

DEVELOPING THE EVALUATIVE JUDGMENT OF LAW STUDENTS THROUGH ASSESSMENT RUBRICS*

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ABSTRACT

Evaluation, or evaluative judgment, is a mandated thinking skill for law students. Students should learn that there is basic logic of evaluation that applies across three evaluative domains relevant to the study and practice of law: evaluation as a critical thinking skill, evaluative judgment as the ability to determine the quality of assessment work, and evaluative reasoning as a method for attributing a property or quality to a legal subject matter. Evaluative reasoning is a discrete model of legal reasoning, called for when the law uses a broad standard or criterion. Law educators can use analytic assessment rubrics, coupled with other pedagogical practices, to teach the ‘logic’ of evaluation and develop the evaluative expertise of students across the three domains.

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I INTRODUCTION

In its simplest form, an analytic assessment rubric provides a framework for ‘evaluation of student performance’ against a set of prescribed criteria.¹ Although assessment rubrics were first used primarily as a tool to assess student learning within higher education,² recently educators have also begun using assessment rubrics to improve student performance and develop students’ metacognitive skills.³

This paper explores how assessment rubrics can be used to develop students’ skills in evaluation, or ‘evaluative judgment’⁴ as the process of evaluation is commonly referred to in educational and professional contexts. There are varying forms and methods of exercising evaluative judgment in higher education. Within the discipline of law, it is contended that evaluative skills can be learned and exercised across three domains, namely:

1. the application of a general evaluative ‘critical thinking’ skill that is common across all disciplines, including law⁵
2. the ability of students to judge the quality of their assessment work against compliance with discipline-specific standards of performance⁶

¹ Ivo de Boer et al, *Rubrics — A Tool for Feedback and Assessment Viewed from Different Perspectives* (Springer, 2021) 2.

² See, eg, Barbara Moskal and Jon Leydens, ‘Scoring Rubric Development: Validity and Reliability’ (2000) 7 *Practical Assessment, Research and Evaluation* 10:1–6.

³ See, eg, Elizabeth Baker and Mary Rozendal, ‘Cognitive-Based Rubrics: Examining the Development of Reflection among Preservice Teachers’ (2019) 46(2) *Teacher Education Quarterly* 58; Heidi Andrade et al, ‘Rubric-Referenced Self-Assessment and Self-Efficacy for Writing’ (2009) 102(4) *The Journal of Educational Research* 287.

⁴ We use the spellings ‘evaluative judgment’ and ‘value judgment’. In our observation, contemporary practice in Australian courts and tribunals is to use the spelling ‘judgment’ within the phrases ‘evaluative judgment’ and ‘value judgment’. For example, the High Court exclusively used the spellings ‘evaluative judgment’ and ‘value judgment’ in their 2022 (as at 28 November 2022) and 2021 judgments; relevantly, ‘evaluative judgment’ appeared in nine High Court cases in 2021 and 2022 (*Garlett v Western Australia* (2022) 96 ALJR 888 (‘*Garlett*’); *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 (‘*Nathanson*’); *Tu’uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 403 ALR 604; *Google LLC v Defteros* (2022) 403 ALR 434; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 398 ALR 404; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 391 ALR 270; *DVO16 v Minister for Immigration and Border Protection* (2021) 388 ALR 389; *Palmer v Western Australia* (2021) 246 CLR 182 (‘*Palmer*’); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68), and ‘value judgment’ appeared in two (*Alexander v Minister for Home Affairs* (2022) 401 ALR 438; *Palmer*). However, we note that the spelling ‘evaluative judgement’ is commonly used in ‘scholarship of learning and teaching’, eg, in Joanna Tai et al, ‘Developing Evaluative Judgement: Enabling Students to Make Decisions about the Quality of Work’ (2018) 76(3) *Higher Education* 467.

⁵ Australian Qualifications Framework Council, *Australian Qualifications Framework* (Report, 2nd ed, January 2013) 13 <<https://www.aqf.edu.au/publication/aqf-second-edition>> (‘AQF’); Jonathan Heard et al, *Critical Thinking: Skill Development Framework* (Final Report, Australian Council for Educational Research, June 2020) <https://research.acer.edu.au/ar_misc/41>.

⁶ Tai et al (n 4) 468.

3. the application of discipline-specific evaluative practices, such as ‘evaluative reasoning’ in the discipline of law.⁷

As teachers, it is helpful to see these evaluative domains as relating to distinct aspects of a student’s learning (ie, critical thinking, assessment work and discipline-specific practices). However, there is also unity across the three domains as all involve the same basic ‘logic’ of evaluation.

The ability to evaluate is an expected learning outcome for higher education graduates, regardless of discipline,⁸ and is a particularly significant skill in law,⁹ and thus opportunities for law students to develop and practice this skill are critical. Importantly, students’ work in one of the evaluative domains can support development of their skill in another evaluative domain if teachers help students to see the underlying process of evaluation. For example, training in how to evaluate a legal text, claim or argument as a critical thinking skill¹⁰ develops the ability of law students to identify relevant criteria for evaluations and to use those criteria to construct and apply discipline-specific standards, skills that are equally useful for developing student expertise in evaluative judgment of their assessment work. This paper explores how analytic assessment rubrics with descriptive criteria, coupled with pedagogical practices aligned with rubrics (eg, assessment exemplars, self-reflection exercises, guided peer-review activities, group discussions, targeted assessment feedback), can support law students to develop their evaluative expertise across the three domains and, in particular, to develop their skill in evaluative reasoning as a law-specific discipline practice.

Section II of the paper describes the key features of evaluation as a critical thinking skill common across disciplines. Section III discusses evaluation as a critical thinking skill in a law-specific context. Section IV discusses evaluative reasoning as a discipline-specific form of evaluation. Finally, Section V examines how analytic rubrics with descriptive criteria can be

⁷ In distinguishing law from other professional practices, Schwandt states: ‘In law, for example, legal thinking involves following, applying, interpreting, and arguing within a framework of rules; a capacity to categorize objects and acts (eg, is a skateboard a toy or a vehicle); reasoning with precedent through analogy; and fact-finding’: Thomas Schwandt, ‘Evaluative Thinking as a Collaborative Social Practice: The Case of Boundary Judgment Making’ (2018) Summer(158) *New Directions for Evaluation* 125, 126. Writing extra-curially, Justice Gordon distinguishes between law and science, observing that ‘in identifying a rule or legal principle, the process of legal method and judicial decision-making requires evaluative reasoning rather than simply direct acceptance of observable outcomes that may appear to determine the question from a scientific perspective’: Justice Michelle Gordon, ‘The Interaction between Science and Law — Legal Science or a Science of Law’ (Speech, French CJ Colloquium, University of Western Australia, 24 November 2016) <<https://www.hcourt.gov.au/publications/speeches/current/speeches-by-justice-gordon>>.

