

LAW SCHOOL ASSESSMENT REVISITED

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In response to Covid-19, law faculties across North America quickly moved their curriculum online and attempted to assess performance in one of the most stressful moments in many students' lives. Clearly, pedagogy was not top of mind for most, yet instructors tried to maintain coherence and integrity alongside compassion. Universities across North America adopted a range of grading methodologies. Some retained numerical grades, some moved to a pass/no pass (pass/fail) model, and others adopted a mix of approaches. Ostensibly the move to a pass/no pass system was meant to ease burdens on law students and instructors alike. For some schools, this (theoretically) less stressful approach was meant to increase equitable outcomes, avoid the inevitable connotations that would differentiate pass/no pass from grades, and allow for flexibility on the part of both students and professors. In practice, the change to a pass/ no pass system generated fascinating reactions from students, the profession and instructors, surfacing long-standing assumptions about the role of grades in legal education. Pass/no pass was interpreted and experienced wildly differently from student to student and from instructor to instructor. It has raised issues that go to the heart of why and what we assess in legal education as well as thorny questions of outcomes, competencies, and the role of law firms in determining law school pedagogy. While the consequences of this change will play out over the next several years, this short commentary offers reflections on the "no numerical grades" experiment and the more existential questions that have followed. What is the current function of grades? Whose interests do they serve? Do they function as proxies for more meaningful assessment? What would holistic assessment practices look like? And what other possibilities exist?

Although it was challenging to quickly abandon numerical grades, pass/no pass models are not new or particularly unique. Clinical and experiential programs in law schools and elsewhere often (although not always) use pass/no pass models of assessment. Many professional schools have long adopted pass/fail modes of assessment including dentistry and medicine

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either in part or in full. For most law schools, however, the pass/no pass model remains a significant departure from the traditional law school assessment model, which – again, with the exception of many clinical and some experiential programs - relies heavily on numerical grades (100% or 4.0) to assess students. In practice – and based only on experience rather than quantitative data – the pass/no pass system was imperfect. Students and instructors alike struggled to use online teaching and assessment methods, internet access was spotty, students’ personal lives were upended, and their financial wellbeing impacted. Yet we also know that other students have types of privilege that shielded them from some or all of these impacts.

For many instructors, pass/fail assessment eased the micro-divisions required under a numerical grading system. However, it increased the importance of meaningful, constructive feedback. Indeed, instructors were forced to quickly pivot from existing rubrics that relied on graded performance to pass/fail, often absent support to meaningfully understand what it means to “pass”. For some, it refocused the importance of learning outcomes. For some, it felt arbitrary. This move also raised many unknowns for instructors and students alike. How will this impact students applying to graduate school? How can an instructor simultaneously avoid a “race to the bottom”, support students under tremendous pressure, and give meaningful feedback – particularly given the huge range of students’ realities?

For some students, a move to pass/no pass was interpreted as being able to perform at “50%” – which became quite difficult to predict in practice, especially given that students are typically graded against one another. Others interpreted a “pass” as requiring significantly more work than they otherwise would have committed, perhaps again because a “pass” standard was – in some cases – opaque. In the struggle for the more intangible ways of showcasing their work, some students sought to distinguish themselves. Interpretations for this behaviour range significantly based on the student’s standpoint. For example, students may be facing additional barriers based on social markers. Some might have less tacit knowledge about the legal community and fewer personal and professional connections (for example, students who are “first in the family”). The commonality amongst these is, of course, the pressure to secure an articling position which students believe (and evidence confirms) relies heavily on grades as a primary way to identify students of

interest. Absent grades, the potential for murkier criteria such as references, last names, and other status markers to influence hiring loom much larger.

As many others have noted, grades – perhaps particularly in the law school context – serve many purposes. Incentive theory would argue that grades offer competitive incentive to succeed based on carefully considered learning outcomes, especially for extrinsically motivated students. Others might argue that grades feed into hierarchy and competitiveness based on ill-considered outcomes and outdated assessment practices (most typically, 100% exams – incidentally, still sometimes used as a method to determine bar passage).

