Critical Perspectives on the Scholarship of Assessment and Learning in Law: Preface

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Critical Perspectives on the Scholarship of Assessment and Learning in Law
Critical Perspectives on the Scholarship of Assessment and Learning in Law

Volume 1: England

EDITED BY
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Preface

Craig Collins, Vivien Holmes and Paul Maharg

In this Preface to the first volume of the series Assessment in Legal Education, we outline the scope of the series, the reasons for its development and the ways it may assist those involved with legal education generally.

Assessment is a considerable and expanding disciplinary sub-domain in legal education. The processes by which law schools make judgments upon their students is one of the most important activities that law school staff undertake, with effects that can be long-lasting on their students. And yet there are few aspects of legal education that are more controversial and confronting as assessment, or as varied in practice, theory and results. In law schools throughout the Common Law world there are conservative practices derived from models of literacy and knowledge resumption that can be traced back to 19th-century models of assessment.

There is no single history of legal education assessment across jurisdictions, indeed no histories of assessment in a single Common Law jurisdiction. The conventional nature of much legal education assessment, however, is noted in many studies, often as a standard refrain describing the status quo before offering descriptions of innovation. Such a rhetorical strategy should be viewed with suspicion; but it is remarkable how certain forms of learning and assessment appear repeatedly in law school curricula over the last 20th century. With isolated and notable exceptions it is only in the last 30 years or so that there has arisen a literature critical of assessment methods and the lack of both assessment innovation and theory. Across a range of jurisdictions and topics the following is a sample of the literature: Kennon M Sheldon and Lawrence S Krieger, 'Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory' (2007) 33 Personality and Social Psychology Bulletin 883, doi.org/10.1177/0146167207301014; Ruth Jones, 'Assessment and Legal Education: What Is Assessment, and What Does It Have to Do with the Challenges Facing Legal Education Symposium: The State and Future of Legal Education' (2013) 45 McGeorge Law Review 85; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future Special Issue: Teaching and Scholarship' (2004) 26 Sydney Law Review 457; David Gijbels and others, 'The Relationship between Students' Approaches to Learning and the Assessment of Learning Outcomes' (2005) 20 European Journal of Psychology of Education 327; Jamie R Abrams, Experiential Learning and Assessment in the Era of Donald Trump Drafting Statutes and Rules: Pedagogy, Practice, and Politics: Symposium Articles' (2017) 55 Duquesne Law Review 75; Larry...
also many emergent new practices, which arise from rejuvenated older practices in legal education itself, or from multidisciplinary borrowings and transplants, a few of which involve innovative uses of digital technologies. And beyond Law there is a substantial and fast-expanding literature on assessment in school education, in adult learning, university education and in professional learning; and legal educators in recent decades have increasingly drawn upon this diverse literature in legal education and its practices.

In all of this, transfer of knowledge about assessment can be problematic, from one disciplinary domain to another, from the legal academy to the legal profession, and from one jurisdiction to another. In addition, many assessment practices stem from jurisdicational customs and are often strongly associated with a jurisdiction’s established views of learning, teaching and curriculum design. We may come to see assessment differently if we move beyond a Westphalian view of our apparently separate jurisdictions and appreciate what is happening in other jurisdictions, where assessment is almost certainly designed for different learning situations, from different cultural assumptions, and in the midst of different economic factors. Our perception of assessment theory and practice can grow when we encounter new forms of assessment, or fresh theoretical advances, or when we see familiar forms of assessment such as essays or reports deployed in unfamiliar contexts, or put to new and interesting purposes.

This series therefore offers views of assessment in legal education across a range of Common Law jurisdictions. Each volume will provide:

- Information on assessment practices and cultures within a jurisdiction.
- A sample of innovative assessment practices and designs in a jurisdiction.
- Insights into how assessment can be used effectively across different areas of law, different stages of legal education and, where relevant, the implications for regulation of legal education assessment.
- Appreciation of the multi-disciplinary and interdisciplinary research bases that are emerging in the field of legal education assessment generally.
- Analyses and suggestions of how assessment innovations may be transferred from one jurisdiction to another.

‘Assessment’ in this series therefore applies to the assessment of learners – not just the assessment of students, but all who undertake legal study and whose performance is evaluated. It does not apply to the evaluation of teachers or of legal education and, for critical as these topics are to legal education, they involve significantly different literatures, contexts and approaches.

Our series methodology has been designed to be as open as possible in order to accommodate as many cross-cultural, ethnographic, educational and legal issues as possible. The series does not attempt comprehensive listing of assessment practices in a jurisdiction or across jurisdictions. While statistical evidence is much needed in legal education (where, by comparison with disciplines such as medical education, there are very few and reliable datasets), a quantitative global research project is a major undertaking, both in the initial data collection and the updating of the data collected if the dataset is to be useful as a reliable, continuous and
contemporary resource. Our concept of scholarship is also open, involving diverse bodies of theory from many disciplines, including the ground-up theory that emerges from assessment practices in law schools and elsewhere. As our subtitle suggests, therefore, we take a critical perspective not only on assessment theory but on assessment practice too.