⁸ See AQF (n 5) 13–17. The AQF was reviewed in 2019: Australian Qualifications Framework, *Review of the Australian Qualifications Framework* (Final Report, 24 October 2019) <<https://www.dese.gov.au/higher-education-reviews-and-consultations/resources/review-australian-qualifications-framework-final-report-2019>>.

⁹ Sally Kift and Mark Israel, *Learning and Teaching Academic Standards Project: Bachelor of Laws, Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, December 2010) 10 <<https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>>.

¹⁰ Nick James, *Good Practice Guide (Bachelor of Laws): Thinking Skills (Threshold Learning Outcome 3)* (Report, Australian Learning and Teaching Council, 2011) 12 <<http://www.lawteachnetwork.org/resources/gpg-thinking.pdf>>.

applied to develop student evaluative skills when combined with supporting practices that require students to engage with the evaluative architecture inherent to the rubric.

II EVALUATION ACROSS THREE DOMAINS: CRITICAL THINKING, EVALUATIVE JUDGMENT AND EVALUATIVE REASONING

A Evaluation as a Critical Thinking Skill

Evaluation has been variously described as, inter alia: the making of a judgment about the amount, number or value of something;¹¹ an ‘applied inquiry process for collecting and synthesizing evidence that culminates in conclusions about the state of affairs, value, merit, worth, significance, or quality of a program, product, person, policy, proposal, or plan’;¹² and the attribution of a property to something.¹³

Evaluation is fundamentally about the attribution of ‘value’ to a subject matter. This attribution of value is often described as a ‘judgment’ — hence use of the terms ‘value judgment’ and ‘evaluative judgment’. The process of evaluation generally involves the attribution of a property, quality, merit, amount, worth or other form of ‘value’ to a subject matter, typically with reference to criteria and standards. The revised version of ‘Bloom’s Taxonomy’, a framework for learning and assessment commonly adopted in universities in Australia, United Kingdom and United States,¹⁴ defines ‘evaluate’ as ‘making judgments based on criteria and standards’, and proposes that a distinctive feature of evaluating as a cognitive process is the ‘use of standards of performance with clearly defined criteria’.¹⁵ Based on the work of the Australian philosopher Michael Scriven, Fournier describes the basic logic of evaluation in this way:

1. *Establish criteria of merit.* On what dimensions must the evaluand (ie the object of the evaluation) do well?
2. *Constructing standards.* How well should the evaluand perform?
3. *Measuring performance and comparing with standards.* How well did the evaluand perform?
4. *Synthesising and integrating data into a judgment of merit or worth.* What is the merit or worth of the evaluand?¹⁶

¹¹ ‘Evaluation’, *Oxford Learner’s Dictionaries* (Web Page, 2022) <<https://www.oxfordlearnersdictionaries.com/definition/english/evaluation>>.

¹² Deborah Fournier, ‘Evaluation’ in Sandra Mathison (ed), *Encyclopedia of Evaluation* (Sage, 2005) 139.

¹³ William FitzPatrick, ‘Representing Ethical Reality: A Guide for Worldly Non-Naturalists’ (2018) 48(3–4) *Canadian Journal of Philosophy* 548, 550.

¹⁴ Philip Newton, Ana Da Silva and Lee George Peters, ‘A Pragmatic Master List of Action Verbs for Bloom’s Taxonomy’ (2020) 5 *Frontiers in Education* 107 <<https://doi.org/10.3389/educ.2020.00107>>.

¹⁵ Lorin Anderson et al (eds), *A Taxonomy for Learning, Teaching, and Assessing: A Revision of Bloom’s Taxonomy of Educational Objectives* (Longman, abridged ed, 2001) 83.

¹⁶ Deborah Fournier, ‘Establishing Evaluative Conclusions: A Distinction between General and Working Logic’ (1995) Winter (68) *New Directions in Evaluation Research* 15, 16.

The value attributed to a subject matter in an evaluation may be a qualitative property or quality, or a quantitative amount or allocation that equates to a particular property or quality. Thus, an evaluation is typically a statement or claim that (a) a subject matter has (or does not have) a particular property or quality or (b) a certain amount or allocation of a subject matter would have a particular property or quality. An evaluative statement or claim will generally identify relevant features of the subject matter; indicate the criteria that guide or inform the attribution of value; and describe the property or quality that is being attributed. Generally, the property or quality is the ‘standard’ for the evaluation, or structures the attribution of value in a way that is standard-like. To improve defensibility, an evaluative statement or claim may also describe the underlying reasoning process, for example, the weighting or consideration given to specific criteria or where the evaluator thinks the threshold for the standard sits in the circumstances.

B *Evaluative Judgment — the Ability to Judge the Quality of Assessment Work*

Tai et al (2018) use the term ‘evaluative judgement’ to describe a student’s ‘capability to make decisions about the quality of work of self and others’.¹⁷ They propose that developing the evaluative judgment of students should be a goal of higher education, and expressly link the evaluative skills that students acquire in relation to assessment work — including understanding how to identify and apply relevant criteria and standards — to the evaluative skills they will need to adopt in their respective disciplines. They argue that when students produce work and receive a mark they gain some insight into the quality of their work and may form implicit evaluative criteria. However, an explicit focus on practices to develop evaluative judgment in relation to standards and criteria leads to better calibrated decisions about the quality of their work, and the curriculum can then better induct and socialise students into their discipline. Where students are able to discuss standards and criteria, and evaluative processes, they gain agency in their learning and integration into the discipline.¹⁸

C *Tying Evaluation Together*

As will be discussed further in Section IV of the paper, ‘evaluative reasoning’ in the discipline of law is a discrete mode of legal reasoning in which a value (ie, a property, quality, amount or allocation) is attributed to a legal subject matter. Conceptually, a student’s ability to judge the quality of their own or others’ assessable work is the same as their ability to attribute a value to a subject matter in legal problem-solving (ie, evaluative reasoning).