Absent very few exceptions, grades have dominated the market's assessment of student competence, at least in the preliminary stages. As such, this moment might be an opportune time to engage in deeper questions about what role grades really play in our collective understanding of student success and what new hiring practices might be adopted by the market. Might this be a moment for law schools and the legal profession to reimagine our understandings of good teaching, learning and practice? One model gaining steam over the past several decades is competency-based assessment. Similar to the many other professions that have adopted a competency-based model, the relevant actors can co-create understandings of the knowledge, attitudes and behaviours that denote excellence in their field. And this is, perhaps, what is particularly thorny in law, a field that has long struggled with its many identities - preparing students for practice, "thinking like a lawyer", inculcating critical perspectives in and on law, engaging in public advocacy, and acting as schools of philosophy and jurisprudence, among others. While there is healthy tension between these and other roles, these tensions are not understood by the vast majority of students nor, indeed, the profession. Seeking clarity without sacrificing independence is, I hope, one purpose of better understanding competency-based assessment.

What is competency-based assessment? There is no single definition or set of established practices. Indeed, its lack of definition gave rise to articles such as "Competency based education: A bandwagon in search of a definition" (Spady, 1977). It also tends to be polarising, much like the abovementioned, long-standing debates in legal education between

theory and practice. While this short piece does not aim to definitively settle the matter, a summary of key competency based education (CBE) concepts most likely includes: a shared understanding of what students should be able to know, do and value by the time they graduate and at what level. It can help more coherently structure how students learn as they progress through their education and support them more effectively in understanding the purpose of various tasks. Other aspects might include focusing on student capability and need rather than a time-based understanding of learning (for example, eschewing “3-hour classes”, “3-year degrees”, etc. in favour of student-centred and criterion-referenced timelines). It might go some way in reducing competition between students that is the antithesis of healthy learning environments. CBE might also more clearly denote purpose to external actors who are often pejorative about legal education, and whose views often reflect a view of legal education more than a century out of date.

Significant and valid concerns are often raised that competency-based assessment focuses on rote skills and is subject to market capture, thereby supporting a neoliberal agenda that leads to further bureaucratisation and scrutiny of higher education for profitability rather than learning. This will indeed occur (and is occurring) absent law schools defining competencies for themselves. Critics might also consider the hard realities of market capture in legal education as it stands. Current understanding of the hiring process for articling (the apprenticeship process required in Canada as part of licensure, which therefore acts as a requirement (sometimes barrier) to entry) is based on a set of inferences often made based on such things as: the school from which a student graduates, the professors from whom a student learned, the names of students’ references, the volunteer and co-curricular activities undertaken by the student, the student’s name and (presumed) various social markers, and – of course – grades.

This is not a uniquely Canadian problem. The mismatch between the competencies employers claim to value and the ones they actually hire for was well documented in the “Foundations for Practice” (Institute for the Advancement of the American Legal System) study. While employers – or possible employers – clearly claimed to value skills embodying what they called “the whole lawyer”, they also note, “[w]e know that legal employers tend to hire on traditional criteria-law school attended, class rank, and law review- that may tell them much about the intelligence of the job

candidate but very little about the character quotient of the lawyer or about the whole lawyer” (online: <https://iaals.du.edu/publications/foundations-practice-whole-lawyer-and-character-quotient#tab=putting-foundations-for-practice-into-practice>). Students are therefore left with dizzying uncertainty about which courses to take (“bar courses”?; courses preferred by certain firms?; courses with a certain professor?; courses for the love of learning?), how to secure references, what to highlight in a cover letter, whether to whitewash their resume, wear a wedding ring, rack up debt for a fancy suit, and so on. While clearly competency-based assessment cannot solve inequality, it can go a long way in clarifying expectations and – hopefully – reducing the opacity that dominates student understandings of excellence in law.

If – as I argue – it is time for law schools to examine the possibility of competency-based assessment, what are the implications? First, I want to be clear that law schools should be setting competencies based on their own specific values and priorities. The Federation of Law Societies of Canada has already embarked on a path toward competency-based assessment in the NCA process (online: <https://flsc.ca/wp-content/uploads/2018/01/National-Requirement-Jan-2018-FIN.pdf>) and, one would assume, are interested in a similar approach in Canadian common law degree granting institutions. Similar to most regulator-mediated relationships, the Federation and Canadian law schools have not often seen eye-to-eye. It is obviously tempting, but likely unprofitable, to ask for collaborative decision making between these bodies absent more foundational discussions. Useful conversations might also be had about the role of competencies and various understandings of academic freedom.

In sum, this moment of uncertainty has offered a less-than-ideal experiment in pass/no pass grading models. It offers law schools an opportunity to think about the content, form and purpose of learning. I propose CBE – or parts of CBE – as one method to rethink legal education, one that might eventually be imposed absent an alternative. Can CBE be framed in mechanistically and restrictively? Of course. Can it be holistic, aspirational, and socially responsive? I think that, properly implemented, it can.