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The Legal Judgment: A Novel Twist on the Classic Law School Problem Question

Forthcoming in The Law Teacher (2022)

Patrick R Goold*

Abstract

In recent years, educators have sought to diversify the types of assessment used in the legal curriculum. This article introduces a novel form of assessment: the legal judgment. Much like a classic ‘problem question’, a ‘legal judgment’ presents students with a factual scenario to analyse. However, rather than ask students to provide legal advice, the legal judgment asks students to decide the case by issuing a written judgment. This article showcases this form of assessment while exploring its advantages and challenges. The article argues that this novel twist on the classic law school problem question helps students to develop higher-order legal reasoning abilities, is more intellectually inspiring than the classic problem question, and encourages students to truly ‘think like lawyers’.

Keywords: Assessment, Learning Outcomes, Legal Judgment

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Billy is an up and coming rap star. Billy has recently created a short dance move. The dance move consists of swiping his left arm across his body while raising his right knee, and then repeating the motion with his right arm and left knee. This move lasts a few seconds and can be repeated. Billy calls this dance move the 'Billy Rock' and is widely known to be Billy's 'signature move'. Because of its simplicity, the Billy Rock has become an international dance craze. Recently, video game producers, Awesome Games has created a new game called Weekend. In the game, avatars perform short dance moves after winning battles. One of the dance moves included in the game is called 'The Swing' and looks identical to the Billy Rock. Having seen the game, Billy is distressed and has started an action for copyright infringement. But at trial, his case was dismissed. The trial court agreed with Awesome Games's argument that copyright does not exist in short dance moves. Billy now appeals to the UK Court of Appeal.

You are a judge in the UK Court of Appeal and must decide the case by issuing a written judgment.

1. Introduction

Up until the last sentence, the opening paragraph will likely have felt very familiar to any law teacher. The paragraph presents a case scenario of the type that we all enjoyed (or perhaps endured) as law students. However, unlike the classic law school problem question, the paragraph above does not ask the student to 'advise the parties' about their rights and responsibilities under copyright law. Nor does the paragraph ask the student to prepare a memorandum for a senior partner or produce a skeleton argument for one side or the other. Rather than ask the student to take the position of a lawyer in private practice, it instead asks the student to assume the position of a judge and to decide the case. The student is subsequently assessed not only on their understanding of the law, but also their ability to use reason to conclude the case in the face of law's indeterminacy.

Asking students to write a legal judgment provides a novel form of assessment in legal education. The purpose of this article is to introduce this form of assessment to the broader legal education community, to compare it briefly to other forms of assessment commonly found in contemporary legal education (Section 2), to consider the benefits (Section 3) and challenges associated with (Section 4) this form of assessment, and to begin a preliminary evaluation of the success of judgment writing as a mode of assessment in law (Section 5). For illustration purposes, the appendix contains an example of a legal

judgment question that the article's author has used in practice.¹ Lastly, this article's methodology is theoretical and reflective. Although the article is grounded in a real-world case-study – the use of a legal judgment as a form of assessment in a QAA Level 5 LLB Intellectual Property module – the article does not report the findings of an extensive empirical research project. Instead, the article's primary goal is to stimulate thought, debate, and discussion. To that end, the article argues that while there are limitations to any form of assessment, the legal judgment is a particularly good method of assessing whether students have achieved the learning outcomes associated with university level legal education.

2. The Legal Judgment: A Comparison to the State of the Art

In 2002, Alison Bone and Karen Hinnett's valuable report, *Assessment for Learning: A Guide for Law Teachers* appraised the state of assessment in British legal education.² The report highlighted the need to

¹ While different jurisdictions adopt different learning outcomes, the outcomes of university level legal education in the UK are defined primarily by the Quality Assurance Agency (QAA), 'UK Quality Code for Higher Education; Part A: Setting and Maintaining Academic Standards' (2014) < <https://www.qaa.ac.uk/docs/qaa/quality-code/qualifications-frameworks.pdf> > accessed 27 August 2021 and the QAA, 'Subject Benchmark Statement: Law' (2019) < https://www.qaa.ac.uk/docs/qaa/subject-benchmark-statements/subject-benchmark-statement-law.pdf?sfvrsn=b939c881_18 > accessed 27 August 2021. In the USA, the skills are defined primarily by the American Bar Association, 'Standards and Rules of Procedure for Approval of Law Schools', Chapter 3 ('Programme of Legal Education') < https://www.americanbar.org/groups/legal_education/resources/standards/ > accessed 27 August 2021. The relevant attributes and skills overlap broadly with the requirements of the legal profession, see 'Legal Education and Training Review, 'Setting Standards: The future of legal services education and training regulation in England and Wales' (Solicitor's Regulatory Authority, Bar Standards Board, and Ilex Professional Standards 2013) <https://letr.org.uk/the-report/index.html> accessed 27 August 2021.

² Alison Bone and Karen Hinnett, *Assessment for Learning: A Guide for Law Teachers* (UK Centre for Legal Education, 2002) archived at < <https://ials.sas.ac.uk/ukcle/78.158.56.101/archive/law/resources/assessment-and-feedback/guide/index.html> > accessed 27 August 2021.

diversify assessments, the benefit of reflecting upon the nature and purpose of assessment, and the desire to encourage students to develop capacities beyond simply demonstrating legal knowledge.