Thus, assessment practices that develop a law student’s skill in determining the quality of assessment work, with reference to criteria and standards, will also develop the skills they use in evaluative reasoning. A law student who is able to determine the quality of their own or others’ assessable work — and to explain the basis for attributing that quality to the work by

¹⁷ Tai et al (n 4) 468.

¹⁸ Ibid 473.

reference to criteria and standards — has the basic logical and argumentative tools to engage in evaluative reasoning for legal problems.

Academic integrity offers a practical example of how evaluative thinking works across the three domains and the shared logical basis for evaluative judgment for assessment work and evaluative reasoning within the discipline of law. For example, at Curtin University, a lack of academic integrity refers to conduct by a student that is dishonest or unfair in connection with any academic work.¹⁹ Thus, for Curtin University students to properly understand what academic integrity requires of them, they must be able to instantiate the concept of ‘unfairness’ to the particular circumstances of an assessment task and possible ‘unfair’ behaviours they might engage in while completing that task. Put another way, students must be able to construct a standard of ‘fairness’ for student conduct relating to the assessment work, which means the students must (inter alia) identify relevant criteria for evaluating student conduct in relation to a particular assessment task, think about how those criteria apply to the conduct in question, and make a reasoned conclusion as to whether the conduct in question conforms to the standard of ‘fairness’ (or does not, and is therefore ‘unfair’). In this context, Professor George Williams recently emphasised the importance of expressly training students in academic integrity, stating that ‘talking to students, eyeballing students, talking about plagiarism, right and wrong — that’s effective. A lot of teaching is about setting down basic values of integrity, ethical standards and the like’.²⁰ Viewed from across the three evaluative domains, training in academic integrity should develop the ability of students to: evaluate information available to them about academic integrity (eg, from discussions with teachers or from university materials); make a decision about the quality of an assessment work (eg, does the work comply with a compulsory standard of performance [ie, the student completing the assessment task with academic integrity]); and attribute a property to a subject matter (eg, is the conduct of the student ‘fair’, in the circumstances).

III EVALUATION AS A CRITICAL THINKING SKILL IN LAW

The Australian Qualifications Framework (‘AQF’) is the national policy regulating education and training qualifications in Australia.²¹ The AQF specifies generic criteria for each qualification level.²² The AQF learning outcomes for qualification types are constructed as a taxonomy of what graduates are expected to know, understand and be able to do as a result of

¹⁹ Section 4 of Curtin University’s *Statute No. 10 — Student Discipline* defines ‘academic misconduct’ as: conduct by a Student, other than conduct constituting Academic Record Fraud or General Misconduct, that is dishonest or unfair in connection with any academic work, such as —

- (a) during any exam, test or other supervised assessment activity;
- (b) in relation to the preparation or presentation of any assessed item of work; or
- (c) in relation to the conduct of research or any other similar academic activity.

²⁰ Celina Ribeiro, ‘The Push and Pull of Cheating at University: “No One Knows What Cheating Is Any More”’ *The Guardian* (online, 27 November 2022) <<https://www.theguardian.com/australia-news/2022/nov/27/the-push-and-pull-of-cheating-at-university-no-one-knows-what-cheating-is-any-more?>>.

²¹ AQF (n 5). For a broad explanation of the national framework regulating higher education in Australia, see Christina Do and Leigh Smith, ‘The Integration of Learning Outcomes and Graduate Attributes in the Australian Higher Education Sector (Part 1)’ (2021) 47(1) *Monash University Law Review* 88, 94–7.

²² AQF (n 5) 9.

learning. By way of example, the bachelor degree is classified as an AQF Level 7 qualification, with all ‘graduates at this level having broad and coherent knowledge and skills for professional work and/or further learning’.²³

The AQF specifies that graduates at Level 7 criteria are also expected to ‘have well-developed cognitive, technical and communication skills to select and apply methods and technologies to: analyse and *evaluate* information to complete a range of activities ...’.²⁴ Therefore, a graduate who has acquired a bachelor degree from an Australian university is expected to have been taught, been assessed on, and adequately demonstrated evaluation skills.

Specifically within the discipline of law, the ability to evaluate is a recognised fundamental legal skill. As prescribed in the Australian Learning and Teaching Council’s *Bachelor of Laws, Learning and Teaching Academic Standards Statement*,²⁵ six Threshold Learning Outcomes (‘TLOs’) were identified for the Bachelor of Laws qualification.²⁶ In the context of the AQF, the TLOs represent what a Bachelor of Laws graduate is expected to know, understand and be able to do as a result of learning.

The six TLOs that were identified for the Bachelor of Laws qualification are:

- TLO 1: Knowledge
- TLO 2: Ethics and professional responsibility
- TLO 3: Thinking skills
- TLO 4: Research skills
- TLO 5: Communication and collaboration
- TLO 6: Self-management.²⁷

With respect to TLO 3, Bachelor of Laws graduates are expected to be able to:

- a) identify and articulate legal issues,
- b) apply legal reasoning and research to generate appropriate responses to legal issues,
- c) engage in critical analysis and make a reasoned choice amongst alternatives, and
- d) think creatively in approaching legal issues and generating appropriate responses.²⁸

Specifically, TLO 3(c) is the ability to critically analyse a legal text, claim or argument in order to understand it more thoroughly, and to evaluate the text, claim or argument in order to determine its truth value or correctness, its consistency with an ideological standard (the rule

²³ Ibid 13.

²⁴ Ibid (emphasis added).

²⁵ Kift and Israel (n 9).

²⁶ Ibid 10.

²⁷ Ibid.

²⁸ Ibid.

of law, gender equality, social justice, etc), or if it is the best option from among a range of choices.

