

EQUALITY IN LAW SCHOOL EXAMINATIONS

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INTRODUCTION

Methods of law school evaluation should measure the performance of students in the course against a series of objectives identified by the instructor in a manner that is both equitable and pedagogically sound. Equality in the examination process is important because every student has the right to an equal opportunity to succeed in their law school courses. Forms of evaluation that are not equal in their application undermine their reliability as measuring tools.

The purpose of this memorandum is to provide law school instructors with a collection of suggestions that will help them to design universally applicable methods of evaluation that are consistent with Osgoode 's Equality Resolution. That resolution, adopted by Faculty Council, affirms Osgoode 's commitment to the principles of the Ontario *Human Rights Code*, and in particular records an undertaking by Faculty to consider "use of language in the classroom, in written materials, and *in examinations* that is free from discriminatory stereotypes and references." (Faculty Handbook, IV.1) Individual requests for accommodation are to be referred to the Assistant Dean (Student Services).

The Equality Committee hopes that these materials will be useful to full-time and adjunct faculty, whether teaching at Osgoode or acting as a secondary examiner reviewing the examination drafted by a colleague. While the focus of this document is on law school examinations, many of the suggestions contained in it are also applicable to other methods of evaluation, such as research papers, presentations, and assignments.

This document is the product of numerous suggestions from faculty, students, librarians and staff members. It is designed as a work-in-progress, and suggestions for new materials that could be added to it in future editions are most welcome.

A BRIEF HISTORY OF EXAMINATIONS AT OSGOODE

The examinations of 1907 are the earliest available record of written examinations at Osgoode. These examinations typically consisted of 7 or 8 short questions. No directions or time limits are specified on the question paper. A representative question read:

State succinctly the provisions in the Union Act of 1840 and the B.N.A. Act, respectively, in regard to the use of the English and French languages. (First Year Constitutional History and Law - Pass, Spring 1907)

Fact patterns were not used often, and were always short:

A agrees orally to paint a portrait of Mrs. B. for B for \$500. When the portrait is done, B refuses to pay for it. Is he legally liable? Reasons. (First Year Contracts - Pass, Christmas 1907).

Early exams did sometimes contain questions with “policy” components, although these were less typical:

Define crime. Give some suggested tests of the criminal nature of an act, and explain what grounds you consider any one or more tests better than the others. (Second Year Criminal Law - Honours, Easter 1908).

By the 1930s, exams begin to include directions to students to be brief. Characters in fact questions are given amusing names, and these questions begin to get longer. In a manner reflective of their time, questions refer frequently to legal issues regarding “tramps”, “lunatics” and “illegitimate” offspring. For the first time, the point value of individual questions is specified.

In the 1940s and 50s, reference is made to what materials can be brought into an exam. Examinations are generally closed book, but some professors permit clean copies of statutes to be used in the exam. By the late 1950s, questions are longer and more complex, and much closer to the fact patterns presently used on many exams. Increasing attempts to use humour can be noted. For example, a Sale of Goods exam from 1959 details an attempt to sell “the Flicko Electric Shaver” with its “six rotating blade heads” with the promise that “Every player on the New York Yankees uses one.”

In the late 1960s, open book exams that permit the use of student notes and casebooks begin to appear. The length of examination questions generally continues to increase throughout the 1970s. One 1978 Torts contained 8 single spaced typed pages of facts covering 4 different fact patterns. Increased storytelling in examination questions leads to an increase in questions that are potentially discriminatory. Many questions deal with issues of race, gender, religion and disability in unreflective ways. Obesity is mocked, sexual assaults described in detail, abused women are mentally unstable and driven to suicide. Some of these questions reflect facts relevant to current legal standards and tests that were themselves discriminatory. For example, a Criminal Law exam from 1968 instructs students to write a speech opposing the decriminalization of homosexual behaviour between consenting adults in private, as well as a shorter memo outlining the weaknesses of the speech.