Almost twenty years later, Alison Bone and Paul Maharg argue that many of the points made in the 2002 report continue to apply.³ Australian National University Press has recently launched a series of collected essays on *Critical Perspectives on the Scholarship of Assessment and Learning in Law*. The first volume focuses on English legal education.⁴ Bone and Maharg's introductory chapter broadly surveys the innovative assessment practices arising from English legal education while making the case that assessment in legal education has not yet received rigorous academic analysis.⁵ The innovative types of assessment practices discussed by the authors include e-assessment (such as multiple-choice tests), group assessment, oral presentation assessments, as well as peer- and self-assessments. Nevertheless, the authors ultimately conclude that 'while innovation does take place..., the majority of practice in most law schools is currently still conventional in structure and content'⁶ and there remains a 'need to diversify assessment, to reflect deeply on the nature and purpose of assessment, and to develop capacities such as judgment in legal education'⁷. While it remains to be seen what the other volumes in the series will conclude, it is likely that many jurisdictions outside of England also are heavily reliant upon conventional forms of assessment.⁸ The

³ Alison Bone and Paul Maharg, 'Introduction: Legal education assessment in England' in Alison Bone and Paul Maharg (eds) *Critical Perspectives on the Scholarship of Assessment and Learning in Law* (ANU Press 2019) at 40.

⁴ Bone and Maharg, *Critical Perspectives* (n 3).

⁵ Bone and Maharg, 'Introduction' (n 3). The treatment of assessment is noticeably less discussed in legal pedagogical literature than issues such as technology in education, alternative types of curricula (including problem-based learning curriculum), and legal skills; see for example, Emma Jones and Fiona Cownie (eds) *Key Directions in Legal Education* (Routledge 2020).

⁶ Bone and Maharg, 'Introduction' (n 3) at 15.

⁷ *ibid.*

⁸ See e.g., Ruth Jones, 'Assessment and Legal Education: What Is Assessment, and What the *# Does It Have to Do with the Challenges Facing Legal Education?' (2013) 45 *McGeorge L Rev* 85 (discussing the role of assessment

combination of the conventionality of current forms of legal assessment and the relatively undeveloped academic literature on legal assessment, is potentially problematic given how assessment can shape not only student learning, but also its context, including the content and structure of degrees, the shape and size of staff needed for provision, and the size of student intake.⁹

Bone and Maharg do not strictly define what qualifies as ‘conventional’ assessment. The present author interprets this phrase to refer to two ubiquitous types of legal assessment: the ‘problem question’ and the ‘essay question’ –both forms of written assessment whether delivered either under invigilated assessment conditions or over a longer timeframe as an independent coursework assignment.¹⁰ As indicated in the introduction, the problem question presents students with a short factual scenario and asks them to assume the position of a lawyer –typically a solicitor – working in private practice.¹¹ The student’s task is to provide some form of legal advice to one or more of the parties.¹² This form of assessment simulates the type of activity that many lawyers face in every-day practice and enables the teacher to assess the student’s proficiency in a variety of skills and attributes that such practice requires.

Although in recent years some academic literature has focused on general and generic assessment

within the context of an ‘historically slow moving’ US legal education system). See also Paul Maharg, ‘Professional Legal Education in Scotland’ (2004) 20 Georgia State University L Rev 947.

⁹ Bone and Maharg, ‘Introduction’ (n 3) at 4.

¹⁰ These two forms of assessment are commonly discussed as the standard mode of assessment in student-facing guides to studying law. See e.g., Emily Allbon and Sanmeet Kaur-Dua, *The Insider’s Guide to Legal Skills* (Routledge 2016) 98 (‘In law school you will typically be asked to write answers to essay questions and problem questions as a method of assessment’).

¹¹ Allbon and Kaur Dua (n 10) 100-103.

¹² *ibid.*

criteria used within legal education,¹³ to date there has been very little attempt to articulate the *specific* assessment criteria that individual assessment types are best designed to evaluate. Yet it is very likely that the nature and character of the assessment will affect the types of skills and attributes that the student can display. Table 1 provides a non-exhaustive list of typical skills and attributes that students undertaking a standard problem question are likely to demonstrate, and on which they can be assessed, in the course of completing the assessment.¹⁴

Table 1: Typical Problem Question Assessment Criteria

Skill	Explanation
Relevant Legal Knowledge	The student's knowledge of pertinent statutory provisions and case precedents, as well as their knowledge of the limits to, and indeterminacy within, such sources of law.
Analysis	The student's ability to separate out distinct claims that parties in the scenario may plausibly make for individual consideration.
Evaluation	The student's ability to evaluate the likelihood of success of the distinct claims and the ability to provide the parties with an overall assessment of the merits of their case.
Communication	The student's ability to express their legal advice clearly and using appropriate legal structure and style.
Research	The student's ability to independently find relevant primary and secondary sources of law and to provide appropriate citations.

By contrast, the essay question is broader, more abstract, and discursive in nature.¹⁵ The essay question does not ask the student to assume a role, but instead encourages the student to express their own reasoned opinion on a given issue. The assessor has considerable latitude when selecting the type of issue

¹³ See e.g., Clair Hughes and Clare Cappa, 'Developing generic criteria and standards for assessment in law: processes and (by)products (2007) 32 *Assessment & Evaluation in Higher Education* 417. Andrea Anne Curcio, 'A Simple Low-Cost Institutional Learning-Outcomes Assessment Process' (2018) 67 *Journal of Legal Education* 489.