IV TEACHING EVALUATIVE REASONING AS A DISTINCT MODE OF LEGAL REASONING

Evaluative reasoning has received limited attention in legal education scholarship in Australia. Recent examples include: Allcock and Yin discussing evaluation as an aspect of judicial consideration of whether to impose a duty of care in negligence;²⁹ Townsley describing the emotional basis for evaluative judgments in legal ethics education;³⁰ and Galloway et al considering evaluative skills as part of teaching students to think and problem-solve like lawyers.³¹ Johnstone's discussion of evaluative skills in legal analysis is an older, but still relevant, example. The work of Julius Stone remains a key starting point, as noted by former High Court Chief Justice Robert French.³² In the field of legal education, Orr's analysis of how the Tertiary Education Quality and Standards Agency's 'fit and proper person' test applies to higher education providers is a helpful illustration of evaluative reasoning, as the test requires an 'evaluative assessment of fitness and propriety'.³³

Part IV contributes to the scholarship in this area. Specifically, this Part draws on the learning and teaching experience and research of Finn, one of the authors of this paper, who teaches evaluative reasoning in an undergraduate unit (Bachelor of Laws, AQF Level 7) 'Constitutional Law', and a postgraduate unit (Bachelor of Laws (Honours), AQF Level 8) 'Advanced Legal Research and Writing for Honours'. In these units, instruction in evaluative reasoning is based on five key points, which are outlined below.³⁴

A Evaluation Is a Critical Thinking Skill and a Mode of Legal Reasoning

Evaluative reasoning is taught as both a critical thinking skill and a discrete mode of legal reasoning. Evaluative reasoning can be contextualised to TLO 3(b): 'apply legal reasoning and research to generate appropriate responses to legal issues'. In the *Good Practice Guide* for TLO

²⁹ Martin Allcock and Ken Yin, 'The Application of Syllogism as a Pedagogical Tool in Teaching Duty of Care' (2020/21) 13/14 *Journal of the Australasian Law Academics Association* 12, 25.

³⁰ Lesley Townsley, 'Thinking Like a Lawyer Ethically: Narrative Intelligence and Emotion' (2014) 24(1) *Legal Education Review* 5:69–93.

³¹ Kate Galloway et al, 'Working the Nexus: Teaching Students to Think, Read and Problem-Solve Like a Lawyer' (2016) 26(1) *Legal Education Review* 5:95–114.

³² Chief Justice Robert French, 'Judicial Activism: The Boundaries of the Judicial Role' (Speech, Law Asia Conference, 10 November 2009) 1, 3–4 <<https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj10Nov09.pdf>>.

³³ John Orr, 'The Fit and Proper Persons Concept in Higher Education Law' (2019) 22 *International Journal of Law & Education* 64, 76.

³⁴ These principles are derived from Hugh Finn, 'Law of Value: Concepts of Value & Evaluation in Judicial Decision-Making' (Honours Thesis, Murdoch University, 2013) <<https://researchrepository.murdoch.edu.au/id/eprint/21955>> and Hugh Finn, 'Law of Value: Training Law Students in Evaluative Reasoning' (Conference Paper, Global Legal Skills Conference, 10 December 2018) <<https://espace.curtin.edu.au/handle/20.500.11937/76205?show=full>>.

3, Professor Nick James describes three forms of reasoning that law students are commonly taught:

When judges and legal theorists synthesise numerous legal decisions into a general legal principle they engage in *inductive reasoning*. When lawyers and judges apply a general legal principle to a particular legal problem they engage in *deductive reasoning*. When lawyers argue about whether or not a particular precedent should be followed they engage in *reasoning by analogy*.³⁵

We frame evaluative reasoning as a fourth mode of reasoning that law students should be trained in, by extending Professor James' framework to include: when judges attribute a value (ie, a property, quality, amount or allocation) to a subject matter they engage in *evaluative reasoning*.

Evaluative reasoning can also be contextualised to law students by giving examples of evaluative tasks in which courts commonly engage, for example:

1. *Establish whether the subject matter conforms with a legal standard or falls within the ambit of a statutory or common law criterion.*

Example: The defendants' conduct was not unconscionable within the meaning of ss 12CB and 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth).

2. *Determine an amount or allocation of time, money, responsibility or other numerical measure that conforms with a standard or satisfies the threshold for a criterion.*

Example: The provision was inadequate for the applicant's 'proper maintenance, education and advancement in life'.

3. *Weigh or balance particular values or evaluative outcomes that cannot be reduced to a common measure of value.*

Example: The criterion 'adequate in its balance' requires the court to balance two incommensurables — the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.³⁶

³⁵ James (n 10) 12 (emphasis added).

³⁶ *Brown v Tasmania* (2017) 261 CLR 328, 377 [160] (Gageler J).

B Evaluative Reasoning Is Called for When the Law Uses a Broad Standard or Criterion Rather than Precise Rules

Value judgments and evaluative judgments are a component of judicial decision-making across many practice areas of law, such as: misleading and deceptive conduct;³⁷ succession law;³⁸ constitutional law;³⁹ statutory unconscionable conduct;⁴⁰ administrative law;⁴¹ sentencing;⁴² and equity.⁴³ The need for value and evaluative judgments — and evaluative reasoning — arises when statutes, common law rules and equitable principles express a legal standard or criterion in broad or vague terms,⁴⁴ whether in common evaluative expressions like ‘reasonable’ or ‘proper’ or in particular statutory terms or phrases — for example, the phrase ‘high risk serious offender’, which the High Court recently considered in *Garlett v Western Australia* (2022) 96 ALJR 888.

The Australian Law Reform Commission report *Financial Services Legislation: Interim Report A*, published in November 2021, provides a practical example of how evaluative reasoning works within the context of a statutory scheme.⁴⁵ Chapter 2 of the report sets out a ‘taxonomy’ of concepts, principles, norms, rules and standards as a framework for understanding how the disclosure requirements in the *Corporations Act 2001* (Cth) ch 7 are intended to operate. For example, discussion of the framework distinguishes between the more indeterminate character of ‘standards’ and the more concrete content of ‘rules’.⁴⁶ As examples of ‘standards’, the report cites a list from Roscoe Pound, namely the requirements to act in ‘good faith’, or ‘reasonably’, or ‘prudently’, or ‘diligently’ or ‘fairly’.

Figure 1 below provides a starting point to encourage students to think about the content of legal norms and whether a particular law is more ‘rule-like’ or ‘standard-like’, and then about the practical operation of ‘rule-like’ laws and ‘standard-like’ laws as a means of regulating conduct.⁴⁷ In line with TLO 3(b), students are then asked to consider how they can use the four

³⁷ French (n 32).

