test only what the teacher sought to test. A better organized and more focused exam will result in better organized, more focused, and easier to grade student answers. Third, using a sample answer with a point allocation component to evaluate a criterion-referenced essay makes grading easier and faster.¹⁶⁶ Finally, training teaching assistants to score the practice essay exams, provides students with concrete feedback on their developing analytical skills with a minimal time commitment for the teacher. Using criterion-referenced essay exams evaluated by teaching assistants allow teachers to give more than one essay exam during the semester. Even one teaching assistant scored practice midterm and practice final exam together with a teacher-scored midterm essay exam provides a significant learning experience to students.

4. In-Class Formative Assessments.

Classroom formative assessments allow gathering frequent feedback on students' learning.¹⁶⁷ They provide valuable information to teachers and students about students' progress without a great time commitment on the part of teachers.¹⁶⁸ Classroom assessment are small

¹⁶⁶ See e.g. BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 254 (citing Wegner, ASSESSMENT, *supra* note 57, at 33).

¹⁶⁷ Thomas A. Angelo & K. Patricia Cross, CLASSROOM ASSESSMENT TECHNIQUES: A HANDBOOK FOR COLLEGE TEACHERS 3 (1993) [hereinafter Angelo & Cross].

¹⁶⁸ See e.g. Hess & Friedland, *supra* note 73, at 261-283 (describing and encouraging the use of classroom formative assessments).

scale formative assessments conducted continuously to determine what students are learning in a course. These assessments are integral to learning because they are proximate in time, allowing immediate feedback to teacher and student.¹⁶⁹ As a result, teachers can quickly review students' responses, determine whether they have learned the lesson, report the results to the students, and plan remediation if necessary.¹⁷⁰ For detailed examples of classroom assessments, see the "Examples of Formative and Summative/Formative Assessments," section VI below.

G. Make Improving Student Learning an Institutional Goal: It Will Pay Dividends

Although all law schools claim that student learning is their primary mission,¹⁷¹ the emphasis on scholarship as the most important factor for promotion and compensation sends a message to teachers that they should not spend a great deal of time in improving their students' learning and a message to students that their learning is not the school's top priority. Since student tuition money provides much more revenue for law schools than faculty research, student learning should be a law school's top priority.¹⁷² An institution-wide commitment is necessary to maximize the benefits of using assessments to improve student learning. At the very least, all first year teachers should be giving students multiple formative and summative/formative assessments throughout each semester. To accomplish this successfully, due dates and exam dates must be coordinated among the teachers. While this can be done with informal agreements

¹⁶⁹ Munro, *Strategies for Assessing*, supra note 70, at 241 (quoting K. Patricia Cross, *Feedback in the Classroom: Making Assessment Matter* 5 (AAHE Assessment Forum, A. Assn. for Higher Educ. 1988)). See also Hess & Friedland, supra note 73, at 261 (encouraging the use of classroom feedback as formative assessments).

¹⁷⁰ *Id.* For a more detailed discussion of classroom formative assessments, see infra notes 177-190 and accompanying text.

¹⁷¹ See e.g. Packer & Ehrlich, supra note 2, at 22-22. (Asserting that the stated primary mission of most law schools is the education of students for entry into the legal profession).

¹⁷² See e.g. OUTCOME ASSESSMENT, supra note 2, at 69 (pointing out that most law school revenue comes from student tuition money, or state support in the case of state-funded law schools and little, if any, comes

among teachers, the involvement of the administration would insure better coordination and effectiveness each school year.

An important part of becoming a good teacher is to learn how to conduct valid, reliable, and pedagogically meaningful assessments. A law school committed to its students' learning should mandate that all teachers receive training in assessment theory and practice and provide support for them to do so.¹⁷³ In addition, law schools should provide summer "teaching grants" that provide the same level of compensation as summer research grants. This would permit teachers to develop effective assessment programs that can become an integral part of their teaching.