¹⁴ In the absence of relevant previous literature on this point, this list should be viewed as a first attempt at articulating the type of skills and attributes best displayed by the standard law school problem question; it is not held out as definitive and I expect other scholars will offer amendments and improvements.

¹⁵ Allbon and Kaur Dua (n 10) 98-100.

for consideration. Typical law school essay questions range from more doctrinal (e.g. ‘Following the case of *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, does English law have a test for determining whether a duty of care exists in tort law?’) to conceptual (e.g. ‘Is the English law on determining duty of care in tort law incoherent?’), to normative and reformist in nature (e.g. ‘Should public authorities, such as the police in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, owe the public a duty to investigate crimes with reasonable care in tort law?’). Like the problem question, the essay question enables the teacher to assess several skills and attributes. The skills and attributes assessed through the essay question overlap with those assessed by the problem question. However, there is a more subjective element compared to the more objective problem question. The focus is more squarely upon the student’s evaluation of an issue and the reasoning process behind such evaluation, rather than whether they can provide an objectively competent assessment of the merits of a case.¹⁶ Table 2 provides a non-exhaustive list of typical skills and attributes that students undertaking a standard legal essay are likely to demonstrate, and on which they can be assessed, in the course of completing the assessment.¹⁷

Table 2: Typical Essay Question Assessment Criteria

Skill	Explanation
Relevant Legal Knowledge	The student’s knowledge of pertinent statutory provisions and case precedents, as well as their knowledge of the limits to, and indeterminacy within, such sources of law.
Evaluation	The student’s ability to provide an answer that responds to the question posed.
Analysis	The student’s ability to support their evaluation with arguments and evidence.
Communication	The student’s ability to express their opinion clearly and using appropriate academic structure and style.
Research	The student’s ability to independently find relevant primary and secondary sources of law and to provide appropriate citations.

Armed with a knowledge of conventional assessment methods in law, how then does a legal judgment compare? The legal judgment combines elements of both the problem question and the essay

¹⁶ Allbon and Kaur Dua (n 10) (focus on critical evaluation of law).

¹⁷ The caveats from Table 1 also equally apply here (n 14).

question. Like the problem question, the student is presented with a detailed factual scenario as opposed to a broad and abstract topic. Like the problem question, the student is assigned a role, rather than responding to the question in a personal capacity. Like the classic problem question, the student must demonstrate a competent grasp of the relevant sources of law and the indeterminacy of legal sources, particularly in ‘hard cases’.¹⁸ But what distinguishes the legal judgment from the classic problem question is how the student *responds* to that indeterminacy. A good solicitor will highlight to their client the contested nature of the law and give them an indication as to the probability of success; a judge cannot do this. A judge must *resolve* the indeterminacy, particularly when it comes to cases at the appellate level. When the legal sources conflict, or the legal arguments presented are finely balanced, a judge cannot throw up their hands and refuse to give a final determination. Instead, they must exercise their judgement. And at this point, the legal judgment takes on some of the qualities of an essay. The student-judge must provide an answer to the case, and that answer must be based on persuasive legal reasoning. The teacher then assesses the student not only on their knowledge of the law, but the reasoning process through which the student overcomes law’s indeterminacy and arrives at a clear and justifiable conclusion. These skills are summarised in table 3.

Table 3: Typical Judgment Question Assessment Criteria

Skill	Explanation
Relevant Legal Knowledge	The student’s knowledge of pertinent statutory provisions and case precedents, as well as their knowledge of the limits to, and indeterminacy within, such sources of law.
Evaluation	The student’s ability to reach a judgment on the distinct claims presented and to conclude the overall case.
Analysis	The student’s ability to support their judgment with arguments and evidence.
Communication	The student’s ability to express their opinion clearly and using appropriate academic structure and style.
Research	The student’s ability to independently find pertinent primary and secondary sources of law and to provide appropriate citations.

In the literature on legal assessment, it appears that the legal judgment is a novel form of assessment

¹⁸ See Ronald Dworkin, ‘Hard Cases’ (1975) 88 Harvard L Rev 1057.

that is currently not commonly used.¹⁹ However, the idea of a judgment has been used to good effect in the Feminist Judgment Project. The Feminist Judgment Project was an idea initially conceived by Canadian feminist lawyers and activists. The participants in the project re-wrote several Canadian Supreme Court judgments from a feminist perspective.²⁰ In 2007, the UK Feminist Judgment Project was launched.²¹ Academics and students rewrote and subsequently published a series of Court of Appeal, House of Lords, and Privy Council Decisions from a feminist perspective. Since then, some of the participants of the project have sought to use feminist judgments in the classroom as a teaching resource.²² As subsequently explained by Hunter, several British academics have created classroom exercises in which students are asked to write legal judgments from a feminist perspective.²³ These exercises encourage students to think critically about the law. Rosemary Auchmuty has taken the project a step further and asked students to rewrite property law judgments from a feminist perspective as a form of assessment in the compulsory property law module at the University of Reading.²⁴ Recently, UK academics have extended the ideas behind the Feminist Judgment Project and launched a Children's Rights Judgment Project.²⁵

But judgments can be used much more extensively than they currently are. Outside of Auchmuty's

¹⁹ While Bone and Maharg do not hold out their survey as exhaustive of assessment practices in England, their chapter does not discuss the use of a legal judgment as a common or innovative form of assessment found within English law schools (n 3)

²⁰ Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 Canadian Journal of Women and the Law 1.