³⁸ Justice Geoff Lindsay, ‘Challenges in the Conduct of a “Succession” Case across Jurisdictional Boundaries’ (Speech, Law Society of NSW Specialist Accreditation Conference (Wills & Estates), 5 August 2021) <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2021%20Speeches/Lindsay_20210805.pdf>.

³⁹ See, recently, *Garlett* (n 4) 912–13, [107] (Kiefel CJ, Keane and Steward JJ).

⁴⁰ *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1.

⁴¹ See, recently, *Nathanson* (n 4).

⁴² *Markarian v R* (2006) 228 CLR 357, 378 [51].

⁴³ *Thorne v Kennedy* (2017) 263 CLR 85, 105 [43].

⁴⁴ See, eg, *Attorney-General (NSW) v World Best Holdings Ltd* [2005] NSWCA 261, [119]–[121]; *Thomas v Mowbray* (2007) 233 CLR 307, 351 [91].

⁴⁵ Australian Law Reform Commission, *Financial Services Legislation: Interim Report A* (Report No 137, November 2021).

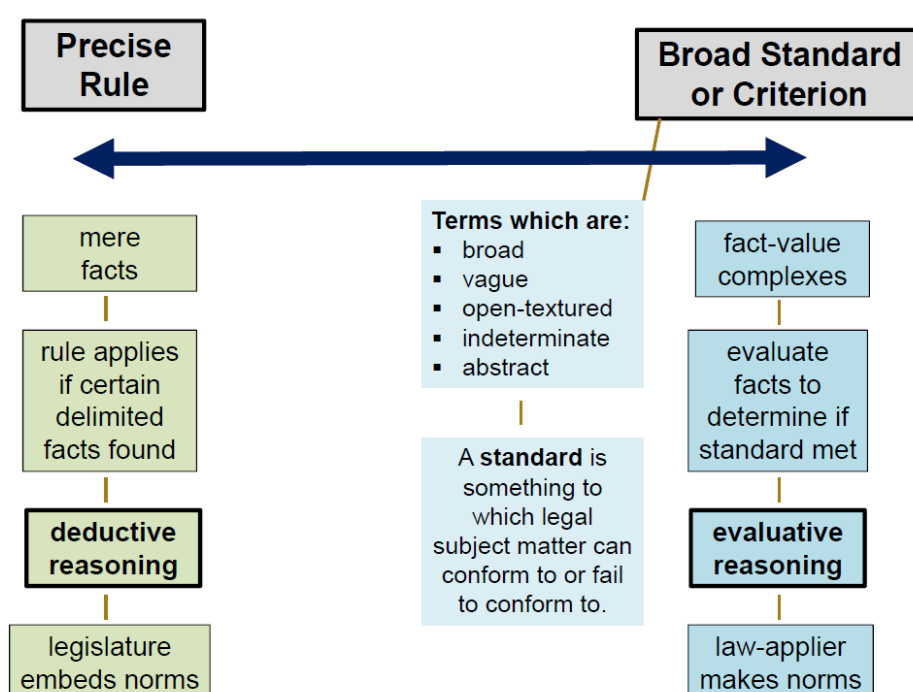
⁴⁶ *Ibid* 57–63. See also Peter Toy, ‘An Examination of Legal Values in Statutory Unconscionable Conduct’ (2020) 48(5) *Australian Business Law Review* 406.

⁴⁷ See, eg, John Braithwaite, ‘Rules and Principles: A Theory of Legal Certainty’ (2002) 27 *Australian Journal of Legal Philosophy* 47; *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 267–268 [266]–[271] (Allsop CJ) (‘*Paciocco*’).

modes of legal reasoning to support legal arguments and solve legal problems. For example, students might use:

- *evaluative reasoning* when considering the application of ‘standards’ and *deductive reasoning* when considering the application of ‘rules’
- *analogical reasoning* to argue for a particular outcome based on how courts have instantiated an abstract standard or applied a precise rule in previous cases with similar factual circumstances
- *inductive reasoning* to build a new legal norm (whether a precise rule or an abstract standard) based on how courts have dealt with a particular circumstance in a series of previous cases.

Figure 1: A continuum for legal norms between ‘rule-like’ and ‘standard-like’



C Two Senses of ‘Value’: Value as a Property or Quality Attributed to Things and Value as a Criterion to Guide Decision-Making

Law students are taught to distinguish between two senses of value. First, value may refer to an abstract property, quality or amount that can be attributed to a subject matter, usually as a form of merit, worth or significance (eg, ‘the conduct of X was unconscionable’ or ‘the provision for Y was inadequate’). Value in this sense can also refer to the amount (or degree) of a property or quality that a subject matter possesses (eg, ‘the probative value of the evidence exceeds its prejudicial value’). Further, value in this sense may be notional or numerical (eg, a percentage or monetary allocation). If the value is numerical, a range of outcomes may be acceptable; in contrast, if the value is notional then generally either a yes or a no answer will

be correct, unless the decision is a ‘discretionary value judgment’ on which reasonable minds may differ as to the outcome.⁴⁸

Second, value may be a conception of an idealised or desirable state of affairs or behaviour. A value, in this second sense, often operates as a guide or criterion for proper conduct (eg, how the parties to a legal relationship are to act) or for judicial or administrative decision-making. As Allsop CJ has observed, values ‘inform and underpin a rational and fair expectation of how power should be organised, exercised and controlled at a private and public level’.⁴⁹ For example, some well-known legal values are that the operation of criminal law should be as certain as possible,⁵⁰ and that a party to a contract must act in good faith and thus must not undermine the bargain entered into.⁵¹ To the cause of great confusion, use of the term ‘value judgment’ may involve either or both of these senses of value — for example, a value judgment may refer to a decision that attributes a property to a subject matter or to a decision that is guided by, or has regard to, a set of values. The complexity is that a single decision may involve *both* senses of value. For example, as put by Allsop CJ:

Decisions about questions such as unconscionable, unfair, good faith and similar expressions are not reached by applying definitions but by understanding and applying the principle with its attendant value to the facts and circumstances and drawing a conclusion by the process of characterisation, which involves the making of a value-based judgment by reference to ascribed meaning (construction), found facts (of all relevant circumstances) and expressed principle or rule (containing relevant public or private values).⁵²

D *There Is a Logic of Evaluation That Provides a Framework for Evaluative Reasoning*

Like other forms of legal reasoning, evaluative reasoning has an underlying logical framework. This framework involves the attribution of a particular *legal standard or criterion* (eg, a property, quality, merit, amount or worth) to a legal *subject matter* (eg, conduct, allocations of assets, evidence). This attribution of value to the subject matter is generally guided by *criteria*, and the overall aim of the evaluation is typically to determine whether the subject matter meets or satisfies a legal standard or criterion (*evaluative outcome*). The criteria guiding the evaluation may be expressly stated or implicitly contained in the relevant law (eg, a statutory provision, common law or equitable principle) — in either case, courts may need to do work to ‘fill out the content of the norm’.⁵³ Where criteria guiding the evaluation include values,

⁴⁸ *A v Corruption and Crime Commissioner* (2013) 306 ALR 491, 543 [246] (McLure P).

⁴⁹ Chief Justice Allsop, ‘Values in Law: How They Influence and Shape Rules and the Application of Law’ (Hochelaga Lecture, 20 October 2016) <<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161020>>.

⁵⁰ *Ibid.*

⁵¹ *Paciocco* (n 47) 273 [288] (Allsop CJ).

⁵² Chief Justice Allsop, ‘The Changing Manifestation of Risk: Comments on Innovation, Unconscionability and the Duty of Utmost Good Faith’ (Geoff Masel Lecture, 10 June 2020) <<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20200610>> (citations omitted).

⁵³ *Ibid.*

reasonable minds may differ about, for example, whether particular values are relevant to the evaluation, how the abstract or idealised content of a value is, or ought to be, instantiated in the circumstances, and what weighting the value should receive in the decision.

E *Evaluative Reasoning Is a Normative Exercise*

Finally, evaluative judgments are normative because, *inter alia*, they: make judgments about what ought to be the case (eg, ‘in these circumstances, this conduct is unreasonable’); attribute (or do not attribute) a property with a positive or negative character to a subject matter; and indicate whether a subject matter conforms or fails to conform to a legal standard. Like other legal decisions, legal consequences (eg, an award of damages) may follow from the outcome of the evaluation.

And understanding of the normative character of evaluative judgments helps students to see the purpose of reasoning — that is, to justify the evaluative outcome reached. Judges and experienced legal practitioners may rely on their experience, and developed intuition, to guide how they reason and make evaluative judgments. In contrast, law students have little or no insight or experience as to how broad legal standards are to be instantiated. Thus, as with the evaluative judgment of assessment work, law students must learn the content of discipline-specific standards, the criteria that underlie the application of those standards, and a methodology to justify evaluative conclusions. In the next section, we discuss how assessment rubrics, in conjunction with supporting pedagogical practices, can help students to develop this evaluative expertise.

V USING ANALYTIC RUBRICS WITH DESCRIPTIVE CRITERIA TO DEVELOP EVALUATIVE SKILLS

A *Assessment Rubrics*

Scholarship on assessment rubric development has grown exponentially over the past decade,⁵⁴ as educators have continued to innovate in rubric design and to explore the breadth of learning outcomes that rubrics can support. Initially, assessment rubrics were used as a tool for educators to assess student learning more effectively.⁵⁵ Thus early research on rubrics focused on measuring and enhancing validity and reliability in assessment marking.⁵⁶ However, there has been a shift towards using rubrics as a way to improve student performance and to promote

⁵⁴ Phillip Dawson, ‘Assessment Rubrics: Towards Clearer and More Replicable Design, Research and Practice’ (2017) 42(3) *Assessment and Evaluation Higher Education* 347, 348.

⁵⁵ See, eg, Moskal and Leydens (n 2).

⁵⁶ For a review of the early academic literature on rubrics and their validity, see Anders Jonsson and Gunilla Svingby, ‘The Use of Scoring Rubrics: Reliability, Validity and Educational Consequences’ (2007) 2(2) *Educational Research Review* 130. See also Moskal and Leydens (n 2).

student development of metacognitive skills through peer and self-reflection,⁵⁷ and more recent research has explored how assessment rubrics can be used to support student learning and reflection through formative assessment.⁵⁸

Brookhart and Chen describe a rubric as a ‘coherent set of criteria for students’ work that includes descriptions of levels of performance quality on the criteria’.⁵⁹ Those criteria and those descriptions can work together to provide a scoring guide or strategy.⁶⁰ For the purposes of this paper, we understand assessment rubrics to have four principal features:

1. a task description that relates to the overall learning outcome(s) being assessed
2. the criteria being assessed (eg, a particular skill, knowledge or behaviour)
3. the levels of achievement for the criteria being assessed
4. descriptions for each level of achievement for each criterion being assessed.

Beyond these core features, the design of assessment rubrics varies widely. For example, rubrics may use evaluative criteria or descriptive criteria, and may apply a holistic or analytic approach.⁶¹

This paper focuses on analytic rubrics with descriptive criteria because their evaluative architecture (ie, criteria with performance-level descriptions) aligns with the logic for evaluation as described above. As explained further below, by engaging with rubrics students learn what skill, knowledge or behaviour they must demonstrate for the assessment task, the criteria that will be used to assess their proficiency in that skill, knowledge or behaviour, and the standard to which they must perform that skill, knowledge or behaviour. In this way, analytic rubrics with descriptive criteria allow students to develop their evaluative skills and improve their ‘assessment literacy’, which is their ‘understanding of the purposes of assessment and the processes surrounding assessment’.⁶²

⁵⁷ For a description of the shift in approaches to higher education, see Peter Grainger and Katie Weir (eds), *Facilitating Student Learning and Engagement in Higher Education through Assessment Rubrics* (Cambridge Scholars Publishing, 2020); Cary Bennett, ‘Assessment Rubrics: Thinking Inside the Boxes’ (2016) 9(1) *Learning and Teaching: The International Journal of Higher Education in the Social Sciences* 50; Baker and Rozendal (n 3); Andrade et al (n 3).