The message these steps would send to students, teachers, and the public is that the school is thoroughly committed to the success of its students. Students who feel that the school is committed to their learning success are more likely to show their gratitude when they become alumni.

VI. EXAMPLES OF FORMATIVE AND SUMMATIVE/FORMATIVE ASSESSMENTS

A. Examples of Formative Assessments

Formative assessments can take many forms. The following are a few examples. Each teacher will find some that will work better than others. They do not all have to be used in any one course. The best approach is to try a few different assessments each semester, re-using those that seem to work and trying new ones the next time.

1. *Hypotheticals with Sample Answers*

Frequent short hypotheticals that test specific legal concepts improve learning when the

from externally funded research).

¹⁷³ See e.g. Aizen, *supra* note 33, at 790-91.

teacher provides students sample answers to help them self-evaluate their performance. These hypos and answers can be posted on the class web page or otherwise provided to the students. Teaching assistants can review answers with students, provide feedback and help them devise strategies for improved performance. Teachers can also discuss hypotheticals in class. As the semester progresses, hypothetical problems should increase in complexity, starting with exercises that test the acquisition of knowledge and progressing to more sophisticated problems that test application of knowledge and deep analytical skills.

In my first-year torts class, I include several short hypothetical problems in each of the handouts provided to students to guide them through the class readings. Sample answers are provided by teaching assistants or posted on the class web page. In addition, two or three times during the semester I will e-mail short hypos to students a day or two prior to discussing them in class. Early in the semester the hypotheticals ask students to identify issues and state applicable rules to resolve them. The purpose of these exercises is to help students and I determine whether the class is acquiring basic knowledge.

As the semester progresses, the hypotheticals become more complex, initially eliciting superficial analysis of one or two issues, later requiring more in-depth analysis of several issues, and finally demanding sophisticated analysis of complex issues similar to what they can expect in summative exam questions. Students are encouraged to prepare written answers to these formative assessments. I post sample answers to these assessments on the class web page for student self-evaluation, or provide them to the teaching assistants for one-on-one discussion with students. Students are urged to use the sample answers to continually self-evaluate their answers, monitor their progress and develop strategies to improve their performance throughout the semester. By answering these hypothetical problems and receiving immediate feedback, students

improve self-learning skills, performance, and the learning experience.

2. *Self-scoring Computer Quizzes*

Self-scoring multiple-choice computer quizzes help students improve test taking skills and evaluate their strengths and weaknesses.¹⁷⁴ Multiple choice questions test factual knowledge and problem solving skills in a different way and permit broader coverage than essay questions.¹⁷⁵ Self-scoring multiple choice quizzes provide instant feedback to students and can be loaded onto the course web page by teaching assistants prior to the start of the semester, resulting in little time commitment on the part of teachers.¹⁷⁶

I load a number of multiple choice practice quizzes on my course web page prior to the beginning of the semester but they become available to students only after class discussions of the legal concepts covered in each quiz. Students are encouraged to take the quizzes immediately following class discussions of the appropriate materials. The Lexis web course software automatically scores the quizzes. For these questions to help students improve their performance and learning, they are urged to review their answers to all questions, whether they got them right or not. They are asked to figure out why they eliminated correct options and chose incorrect ones. They are also asked to study the reasoning on the questions they answered correctly to ascertain whether their correct choice was based on viable legal grounds. The instant feedback of multiple choice questions allow students to quickly ascertain their understanding of legal concepts. If they have questions about the concepts tested in the quizzes, they are encouraged to

¹⁷⁴ BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 160.

¹⁷⁵ See e.g. Sergienko, supra note 14, at 486.

¹⁷⁶ Professor Greg Sergienko, among others, argues that multiple choice exams are actually more sophisticated tools than essay questions for analyzing students' abilities to read facts and cases as well as their ability to apply an unfamiliar rule of law to a legal problem. Sergienko, supra note 14, at 493-505.

discuss them with a teaching assistant. Because the multiple choice quizzes are available on the course web page, students are able to revisit them throughout the semester.