²¹ Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Bloomsbury 2010).

²² Rosemary Hunter, 'Feminist judgments as teaching resource' (2012) 46 *The Law Teacher* 214.

²³ Hunter, McGlynn and Rackley (n 21).

²⁴ Rosemary Auchmuty, 'Using Feminist Judgments in the Property Law Classroom' (2012) 46:3 *The Law Teacher* 227.

²⁵ Helen Stalford, Kathrn Hollingsworth, Stephen Gilmore, *Rewriting Children's Rights Judgments* (Hart Publishing 2017).

example, there is no evidence of the legal judgment being used as a form of assessment. Yet, the legal judgment is not merely a good tool for teaching students critical legal thinking skills, it is also a particularly good way of assessing students' proficiency therein. Furthermore, while directing students to adopt a distinctly feminist perspective is important, there is no inherent reason why the judgment needs to be confined to one particular approach to law. There is value in directing students to write from other perspectives –e.g., critical race theory, law and economics etc. –, or simply allowing students the freedom to judge the case from whatever perspective they find most intellectually defensible.

3. Benefits

The author remembers well his first Constitutional Law class at Cornell Law School. The pre-lecture reading assignment was to read the famous Supreme Court case of *Marbury v Madison* that established the process of US judicial review.²⁶ Within the first ten minutes of the lecture, the class had collectively recited the case facts and the final outcome. But the lecture did not stop there. The remaining forty-five minutes was spent 'shredding' Chief Justice John Marshall's judgment. Every claim that Marshall made (such as his bald assertion that the judiciary could review executive action) was picked apart –what if any evidence was offered in support of the claims? If they were supported, the class moved on to ask whether the claims logically determined the conclusion that Marshall ultimately drew – why would one assume, for example, that judicial authority to review executive action says anything about judicial power to review Congressional legislation? And the class collectively speculated about why Marshall had apparently gone out of his way to answer the question about judicial review when he could have avoided the question altogether had he so wished. At the end of the lecture, the class had collectively decided, much like Justice Felix Frankfurter many years before, that Marshall's reasoning was 'not impeccable' and his conclusion 'not inevitable'.²⁷

²⁶ 5 US 137 (1803).

²⁷ Felix Frankfurter, 'John Marshall and the Judicial Function' (1955) 69 Harvard Law Review 217, 219.

But why would a group of aspiring lawyers begin their legal education by dissecting a legal judgment? Most of the students went on to work in private practice as solicitors or attorneys; very few are now working as judges. A more logical preparation for legal practice would, perhaps, have been to examine the legal advice that Marbury and Madison had received prior to trial. The class could have asked whether the advice given was sound and accurate. Or if such advice is not publicly available, the lecture time could have been spent asking the students what advice they would have given to the parties prior to trial. The class could have considered the rules and principles of constitutional law as they existed in the early nineteenth-century and debated whether Marbury should have even attempted to litigate the case in the first place.

Of course, much has been written about the ‘case method’ in law and the use of appellate level judgment analysis.²⁸ Notwithstanding its limits, the enduring appeal of this pedagogical approach is that it introduces students to the topic of ‘legal reasoning’.²⁹ Some go as far as to see the cultivation of legal reasoning skill as the ‘central task’ of jurisprudence.³⁰ Very few legal educators would openly describe law school as a ‘trade school’. Of course, law teachers want students to acquire a sufficient understanding of the law to enable them to practice in the future, should they want. But the goal is not merely to produce students that have encyclopaedic knowledge of cases and statutes and who can provide competent legal

²⁸ See generally Edwin W Patterson, ‘The Case Method in American Legal Education: Its Origins and Objectives’ (1951) 4 *Journal of Legal Education*. Paul F. Teich, ‘Research on American Law Teaching: Is There A Case Against the Case System?’ (1986) 36 *Journal of Legal Education* 167. Myron Moskowitz, ‘Beyond the Case Method: It’s Time to Teach with Problems’ (1992) 42 *Journal of Legal Education* 241.

²⁹ See Todd D Rakoff and Martha Minow, ‘A Case for Another Case Method’ (2007) 60 *Vanderbilt L Rev* 597, 598 (discussing the case method as a means of cultivating a ‘style of reasoning and questioning that was intellectually respectable’ and ‘well-suited to the paradigmatic law practice of adjudication’). Although it is possible that this form of legal education is less popular than it was in the past.

³⁰ See e.g. A L Epstein, ‘The Case Method in the Field of Law’ (1979) *The Craft of Social Anthropology* 205.

advice. Much like other subjects in the humanities such as philosophy or history or literature, contemporary law schools seek to encourage students to develop an ability to present, evaluate, and defend arguments. To adopt William Twining's famous terminology, the goal of legal education is not merely to create 'plumbers' – that is, no-nonsense down-to-earth technicians –, but to create 'Pericles' –that is, wise and enlightened lawmakers.³¹ And, in the UK, the focus on reasoning skills within legal education has been formalised through the Quality Assurance Agency's Framework for Higher Education. Students who leave university legal education should not only have a systematic knowledge of their field, but also demonstrate an ability to 'critically evaluate arguments', to 'make judgements', and for 'decision-making in complex and unpredictable contexts'.³²