⁵⁸ See, eg, Ernesto Panadero and Anders Jonsson, ‘The Use of Scoring Rubrics for Formative Assessment Purposes Revisited: A Review’ (2013) 9(1) *Educational Research Review* 129; Lene Nordrum, Katherine Evans and Magnus Gustafsson, ‘Comparing Student Learning Experiences of In-Text Commentary and Rubric-Articulated Feedback: Strategies for Formative Assessment’ (2013) 38(8) *Assessment & Evaluation in Higher Education* 919.

⁵⁹ Susan Brookhart and Fei Chen, ‘The Quality and Effectiveness of Descriptive Rubrics’ (2015) 67(3) *Educational Review* 343, 343.

⁶⁰ Dawson (n 54).

⁶¹ Ernesto Panadero and Anders Jonsson, ‘A Critical Review of the Arguments against the Use of Rubrics’ (2020) 30 *Educational Research Review* 100329; Susan Brookhart, ‘Appropriate Criteria: Key to Effective Rubrics’ (2018) 3 *Frontiers in Education* 22:1–12.

⁶² Calvin Smith et al, ‘Assessment Literacy and Student Learning: The Case for Explicitly Developing Students “Assessment Literacy”’ (2013) 38(1) *Assessment & Evaluation in Higher Education* 44, 44–6.

Generally, in an analytic rubric the criteria being assessed are evaluated separately,⁶³ with the criteria set out in rows and the descriptions for the levels of performance for each criterion set out in columns. The marker then evaluates the assessment work for each criterion independently.⁶⁴ In contrast to evaluative criteria, which use adjectival expressions to differentiate levels of performance (eg, satisfactory, good, excellent), descriptive criteria indicate particular aspects or features of performance. In an analytic rubric, the descriptive criteria are differentiated across the levels of performance for a particular criterion. Figure 2 below provides an example of an analytic rubric with descriptive criteria.

Figure 2: Example of an analytic assessment rubric with descriptive criteria, showing assessable criteria (three criteria for the broader criterion of ‘argument’) and descriptions for the levels of performance

Category & Weighting	Criteria	Below Expectations (Fail)	Meets Expectations (Pass)	Meets Expectations (Credit)	Exceeds Expectations (Distinction)	Exceeds Expectations (High Distinction)
1 Argument (x marks)	Logical structure (1)	The assessment did not follow a logical sequence based on: (1) a clear statement of the overall argument; (2) the presentation of a series of claims to support the overall argument; and (3) the presentation of information to support the claims.	The assessment generally presented an argument in a logical manner that stated the overall argument, presented claims to support that overall argument, and also presented information to support the claims. The assessment could be improved by stating the claims and supporting information with greater clarity and by imposing a clearer structure to the argument. The assessment may not have sufficiently addressed all aspects of the assessment question.	The assessment presented an argument in a logical manner that stated the overall argument, presented a series of distinct claims to support that overall argument, and also presented information to support the claims. The assessment could be improved by stating the claims and supporting information with greater clarity and by imposing a clearer structure to the argument. The assessment may not have sufficiently addressed all aspects of the assessment question.	The assessment presented an argument in a logical manner that stated the overall argument, presented a series of distinct claims to support that overall argument, and also presented information to support the claims. Most claims and supporting information were presented with sufficient clarity and there was a clear structure to the argument. The assessment sufficiently addressed all aspects of the assessment question.	The assessment presented an argument in a logical manner that stated the overall argument, presented a series of distinct claims to support that overall argument, and also presented information to support the claims. Claims and supporting information were stated with sufficient clarity and the overall argument was clear. The assessment addressed all aspects of the assessment question in a creative, original and highly persuasive manner.
	Quality of reasoning (2)	The assessment did not use legal and non-legal concepts and other information extracted from relevant and authoritative primary and secondary sources to make appropriate claims that were supported by suitable evidence, examples, analogies, or other supporting information.	The assessment generally used legal and non-legal concepts and other information extracted from relevant and authoritative primary and secondary sources to make appropriate claims that were generally supported by suitable evidence, examples, analogies, or other supporting information. However, many of the claims were weak or were inadequately explained and some or much of the supporting information was irrelevant, unpersuasive or otherwise unsuitable.	The assessment used legal and non-legal concepts and other information extracted from relevant and authoritative primary and secondary sources to make appropriate claims that were supported by suitable evidence, examples, analogies, or other supporting information. However, some claims were weak or poorly explained and some of the supporting information was irrelevant, unpersuasive or otherwise unsuitable.	The assessment used legal and non-legal concepts and other information extracted from relevant and authoritative primary and secondary sources to make appropriate and sometimes complex or sophisticated claims that were supported by suitable evidence, examples, analogies, or other supporting information. However, a few of the claims were weak or poorly explained and a small amount of the supporting information was irrelevant, unpersuasive or otherwise unsuitable.	The assessment used legal and non-legal concepts and other information extracted from relevant and authoritative primary and secondary sources to make appropriate and complex or sophisticated claims that were supported by suitable evidence, examples, analogies, or other supporting information showing considerable insight.
	Understanding of law and legal theory (3)	The assessment did not accurately describe legal concepts, correctly apply legal concepts to particular circumstances, and/or critically evaluate the strengths, weaknesses or other relevant characteristics of legal concepts and legal arguments.	In general, the assessment accurately described legal concepts and correctly applied legal concepts to particular circumstances. However, some legal concepts were described or applied incorrectly. The assessment did not critically evaluate the strengths, weaknesses or other relevant characteristics of legal concepts and legal arguments.	The assessment accurately described legal concepts and correctly applied legal concepts to particular circumstances but there were a few notable errors. The assessment included little critical evaluation of the strengths, weaknesses or other relevant characteristics of legal concepts and legal arguments.	The assessment accurately described legal concepts and correctly applied legal concepts to particular circumstances except for a few minor errors. The assessment included some critical evaluation of the strengths, weaknesses or other relevant characteristics of legal concepts and legal arguments.	The assessment accurately described legal concepts and correctly and insightfully applied legal concepts to particular circumstances. The assessment consistently engaged in critical evaluation of the strengths, weaknesses or other relevant characteristics of legal concepts and legal arguments.

