ASSESSMENT METHODS

Multiple choice examining in law
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Multiple Choice Examining (MCE) is by no means a new phenomenon in law examining. It is the only means of examining, for example, the American Bar Association's multi-state test, under which multiple choice papers are marked by a scanning process which records electronically each student's answer to each question and produces them for scrutiny by the examiners in such a way as to facilitate the kind of manipulation which is necessary.

MCE is a method of assessment which could be used at least as part of the examining process on more or less any subject matter, particularly for the kind of course in which the examination is by the traditional problem question. Any problem question can be replaced by multiple choice questions. The major practical qualification is that the group must be a fairly large one, of at least, say 70 students. A substantial sample is necessary for the comparative process to be statistically reliable and to make the effort worthwhile.

Using MCE has a number of advantages over the traditional law exam. First, it brings consistency to the marking. Secondly, questions can be set at a higher level of legal analysis than most of the students would otherwise reach. In the standard 'problem' question, frequently the assessment turns more upon the ability of the candidate to identify issues than actually upon what is said about those issues. In the case of MCEs because the candidate is not choosing from the entire universe, so the legal issues are identified with far greater precision. Thirdly, in the short term, the examiners' work is more pleasant to do and can be done at a time more of their choosing. In the long term, it also takes up significantly less time, particularly when the groups are large ones. At a time of increased pressure upon the time of academic staff, this is not something to be ignored. Fourthly, because reading is faster than writing, it is possible to cover a greater area of the course in a shorter time. It is not possible to deal with the sort of discursive abilities that can be tested by essay questions, but this may be thought a sacrifice worth making.

There will be things which cannot be achieved by this form of examining. First, it is said that the candidate will be unable to demonstrate skill in writing. Secondly, there is a difficulty which arises from the format: there is a possibility that something written by the examinee in a traditional written exam will actually change the examiner's mind and create a reappraisal of the appropriate answer during the marking process. However, the occasions upon which the candidate in a traditional written exam comes up with any radical new departure are sufficiently rare as to be negligible. Thirdly, there is the related question of the appropriateness of the jurisprudential paradigm which permits or compels right/wrong answers. But the questions asked in MCE need not have the nature of 'What is the law : (a) ... or (b) ...?' and one of the answers might be 'It is impossible to say.' Fourthly, there is the question of language and potential disadvantage to students whose first language is not English. The final qualification is that 'this might be all right for first year undergraduates but not for testing candidates for their final degrees.' MCE is a valid method for discriminating between the abilities of candidates and there is no difference in principle between first and final years and between the pass/fail and other class divisions.

Any examiner contemplating introducing this system will need to make a number of choices as to how it is to operate. The first might be the proportion of the assessment in the subject in question which is to be performed by MCE. Setting questions is time consuming, so the ideal is to set as many as are necessary to cover the whole course but no more. The examiner will need to decide whether or not to penalise wrong answers. There could be questions with more than one correct answer or there could be a system of graduated correctness or one in which designated incorrect answers are not penalised, whereas others are. The students must be told something about the marking scheme, but the raw marks are relatively unpredictable, so the marking scheme cannot be so inflexible as to prevent manipulation.

The form in which the information arrives is to the specification of the examiner. The data available are all the answers given by all the students to all the questions, and this can be arranged however the examiner chooses. In order to benefit from MCE the marker must be reasonably conversant with the relevant spreadsheet or database program. There are two sorts of modification which can be made: adjusting for individual (flawed) questions and setting the borderlines for pass/fail, compensation areas and classes.

Before the process of setting the pass-mark is undertaken, checks can be carried out on the first table to determine whether any of the questions are flawed so to necessitate remedial action. The next manipulation which

needs to be carried out is to determine the passmark, and whatever other borderlines are significant. The marks achieved by a large group on an MCE test are sufficiently unpredictable that the raw marks need to be converted.

The investments of time which are necessary to introduce MCE are significant but by no means prohibitive. Time has eto be spent on learning to use a spreadsheet or database program, setting appropriate questions and supplying students with a specimen exam paper. These outlays are not recurrent. The examiner has to be prepared to spend much longer than usual setting the exam but the papers can be collected and the questions recycled.

The use of MCE as an assessment mechanism has been used elsewhere for a long time. It is well worth considering its introduction more fully into the undergraduate law curriculum.

Law school examinations and factual analysis
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One of the greatest difficulties students face in law school is not memorisation of countless legal rules with innumerable exceptions, defences and alternatives but the expeditious and judicious analysis of complex fact patterns. Analysis of fact patterns is a central exercise in the legal curriculum, yet it arises *ad hoc* in the classroom and there is no course on the analysis of facts *per se*. There are recurring paradigms and techniques which can be learned. An understanding of these techniques by students should greatly facilitate their test taking ability, as well as enhance their ability to diagnose and analyse legal problems professionally.

It is important to delineate the rule of law in elemental form because the crux of a legal analysis is the identification of each fact which satisfies each element of the legal rule. In order to analyse the facts, it is necessary to specify the standards which satisfy each element. Only after the facts have been exhaustively analysed in the context of the elements of the legal rules can a conclusion be properly drawn.

The most basic type of fact pattern is the express fact pattern. All the relevant facts required for arriving at a single legal conclusion are expressly stated. The legal issue is resolved in the positive or the negative with virtually no room for reasonable dissent. This is the simplest form of factual presentation. It is rarely if ever employed.

A slight modification on the express fact pattern is the use of an implied fact. One or more of the facts required to reach a sound legal conclusion are absent. Rather, they are implied, either by law or by logic, by other facts which are stated. The student is required to determine whether an element of the legal test is satisfied where there is no direct statement on that point. The student must draw logical conclusions or know legal implications in order to complete the legal chain.

At times, a necessary area of the statement of facts will be missing. It is imperative that new facts are not invented to fill the hole. The correct method of handling such a problem is to indicate that there are no relevant facts stated which apply to a specific legal element. Then the student must explain that, if the unstated facts were of one type, then the element would be satisfied. Otherwise, the legal element would not be satisfied and recovery would be barred. Such a question provides an excellent test of a student's knowledge of all the elements of a legal rule, as well as the student's ability to identify which type of information is required to complete the problem. The student should explain that a fact is missing and indicate which types of facts provide which types of conclusions.

Another common technique employed in constructing law school examinations is the use of an ambiguous fact. In an ambiguous factual situation, the fact either satisfies a legal element — or it does not. The student only has to point out that the fact is ambiguous and what the alternative outcomes would be depending upon its ultimate characterisation by the finder of fact. Of course, the student may draw a conclusion but the student would be well-advised to caution that reasonable minds could differ on the point.

Another favourite technique relied upon by law professors is the weak fact. The weak fact situation exists where there is a continuum or scale of possible degrees of facts. The given fact lies somewhere on this scale. It neither clearly satisfies the burden nor does it clearly fail to satisfy the burden. It is a weak fact that lies somewhere in the grey area between obvious rejection and acceptance of the legal rule.

An additional complication that can be added to the above situations is to place the facts in an impractical setting. The facts satisfy the classic legal definition but the case is so trivial or the damages are so minimal that no attorney would advise pursuing the case. In an examination situation, a student would be well-advised to complete the legal exercise and analyse the facts methodically. After drawing the appropriate conclusion, it would be wise to note that this par-