But if reading judgments is an accepted way of honing a student's reasoning skills, then asking students to write judgments is a logical way of assessing the extent to which students have acquired those skills. This is particularly true when the judgment is compared to the standard law school problem question. All too often, the classic law school problem question does not challenge students to demonstrate higher level reasoning skills. A typical problem question will present the student with a factual scenario involving multiple distinct legal claims. The nature of the question means that students will typically produce very similar answers. When faced with such a scenario, students will: (a) identify the 'easy' issues and provide relatively straightforward advice thereon (e.g., 'Bob's decision to reverse 100 miles an hour down the motorway at night without lights means he will be liable in negligence for causing the accident'); and (b) identify the 'hard' issues where the law does not provide a clear answer and conclude that no definitive

³¹ William L Twining, 'Pericles and the Plumber: An inaugural lecture delivered before the Queen's University of Belfast on 18 January 1967' (1967) 44 *New Lecture Series*, abbreviated reprint William Twining, *Law in Context: Enlarging a Discipline* (Clarendon Press 1997) 63-89.

³² Quality Assurance Agency (QAA), 'UK Quality Code for Higher Education; Part A: Setting and Maintaining Academic Standards' at 26 (2014) < <https://www.qaa.ac.uk/docs/qaa/quality-code/qualifications-frameworks.pdf> > accessed 27 August 2021.

legal advice can be given.³³ And while the student certainly demonstrates some standard reasoning ability in coming to these conclusions, the reasoning skills on display are rather pedestrian. The ‘easy’ issues are simply too basic to require advanced reasoning; it is the legal equivalent of evaluating a university mathematics student’s ability by asking them to apply Pythagoras’s theorem to calculate the length of a triangle side. The answer the student provides in relation to the hard issues is more advanced because it requires an appreciation of law’s indeterminate nature and an ability to foresee opposing arguments. And yet, such reasoning is still limiting for students who are capable of demonstrating much more advanced reasoning powers, such as those required in writing a judgment. By contrast, the nature of the legal judgment pushes the student to grasp the nettle on ‘hard’ issues, or what the QAA may refer to as ‘complex’ problems. Rather than sidestep the issue, the student must go beyond merely appealing to the indeterminacy of the law, and instead overcome that indeterminacy by providing an answer backed up with the most compelling reasons the student can muster. The teacher can then assess how persuasive the student’s reasoning is. Are their premises well-supported? Are their inferences valid? Have they left themselves open to important counter-arguments? Or, like Marshall, does their reasoning leave something to be desired?

Moreover, the judgment does not merely push the student towards exercising higher-level reasoning skills, it also introduces students to the contested nature of *legal* reasoning in particular. When the student is confronted with a hard issue of law, they not only must use their reason to resolve the case, but they must also take a stance on what counts as ‘legal’ reasoning. This takes students into the territory of jurisprudence. Budding formalists will tend to cautiously stick to the legal rules and principles that have been previously announced by courts and, like a geometer, try to infer an answer therefrom.³⁴ Budding

³³ The ‘easy’ or ‘hard’ issue terminology is the same as how these terms are used in jurisprudence broadly, see Dworkin (n 18), see also HLA Hart, *The Concept of Law* (Clarendon Press 1960) [3rd edition reprint] (contrasting the application of the ‘core of certainty’ contained within legal rules with application in situations involving the ‘penumbra of doubt’) 124-154.

³⁴ See generally Brian Leiter, ‘Positivism, Formalism, Realism’ (1999) 99 *Columbia Law Review* 1138.

realists will be more open about the indeterminacy of legal sources and, exercising their discretion, will engage in more straightforwardly normative reasoning, appealing to values of like justice or fairness, or to public policy goals.³⁵ And of course, students are free to adopt a variety of reasoning styles along the formalist-realist spectrum from Dworkinian ‘creative interpretation’³⁶ to Posnerian efficient use of resources³⁷. By putting them in the position of a judge rather than an advocate, students appreciate first-hand how the process by which judges arrive at decisions is not set in stone, but is politically and academically contested.

Asking students to assume the role of a judge also makes apparent to students the value of reading cases. For many students, the process of reading cases remains a slightly baffling aspect of legal education.³⁸ If the goal is to learn the law of a jurisdiction, then reading a textbook is by far the most efficient way to accomplish that goal; and for this reason, it is debatable whether many practitioners in law ever read a judgment in full ever again after leaving law school. But if the goal is to introduce students to legal reasoning, then reading cases is an entirely logical learning exercise. Students who write the best judgments are those that analyse previous cases and learn how judges use reason to solve complex problems. Reading cases is no longer an anachronistic and slightly performative task but is sensible preparation for students who will shortly try to write their own judgments. Students quickly appreciate how reading judgments will improve their short-term chance of success in the module, which in turn aligns their incentives with our long-term goal of developing students into independent critical thinkers.

And nor is writing a judgment only a sensible way of assessing students, but it might also provide a more fun and intellectually inspiring form of assessment. The Enlightenment was formed on the idea that

³⁵ Hart (n 33) 124-154.

³⁶ Ronald Dworkin, *Law's Empire* (Belknap Press 1986).

³⁷ Richard A Posner, *Economic Analysis of Law* (Little, Brown and Co, 1973).