Analytic rubrics with descriptive criteria can support either holistic or analytic marking. In holistic marking, the marker forms an overall judgment on the quality of an assessment work through the simultaneous consideration of the assessable criteria, whereas in analytic marking the mark for an assessment is derived in a systematic way from judgments on individual criteria (eg, marks are allocated to individual criteria and these marks are then added together to obtain the overall assessment mark).⁶⁵ In either case, the rubric can be used as a reference point for feedback on how students performed for particular criteria (eg, shading in the cells that

⁶³ de Boer et al (n 1) 2.

⁶⁴ Brookhart (n 61).

⁶⁵ Carmen Tomas et al, ‘Modeling Holistic Marks with Analytic Rubrics’ (2019) 4 *Frontiers in Education* 89:1–19.

correspond to the level of performance for the criterion or structuring feedback comments in relation to the criteria descriptors).

B Using Analytic Rubrics with Descriptive Criteria to Develop Evaluative Skills

We propose that there are three key stages to how analytic rubrics with descriptive criteria can support the development of student evaluative skills.

First, students engage with the content of the rubric itself to learn its underlying logic of evaluation and to familiarise themselves with the basic components of its evaluative architecture — namely the criteria and the descriptors for each level of performance for a criterion. Critically, engagement with the criteria and the criteria descriptors builds student understanding of evaluation as a logical and structured process, by which the evaluator reasons towards a justified conclusion — or, often, to a series of evaluative conclusions (eg, for each assessable criteria), from which an overall evaluative conclusion for the assessment work (or other subject matter) is synthesised or calculated. This insight into the logical foundation of evaluation prepares students for the practice of evaluation, in which students will apply the logical process they have learned to an assessment work. This ‘logical’ expertise underpins evaluation as a critical thinking skill, as an ability to judge the quality of assessment work, and as discipline-specific practice for attributing properties or qualities to subject matter (ie, evaluative reasoning).

Second, students apply that evaluative architecture to evaluate assessment work, which may include their work or the work of others. At a granular level, this stage requires students to examine the assessment work and use the criteria descriptors to determine an appropriate level of performance for each criterion. This stage builds on the earlier rubric engagement by encouraging students to analyse and apply the criteria and the performance descriptors against an assessment work. In doing so, students will consider what the threshold is for each level of performance and use the descriptors to evaluate the assessment work against the ‘standard’ they have intuited.

Third, students must use the completed evaluative process to improve performance. In this stage, students integrate information they have received during the assessment process — for example, any activities undertaken in the first two stages with feedback from the marker (including marks awarded) — to consider the standards of performance for particular criteria and how they can achieve a higher level of performance for a similar task in the future.

C Pedagogical Practices to Support Student Engagement with Rubrics

Pedagogical practices may be used alongside analytic rubrics with descriptive criteria to actively engage students and develop their evaluative skills. Examples are:

- **Rubric guidance** — students receive guidance about the rubric content, eg, to explain why criteria were selected, how criteria reflect discipline-specific tasks, norms or standards, and how levels of performance differ for particular criteria.
- **Rubric dialogue** — students have opportunities to question the teacher about the rubric content, either in real time or via online forums (eg, discussion boards).
- **Students as partners** — teachers and students work together to develop the rubric or to refine its content.
- **Assessment exemplars** — students are given examples of assessment work with guidance as to the levels of performance for particular criteria (eg, an example of an assessment work that is annotated with feedback referenced to the rubric).⁶⁶
- **Self-reflection exercises** — students review and reflect on their own capability and performance for an assessment, prior to submission (eg, answering a series of reflective questions or preparing a reflective journal).⁶⁷
- **Peer-review activities** — students review and assess the performance of their peers for an assessment (eg, engaging in peer-assessment grading or peer-group rating for group assessments).⁶⁸
- **Peer discussions** — students collectively discuss the assessment rubric, contributing their perspective, understanding and knowledge (eg, in facilitated in-class discussions).⁶⁹
- **Group assessments** — students work collaboratively on a group assessment, with requirements or suggestions that students discuss the rubric and/or collectively reflect on their own capability and performance for an assessment work, prior to submission.
- **Rubric-referenced feedback** — markers provide feedback that is referenced to the criteria in the rubric and that explains the level of performance achieved (eg, written or oral feedback provided in conjunction with the assessment rubric).⁷⁰
- **Post-assessment reflection** — students review the assessment feedback and reflect on their own capability and performance (eg, answering a series of reflective questions or preparing a reflective journal).
- **Post-assessment revision** — students revise the assessment to address the assessment feedback and improve their performance.

VI CONCLUSION

Evaluation is a fundamental ‘thinking skill’ that law students must learn and demonstrate throughout their law degree⁷¹ and, in the longer term, must also demonstrate in legal practice

⁶⁶ See generally Bruce Cooper and Anne Gargan, ‘Rubrics in Education: Old Term, New Meanings’ (2009) 91(1) *Phi Delta Kappan* 54; Dawson (n 54); Jonsson and Svingby (n 56).

⁶⁷ See generally Baker and Rozendal (n 3).

⁶⁸ See generally Panadero and Jonsson, ‘The Use of Scoring Rubrics for Formative Assessment’ (n 58).

⁶⁹ See generally Jordan Rogers et al, ‘Validation of a Reflection Rubric for Higher Education’ (2019) 20(6) *Reflective Practice* 761.

⁷⁰ See generally de Boer et al (n 1) 31.

⁷¹ *Ibid.*

and within the profession. Evaluative reasoning has traditionally been taught in law schools through the use of scenario problem questions — requiring students to examine statutes and/or equity and the common law to apply the identified relevant legal principles to the factual situation in order to ascertain a likely outcome. However, to assist law students in developing their evaluative expertise, it is critical for legal educators to provide numerous and varying opportunities for law students to practice the particular skills underpinning evaluative reasoning.

Additional opportunities for law students to engage in and exercise evaluative reasoning can be facilitated through the explicit use of analytic assessment rubrics, in conjunction with other pedagogical practices. Further, a requirement for students to actively engage with analytic assessment rubrics, by examining the criterion descriptors and measuring each criterion against their work to assess its quality, will not only assist students to develop their evaluative judgment for assessment work, but will also better equip students to assess standards more broadly and assist them to become independent, self-regulated learners and legal scholars.