Writing multiple choice questions can be a time consuming endeavor but there are ways to reduce the time commitment while providing students valid and reliable objective questions. As I prepare for each class discussion, I create multiple choice questions based on cases discussed in the textbook and hypotheticals used in the handouts. I load some of these questions on the course web page, use some for in-class assessments and save others for later quizzes, the midterm, or even the final exam. I also re-cycle previously created multiple choice questions.¹⁷⁷ I have teaching assistants create the first draft of some multiple choice questions using questions and answers provided by BarBri and PMBR. BarBri has occasionally provided me with complete sets of practice multiple choice questions and answers that I directly load onto the class materials web page for students to use as practice questions prior to the midterm and final exams.

3. *Scored But Not Graded Practice Exams*

Students should know what they will be tested on as well as the format of the exams. The best way for them to ascertain what is expected of them in a graded exam is to take practice exams that are similar in form and content to the graded exams. After taking practice exams on their own or in class, students are provided with criterion-based sample answer/evaluation sheets that allow them another self-learning experience and help them know what the teacher considers important.

4. *Informal Classroom Assessments*

¹⁷⁷ Some questions used in quizzes, midterms, or final exam are later used as practice questions. Midterms contain approximately 40-50% re-cycled questions and final exams 20-30% recycled questions. This means students cannot keep quizzes and the multiple choice portion of midterms and finals. My torts students return quizzes and multiple choice portion of midterms and final exams and they are allowed to review multiple choice questions in private meetings with me or a teaching assistant.

Thomas A. Angelo and K. Patricia Cross's seminal work on this subject describes many classroom techniques teachers can use to assess student learning and faculty teaching.¹⁷⁸ These include techniques for assessing knowledge and for assessing skills. The following are a few formative classroom assessment techniques that law teachers can use:

- a. Assessments of Prior Knowledge, Recall and Understanding
 - (1) Misconception/Preconception Check

The greatest obstacle to learning is often not students' lack of prior knowledge but the existence of prior knowledge.¹⁷⁹ The misconception/preconception check technique is a quick way to uncover the knowledge or beliefs that may interfere with students' learning.¹⁸⁰ For example, students in my first semester torts class often believe that the intent element in intentional torts is fulfilled only by showing that the actor subjectively desired to bring about a particular outcome. Students start law school not knowing that in tort law, intent can be shown regardless of subjective intent.

The misconception/preconception check can reveal and address shortcomings like this.¹⁸¹ Prior to discussing intent in class, I describe a few hypothetical scenarios depicting both deliberate desire intent and substantial certainty intent. One such scenario might depict a person pulling a gun, taking aim at another and shooting, injuring the other person. In another scenario, a person pulls a gun in a large room and fires a celebratory shot in the air, injuring another person when the bullet ricochets off the ceiling. To determine if students understand non-subjective

¹⁷⁸ Angelo & Cross, *supra* note 166, at 103-361.

¹⁷⁹ *Id.* at 132.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

intent, I ask them which scenario shows an intentional tort. Not surprisingly, most students respond that intent occurred only when the person clearly had a deliberate desire to cause harm. Explaining to the class that both scenarios show intent under tort law is a quick way to bring substantial certainty intent into focus prior to analyzing cases where the courts make that distinction, often in ways that are too subtle for first semester law students to grasp.

(2) Focused Listing

Focused listing helps teachers determine how well students understand critical legal concepts and helps students learn to focus attention and improve recall.¹⁸² Focused listing takes only a few minutes and can be done in class or, electronically, after class. After finishing class discussions on the topic of intent, for example, I give my torts students a list of studied concepts and terms, including “purposeful intent,” “substantial certainty intent,” “transferred intent,” “objective standard,” and “subjective standard.” Students then write down how well they understand each term or concept by putting a checkmark next to “very well,” “more or less,” “not so well,” or “not at all.” I collect the anonymous responses and ask a teaching assistant to quickly sort through them and advise me of concepts or terms that more than a quarter of the class does not understand. I then discuss these concepts further in class or by electronic correspondence. I also ask the teaching assistants to go over particularly difficult terms or concepts during their office hours.