³⁸ Nicholas J McBride, *Letters to a Law Student: A Guide to Studying Law at University* (Pearson 2007) Chapter 13 ‘Reading Cases and Statutes’ 139 (covering why students should read cases).

knowledge provides freedom from authority – summed up in Kant’s famous phrase: ‘Have the courage to use your own reason’³⁹. But the practice of providing legal advice is often a dull and subjugating experience.⁴⁰ The role of the student in the problem question is to show obedience to authority by dutifully parroting the rules set for them by their superiors in Parliament or on the bench. By contrast, writing a judgment is a liberating experience. The student is not tasked with providing a prediction like some form of astrologer but is instead encouraged to think about what is the *right* thing to do in context, taking into account the frequently competing demands of stability - provided through stare decisis - and of justice. The nature of the assessment treats students as individuals and makes it clear that their reasoned opinion matters. This aligns neatly with the goals of post-Enlightenment university education and the role of the law school within those institutions.⁴¹

And lastly, the author speculates that the benefits associated with writing a legal judgment may potentially have particular relevance for students from widening participation backgrounds. The British judiciary is not a particularly diverse bunch. According to the latest ‘Diversity of the judiciary’ report from the Ministry of Justice (2020), only 8% of the English judiciary self-identify as from BAME backgrounds and only 32% self-identify as female.⁴² A well-developed literature examines why this is the case and

³⁹ Immanuel Kant, ‘What is Enlightenment?’ (1784).

⁴⁰ Duncan Kennedy, ‘Law School and the Reproduction of Hierarchy: A Polemic Against the System’ (NYU Press, 1983).

⁴¹ Anthony Bradney, ‘Conclusion: What are University Law Schools For?’ in Jones and Cownie (n 5).

⁴² Ministry of Justice, ‘Diversity of the Judiciary: Legal professions, new appointments and current post-holders; 2020 Statistics’ (2020) available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918529/diversity-of-the-judiciary-2020-statistics-web.pdf accessed 27 August 2021. Furthermore, the report found that that only 4% of judges sitting in the High Court and above identified as BAME compared to 12% of tribunal judges, *ibid* at 5.

evaluates the measures designed to correct the apparent imbalance.⁴³ And while asking students to write legal judgments is hardly at the top of the list of potential corrective measures, there is a subtle but important benefit to showing students from all backgrounds that their opinions matter. Particularly for students who may feel unheard in contemporary society, it is important to adopt a form of assessment that explicitly encourages the development and expression of their viewpoint. And, by asking students to assume the position of a judge, the form of assessment enables students to see themselves as people who could, one day, reach the highest echelons of the legal profession, regardless of their background.

4. Limitations and Challenges

All forms of assessment have limitations, and a legal judgment is no different. In one significant way, using a legal judgment as a form of assessment departs from the real-world practice of judging. In a real-world case, the judge is supplied with written skeleton arguments prior to the hearing. Those skeleton arguments present the parties' cases. And at trial, the judge can present questions to the litigators about the arguments. The judge would then retire to chambers to evaluate those arguments and determine which party's case is more persuasive. But this process does not happen when using a judgment as a form of assessment. Of course, all of this *could* happen. The students could be presented with a set of skeleton arguments prior to writing their judgment and, should the teacher wish, could even hold mock trials to provide students with a chance to ask questions about the arguments. Similarly, there may also be some value in asking students to deliver their judgment orally.⁴⁴

⁴³ See e.g., Graham Gee and Erika Rackley (eds) *Debating Judicial Appointments in an Age of Diversity* (Routledge 2017). Kate Malleon, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 *Journal of Law and Society* 376.

⁴⁴ Oral delivery may be helpful given contemporary concerns about contract cheating and essay mills. See Michael Draper, Thomas Lancaster, Sandie Dann, Robin Crockett and Irene Glendinning, 'Essay mills and other contract cheating services: to buy or not to buy and the consequences of students changing their minds' (2021) 17 *International Journal for Educational Integrity* 13.

However, understandably some educators may be reluctant to engage in this process because it potentially makes it more difficult to assess the student's relevant legal knowledge. While evaluating the presented legal arguments would be difficult without the required knowledge base, the student's ability to demonstrate their independent legal knowledge is constrained when much of the relevant law is provided to them in the form of skeleton arguments prior to the assessment. Thus, a balance needs to be found between creating a form of assessment that allows a student to demonstrate their understanding of the basic rules, principles and concepts of the field, while also encouraging independent critical evaluation and analysis. This balance can be found by providing a factual scenario for consideration without any accompanying written submissions. The task is then for students to envision the type of arguments the parties would be best advised to make, to evaluate those arguments, and to come to a final judgment.

This form of assessment also requires students to have some understanding of the legal system.⁴⁵ Before a student can adequately prepare a judgment, they must have a basic knowledge of the system of statutory interpretation and stare decisis – including the respective roles of superior and inferior courts and the distinction between binding and persuasive precedent. Ideally students will also understand the difference between 'easy' and 'hard' issues,⁴⁶ and appreciate how the type of questions faced by judges, particularly at the appellate level, often do not have simple and straightforward answers. Similarly, students flourish when they can differentiate questions of fact and questions of law. These skills are typically taught in UK universities during a first year 'Legal System and Skills' type module (normally at QAA level 4). As a result, using a legal judgment as a form of assessment may be best suited to students in the second or final year of their education, after they have been introduced to the legal system and have had an opportunity to appreciate the indeterminacy of legal sources.

Frequently, students undertaking this assessment can become needlessly bogged down in issues of

⁴⁵ See e.g., J Scott Slorach, Judith Embley, and Peter Goodchild, *Legal System and Skills* (Oxford University Press 2017).