These examples diminish in number somewhat throughout the 1980s and 1990s, but are at times replaced by problems in which characters who protest discrimination are derided and dismissed by others as oversensitive and bent on enforcing “political correctness.”

An understanding of this evolution in law school examinations is a useful reminder that methods of evaluation are not set in stone. Moreover, changes in methods of evaluation, whether sudden or gradual, should be considered carefully to ensure that achieving one objective does not undermine another. Using problems that encourage students to analyze facts and identify issues rather than simply recite rules may be an important pedagogical advance, but these benefits can be undermined if questions are not drafted carefully.

EQUALITY AND THE FORMAT OF EXAMINATIONS

Both open book or closed book types of examinations can serve useful pedagogical goals. Either format, however, can raise equality issues where time pressure is substituted for carefully drafted questions as a way of distinguishing among students. This may occur, for example, where instructors make an open book examination very lengthy to prevent students from looking up the answers in notes and summaries.

Any exam that is excessively lengthy and largely rewards those students who work the fastest raises a number of equality concerns. It disproportionately penalizes those students who do not speak English as a first language (including many Aboriginal students) to questionable pedagogical ends. It also requires individual accommodations for students with disabilities who may be unable to work quickly enough to complete the exam in the time allotted. The question of how much extra time to give to each of these students is an inexact science. This process can also unfortunately subject students with disabilities to stigma and hostility from some other students who resent this treatment.

Decreasing reliance on time pressure will also be useful in addressing concerns, expressed by some students, that unfairness will result where students are able to write their exams on computers, an option currently the subject of a pilot program at Osgoode. Specifically, some students have raised concerns that students typing exams will be able to complete their exams more quickly. Even if computers are provided for exams to students who do not own one, this may still disadvantage students who are unable to afford their own computer on which to practice.

This does not mean, however, that closed book exams are a perfect solution to equality concerns. Examinations that do not permit reference to even a few pages of notes are viewed with considerable frustration by many students. One respondent suggested to the Committee that such exams disadvantage older students, who may have more trouble memorizing large amounts of information.

Suggestions for reform:

- The process of ensuring equality in examinations begins on the first day of classes. Make sure that during the first week students are provided with a clear outline of what material is to be covered and examined. Provide information on the methods of evaluation to be used in the course. Predictability of evaluation standards is particularly important to students with psychiatric and learning disabilities.

- Ask questions that require analysis, synthesis and critical reflection, not just retrieval of information. Where information retrieval must be emphasized, consider using a closed-book or partial closed-book exam, with ample time for its completion.
- Remember that a method of evaluation in addition to the examination is required in upper-year courses. The alternative to the 100% final in upper year courses might take the form of an additional essay, a take home exam, or a class participation grade rather than another in-class exam. In setting the time period for a take-home exam, remember that take home exams with lengthy completion periods can be difficult for students with care giving responsibilities.
- Consider carefully how long it will take for students to complete your exam. Have you allotted enough time? Are lengthy fact pattern questions necessary or useful to meet your evaluation goals? Seek guidance from colleagues in your area on these matters.
- Vary the format of questions on your exam. Use a selection of fact pattern, paragraph answer, essay or other types of questions. New instructors may find samples from colleagues helpful, but should not feel bound by recent precedents and should consider them carefully in light of their own objectives for the course.

EQUALITY AND THE CONTENT OF EXAMINATIONS

- Equality concerns also arise in the content of law school examinations. In drafting examination questions, consider what assumptions about the universality of student knowledge and experience are being made. These assumptions may be incorrect, and work to the disadvantage of some students based on socio-economic class, place of origin, ethnic origin, sex, disability, aboriginal status or other grounds. Similarly, questions may contain stereotypes, myths and other discriminatory material that are alienating and distracting for members of the group affected.