I have also the teaching assistants to conduct the focused listing exercise outside of class and provide me with the results. I respond in class or by electronic correspondence. This approach allows me to avoid devoting class time to conduct the listing exercises but still gain the benefits of the students’ feedback.

¹⁸² *Id.* at 127.

(3) Fill-in outlines or Answers

Fill-in outlines or fill-in answers involve giving students a partially completed outline of previously discussed material or a partially completed answer to a previously assigned hypothetical and allowing students to fill in the blank spaces.¹⁸³ This helps teachers determine how well students are grasping critical legal concepts and helps students recall and organize materials and build their analytical skills.¹⁸⁴ It is particularly helpful in first year courses in which large amounts of content, facts and principles, are presented regularly in a structured manner.¹⁸⁵ After the first three weeks of class, I hand my students the following fill-in outline and give them five minutes to complete and return it to me.¹⁸⁶

PRIMA FACIE CASE FOR BATTERY

Rule: a person is subject to liability for battery when _____

- I. **INTENT** to _____.
- A. Intent may be established without a showing of intent to inflict personal injury; it may be proven by showing intent to _____.
- B. Tests to prove intent
1. _____

¹⁸³ *Id.* at 138.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Although students need not write their names on the outline, they must write the name of their teaching assistant. I will distribute the outlines to the teaching assistants so they may discuss with their students any glaring problems identified by the outline.

2. _____
 3. *transferred intent*.
 - a. torts can _____
-

After one of my teaching assistants collates the responses, she advises me of concepts that seem confusing to at least a third of the class. I will either make clarifications in class or by an e-mail to the class. Additionally, the outlines are distributed to the teaching assistants so they may also discuss problems with their students.

(1) Minute Paper

The “minute paper” exercise consists of the teacher asking students to take two or three minutes to answer two questions: “What is the most important thing you learned during this class?” and “What important question remains unanswered?”¹⁸⁷ This assessment helps determine whether students have understood key legal concepts during class discussion so it is more effective if conducted at the beginning of the following class.¹⁸⁸ After the class finishes discussing particularly difficult concepts, my teaching assistants conduct a “minute paper” exercise during office hours, collate the responses, and advise me of concepts that seem problematic to at least a third of the class.

b. Assessment of Analysis and Critical Thinking Skills

(1) Defining Features Matrix

This assessment requires students to categorize concepts according to the presence or absence of certain critical defining features.¹⁸⁹ Students are provided a grid containing two or three categories of legal concepts along with a scrambled list of subordinate terms that belong in

¹⁸⁷ *Id.* at 164.

¹⁸⁸ *Id.*

one or another of the categories.¹⁹⁰ They are then given a few minutes to sort the subordinate items into the correct categories.¹⁹¹ For example, soon after we begin covering proximate cause, I give students a sheet of paper containing the description of an actor's negligent conduct, a grid containing the categories of "foreseeable consequences" and "unforeseeable consequences" as well as a list of several potential consequences of the actor's negligence. I ask students to categorize the various outcomes as either foreseeable or unforeseeable consequences of the actor's conduct. My teaching assistants sort through the responses and we determine how well students understand the concept of foreseeability within the context of proximate cause.

2. *Other Types of Informal Assessments*

a. *Electronic Mail Feedback*

Another way teachers can ascertain whether students are understanding basic legal concepts is to e-mail a single question to students and require them to respond in three sentences or less prior to class.¹⁹²

b. *Group Instructional Feedback*

This technique provides a timely and anonymous way to obtain feedback on the class generally.¹⁹³ Twice during the semester, students are asked to spend 10 minutes to answer three questions in class: (1) What is working? (2) What is not working? (3) What can be done to improve the course or instruction? My teaching assistants collate the answers and provide me a

189 *Id.* at 160.