⁴⁶ (n 33).

format and style. The style of writing adopted by the judiciary can be foreign and alienating to students. As a result, some students can become overly concerned with mimicking the form and style of judicial writing; leading to a litany of questions about whether to write in the first person or whether to adopt headings and subtitles. Of course, students should be encouraged to develop their written communication skills; and reading the written work of good judicial writers is a helpful way to achieve this end. But students also must be reminded to spend comparatively more time on the substance of the issue and creating a well-reasoned and thoughtful answer, rather than thinking that good judgement is primarily a matter of formal style.

Performing well on this type of assessment requires students to display their reasoning skills. However, it is not clear to what extent logic is taught in contemporary legal education. Particularly in UK legal education, where students come to law without receiving a prior undergraduate degree, many students enter law school without ever encountering a ‘formal’ argument. For the most part, it is assumed that students already know what differentiates a true premise from a false premise, or what makes an inference valid or invalid, or what is the difference between a sound or unsound argument. In these circumstances, it is little wonder why students can be anxious about offering their own opinion in response to a question. If students have not been taught how to construct an argument, or to evaluate arguments presented to them, it is likely that students will be reluctant to offer their own opinion and will feel more comfortable parroting case decisions back to the assessor in an appeal to authority over reason. If a judgment is to be used as a form of assessment, the module leader must design a set of teaching materials that help students acquire the reasoning skills on which they will later be assessed. In the author’s experience, this material must be built in throughout the module. This is a potentially time-consuming task for a module leader.

Lastly, when setting the assessment, the module leader must decide what court is to hear the case. If the question asks the student to write a judgment from the perspective of a trial court, the answer will rightly be different in nature than if the student is asked to write from the perspective of an appellate court. In part, this is due to the different nature of the judicial task: trial courts are more focused on questions of fact, while appellate level courts are more focused on questions of law. Furthermore, inferior courts are

more rigidly bound by precedent than superior courts. In the past, the author has asked students to write from the perspective of the UK High Court to encourage students to feel bound by precedents emanating from the Court of Appeal and Supreme Court. But in the future, the author intends to ask students to write from the perspective of the Supreme Court to give students more latitude to shape the law in desirable directions when they believe the law is indeterminate.

5. Towards an Appraisal

But the question remains: does this form of assessment really ‘work’? Has the assessment delivered on its purported benefits so far? Of course, measuring the success of any assessment is difficult task. Successful student outcomes are the product of a range of factors, of which assessment type is only one. Yet early indications suggest that the assessment has successfully achieved the learning outcome of developing legal reasoning skills.

Student outcomes on the LLB Intellectual Property module have been very good since the introduction of this form of assessment. This form of assessment was introduced into the module in the 2020-2021 academic year following some small-scale piloting the previous year. Appendix 1 contains one of the questions students could undertake as part of this assessment. Students were given three weeks in which to complete the assessment. Table 4 presents the module statistics for this year.

Table 4: LLB Intellectual Property 2020-2021 Module Statistics

Student No:	Average Mark:	Max. Mark	Std Dev	Fail %	3rd %	2.2 %	2.1 %	First %
247	63	88	9.3	3	5	25	46	22

It is noticeable that 68% of students achieved good honours. The marking team observed that not only did students display a systematic understanding of the law and module materials, but that they also more clearly demonstrated the problem solving and critical analysis skills that are required of a QAA level 5 module.⁴⁷ Such problem solving and analytical skills were more clearly demonstrated because the assessment type naturally guided students towards making a reflective and reasoned decision as to the appropriate resolution of the case. While some students expressed concern at the start of the module about their ability to write a judgment, the module outcome statistics provide a tentative and early indication that this form of assessment is not ‘too hard’ for level 5 students providing their programme of study supports them to learn the required skills.

Students also reported high levels of satisfaction with the module and the module assessment format. The module was given an overall rating of 4.55 / 5 in the student-completed module evaluations.⁴⁸ This was the joint highest module evaluation score on the LLB programme for the year. Moreover, the module received a score of 4.3 / 5 on the specific question regarding whether students ‘understood the assessment criteria’ and what is ‘required [of them] to perform well in the module’.⁴⁹ The qualitative feedback also referenced the value of judgment writing. As one student explained: ‘allowing us to understand how and what a judge does in their writing has added a new perspective which most modules do not cover. While every module requires us to read judgements this one explains why and how they are important’.⁵⁰

As module leader, the author found the students produced highly thoughtful and intellectually stimulating judgments. This was particularly clear in the answers that achieved good honours marks. The illustrative example in appendix 1 concerns whether and under what conditions individuals ought to be able

⁴⁷ QAA, ‘UK Quality Code for Higher Education; Part A: Setting and Maintaining Academic Standards’ (n 1) 23.

⁴⁸ Internal Module Evaluation Statistics for LU2028 at The City Law School, 2020-2021 (on file with author).

⁴⁹ *ibid.*

⁵⁰ *Ibid* at 3.

to trade mark terms associated with social and racial justice movements. This question encouraged students to reflect on what trade marks in the twenty-first century are meant to accomplish. Are trade mark rights only awarded to ensure that consumers are not confused as to the origin of goods? Or should trade marks be awarded when important signs and symbols perform other ‘functions’ such as helping to create community or express political values? And, if the trade mark law should recognise the broader functions that signs and symbols perform, how ought this to fit within the current architecture of contemporary trade mark doctrine? The student answers to this problem were highly diverse and individualistic in a way that answers to standard problem questions used previously on the module were not. The same was true of the answers provided to the other questions on the assessment (concerning copyright and patents).