The series has also taken a different approach to that of other international legal education initiatives, such as the Internationalisation of Legal Education. In the book of that name, the editors Christophe Jamin and William van Caenegem provided a snapshot of the debates surrounding this subject by issuing a questionnaire to a wide range of jurisdictional reporters, 38 in total, who each authored a National Report. The collected reports were then collated into the book's substantial General Report, authored by the editors, and presented to the Vienna Congress of the International Academy of Comparative Law, in July 2014. Some 19 of the 38 National Reporters wrote up their reports for the volume that was published by Springer. The General Report was a substantial contribution to our knowledge of the internationalisation of legal education.

Our focus in this project is different, however. We wish to give attention to the design of innovative assessment in legal education – a topic at once much more particular than internationalisation, in its focus on assessment, and also broader, in its focus on innovation. As series editors, we do not attempt to define innovation, for that would be to define a concept from our own standpoint as cultural subjectivities beyond the jurisdiction and scope of each volume. Instead, we leave the decision to those editors of the jurisdictional volume who will have specific knowledge of the assessment practices, the bodies of theory and the more general legal education practices in the jurisdiction. Nor are the series editors attempting closely comparative accounts of legal education assessment. As a methodology, comparativism is essential to law and legal education in a global world. Comparativism itself is undergoing change, moving from a methodology grounded in private law conceptions of legal families to constitutional issues, human rights and judicial review. Its empirical methodology is changing too, moving away from functionalist concerns, and becoming more heterogeneous and interdisciplinary in its methods.  

We therefore draw upon the more open structure of comparativist studies. Our focus on innovation, diversity and variety of assessment practices means that we want our collection of data to be as open-ended, as diverse and as variegated as is required. Who would determine that? We would answer that those working in an editorial role inside legal education within a jurisdiction are best placed to understand issues, theory and practices from within, and with a sense, too, of what is beyond the jurisdiction. But if this international series does not set out to be a comparative jurisdictional project, it does attempt to embed important insights of comparativist theory and practice in its work. It accepts Frankenberg's bracing critique of the conventional comparativist approaches, sides with Siems on the value of fresh critical approaches, and attempts to discover and critically discuss innovation in a jurisdiction, where and when it happens, to what effects and in which contexts.

As series editors, we therefore encourage the jurisdictional editors to challenge their own and their authors' assumptions, their 'hidden curricula' (to adopt a term of art from education), their unstated educational and assessment norms. We encourage ethnographical, anthropological approaches, as well as more generally accepted educational analyses of assessment. We draw upon the diversity of methods in education itself – indeed we make a strong argument for interdisciplinarity in our treatment of assessment, without underestimating the difficulties of such an approach. Other disciplines may show how this can be achieved. In his groundbreaking study of the material culture of experimental microphysics, the historian of science Peter Galison investigated how the many professional groups involved in that domain (computer designers and programmers, engineers, physicists, instrument makers, policymakers, politicians, university management) could communicate to share knowledge collaboratively on projects. According to Galison, they 'traded' concepts and language, and they coordinated across disciplines without homogenising, such that as trading partners in research projects they could 'hammer out a local co-ordination despite vast global differences'.

See, for example, Matthias Siems, *Comparative Law* (2nd edn, Cambridge University Press 2018).
Galison makes a strong argument for the presence of at least some understandings across disciplines in the success that attends such endeavours, without which there could be no communication let alone successful completion of projects. We hold that the same can be true comparatively, within legal education, across disciplines and across jurisdictions. Dialogue is possible in the ‘trading zone’, to adopt Galison’s vivid metaphor, and often enables deeper dialogue in further border crossings.

We seek to encourage dialogue therefore; but not the dialogue that will merely reproduce forms of assessment. Instead we seek to explore innovation in assessment processes, methods and results that may bring about transformation in assessment in legal education, for students, staff, law schools, regulators and others. We also recognise that the attempt to transplant, to reproduce forms of learning and assessment, often contains hidden values more akin to ‘imperialism and a colonialism under the guise of supposedly value-free or objectively universal terms’. It is questionable whether such reproduction can be carried out without some degree of change and development. In this respect, reproduction often contains the seeds of its own transformation, as Henry Giroux observed: ‘reproduction is a complex phenomenon that not only serves the interest of domination but also contains the seeds of conflict and transformation’.

Finally, we would make the observation that regulation and assessment are often intimately bound up with each other, and in terms of assessment we need to turn our gaze to the effects that regulation has on assessment. Regulators increasingly interpret their role as the safeguarders of public interest, concerned with risk, and balancing the forces of conservation and innovation. Assessment figures largely in their thinking and regulatory practices. And yet detailed resumption and analysis of the educational evidence, it is probably fair to say, is lacking in most legal educational reports in many jurisdictions. In England, the Legal Education and Training Review (LETR) Report pointed to the significant absence in the primary legal educational literature of substantial research upon which new educational practices could be founded, or upon which bases older practices could be confirmed as effective and further developed, or confirmed as ineffective in specific contexts, and laid aside.