190 *Id.* at 160.

191 *Id.*

192 BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 258.

193 *Id.* at 259.

list of the three most prevalent responses to each question.

This assessment can be performed by an outside facilitator, who can divide the class into small groups and ask the students the same three questions. The facilitator collates the answers and provides the results to the teacher, allowing the process to remain anonymous but providing valid, reliable, and fair feedback to the teacher.¹⁹⁴

c. Electronic Classroom Assessment Systems

A Classroom Performance System (CPS) (also known as an Audience Response System) is an electronic way of assessing student learning.¹⁹⁵ The teacher projects a multiple choice question from her or his computer onto an LCD-projected screen so that all students can read it. Students choose an answer using a remote control device known as a "clicker."¹⁹⁶ A radio or infrared transmitter at the front of the classroom picks up each student's response and sends it to the computer, which stores the responses and can provide detailed reports.¹⁹⁷ This system allows instructors to obtain immediate feedback from each student and keeps a log of every class session, so student records are always available. Electronic classroom assessment systems inform teachers whether their students are learning and informs students whether their learning strategies are working.¹⁹⁸

I intend to but have not yet used an electronic classroom assessment system. However,

¹⁹⁴ *Id.*

¹⁹⁵ Wikipedia, at http://en.wikipedia.org/wiki/Classroom_Performance_Systems (last visited September 20, 2008).

¹⁹⁶ *Id.* See also BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 259.

¹⁹⁷ *Id.*

¹⁹⁸ BEST PRACTICES FOR LEGAL EDUCATION, supra note 7, at 259. More information on this form of electronic classroom assessment can be found at <http://www.einstruction.com/> (last visited September 20, 2008); or <http://www.smartroom.com/> (last visited September 20, 2008).

Paul Caron and Rafael Gely describe their experience as follows:

First, we prepare in advance of each class a series of multiple-choice questions which we project onto the screen. We intersperse these questions throughout the class hour, typically after we have first gone over a particular case, statute, ruling, or regulation, and then illustrate the applicable rule with a question or problem. Students are required to respond via their handhelds, and we then display the correct answer and the percentage of students who answered the question correctly. One of the benefits of the CPS is that it preserves individual student anonymity in the classroom but gives us instant feedback on students' comprehension of the material covered. The CPS software automatically tracks the individual student's performance through-out the semester, which we access outside of the classroom and take into account in determining final grades.¹⁹⁹

B. Examples of Summative/Formative Assessments

1. *Graded Quizzes and Midterms*

Graded quizzes and midterms are important not only as summative assessments (to assign grades), but as an essential form of formative assessments. Because they are graded, summative quizzes and midterms are a realistic assessment of students' progress in acquiring the skills the course seeks to build. Graded quizzes and midterms are also critical formative assessments because they motivate students to work to improve their learning and performance in future summative assessments. In my torts class, I give two graded quizzes and one midterm. After I grade the quizzes, students meet with their teaching assistants to discuss their performance and how to improve it. After I grade the midterm, students meet with me to discuss their performance and how to improve it.

II. CONCLUSION

Assessment practices highly influence how and what students learn in law school. Formative assessments are the most effective tools to improve student learning and performance

¹⁹⁹ Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. Legal Educ. 551, 560-61 (2004).

in a course, in law school, and, on the bar exam. The current assessment practice of a single, end-of-the-semester, do-or-die final exam does not provide students the feedback they need to develop self-learning skills and improve performance in law school and beyond. If law schools and law teachers are serious about their mission to prepare students to become competent lawyers, they must develop comprehensive assessment programs. The best practices for assessing student learning described in this article are meant to provide law schools and law teachers the components for such an assessment program.