Examples include:

- A question that assumes that all students will know that airplane food is generally of low quality. This assumption may disadvantage students from lower-income backgrounds or rural areas, who are less likely to have flown on a commercial airline.
- A torts exam question that involves the plaintiff being hit in the head with a Nerf football. A foreign-born student did not know that “nerf” balls are made of foam and thus less likely to cause injury than a regular football. Using words or terms that cannot be found in a standard dictionary, such as “Xerox”, “6/49” or “Ivory” without defining these terms may unnecessarily confuse students who do not speak English as a first language. Access to a dictionary during exams is not helpful where words are not defined in it.
- Questions that use slang expressions, abbreviations, puns and other embellishments. Some examples provided to the Committee include: “that just killed me” to indicate

something is very funny; use of the expressions “term of art”, “killjoy”, and characters given confusing names, like “Nobody buys land from Anyone”.

- Questions that assume that all students know the rules of hockey, have gone camping, know that Woodstock is a town in Ontario, or know that Lex Luthor is a bad guy and Superman is a good guy. While there is nothing inherently wrong with an examination question based on the plot and characters of *Star Wars*, culturally specific knowledge or experience should not be required to understand or answer the question. Once again, such examples assume a shared reality that is not true for many non-majority students. Moreover, even where such knowledge is not required to answer the question, unfamiliarity with the context may produce anxiety for students who do not recognize these references and enhance the comfort level of those who do.
- Questions which repeat ethnic, racial or religious stereotypes: for example that Italian-Canadians are members of the “mob” or that Muslim Canadians are “terrorists” manufacturing chemical weapons.
- Questions that are premised on homophobic beliefs. Even where those beliefs form part of the current law, students should not be asked to apply these legal standards uncritically. For example, a question from a 1968 criminal law exam that still raises legally operative questions of provocation, states:

“R, a respectable young man, is walking down Yonge Street. He stops G to ask for a light. Unfortunately, R stops immediately outside a bar which was a well-known haunt of homosexuals and G wrongly assumed that R had just emerged from the bar and was accosting him for immoral, if not indecent, purposes.” (The question ends with R, accused of being gay, striking G and leaving him for dead.)

- Questions that require students, and especially, women to unnecessarily consider and deal with descriptions of sexual assault. This would include an exam question in which a woman is sexually assaulted and fights back, only to be charged with assault herself, or who finds herself facing mischief charges for making a false complaint when she decides not to pursue the case. Such examples can be devastating for survivors of sexual assault, especially those who are currently dealing with the criminal justice system or who are considering whether to report the assault.
- A question that describes aboriginal peoples as “conquered people” or that refers to them possessively as “our Native peoples”, thereby excluding and alienating aboriginal students.

Suggestions for Reform:

- In general, students appreciate attempts to make exams interesting and even humorous, where the subject matter permits. However, doing this well takes some care.

- When writing fact pattern questions, choose examples with attention to equality concerns. Find other instructors or colleagues to review your draft exam, especially those colleagues whose background and experiences may be different than your own.
- Consider whether your humour is appropriate and accessible. Avoid mocking personal characteristics such as obesity, alcoholism or manner of dress.
- Consider what assumptions you are making about students ' knowledge and experience. Are your famous people really famous and your notorious facts really that notorious? If these assumptions are not important to the course, explain them or change the question.
- Draft questions in standard academic English, at a level similar to what students are likely to encounter in recent cases or legal publications. Try for a mix of questions and give students time to think and to organize their thoughts.
- Requiring students to take a position contrary to equality norms can be disproportionately difficult for those students who are personally affected by the argument. An exam should not have the effect of asking a student, for example, to argue that the family unit in which he or she lives should be banned by the state.
- *The role of the secondary examiner is crucial to the process of ensuring equality in exams. When reviewing the exams of others, secondary examiners should explicitly consider whether the problems identified above may arise so that these problems can be corrected before the exam is administered.*

Questions, comments and suggestions on this document may be directed to the Equality Committee, J. Benedet, Chair.

November 18, 2002