The result is that regulators may have little sense of which assessment practices are effective, why and in which contexts. Generalisations can thus be upheld; received opinion remains uncontested; normal categories of educational practices can remain unchallenged. Much more research needs to be carried out, in most jurisdictions, and confirmatory studies also need to be developed. We hope that this series will contribute to that literature.

This series is published via the PEARL Centre (Profession, Education and Regulation in Law), in The Australian National University’s College of Law, School of Legal Practice. The centre produces research upon the legal profession, on legal education and on the regulation of both. The centre decided to produce a book series for a number of reasons. From discussions with academics and with professional bodies in Scotland, Ireland, England, America and Australia, it was clear to Maharg and others that, while there were innovations in assessment in every jurisdiction, information and description tended to remain in the jurisdiction, and was seldom visible beyond it. Innovation is complex and difficult enough in itself; but once designed and implemented, its dissemination can be even more difficult. Once the platform of the PEARL Centre was formed at The Australian National University College of Law in 2015, its interdisciplinary and interjurisdictional focus made it the natural home for a book series that sought to be global and local at the same time, and to support experimentation, innovation, critical discussion, theory construction and effective practices in educational assessment.

Each volume in the series will be edited by at least one editor from the jurisdiction under consideration, and who will work with the series editors in the production of the volume. Editorial decisions regarding the choice of chapter subjects will be left largely to volume editors; and where possible the collection of chapters will be preceded by a call for papers or a workshop or conference at which chapters can be presented as drafts for discussion. The Introduction to each volume will provide a substantial overview of the salient issues affecting assessment theories, practices and cultures in the jurisdiction, while the volume editors will be encouraged to commission at least one chapter that focuses on issues of legal education regulation in the jurisdiction.
Critical Perspectives on the Scholarship of Assessment and Learning in Law: Volume 1

It is intended that the following volumes will be produced:

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<tr>
<th>Vol</th>
<th>Jurisdictions</th>
<th>Approx. date of production</th>
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<tr>
<td>1</td>
<td>England</td>
<td>2019</td>
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<tr>
<td>2</td>
<td>Hong Kong, Singapore, Ireland</td>
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<td>3</td>
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One volume will comprise three smaller jurisdictions, namely Hong Kong, Singapore and Ireland, where the varied political, economic and cultural contexts of small jurisdictions will provide a rich source of comparison. The rest comprise a variety of single jurisdictions (England) or multiple jurisdictions of states, territories, and provinces (Australia, Canada, USA). We are of course acutely aware that there are few Asian, and no African or South American, Common Law jurisdictions included. Our series was limited in terms of resource and is, after all, an experiment; and should we have more resource in the future then further Common Law jurisdictions could be the focus of a second series.

This series is designed to give a sense of what assessment practices appear to be across a range of jurisdictions. We hope that they will be useful for those seeking a summary of the contemporary issues facing academics, students, regulators, lawyers and others in the jurisdictions under analysis. We hope, too, that the exemplar chapters may assist cross-jurisdictional fertilisation of ideas and practices.

Finally we hope that the series as a whole, with its rhythms of overarching introductions and its exemplar chapters, may be a useful model for other areas of legal education. This may be a fond hope; but in its small ambition the series at least makes a gesture to the future. Hand in hand with a comprehensive historical analysis of assessment in these jurisdictions – no small project – it might contribute to dialogue between all those affected by assessment in legal education, and the mapping of the research domain.

References


Introduction: Legal education assessment in England

Alison Bone and Paul Maharg

Assessment is an act of interpretation, not just measurement.¹

In this Introduction, we set out some of the innovative practices and themes arising from assessment in legal education in England. It is fair to say that assessment theory has not attracted the same rigorous analysis and implementation that has attended the subject in other disciplines such as medical education. Much of the theoretical innovations tend to be syncretic, adaptations from other disciplines. Nevertheless, there are examples of genuine innovations when England is viewed alongside other jurisdictions, and where it has occurred we have noted it in this Introduction. Needless to say, but we shall say it anyway, the field is extensive and growing; and by no means all the innovations within the last several decades are listed here. We have attempted to be as contemporary as possible to our publication date of 2019, but inevitably there are many projects discussed in the book that are in the process of adaptation and change. Where possible, we give website resources so that readers can follow up the latest developments in any particular project.

It may be helpful for international audiences to know the broad outline of legal education in English higher education. The standard three-year LLB or Bachelor of Laws is the general law degree in England, studied at undergraduate level, and for graduates from other disciplines a one-year conversion Diploma is available (and of course there are part-time, block-release and distance-learning variants of these qualifications). They are ‘qualifying law degrees’ in that they contain the subjects required