While student outcomes on one module in one year provide some information, this is certainly far from a rigorous evaluation of the assessment type. In order to form a clearer picture of the assessment type’s merits, significant further investigation is required. Ideally, to fully investigate the benefits of this form of assessment, numerous different modules, each taught by different module teams, would need to adopt the assessment format. If students and module teams continue to report success over a sufficiently long period of time, we might then reasonably conclude that the assessment format achieves its stated aims. Of course, rarely are any assessment formats subject to such scrutiny. In the short term, the author intends to conduct focus groups with students to solicit their feedback more clearly on the assessment type. The findings of this further investigation can be disseminated in due course.

6. Conclusion

Ironically, the legal judgment is both a novel and an old-fashioned type of assessment. Judgment writing is novel because it provides a type of assessment which is not commonly found within contemporary legal education. It is also novel in the sense that judgment writing provides a type of assessment that encourages the skills and attributes –such as individual judgement and complex problem solving ability – that are valued in the post-1997 Quality Assurance Agency Framework. In some ways, this mode of assessment modifies the classic law school problem question to more fully test students for the full range of skills that

university legal education seeks to provide.

And yet, there is something very ‘traditional’ about this form of assessment. For over a century, budding lawyers and jurists have been introduced to legal reasoning through the analysis of appellate judgments.⁵¹ In a sense, legal education is less about teaching students to ‘think like lawyers’ and more about teaching students to ‘think like judges’. Asking students to write their own judgments provides teachers with a helpful tool to assess how well students have honed their legal reasoning abilities. As a result, this form of assessment is not only valuable for educators who wish to diversify the nature of assessment in the legal curriculum, but it is also a form of assessment that may appeal to those who value the traditional focus of legal education on case analysis.

Research into assessment in law studies is in its infancy. The *Critical Perspectives on the Scholarship of Assessment and Learning in Law* series helpfully attracts attention to this under-explored subject.⁵² By theoretically exploring the use of a legal judgment as an assessment method, the present article contributes to that growing literature. In turn, this article suggests two productive avenues for future research. Firstly, a broader empirical analysis of the success of judgment writing in developing legal reasoning abilities is necessary. Such an empirical analysis should report the student experiences with this assessment type. Secondly, more research into the relationship between specific assessment type and learning outcomes would be welcome. As this article theoretically illustrates, different assessment methods encourage students to develop different skill sets. As educators, we ought to understand and reflect on what assessment methods are most appropriate for our specific learning outcomes.

⁵¹ Edmund M Morgan, ‘The Case Method’ (1952) *J Legal Education* 379 (on Christopher Columbus Langdell’s case method).

⁵² Bone and Maharg, *Critical Perspectives* (n 3).

Appendix 1: Sample Judgment Problem Scenario

[Disclaimer: This problem is based on a real world example but some of the case details and participants' names have been altered]

In 2020, an African American man called George Floyd was killed by police officers working for the Minneapolis police department. One of the four officers (Derek Chauvin) knelt on Floyd's neck for 8 minutes until he was dead. Floyd's last words were 'I can't breathe'. In the wake of the killing, global protests erupted demanding an end to racism (see figure 4). Many of these protests were organised by the Black Lives Matter Global Network (BLMGN). These protestors made extensive use of the slogan 'Black Lives Matter'.

[REMOVED]

Figure 1: Black Lives Matter 2020 protests

Following the protests, a Caucasian British business owner Ganis Demetry has filed two trade mark applications with the UK Intellectual Property Office. Demetry seeks to trade mark the terms 'Black Lives Matter' and 'I Can't Breathe'. Both applications are made in relation to clothing (classification 25). Demetry has said that he intends to sell items of clothing and bracelets including these words and that he will give the proceeds to charities working towards racial equality. Demetry is in no way connected to the BLMGN or the broader movement for racial equality. The UK IPO is considering the applications.

Both applications have been opposed by the BLMGN. The BLMGN argues that the applications should be rejected. They argue that: (1) granting the trade marks would deceive the public about the origin of the goods, (2) that the applications were made in bad faith, and (3) that it is against public policy or morality to allow someone not associated with the Black Lives Matter movement to register a trade mark on these terms. The BLMGN alleges that these trade marks should be granted to them. They have subsequently applied to trade mark both 'Black Lives Matter' and 'I Can't Breathe' in relation to clothing. For some significant period of time, the BLMGN has been selling t-shirts on their website containing the phrase 'Black Lives Matter' (see figure 5). They have substantial market research demonstrating that the average consumer associates such t-shirts with the BLMGN. However, they have not previously used the 'I Can't Breathe' slogan and have no market evidence concerning the consumer perception of such mark.



Figure 2: BLMGN T-shirt

The BLMGN applications have been opposed by a third party, the Black Lives Matter Foundation (BLMF). The BLMF is a charitable organisation completely unrelated to the BLMGN. The BLMF's goal is to foster good relationships between communities of colour and local police through the use of dialogue and cooperation. The BLMF oppose the BLMGN applications arguing that terms relating to important social justice movements must not be subject to trade marks in any case.

The UK IPO has referred the case to the UK High Court. They ask the court to provide guidance on trade marking of terms related to social justice movements, and ask who if anyone should be entitled to the trade marks on the terms 'Black Lives Matter' and 'I Can't Breathe'.

You are a judge in the UK High Court. You must write a judgment deciding the case.

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